COMPETENCE: FOCUS ON THE ABILITY TO CONSULT WITH AND TO ASSIST IN PREPARING THE DEFENSE

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Take-aways:

- The requirements for a competence assessment have changed—the templates have not—that's a problem
- Counsel have some specific inquiries to make and decisions on whether and how to document them
- If a lawyer is raising inability assist, or communication issues, systematic inquiry, documentation, and challenges to insufficient examinations/assessments are key
- It is likely that for the next couple of years, all of your favorite examiners are not going to know the breadth of inquiry required/advisable

How is this element of competence defined?

In *Dusky v. U.S.*, 362 U.S. 402 (1960)(*per curiam*):

> "The 'test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding…'"

Note the Kennedy concurrence in *Godinez*

"Although the *Dusky* standard refers to 'ability to consult with a lawyer,' the crucial component of the inquiry is the defendant's possession of 'a reasonable degree of rational understanding.' In other words, the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify."

Godinez v. Moran, 509 U.S. 389, 402 (1993)

Kennedy's point isn't reiterated:

- In *Indiana v. Edwards*, 554 U.S. 164, 170-71 (2008), the Court emphasizes that in *Drope v. Missouri*, 420 U.S. 162 (1975), it explained that part of competence required the accused to have the capacity "to consult with counsel and to assist in preparing his defense…." *Indiana, supra*, at 169.

Indiana v. Edwards, 554 U.S. 164, 170-71

- "The two cases that set forth the Constitution's 'mental competence' standard [citing *Dusky v. United States*, 362 U.S. 402; *Drope v. Missouri*, 420 U.S. 162)."

In *Drope,* 420 U.S. 162 :

- The Court notes “the evidence possibly relevant to petitioner’s mental condition that was before the trial, prior to trial and thereafter.” *Id.*, at 175.
- The Court notes a psychiatric report explaining difficulty in “**participating well**,” in “**relating**,” and having “**markedly circumstantial and irrelevant**” speech – considered evidence of his **demeanor at trial**. *Id.*, at 179.
- There was third party information about a preexisting mental condition; there was a lack of opportunity to observe the accused because of his absence from the trial

Drope v. Missouri, 420 U.S. 162:

The Court specifically incorporates into the standard the wording used in Missouri: "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Id.*, at 171-72.

Godinez v. Moran, 509 U.S. 389 (1993)—a Nevada capital case

- The focus is on competence to stand trial; to waive trial rights and enter a guilty plea; to waive counsel
- The case explains that the **competent accused has to make decisions about whether to go to trial or not; and whether to testify or cross-examine, or not—if he goes to trial, there are strategic decisions about defenses, and which to consider** *Id.* 398-399
- J. Kennedy's concurrence emphasizes that "the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify…." *Godinez*, at 403-04.

McCoy v. Louisiana, 138 S.Ct. 1500 (2018) adds a critical new question

- "The choice is not all or nothing: to gain assistance, a defendant need not surrender control entirely to counsel." *Id.*, at 1508-09.
- "Some decisions, however, are reserved for the client – notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal." *Ibid.*

The *McCoy* Wrinkle

"Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are."

Id., at 1508-09.

The *McCoy* Rule

"When a client expressly asserts that the objective of '*his defense*' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt."

Id., at 1509-10 [referencing Sixth Amendment and ABA Model Rule of Professional Conduct 1.2(a) (2016)]

People v. Amezcua and Flores (2019) 6 Cal.5th 886

- "Thirty years of precedent … have consistently held, among the core of fundamental questions over which **a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a capital trial, and the choice not to do so is not a denial of the right to counsel or a reliable penalty determination**."

  Id., at 925-26 – further referencing *McCoy v. Louisiana* (2018)

- *People v. Miracle*(2018) 6 Cal.5th 318 – not error to allow unrepresented accused, with advisory counsel, to enter guilty plea to death eligible charges under specified circumstances.

A Right Extended to Non-Capital Cases

- *People v. Eddy* (2019) 33 Cal.App.5th 472, 483-84: defendant has the right to insist on presentation of not guilty theory in non-capital case, and counsel has no right to argue for lesser included offense when actual innocence asserted.
- *People v. Flores* (2019) 34 Cal.App.5th 270 – non-capital case, counsel not entitled to take a position contrary to client's insistence that he did not commit criminal acts.

The *McCoy* Issue Likely Requires Specific Inquiry and Assessment

- *McCoy* builds in a necessity for an inquiry into the client's likely defenses; whether actual innocence or denial of involvement in criminal activity is asserted; and whether that matter has been discussed with counsel.
- **After *McCoy*, thorough competence appraisal likely requires discussion of the client's specific understanding of rights reserved to him/her, and whether the client demonstrates the capacity to make rational decisions on the exercise of those rights.**
- Based on Justice Kennedy's observation from *Godinez*, an examiner or lawyer should assess whether the accused's discussion evidences basic knowledge of the rules, and rational discussion of decision making.

Arguably, *McCoy* Raises Questions for Experts and Lawyers Alike

1. Since *McCoy* made it clear that the trial court had determined that he was competent to stand trial, must lawyers make a suitable inquiry to determine whether to be effective they must cause assessment of the client's competence through an expert?
2. Must an assessing expert proactively make an inquiry into any assertion of actual innocence of both the accused and at least attempt to do so with counsel?
3. In a capital case, following *McCoy*, is an effective lawyer one who assesses the accused's competence in deciding whether or not to present mitigating evidence? If so, how?
4. In a capital case, does an assessing expert have a duty to make specific inquiry into the bases on which the accused has decided to instruct counsel not to present mitigation or not to assist counsel in presenting mitigation?

Post-*McCoy* Question for Lawyers and Experts Alike

- Is there any current structured interview or competence assessment device sufficient to address *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)?
- Whether the duties both of counsel and separately of an assessing expert in a capital case (or in a non-capital case) where a *McCoy* guilt or penalty assessment is made?

2018 *AAPL Practice Resource Eval. Competence*

- References assessment of ability to assist both in passing and specifically
- At S49, "…the psychiatrist should contact the defendant's attorney to assess the defendant's ability to assist counsel"
- "The psychiatrist should also assess the **defendant's capacity to make legal decisions in collaboration with defense counsel and to participate in other activities that counsel may require** [plea bargain; waive jury trial; testify]; focus on how well defendant "can appreciate the situation, **manipulate information related to the trial process, and work with counsel…in making decisions**"

AAPL Practice Resource
46 AAPL Journal 2018 Supp.

- Note the AAPL *Guideline* and *Practice Resource* emphasize the need for examiners to have knowledge of the content of statutes and case law
- Reviews reported cases in which the accused gives **appropriate responses; writes letters; no family member** expressed concern S14
- Discusses **physical impairments as indicative of barriers to assistance**

Zapf and Roesch
Evaluation of Competence to Stand Trial

"Since the defense attorney is the only party who knows what will be required of the defendant for the particular case, it is important to speak with him (or request this information in writing) to gain an understanding of the complexities of the case and the requirements of the defendant in participating or assisting in her defense." *Id.*, at 90.

Grisso, *Competency to Stand Trial Evaluations (2014)*

'Ability to consult' means more than being able to talk: "It refers to participation in the defense for which the attorney is responsible…. Defendants must be able to convey their thoughts to others and manage their behavior in ways that do not disadvantage their defense…." (page 18)

Grisso --

“One way to assess defendants’ abilities to relate to an attorney is by observing them in an actual interaction with their attorneys….” (page 39)

“You may wish to consider audiotaping your evaluation sessions with examinees, and some authorities have even urged consideration of videotaping.” (page 55)w

What the Capacity to Consult Is Not(the self representation domains)…

- The capacity to consult and to assist is not the same as the capacity for self-representation, which some have argued includes:
  - Knowledge of the right to pretrial discovery, some ability to conduct such
  - Some basic understanding of the right to jury selection and to certain sorts of challenges
  - Some ability to understand and to make an opening statement
  - Some understanding of the right to object and of the existence of rules of evidence
  - Some understanding of the right to cross-examination, within certain rules
  - Some understanding of the right to file documents according to court procedures
  - Etc.
- Slobogin, “Mental Illness and Self-Representation: Faretta, Godinez, and Edwards,” 7 Ohio State J. Crim. L. 391 (2009)

So, what does ability to consult/assist mean?

- Under *Strickland v. Washington*, 446 U.S. 668, 689 (1984), lawyers are understood to make decisions based on "information supplied by the defendant."
- Under *Godinez*, 509 U.S. at 399-401, the accused must have rational understanding of the charges; must be able to make a knowing and intelligent decision on whether to plead guilty or to go to trial; and specifically, must have the capacity "**In consultation with his attorney…to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses**." *Id.*, at 398-99.
- The accused must have the ability to make a rational decision on whether to give up privileges by taking the witness stand.

Ryan v. Gonzales, 133 S.Ct. 696, 704 (2003)

"…an incompetent defendant would be unable to assist counsel in **identifying witnesses and deciding on a trial strategy**."

U.S. v. Nagy, 199 U.S.Dist. LEXIS 9478 1988 WL 341940 (S.D.NY, June 26, 1998)

- Judge Sweet explaining that the Second Circuit envisions competence assessment as including:
  - An assessment of whether the accused can assist in ways such as providing accounts of the facts, names of the witnesses, etc.
  - Can discuss: the charges, the range of possible penalties, and the likely outcomes
  - The factual bases for the charges and possible defenses, plea options
  - Can Evaluate the testimony of witnesses and significance of exhibits
  - Can testify coherently
  - Has motor control and verbal skills

A BOP evaluator testifies on abilities that the accused should be able to demonstrate

United States v. Duhon, 104 F. Supp. 2d 663, 673-4 (W.D. La, 2000)

“Dr. Berger admitted that the FCI report does not address Duhon's ability to assist counsel in discussing strategies for his defense:

THE COURT: Do you think that that is a factor that should be considered in determining competency, **whether the person has any ability to understand strategies based upon his understanding of the charges and relevant outcome, based upon whether they testify or don't testify which of course would involve an understanding of what the testimony they would give and the effect it would have on the Judge and jury, how it could be refuted by the witnesses, et. cetera** . . . Just focusing on his ability to even engage in that type of conversation, do you think that should be a factor in assessing competency?

THE WITNESS: Yes.”

Duhon, 104 F. Supp 2d at 674

"…nothing in the FCI report addresses Duhon's ability to 'consult with his lawyer with a reasonable degree of rational understanding' or 'otherwise assist in the defense.' A 'basic ability to understand strategy' and knowledge that 'his attorney was fully on his side' are not legally sufficient."

Standards Related to Attorney-Client Communication

ABA *Criminal Justice Standards for the Defense Function* (4th Ed., 2017)

- Standard 4-1.3
  - (d) A duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes."
  - (f) A duty to continually evaluate the impact of each decision or action may have at later stages, including trial, sentencing, and post-conviction review."
  - (g) A duty to be open to possible negotiated dispositions of the matter including the possible benefits and disadvantages of cooperating with the prosecution
- Standard 4-3.9 [duty to keep client informed and advised about the representation] – client to be informed about the developments and progress in pretrial investigation, discovery, disposition negotiations, preparing the defense: "Information should be sufficiently detailed so that the client can meaningfully participate in the representation."

Standards related to attorney-client communication (continued)

- Standard 4-5.1 (advising the client)

  (e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options and avoid unnecessarily rushing the accused into decisions.

ABA Death Penalty Representation Guideline 10.5

- “Relationship with the client”
- “(C)ounsel at all stages of the case should engage in continuing interactive dialogue with the client…” on matters such as:
  - progress of investigation
  - what assistance client might provide
  - legal issues
  - development of a defense theory
  - defense case
  - possible presentations
  - litigation deadlines
  - client’s relationship with custodial staff

Philipsborn, "Competent on Competence" ABA *Criminal Justice & NACDL* (2018-19)

- Suggested domains for counsel to evaluate:
  1. Can client communicate and consult with counsel on the charges and provide a basis for making decisions about investigations; litigation; and defense strategies?
  2. Can the client discuss whether defenses or mitigation can be supported by identifiable witnesses?
  3. Can the client discuss whether there is a rational and factual basis for trial, including a claim of innocence, or in the alternative, settlement?
  4. Can the client discuss possible trial testimony in a rational and factual manner, using language that is comprehensible and sufficiently organized to convey information to a jury?

“Competent on Competence”

- Suggested domains (continued)
  5. Does the client have the ability to discuss likely outcomes; alternative outcomes; sentencing consequences; collateral consequences?
  6. Can the client rationally discuss the appraisal of alternatives and the likelihood of given results in the case, and related strategies for achieving these?
  7. Can the accused display an understanding of the alternatives to various courses of action: using self-defense; an alibi defense; partial admission of guilt; relying on submission based on a reasonable doubt argument; a concession of guilt (death penalty case)?

“Competent on Competence”

- Suggested domains (continued)
  8. Is the client able to suggest areas of cross-examination of particular witnesses?
  9. Is the client able to provide rational explanations of potentially useful and identifiable witnesses?
  10. Can the client discuss with the lawyer the relationship between the case at the guilt trial and the case in a penalty trial and/or penalty and eligibility trial?
  11. Is the client able to discuss penalty trial evidence, including potential witnesses?
  12. Is the client able to discuss evidence in aggravation, including providing counsel with information about potential aggravation and possible avenues of responsive evidence or cross-examination?

“Competent on Competence”

- Suggested domains (continued)
  13. Is the client able to discuss, in a rational and factual way, the possibility of providing testimony at either the guilt and/or penalty trials?
  14. Does the client have the apparent ability to retain advice about potential testimony and to adjust response styles, discussions, and explanations so as to respond to specific questions?
  15. Does the client display impairments such that counsel could suggest and discuss with the client either providing narrative answers to a few specific questions or an allocution at time of sentencing?
  16. Does the client communicate with counsel, acknowledging previously given advice and/or prior communications, or is the client displaying apparent lack of memory or lack of information processing raising questions about functioning that require consultation with an expert on mental condition or functioning?

U.S. v. Patel, 524 F.Supp.2d 107, 116-17 (D.Mass, 2007)

The Court makes reference to mental health expert's notations:

1. Accused shows ability to communicate in a linear and responsive manner;
2. Follows instructions;
3. Carries on an ongoing dialogue;
4. Conducts himself unremarkably during mental state examination;
5. No objective signs of confusion, disorientation, or distraction;
6. Examination punctuated by periodic statements of inability to remember.

U.S. v. Dreyer, 705 F.3d 951, 962-63 (9th Cir., 2013)

- Suspicion of frontotemporal dementia – concern **about inability to refrain from making comments contrary to his own beliefs or against his own interest**, including comments that could place him in physical danger.
- During responses to experts, a "profound lack of social propriety" and inability to "filter himself effectively."
- Made inflammatory statements about religious and racial issues apparently inconsistent with what third party reporters explained were his long held views to the contrary.
- All added up to an inability to assist in his own defense.

Sources of Information Other Than Counsel

California Supreme Court points out in *People v. Pennington,* 66 Cal.2d 508, 517-18 (1967), that in the case underlying the U.S. Supreme Court's decision in *Pate v. Robinson*, 383 U.S. 375 (1966), there are indications (from the dissenting opinions) that Robinson, while at times hospitalized, suicidal, and a substance abuser in the community, had "colloquies" with the trial judge "…which undoubtedly permitted a reasonable inference that Robinson was quite cognizant of the proceedings and able to assist counsel in his defense."

Courts Evaluating Ability to Assist Based on Third Party Reports

- *People v. Clark* (2011) 52 Cal.4th 856, 893-95: on appeal, evidence of incompetence based on inability to assist found lacking where evidence of **in-court behavior, interactions with court personnel, and reported interactions (by court personnel and Deputies) with lawyers** in courtroom undermine claim of interference with ability to rationally assist
- Prosecution expert characterizes demeanor as somewhat withdrawn or uninterested but not indicative of interfering mental condition

People v. Dunkle, 36 Cal.4th 861, 884-85 (2005)- Example of Extrinsic Evidence of 'Capacity'

- On direct appeal, California Supreme Court notes that prosecution examiner testifies that "…defendant spontaneously referred to [victim] but refused to discuss details of the offense."
- Observations of demeanor by a number of transporting law enforcement officers and investigators submitted to rebut evidence of interfering mental health condition and inability to assist.

"Defendant's Competency to Stand Trial" 40 Am. Jur. POF 2d 171 (2019 update)

- Listed factors in determining ability to assist:
  - Ability to communicate
  - Ability to maintain a collaborative relationship
  - Ability to assist in planning a legal strategy
  - Ability to recall and relate facts
  - Ability to identify and help locate witnesses
  - Ability to comprehend instructions and advice
  - Ability to make decisions based on explained alternatives
  - Ability to follow and interpret witness testimony to inform counsel of errors
  - Ability to testify

Many sources on competence assessment agree: counsel should be consulted during the evaluation

- Zapf and Roesch, *Evaluation of Competence to Stand Trial* (2009), page 90
- Grisso, *Competence to Stand Trial Evaluations: Just the Basics* (2014), pages 52-53
- Melton, et al., *Psychological Evaluations for the Courts* (4th Ed.) pages 152-53
- Court decisions confirming the importance of contact with counsel
  - *U.S. v. Osborn*, 664 Fed.App'x 708, 713-14 (10th Cir., 2016): "…while the district court was required to consider input from defense counsel, it wasn't required to accept counsel's recommendations, relying in part on *Drope v. Missouri*, 420 U.S. 162, 177, fn.13 (1976)

Counsel and Examiners Should Have in Mind:

- "…defense counsel will often have the best-informed view of the defendant's ability to participate in his defense…." *Medina v. California*, 505 U.S. 437, 449-50 (1992)
- "…judges must depend to some extent on counsel to bring [competence] issues into focus." *Drope v. Missouri*, 420 U.S. 162, 176-77 (1975)

People v. Medina, 51 Cal.3d 870, 885-86 (1990)

- "…one might reasonably expect that the defendant and his counsel would have better access than the [prosecution] to the facts relevant to the court's competency inquiry."
- "Indeed, this analysis affords a satisfactory to [the] concern about the defendant's possible inability to cooperate with counsel in establishing his incompetence: counsel can readily attest to such defect or disability."

U.S. v. Osborn 664 Fed Appx 708, 713-714(10th Cir, 2016): counsel's concerns v. trial court's interactions

- "The record reflects that the district court didn't ignore defense counsel's proffers. Instead, it noted those proffers but found it likely that the persistent nature of Osborn's mental illness and delusions would interfere with Osborn's **ability** to **assist counsel** in formulating a defense strategy or deciding whether to testify in her own defense. Moreover, **while the district court was required to consider input from defense counsel, it wasn't required to accept counsel's recommendations.** *See* *Drope*, 420 U.S. at 177 n.13, 95 S.Ct. 896(explaining that although trial court should consider counsel's representations regarding defendant's competency, it need not accept them); *cf.* *Mackovich*, 209 F.3d at 1233 ("[C]oncerns of counsel alone are insufficient to establish doubt of a defendant's competency."). **Particularly in light of Osborn's ex parte conversation with the district court**,5 we find no error in the district court's finding that Osborn is not presently able to assist in her defense."

U.S. v. Duhon, 104 F.Supp.2d 663, 669 (2000); AAPL Practice Resource (2008)

- "It has been observed that a multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on a defendant's ability to assist counsel. In such a case, 'one of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would normally go into the defense of the case.'" *U.S. v. Duhon*, 104 F.Supp.2d 663, 669 (2000).
  - Citing Burt and Philipsborn, *Assessment of Client Competence, A Suggested Approach,* 22 June CHAMPION 18 (1998);
  - Also cited in Collins, "Re-Evaluating Competence to Stand Trial" 82 LAW & CONTEMP. PROBS. 157 (2019), at 180.

WE ARE MENTAL HEALTH FIRST RESPONDERS

As a threshold issue, we should always ask ourselves, “Is my client suffering from a mental disorder, of any kind?”… And does it create a gap in her ability to:

- ***Meaningfully*** understand and confront her charges?
- ***Help me*** perform essential tasks needed to represent her?
- Make ***rational*** decisions to plea bargain, go to trial, testify, elect defense objectives including a claim of innocence.

AS FIRST RESPONDERS
How do we evaluate our clients?

- **Ask <u>open ended</u> questions and <u>listen.</u>**
- Pay attention to verbal and non-verbal attributes, such as:
  - Grooming / hygiene;
  - Disengaged, fixated, guarded, aggressive, controlling;
  - Inappropriate, rambling or looping responses;
  - Individual sentences make sense, but the whole does not present a cohesive narrative
- When I leave the interview room, do I feel frustrated or uncomfortable?

Competence requires:

1. Rational as well as factual understanding of the proceedings;
2. Sufficient present ability to consult with counsel with a reasonable degree of rational understanding;
3. The capacity to understand the objective of the proceedings;
4. The capacity to consult with counsel and to assist in preparing the defense.

Indiana v. Edwards, 554 U.S. 164, 170-71 (2008), *Drope and Dusky* as the Due Process ‘floor’.

The standard (cont.)

- The present ability to make rational decisions regarding the exercise of procedural rights (plea bargain, jury trial, testify) and choose defense objectives including a claim of actual innocence or denial of criminal involvement.

Godinez v. Moran (1993) 509 U.S. 389, 398; *McCoy v. Lousiana*, 138 S.Ct. 1500 (2018).

Note: *Godinez* says making "reasoned choices" about the exercise of procedural rights is part of having a "rational understanding of the proceedings." (*Ibid*.) *McCoy* makes clear such choices includes defense objectives, e.g. an assertion of innocence or lack of criminal involvement

Practical observation

- There is significant overlap between the competency criteria.
- Do not feel constrained to discuss an attribute of your client's thinking or behavior in the context of a single category.
- It may be that an aspect of his behavior fits into two or more criteria.

Factual understanding

The factual understanding prong addresses your client's basic knowledge of the courts and the proceedings. Factual understanding requires:

- Understands the roles of principal courtroom personnel – judge, witnesses, defense attorney, DA as well as his role as defendant;
- Awareness of being charged with a crime and the fact he is facing prosecution;
- Understands the charges, their elements and potential penalties if convicted.

- Understands potential defenses and how they may apply to his case;
- Appreciates the adversarial nature of the process;
- Understands the legal rights available to a defendant during the adjudicative process;
- Some individuals may appear to have a factual understanding of the process but actually do not. For example, some individuals with developmental disability who have undergone competence training may provide rote memorized answers to questions about trial facts without developing an appreciation of the issues. (*U.S. v. Duhon* (2000) 104 F.Supp.2d)

[AAPL Practice Guideline for Forensic Psychiatric Evaluation of Competence to Stand Trial]

Rational understanding

A “rational understanding of the proceedings” requires that the person have the ability to apply *reality-based* reasoning to the facts of his case. For example, your client accurately recites the punishment for his alleged crime, but insists upon a grandiose religious delusion that he is immune from punishment. Such a client lacks the ability to *rationally* apply the sentencing laws to his case.

[AAPL Practice Guideline for Forensic Psychiatric Evaluation of Competence to Stand Trial]

Rationally assist counsel

The rationally assist counsel prong focuses on your client's present abilities to assist his lawyer and requires that your client possess the situational awareness, capacity, and ability to assist in trial preparation, consideration of settlement options, acceptance or rejection of settlement options, and assist in the trial itself.

Cooper v. Oklahoma (1996) 517 U.S. 348, 354.

Rationally assist counsel (cont.)

Rationally assisting counsel means your client has the:

- Ability to behave properly during court proceedings and trial;
- Capacity to appraise the impact of evidence that could be adduced;
- Understand available pleas and their implications, including plea bargaining;
- Capacity to identify witnesses and assist in investigation;
- Capacity to provide information relevant to defenses on the elements of the charges and affirmative defenses.

[*Ryan v. Gonzales* (2013) 133 S.Ct. 696, 704; AAPL.]

Decisional competence:
Ability to make rational choices around rights specifically reserved to client

Decisional competence refers to your client's ability to make rational decisions to plea bargain, waive the right to jury trial, testify and elect defenses including whether to insist on a defense of innocence.

Godinez v. Moran (1993) 509 U.S. 389, 398; *McCoy v. Lousiana*, 138 S.Ct. 1500 (2018).

Document the symptoms and the history

- **Ask open ended questions and listen**
- Make notes of your observations
- Gather mental health records, including jail mental health
- Gather other relevant records—school, SSI, employment
- Prior police reports and related court and defense case files
- Interview family members, teachers, friends, any person that has information about client's behavior over time.

First, we must decide if client is incompetent

Practice tip: It's our responsibility to make the initial determination that our client is incompetent and then communicate our reasoning to the psychiatrist or psychologist.

The Question We Must Settle: Does my client suffer a mental condition that creates a gap in his ability to:

- Understand the charges, penalties or any aspect of the proceedings;
- Have reality-based expectations about the outcome of the case;

We must decide… (cont.)

- Provide you reality-based information about witnesses and potential areas of investigation;
- ***Rationally*** evaluate the advantages and disadvantages of:
  - Defense objectives;
  - Plea bargaining and settlement options;
  - Choosing a court or jury trial;
  - Testifying versus not testifying.

Focus on symptoms, not diagnosis

"A finding of incompetence to proceed may arise from any mental disorder or condition as long as it results in a defendant's inability to consult with defense counsel or understand the proceedings."

Mental Health Standard 7-4.1(d), ABA Criminal Justice Mental Health Standards (2016)

Attorney makes tactical decisions

- **Decision to waive jury trial.** Right to a competency jury trial is statutory, not constitutional. It is within the attorney's discretion to stipulate to an 11 person jury panel over client's objection. (*People v. Masterson* (1994) 8 Cal.4th 965.)
- **Decision to testify.** Error to allow client to testify at competency trial over attorney's objection. The attorney controls whether or not client testifies. (*People v. Bell* (2010) 181 Cal.App.4th 1071.)
- **Attorney-client privilege (??):** Can the attorney, over client's objection, disclose attorney-client communications?
  - *People v. Mickle* (1991) 54 Cal.3d 140 is sometimes cited for the principle that the lawyer cannot introduce attorney-client communications during competency litigation without a waiver from client.
  - *Mickle* in part relied upon "the presumption of competence [found] in section 1369, subdivision (f)." Basic logic: If client is *presumed* competent, then client is presumed to have the ability to veto the attorney's decision to disclose attorney-client confidences.

Attorney makes tactical decisions

- Not so fast. Consider the later decided Cal. Supreme Court case, *People v. Masterson* (1994) 8 Cal.4th 965. *Masterson* made clear that this issue was not preserved in *Mickle*. *Masterson* went on to favorably cite the earlier Cal. Supreme Court case *Samuel*, and reiterated this core principle of competency litigation:

  "[T]he person whose competence is in question cannot be entrusted to make basic decisions regarding the conduct of that proceeding…

  In sum, we hold that counsel may waive a jury trial in a proceeding to determine whether the defendant is competent to stand trial on criminal charges, and may make other decisions regarding a jury trial, even over the defendant's objection." (*Id*., at 973-974.)

What goes in competency stays in competency

***In re Hernandez* (2006) 143 Cal.App.4th 459**. The case summarizes relevant California authority (*Tarantino*, *Arcega*, *Baqleh*, etc.) and clearly articulates the judicial immunity principle that is applicable to all *California* competency proceedings:

- The fruit of the defendant's competency evaluations, i.e., the competency expert's impressions, reports or the results of the evaluator's testing, are not to be made available to experts appointed to testify on the issues of the defendant's guilt, sanity, or penalty.
- The case is explicit in stating judicial immunity applies to court appointed 1368 doctors and the 1370 state hospital restoration doctors.
- It also is explicit in saying that *California* judicial immunity covers statements client makes about the facts of the alleged crime and any other statements. Therefore, client's answers to testing questions and the results may not be relied upon by guilt, sanity, or penalty phase doctor.

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