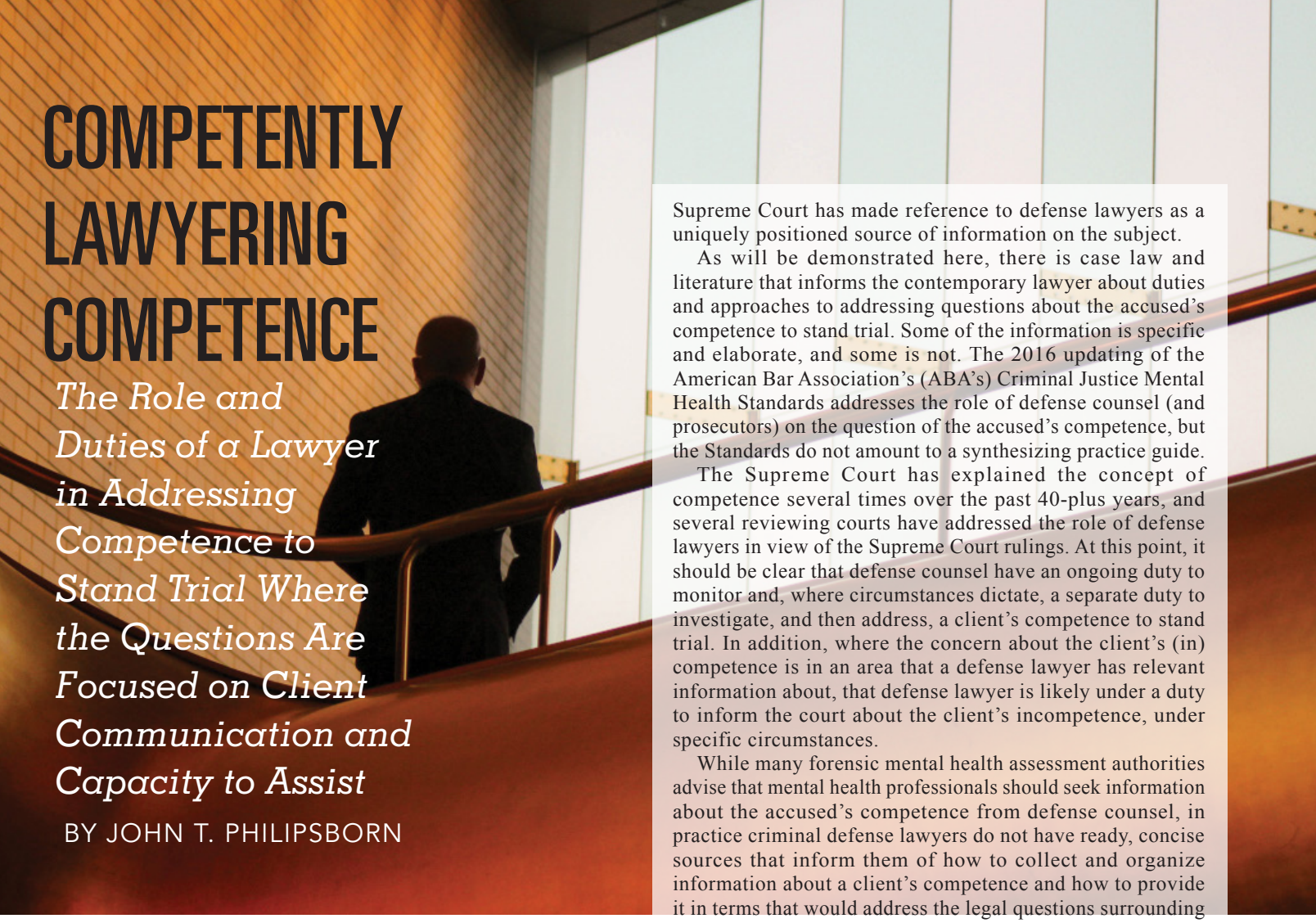

COMPETENTLY LAWYERING COMPETENCE

The Role and Duties of a Lawyer in Addressing Competence to Stand Trial Where the Questions Are Focused on Client Communication and Capacity to Assist

BY JOHN T. PHILIPSBORN

Courts, commentators, and various practice guides (mainly for forensic mental health professionals) have addressed the assessment of competence to stand trial. Even though competence to stand trial is a legal condition required of the accused, criminal defense lawyers have widely differing levels of understanding of the requirement and uneven approaches to monitoring and, where necessary, formally evaluating and then litigating competence. Part of the problem is that training of lawyers on forensic mental health issues is generally not a requirement to defend criminal cases, and the literature aimed at the lawyering aspects of competence issues is sparse. The United States Supreme Court has made reference to defense lawyers as a uniquely positioned source of information on the subject.

As will be demonstrated here, there is case law and literature that informs the contemporary lawyer about duties and approaches to addressing questions about the accused's competence to stand trial. Some of the information is specific and elaborate, and some is not. The 2016 updating of the American Bar Association's (ABA's) Criminal Justice Mental Health Standards addresses the role of defense counsel (and prosecutors) on the question of the accused's competence, but the Standards do not amount to a synthesizing practice guide.

The Supreme Court has explained the concept of competence several times over the past 40-plus years, and several reviewing courts have addressed the role of defense lawyers in view of the Supreme Court rulings. At this point, it should be clear that defense counsel have an ongoing duty to monitor and, where circumstances dictate, a separate duty to investigate, and then address, a client's competence to stand trial. In addition, where the concern about the client's (in) competence is in an area that a defense lawyer has relevant information about, that defense lawyer is likely under a duty to inform the court about the client's incompetence, under specific circumstances.

While many forensic mental health assessment authorities advise that mental health professionals should seek information about the accused's competence from defense counsel, in practice criminal defense lawyers do not have ready, concise sources that inform them of how to collect and organize information about a client's competence and how to provide it in terms that would address the legal questions surrounding competence. Indeed, it is not uncommon for lawyers who have practiced for a number of years in criminal court never to have addressed a client's incompetence in a contested proceeding and to be unaware of the breadth of informative case law and literature on the subject of competence to stand trial.

This article both argues and confirms that it is a professional duty of defense lawyers to become familiar with the law and assessment approaches addressing competence to stand trial, beginning with the definitions of competence from the United States Supreme Court and in the jurisdictions the lawyers practice in and to be prepared to actively address competence issues with courts and experts.

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LAWYER'S DUTY TO INVESTIGATE THE ACCUSED'S COMPETENCE, AND WHEN TO NOTIFY THE COURT

The United States Supreme Court has not ruled that counsel have a specific duty to provide notice to a trial (or reviewing) court that the accused is not competent to stand trial. But in *Drope v. Missouri*, 420 U.S. 162, 176–77 (1975), the Court observed that "judges must depend to some extent on counsel to bring [competence] issues into focus." Several reviewing courts have provided strongly worded statements about defense lawyers' roles and duties where a client's incompetence is established to be a significant issue. The Tenth Circuit has explained:

> Of all the 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 the competency issue, but, because of the importance on the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate.

(United States v. Boigegrain, 155 F.3d 1181, 1188–89 (10th Cir. 1998).)

Under the *Strickland v. Washington*, 466 U.S. 668, 691 (1984), standard of effective assistance, under which counsel have a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary, the Eighth Circuit has found that "[t]he failure of trial counsel to request a competency hearing where there was evidence raising a substantial doubt about a petitioner's competence to stand trial may constitute ineffective assistance of counsel." (Speedy v. Wyrick, 702 F.2d 723, 726 (8th Cir. 1983), *cited with approval in* Vogt v. United States, 88 F.3d 587, 591–92 (8th Cir. 1996).)

A ruling by the District of Columbia Court of Appeals, *Blakeney v. United States*, 77 A.3d 328 (D.C. 2013), contains a useful compendium of case law from both federal and state courts covering the analysis of ineffectiveness claims where the accused's competence is at issue. The *Blakeney* court explained:

> Trial counsel and the trial court each have important roles to play in ensuring that only competent defendants are tried. . . . But the court typically has only limited contact with criminal defendants; it is not in the best position to identify those in need of competency evaluations. Normally, it is defense counsel who has the most exposure to the defendant's behavior and (prior to any expert evaluation) "the best-informed view of the defendant's ability to participate in his defense."

(*Id.* at 342–43 (relying in part on Medina v. California, 505 U.S. 437, 450 (1992)).)

Other courts, including the Supreme Court of Wisconsin in *State v. Johnson*, 395 N.W.2d 176 (Wis. 1986), have addressed the obligations of lawyers to "bring up" the issue of incompetence when there is sufficient evidence to do so.

The *Blakeney* court makes reference to the 1984 version of ABA Criminal Justice Mental Health Standard 7-4.2(c), which explained that defense counsel should bring the issue of the accused's likely incompetence to the court's attention when counsel has "a good faith doubt as to the defendant's competence." As of 2016, there are newly adopted ABA Criminal Justice Mental Health Standards, which offer expansive aspirational statements about defense counsel's role in working with clients who have mental disorders. (Criminal Justice Mental Health Standards Standard 7-1.4 (Am. Bar Ass'n 2016).) The 2016 Standards explain that defense lawyers (and prosecutors) have roles in raising the issue of competence to proceed. (*See id.* at Standard 7-4.2.)

Lawyers seeking guidance on the level of information, and necessary confidence levels on that information, that is the basis for a lawyer's statement of concern about the accused's incompetence will need to inform themselves on whether their jurisdiction uses a "reasonable doubt," a "substantial doubt," or a "doubt based on expert advice" standard, or some other standard or test as the basis for triggering a judicial competence inquiry. The *Blakeney* court resolved the matter for the District of Columbia by stating: "we hold that criminal defense counsel must raise the issue of the defendant's competency with the court if, considering all the circumstances, objectively reasonable counsel would have reason to doubt the defendant's competency." (77 A.3d at 345–46.)

The Fifth Circuit added another wrinkle, explaining that where defense counsel "investigated the competency issue and decided, for tactical reasons" not to pursue the issue and request a competency hearing, there was no basis to determine that there was ineffective assistance. (Enriquez v. Procunier, 752 F.2d 111, 114–15 (5th Cir. 1984).) The Supreme Court of Missouri has taken a similar approach and deferred to the lawyer's investigation and evidence of defense counsel's communications with the accused in finding effective handling of the matter. (Clayton v. State, 63 S.W.3d 201, 209 (Mo. 2011) (en banc).) Other courts have held "that strategic considerations do not eliminate defense counsel's duty to request a competency hearing" where counsel has substantial evidence of incompetence. (*Johnson*, 395 N.W.2d at 183–84.) The fabric of competence-related case law strongly suggests that where counsel believes there is substantial evidence of incompetence, particularly where that evidence includes historical information and diagnostic opinions consistent with a basis for current incompetence, a strategic consideration would not outweigh counsel's belief that there is a likelihood of a deprivation of due process.

John Parry wrote as follows in his book *Criminal Mental Health and Disability Law, Evidence and Testimony*:

> Counsel must act affirmatively to bring a client's possible incompetency to the court's attention, or else the client may appeal, contending that counsel was ineffective. Arguably, the threshold for action is lower than what is expected of the court itself because counsel is supposed to advocate on behalf of the client's interests and has more direct exposure to the client's behavior. The Tenth Circuit, for example, found that a defendant's representation was ineffective, even though his lawyer did not have actual knowledge of his client's possible incompetency. There, counsel failed to investigate the defendant's long history of mental illness, including the fact that he had been incompetent to stand trial in a previous case.

(John Parry, Criminal Mental Health and Disability Law,

Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Criminal Justice Professionals 98 (2009) (footnotes omitted).)

In sum, defense lawyers have a duty to monitor and address competence to stand trial. Competence is a condition that a defense lawyer must monitor and raise where legally necessary and required.

US SUPREME COURT EXPLAINS UTILITY OF INFORMATION ON COMPETENCY FROM DEFENSE LAWYERS

Several rulings from the United States Supreme Court where competency to stand trial is at issue discuss the utility of information from defense counsel. In *Drope*, 420 U.S. at 177–78, the United States Supreme Court reviewed competency-related information available to the trial court that was not factored into the competency assessment analysis. The Court then added this important note: "we do not . . . suggest that courts must accept without question a lawyer's representations concerning the competence of his client, [but] an expressed doubt in that regard by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." (*Id.* at 177 n.13.)

In *Medina v. California*, 505 U.S. 437, 450–51 (1992), the Court observed that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." The underlying decision of the California Supreme Court had already explained this point in *People v. Medina*, 799 P.2d 1282, 1291 (Cal. 1990):

> [O]ne 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 answer to [case law's] concern about the defendant's possible inability to cooperate with counsel in establishing his incompetence: Counsel can readily attest to such defect or disability. [The state prosecutors], on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or the defendant's actual comprehension of the nature of the criminal proceedings.

The United States Supreme Court has never retreated from the use of its phrase "unquestionably a factor which should be considered," and an effective lawyer should have it in mind when addressing a competence to stand trial issue.

DEFENSE COUNSEL IS IN A UNIQUE POSITION TO ADDRESS THE ACCUSED'S COMPETENCE

Because of their position in the criminal court process, defense counsel can address and inform parts of the assessment of competence to stand trial that are not reached by forensic mental health experts, who are not communicating with the accused as the lawyer in the case and who are not likely to be aware of case-related choices, case-related tasks, and strategic decisions with which the client and lawyer are involved.

"Representation of a criminal defendant entails certain basic duties." (*Strickland*, 466 U.S. at 688.) Where review of an ineffectiveness claim in a criminal case is undertaken by a court, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Id.*) It is a violation of the Constitution of the United States for a person who lacks "mental competency" to be subject to a criminal trial. (Dusky v. United States, 362 U.S. 402 (1960) (per curiam).) It is a violation of due process for someone who is not competent to be subjected to trial and conviction. (Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).)

The Constitution sets the "floor" of the definition of competence as the *Dusky*/*Drope* standard. (Indiana v. Edwards, 554 U.S. 164, 170–71 (2008).) In *Edwards*, the United States Supreme Court confirmed that the need for mental competency during the trial process requires that the accused have: (1) a rational as well as factual understanding of the proceedings against him or her, and (2) sufficient present ability to consult with counsel with a reasonable degree of rational understanding and to assist in preparing the defense. (*Id.* at 170 (relying on *Dusky*, 362 U.S. at 402, and *Drope*, 420 U.S. at 171, as providing these definitions of "mental competency").)

The accused who is competent must also be capable of considering and of deciding to exercise or to give up rights, including the right to the assistance of counsel or to trial. (*Id.* at 171–72 (referencing Godinez v. Moran, 509 U.S. 389, 392–94 (1993)).) Competence to stand trial necessarily involves the competence to exercise or to waive certain rights (which include the right to testify or not and the right to call witnesses or not). Being competent to stand trial does not necessarily equate to the capacity to conduct the defense of a case without counsel. (*Id.* at 177–78.)

Competence to stand trial is not just "functional competence," but consists of specified abilities and capacities that are directly related to the criminal court context. (Riggins v. Nevada, 504 U.S. 127, 140–41 (1992) (Kennedy, J., concurring).) In *Riggins*, Justice Kennedy wrote an observation which the full court then cited with approval in *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996):

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

(*Riggins*, 504 U.S. at 139–40 (Kennedy, J., concurring).)

In *Godinez*, 509 U.S. at 397–98, the Supreme Court explained that the accused who goes to trial is "likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads

guilty." The choices—and the abilities to make them—include whether or not to choose the right to trial by jury, whether to testify or waive the right to testify, and whether to call witnesses to put on a defense or not. The accused who goes to trial may—like the person who decides to plead guilty—give up the right to call witnesses, or to put on one defense, or to assert any affirmative defenses. The accused who goes to trial, as the Court explained, may have to make "a sum total of decisions." (*Id.* at 398–99.)

Godinez explains that whether approaching the decision to plead guilty or to go to trial, competence involves the ability to address and make "strategic choices." (*Id.*) The choices are to be made "[i]n consultation with [the accused's] attorney." (*Id.*) Both processes—the guilty plea and the trial—will involve strategic decisions and choices made based on an understanding of fundamental principles involved in criminal courts. The decisions made during a trial, which can include calling witnesses to support a given defense or the accused testifying in support of the defense, involve understanding that there is a right to present a defense and various ways to do so.

"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, 568 U.S. 57, 65 (2013).)

These are all matters that defense counsel can assess from their unique position in relation to the accused.

FORENSIC MENTAL HEALTH EXAMINERS UTILIZE COMPETENCY INFORMATION FROM DEFENSE COUNSEL

Drs. Patricia Zapf and Ronald Roesch, who have written a book on the evaluation of competence to stand trial, explain that "[t]he defense attorney will be an important resource in terms of assisting the evaluator in obtaining relevant sources of information" on a variety of matters including "information regarding the complexity of the case and the abilities required of the defendant to meet the demands of the case." (Patricia A. Zapf & Ronald Roesch, Evaluation of Competence to Stand Trial 89–90 (2009).) While the United States Supreme Court has not specified that the complexity of a given case is a constitutionally mandated consideration, Zapf and Roesch are not alone in encouraging evaluators to consider the relative complexity of the case in a competence evaluation. More pertinent even is the following observation made by these much-published writers and researchers on forensic mental health assessment: "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.)

One of the most extensive discussions of the judicial appraisal of competence and evidence of competence restoration by a federal trial court is found in *United States v. Duhon*, which relied in part on literature aimed at defense counsel in explaining that where the focus is on the ability to assist counsel, a "multi-disciplinary approach is often critical" because there is a question about the extent to which an examining psychologist or psychiatrist will know what issues are presented by the demands of the defense of a case. (104 F. Supp. 2d 663, 669–70 (W.D. La. 2000) (citing Michael N. Burt & John T. Philipsborn, *Assessment of Client Competence: A Suggested Approach*, 22 Champion, June 1998, at 18).) The multidisciplinary approach, in general, is one endorsed in the 2016 ABA Criminal Justice Mental Health Standards.

Dr. Thomas Grisso, whose work on competence assessment is well known and has helped lead the field for many years, was explaining in 1988 that consultation with counsel can provide "information from [counsel's] own direct experiences in working with the defendant." (Thomas Grisso, Competency to Stand Trial Evaluations: A Manual for Practice 41 (1988).) Dr. Grisso has since echoed this position. So have Dr. Melton and his coauthors in their text *Psychological Evaluations for the Courts* (3d ed. 2007).

In addition, the American Academy of Psychiatry and the Law (AAPL) has had a published practice guideline for the assessment of competence to stand trial since 2007 that makes reference to obtaining information from defense counsel. (Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. Am. Acad. Psychiatry & L. S3, S25–26 (Supp. 2007).)

Defense lawyers should be aware of those practice guides and commentaries written by mental health professionals that encourage collecting information from the defense lawyer of record. Lawyers should consider what information they can appropriately make known to examiners (and courts) and how to make that information known, including through written submission, participating in interviews, responding to questions, being observed in interactions with the accused in question, etc.

DEFENSE COUNSEL CAN EXPLAIN HOW OBSERVED INCOMPETENCE AFFECTS COMMUNICATIONS AND UNDERMINES EFFECTIVE DECISION MAKING

The United States Supreme Court has explained how defense lawyers' decision making is evaluated under the effective assistance of counsel standard. And often courts, the lawyers practicing in them, and the forensic mental health experts participating in court processes do not focus on the assessment of the implications of impaired attorney-client communications on the legally defined requirement of effective assistance. The following passage from *Strickland*, a seminal decision defining the basis for an allegation of ineffective assistance of counsel in a criminal case, informs discussion:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. 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. . . . In short, 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.

(466 U.S. at 691 (emphasis added).)

In sum, when it comes to addressing whether the accused has a sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, part of the lawyer's appraisal is whether the information being supplied by the client is sufficiently well related to the facts of the case as to be the basis on which a lawyer can make certain strategic decisions about investigation, pretrial litigation, or an actual trial defense.

From an operational viewpoint, one characteristic of a trial-competent client is that the client has a basic understanding that he or she and the defense lawyer have a collaboration on the pending charges and in regard to the pending legal proceedings. Communication with counsel is a part of the client's decision to proceed with the assistance of counsel. The collaboration is specific to the criminal charges and on addressing them with a factual and rational understanding both of the legal process and of the way the case can progress given the facts disclosed to counsel by the client, by defense counsel's investigation, or both. Communications with the client on the subject matter of the charges, including crime facts, or on background information are directly related to the effective assistance of counsel.

Unless clinicians and forensic mental health professionals have both training and experience in the preparation of the defense of a criminal case, they will unlikely be able to address where and how the client is not able to communicate with counsel in a manner consistent with legally defined competence, or is unable to make basically informed rational decisions about the case including whether to plead or to pursue permissible lines of defense.

As pointed out by the United States Supreme Court in *Godinez*, the accused must at least be capable of understanding the basic procedures employed in the criminal courts that frame the choices the accused must make, including the right to contest the charges at trial, the right to testify, the right to call witnesses as part of an approach to trial defense, and the right to resolve the case without a trial when the opportunity exists. Among these, as the Court noted, is "to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses." (*Godinez*, 509 U.S. at 398.)

In sum, the definition of competency to stand trial, and thus of incompetency, as well as discussions of the process in controlling case law place defense counsel in a potentially important position to at least inform some aspects of the court's assessment of the competence question presented in a given case. But the reality, as a number of researchers on the competence assessment process have concluded, is that often the resolution of a competence to stand trial question is arrived at by an agreement between the court and parties to accept the opinions of forensic mental health examiners. (Patricia A. Zapf et al., *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to the Clinicians?*, 4 J. Forensic Psychol. Prac. 27 (2004).)

There are no standardized inventories or structured interviews, or even detailed practice guides, that address what a forensic evaluator should ask of a defense lawyer on the issue of competence. At the same time, there is no specific guidance offered by lawyering standards or in respected sources of lawyering practice for how defense lawyers should use the dictates of effective defense practice, the mandate of communication with their clients, and legal definitions of competence to offer specific opinions or information about a client's competence. At least some of what a prepared and effective lawyer should be able to address according to a breadth of case law where a client's competence is in doubt includes:

1. Whether the accused is able to communicate and consult with counsel on the subject matter of the charges, such as to provide the lawyer a basis to make decisions about investigation and defense strategies;
2. Whether the accused is able to discuss and/or consider basic issues presented in the case at hand, including whether there are available defenses, and whether those defenses can be presented given the evidence (including any witnesses) as part of the assessment of whether there is a rational and factual basis for a trial or a plea;
3. Whether the accused is able to discuss his or her possible trial testimony in a factual and rational manner and whether the accused is able to understand he or she has the right to testify as well as the right to forgo both trial and testimony, depending on what provides the most rational beneficial outcome;
4. Whether the accused has the ability to discuss with counsel the likely outcomes in the case, including after conviction by guilty plea as compared to after trial, the level and length of incarceration or legally debilitating sentencing consequences, and the resulting and associated disabling consequences such as adverse immigration status matters, adverse employment or licensure consequences, and the inability to be bonded;
5. Whether the accused is able to rationally discuss the possible outcomes in appraising the utility of negotiating a plea agreement, in contrast to the utility and strategy of proceeding to trial;
6. Whether, if the case specifics require it, the accused can discuss the implications, consequences, and basic strategies involved in the pursuit of a defense such as an alibi, self-defense, or a not guilty by reason of insanity plea, or the accused's being subject to mentally disordered offender or disordered sex offender proceedings, which may entail the possibility of a lifetime commitment in a quasi-criminal/quasi-civil

process that is somewhat complex;

7. Whether the accused is able to understand in both a rational and factual manner his or her position in relation to counsel and the allocation of case-related responsibilities, in that counsel will defer certain decisions to the accused (e.g., whether to go to trial or whether to testify) while other areas are reserved to the lawyer (e.g., the extent of the questioning of witnesses); and
8. Whether the accused is able to provide basic explanations of how a defense to the pending charges could be presented in the case-specific context together with a basic evaluation of the relative strength of the government's case compared with that of the defense.

Addressing these points may respond to the note from Drs. Zapf and Roesch that "[s]ince 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." (Zapf & Roesch, *supra*, at 90.)

DEFENSE LAWYERS MUST AVOID PREJUDICING A CLIENT DURING PARTICIPATION IN COMPETENCE ASSESSMENT

One of the most evident cautionary notes that lawyers should have in mind is that there is some support for the view that statements made by the accused in a court-ordered competency examination may be the subject of Fifth Amendment protections. Some states have recognized a statutorily provided immunity against the use of statements made by the accused in court-ordered competency examinations. (*See, e.g.*, People v. Arcega, 651 P.2d 338, 346–47 (Cal. 1982); Centeno v. Superior Court, 11 Cal. Rptr. 3d 533, 542–43 (Ct. App. 2004); Tarantino v. Superior Court, 122 Cal. Rptr. 61, 62–63 (Ct. App. 1975).) This position of California courts was reiterated in *People v. Pokovich*, 141 P.3d 267 (Cal. 2006), which referenced the notion of immunity that attaches to certain classes of statements made in various settings in which the statements are compelled. Some support for this position is found in the lengthy discussion of the issue in *New Jersey v. Portash*, 440 U.S. 450, 452–59 (1979), which involved a statutory immunity for public employees. More on point for California counsel is *Baqleh v. Superior Court*, 122 Cal. Rptr. 2d 673 (Ct. App. 2002), a decision that explains California's competence-related immunity doctrine at some length.

Elsewhere, a lawyer's description of statements made by a client, including summaries of statements or characterizations of a client, could arguably be viewed as voluntarily disclosed, at least by the lawyer, and thus useable in several possible contexts. Lawyers who provide information to experts, or who make representations on the record on behalf of their presumably incompetent clients, may find themselves faced with an argument that they have waived certain privileges, or that testimony given by an expert who relies on communications from a lawyer waives the attorney-client privilege and work product privilege to the extent of the divulged communication and perhaps further. Various rulings deal with the permutations involved, but counsel should be cautious in controlling the manner in which they divulge information about a client's competence to the court, to court-appointed experts, or even to their own experts. Some of the issues that should be considered are covered in a decision of West Virginia's Supreme Court of Appeals. (Marano v. Holland, 366 S.E.2d 117 (W. Va. 1988).)

Some counsel, aware of the problems presented, will offer conclusory information to the trial court while asserting that no privileges are being waived by defense counsel's participation in the process and noting that under cases like *Medina v. California*, counsel's statements are meant to provide useful light on the competency issue. Some lawyers have argued that without forms of judicial immunity against collateral use of their statements or information, they cannot offer detailed accounts or information about competence—a process that sometimes leads astute courts in the direction of urging the government to stipulate that none of counsel's information can be used against the accused in any part of the case and emphasizing the need for all concerned to be properly assessed of the accused's competence.

CONCLUSION

Rulings have explained that defense counsel have an obligation to effectively investigate a client's possible incompetence and under specified circumstances to inform the court about that incompetence. But what triggers that obligation and what guides the defense lawyer's assessment of a client's competence and the lawyer's contribution to the assessment process are matters that defense lawyers are often not familiar with. The Supreme Court has defined the elements of competence and characteristics of the individual who is competent by discussing how competence relates to decision making in view of the criminal court adjudication process and based on the accused's procedural rights. The competence-related commentaries and assessment guides explain the various techniques and methodologies of competence assessment. In view of the critical importance of ensuring that the accused is competent to stand trial, and given that competence is a legally required condition that defense counsel can help address, it should be clear to defense lawyers that their clients' competence must be effectively monitored, and where necessary, addressed—that is a lawyering duty.

There are aspects of the condition of being competent to stand trial that are not easily accessible to forensic mental health professionals, who sometimes define themselves as the best sources of information on all aspects of competence to stand trial. Especially where the issue presented is specific to attorney-client communications and capacity to assist, courts and experts alike should remember the Supreme Court's advice about the utility of information from defense counsel. Where necessary, defense counsel must step up and make known their unique perspective.■