

COMPETENCE ASSESSMENT— room/need for collaboration between mental health professionals and defense counsel

John Philipsborn, M.Ed, J.D., MAS

Lawyer, San Francisco, California

jphilipsbo@aol.com

What's being covered ?

- Competence Assessment—should communication between mental health professionals and lawyers be considered necessary to a reliable competence assessment ?
- What about the lawyers who don't communicate ?
- What can be gained from considering a lawyer-expert ?
- What information do courts get from a competence assessment process that has involved cooperation/communication between lawyers and mental health professionals ?

The Competence to Stand Trial Evaluation

- Pirelli et al, “A Meta-Analytic Review of Competency to Stand Trial Research” 17 *Psychology, Public Policy and Law* 1 (2011);
- Grisso, *Competence to Stand Trial Evaluations: Just the Basics* (2014)
- Melton et al, *Psychological Evaluations for the Courts*, 4th Edition, Ch. 6 (2018)
- Gold & Frierson, Eds, *APA Textbook of Forensic Psychiatry*, 3rd Ed, Ch 18, Ch 18, Dr. Charles Scott (2018)
- Zapf and Roesch, *Evaluation of Competence to Stand Trial* (2009)
- Jakuback, “*The Expert’s Role in Competency to Stand Trial Determinations*”, (2020) Seton Hall University Law Student Scholarship

ABA Criminal Justice Standards on Mental Health (August, 2016)

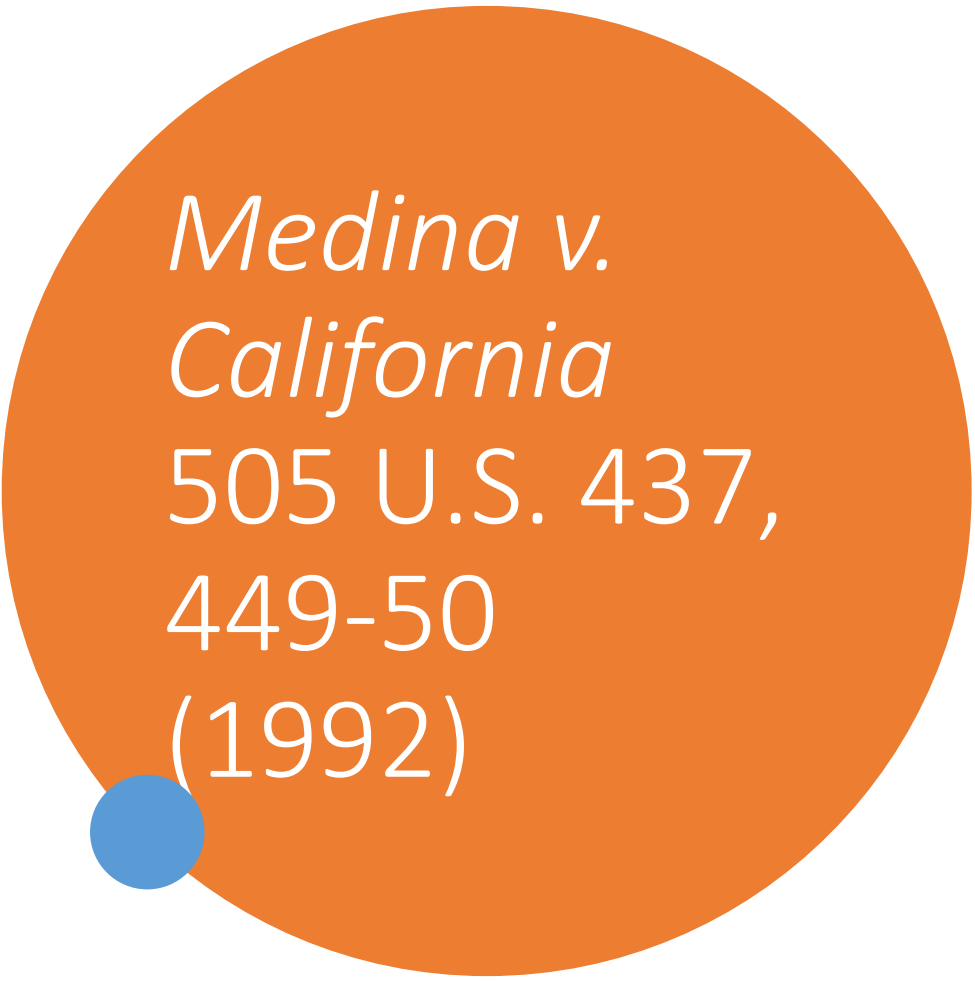
- Standard 7-3.5 (the conduct of the evaluation)-
 - (c) when scope of evaluation is limited to competence lawyer is 'entitled' to be present, but cannot participate unless requested by evaluator
 - (d) whenever feasible all court-ordered evaluations should be recorded
 - (e) joint evaluations should be encouraged
 - STANDARD 7-5.2- Competence to Proceed With Specific Decisions: control and direction of the case [waive counsel, plead, assert insanity defense, waive jury trial, testify, appeal]—the McCOY issues
 - STANDARD 7-8.7-Competence to proceed, non-capital sentencing
 - STANDARD 7-9.8-Competence to proceed at capital sentencing proceeding

Pizzi, “Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems,” 45 U. CHI. L. REV. 21, 27 (1977)


“For practical reasons, the key to the competency issue is the defense attorney. The defense attorney has the most exposure to his client, and, unlike the court or prosecutor, he witnesses his client’s behavior on various occasions and in various settings and circumstances. Given the test for competency, the importance of the defense attorney is not surprising; he generally has the best opportunity to notice any defects in the defendant’s ‘ability to consult with his lawyer.’”

People v. Medina (1990) 51 C. 3d 870

- “...one might reasonably expect that the defendant and his counsel would have better access than the [State] to the facts relevant to the court’s competency inquiry”. *Id.* at 885-886



*Medina v.
California*
505 U.S. 437,
449-50
(1992)

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- “...defense counsel will often have the best informed view of the defendant’s ability to participate in his defense...”

Drope v. Missouri 420 U.S. 162 (1974)

- “...judges must depend to some extent on counsel to bring issues into focus”. *Id.* at 177-178 [referencing the information provided to the court in a motion for a continuance explaining that “ ‘the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial’ ”]

U.S. v. Duhon, 104 F. Supp. 2d 663, 669 (W.D. La., 2000)


- “It has been observed that a multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on the 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”** [fn omitted].”

Assessment of competence ? Lawyers' duty ?





- “Of all actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant’s lawyer is not only allowed to raise a competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate.” *U.S. v. Boigegrain*, 155 F. 3d 1181, 1188-89 (10th Cir, 1998)

AAPL Practice Guideline (Psychiatric Evaluation of Competence to Stand Trial--2007—S 39)

- “The psychiatrist retained by the court or the defense attorney may speak directly with the defense attorney to obtain information about counsel’s reasons for the referral and experiences relevant to the defendant’s ability to assist counsel.”



Zapf and Roesch, *Evaluation of Competence to Stand Trial* (2009)

- “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” p. 90
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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**”



Say you aren't getting information from defense counsel—or if you feel you need more information ?

**WOULD YOU EVER
CONSIDER A LAWYER
EXPERT...?**

What is it that you might need to know that the lawyer (or a lawyer expert) could discuss ?

- Under *Strickland v. Washington*, 446 U.S. 668, 689 (1984), “**Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.**”
- “...an incompetent defendant would be unable to assist counsel in **identifying witnesses and deciding on a trial strategy.**” *Ryan v. Gonzales*, 586 U.S. 57, 66-67 (2013)
- If going to trial, a person who is competent is able in consultation with counsel to decide **whether and how to put on a defense and/or whether to raise “one or more affirmative defenses.”** *Godinez v. Moran*, 509 U.S. 389, 398 (1993)

A Lawyer Expert, Prevailing Professional Norms, Standards and Guidelines

- A lawyer's performance and effectiveness in a given criminal case are assessed under "...prevailing professional norms." *Strickland*, 466 U.S. at 686-687
- Sources like *ABA Standards For Criminal Justice* ('The Defense Function') are "guides to determining what is reasonable, but they are only guides." *Strickland*, at 688.
- "No particular set of detailed rules for counsel's conduct **can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.**" *Id.* at 688

So—what describes what a lawyer does in a criminal case ?

- The lawyer, according to *Strickland*, is competently representing the accused when exercising “...reasonable professional judgement...” given the “...wide range of professionally competent assistance.” *Id.* at 388
- While not regulatory, there are *ABA Criminal Justice Standards: The Defense Function (2017)* [duty to investigate; advising the client]; *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003, 2008)*




ABA Criminal Justice Standards: The Defense Function:

- 4-1.3—confidentiality; loyalty; candor towards the court; well informed about legal options; continually evaluate decisions that may have affect later stages including trial, sentencing, post conviction review; possible negotiated dispositions; collateral consequences of decisions and of conviction; 4-1.5 Duty to Preserve the Record
- 4-3.1 Establish and Maintain An Effective Client Relationship (discuss objectives; length of representation; possible client impairment)
- 4-3.3 Interviewing the Client; 4-3.7 Prompt Action to Protect the Client; 4-4.1 Duty to Investigate; 4-4.3 Relationship With Witnesses; 4-5.2 Control and Direction of Case (Strategic and Tactical Decisions to Be Made By Counsel); 4-5.4 Collateral Consequences; 4-6.1 Duty to Explore Disposition Without Trial



Criminal Justice 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, preparation of the defense: **“Information should be sufficiently detailed so that the client can meaningfully participate in the representation.”**
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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**

**Strickland v
Washington 466
US 668 (1984)**

- “...inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” *Id.*, at 691.

A LAWYER'S
DISCUSSIONS
WITH THE
CLIENT NEED
TO INFORM A
LAWYER'S
DECISION-
MAKING

- ACCORDING TO PRACTICE STANDARDS APPLICABLE TO LAWYERS, INTERACTION MUST BE SUFFICIENT:

To give the lawyer a basic understanding of the client's **ability to communicate and to respond to counsel's communications**

To provide information about **the client's personal background and history** (people, places, dates, phone numbers, events to include traumatic events, schooling, socialization, hospitalizations, medications, interactions with people and institutions)

The lawyer needs enough interaction with the client to be able to **gauge and evaluate the client as a potential witness** to a variety of case information, including how the client responds to inquiry and areas of cross-examination

Lawyer interaction:

- The lawyer needs to have interactions about **decisions reserved to the client**: to be present at hearings; to agree to extensions of time; to notice or present certain defenses or claims (McCoy/denial of culpability; self defense; alibi; was not at the scene; was not the killer; was under duress; was intoxicated; was mentally disordered; believed had the authority, etc, etc.)
- Does **the client wish to settle the case** if possible and on what basis ?
- Does the client **want to testify, or not** ?
- Does the client want to try (where permissible) to **waive jury trial** ?
- Does the client want to participate (as a witness or in an allocution) **at the penalty trial** ?

What can the lawyer expert do ? (And what should counsel of record be able to explain ?)

- Provide expertise of the prevailing standard of practice applicable in general, and in the specific case
- Provide expertise on the sources of information that inform the prevailing standard of practice pertinent to the criminal defense function
- Provide opinions, based on practice related information, about the manner in which lawyers are trained to evaluate a client's competence
- Provide opinions about the attributes or characteristics of competence as lawyers are trained to evaluate these
- Provide opinions about the accused

The prevailing models for lawyer-experts

- (1) 'Pristine'--The lawyer expert **explains what the duties of counsel** are (effective representation); **what the elements of effective representation** are; what the lawyer and client are assumed (*Strickland*) to have communicated about; how the lawyer is assumed (*Strickland*) to have **made decisions about** investigation, witness selection, defenses, arguments—including in the context of the specific case;
- (2)'Case-Related' **The lawyer expert reviews case related materials** and is asked case related questions in addition to (1), above;
- (3)'Client-Related' The **lawyer expert meets with the client**; may observe the client and lawyer interact; may view/hear interactions with competence assessment experts; may interview 3d party sources in addition to the above

U.S. v.
Merriweather
921 F. Supp
2d 1265 (N.D.
Ala, 2013)


“Mr. Jack Earley, a California-based public defender retained by the Defense, accompanied Defense Counsel — Mr. Jaffe and Mr. Drennan — to see Merriweather on June 27, 2011. (Tr. Vol. V, 819)...Earley testified that Merriweather’s speech during this conversation, while somewhat incoherent to others, seemed organized to Merriweather. (*Id.* at 838).” *Id.* at 1290

Jack Earley’s name is referred to 18x in the ruling

U.S. v. Duhon, 104 F. Supp. 2d 663, 676-77 (W.D. La, 2000)

“2. Criminal Defense Expert, Frank Dawkins

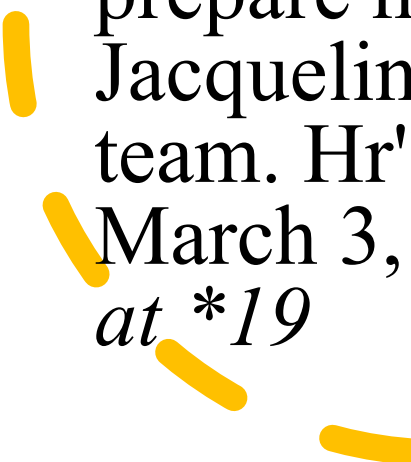
Mr. Dawkins testified as the court-appointed attorney expert. Mr. Dawkins has been licensed to practice law in Louisiana for over twenty years, worked as an Assistant United States Attorney for approximately three years in the criminal division, and has practiced criminal defense in private practice for over ten years. 58 Mr. Dawkins met separately with Duhon and with Dr. Fain, and reviewed a comprehensive list of documents, including a copy of the offense report and Duhon's records. **Mr. Dawkins [**40] concluded that Duhon could not perform the essential tasks required to be competent to stand trial..”**



U.S. v. Carlo Wilson, 2022 U.S. Dist. LEXIS
137109 (E.D. Mich, August 2, 2022)

“J. Philipsborn

Philipsborn is an attorney licensed to practice in California. Hr'g Trans. Vol 5 at 5 (Dkt. 1628). The defense hired Philipsborn "as an attorney-expert on competency with regard to the ability to assist prong of Dusky." Def. Br. at 24.14,15 To prepare his report, Philipsborn interviewed Wilson's lawyer, Jacqueline Walsh, as well as other members of Wilson's defense team. Hr'g Trans. Vol. 5 at 13. He also met with Wilson on March 3, 2020 and again on August 18, 2021. Id. at 21, 45.” *Id.*
*at *19*



U.S. v. Wilson—footnote 15

Fn 15: “Before Philipsborn testified at the competency hearing, the Government sought to exclude or limit his testimony (Dkt. 1584).

The Court granted in part and denied in part the Government's motion (Dkt. 1588). Specifically, **the Court excluded Philipsborn's opinion testimony regarding "whether or not [Wilson's lawyer,] Ms. Walsh and her legal team met the standards of practice applicable to the investigation assessment of a client's possible incompetence,"** as this issue was not one before the Court. Hr'g Trans. Vol. 4 at 6263...However, **the Court permitted Philipsborn to offer his opinion as to whether Wilson can assist his counsel.**”Id. at 64.

People v. Frye (1998) 18 Cal 4th 894 (overruled on other grounds)

Competence issue flagged prior to penalty trial beginning based on concerns that the client was not competent to assist counsel or to testify rationally during the penalty trial

Counsel of record were called to testify during the competence trial (counsel had internal disagreements about the client's condition)

Attorney James Thomson, expert on capital case defense, testified as an expert during the competence trial [note that this is not covered in the reported decision, but is clear from the record]

Arguments To Exclude Lawyer-Expert Testimony

- Not qualified to give opinion on the mental condition of the accused
- Not qualified to give opinion on the issue of competence to stand trial
- Proposed opinion invades the province of the Court (or Jury)
- Proposed opinion is a legal conclusion, and is in the province of the Court (or Jury)
- Proposed opinions on the duties of counsel and prevailing professional norms are argument and advocacy, not admissible expert opinions
- Proposed testimony is unduly time consuming and marginally relevant—the defense can argue the issues

What sorts of opinions from lawyer experts have been permitted ?:

- Opinions related to the duties of counsel, including duties in relation to lawyer-client communications
- Opinions about the duties of counsel to prepare and investigate so as to provide effective representation
- Opinions about the subject areas that are necessary to effective representation, including providing adequate legal advice (what is the law pertinent to the case ?)
- Opinions based on the observations made by the lawyer expert during attorney-client communications

The accused
who is
competent
can legally
enter a guilty
plea (or not)
or pursue trial

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

- “rational understanding of proceedings” and demonstrates the “**capacity to make reasoned choices.**” *Id.*, at 396-97
 - Has **sufficient rational knowledge and capacity to make rational decisions** so as to waive (give up) or not to waive rights (**self-incrimination/put on a defense/go to trial or not/cross-examine or not**). *Id.*, at 398.
 - If going to trial, **whether and how to put on a defense and/or whether to raise “one or more affirmative defenses.”**

Attributes of competence

“It stands to reason that the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney. For example, an incompetent defendant would be unable to assist counsel in **identifying witnesses and deciding on a trial strategy.**” *Ryan v. Gonzales*, 133 S.Ct. 696, 704 (2013).



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* 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. Flores (2019) 34 Cal App 4th 270

- In a non-capital case, counsel is not entitled to take a position contrary to the client's insistence that she/he did not commit criminal acts

American
Academy of
Psychiatry
and Law

AAPL Practice Guideline for the
Forensic Psychiatric Evaluation
of Competence to Stand Trial,
35 JAAPL 2007 Supp.

AAPL Practice Resource for the
Forensic Psychiatric Evaluation
of Competence to Stand Trial,
46 JAAPL 2018 Supp.



What favors communication between mental health experts and lawyers on competence issues?

Case law tends to promote it;

Standards of practice, and related literature encourage it;



Training of lawyers and assessing mental health experts encourages it

U.S. v. Duhon, 104 F. Supp. 2d 663 (W.D. La, 2000)

“ It has been observed that a multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on the 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.’ *Id.* at 669. fn 21

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.”

The Mental Health Assessment Models Do Not Provide Courts With All Of the Evidence That May Pertain To A Legal Decision On Competence to Stand Trial

Robey *Criteria for Competency to Stand Trial* [writing 5 years after *Dusky*]

Comprehension of Court Proceedings

Ability to Advise Counsel: facts; plea; legal strategy; maintaining relationship with lawyer; maintaining consistency of defense; waiving rights; interpreting witness's testimony; testifying ('if necessary')

Susceptibility to Decompensation While Awaiting or Standing Trial: Violence; Acute Psychosis; Suicidal Depression; Regressive Withdrawal; Organic Deterioration

Bonnie, Hoge, Monahan, Poythress,
Eisenberg, et al

Competence to assist counsel:

(1) to **understand** the charges and the basic elements of the adversary system

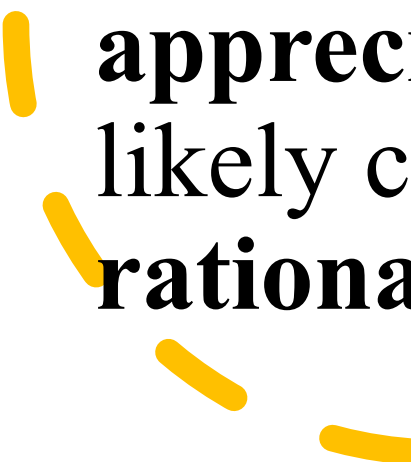
(2) to **appreciate** one's situation as a defendant in a criminal prosecution,

(3) to **relate** pertinent information to counsel concerning the facts of the case.



Zapf & Roesch: **An Investigation of the Construct of Competence: A Comparison of the FIT, the MacCAT-CA, and the MacCAT-T**, 29 *L & Hum. Behav* 229 (2005)

“These competence-related abilities can be arranged in hierarchical ...the four tests are (1) the ability to **communicate** a choice, (2) the ability to **understand** relevant information, (3) the ability to **appreciate** the nature of the situation and its likely consequences, and (4) the ability to **rationally manipulate information.**” *Id.* at 233



2018 AAPL
*Practice
Resource
Eval.
Competence*

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- At S49, “...the psychiatrist should contact the defendant’s attorney to assess the defendant’s ability to assist counsel”
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Each 'Tribe' Has Complaints About the Other:

- The Lawyers Don't Return My Calls,
- The Lawyer Won't Discuss the Case With Me,
- The Lawyer Did Not Provide Well Organized Information About The Client's Behavior; About Available Collateral Information; About Pertinent Sources Of Information.
- The Doctor Wasn't Interested In My Information,
- The Doctor Didn't Want the Records I have Available
- The Doctor Didn't Want My Interview Notes
- The Lawyer/Doctor Didn't Have The Time To Go Over the Case

Best Practices and Basic Practice Guidelines:

- Encourage Mental Health Expert-Lawyer Communications on Competence to Stand Trial
- The Pertinent Literature Encourages It
- At the high end, court rulings promote the need for lawyers and mental health professionals to acquire information about the accused's present condition, strengths and limitations, abilities and capacities, case related behaviors

