

Assessing Competency Competently: Toward a Rational Standard for Competency-to-Stand-Trial Assessments

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This article reports on a survey of forensic psychiatrists and psychologists who read two case study vignettes and assessed whether each criminal defendant was competent to stand trial, using three differently worded standards of competency: one that focused on whether the defendant's thinking was rational, a second that focused on whether the defendant's behavior was rational, and a third that did not use the word "rational." The objective was to discover whether forensic examiners would distinguish among the standards (i.e., find the defendant competent under one standard but not under another) or whether they would find the defendant competent under all standards or incompetent under all standards. In responding to both vignettes, more than three-fourths of all respondents either found the defendant competent under all three standards or incompetent under all three standards. In addition, in answering one vignette, the respondents were divided almost equally in deciding whether the defendant was competent to stand trial. These results are analyzed and respondents' comments are discussed. The article concludes with specific proposals to improve competency-to-stand-trial assessments.

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In a recent article, Jan Brakel¹ noted that remarkably little consideration has been given to the concept of rationality as a standard for separating those who are fit to stand trial from those who are not. The federal competency statute does not mention the rationality concept, but rather, merely provides that a criminal defendant is incompetent if "he [the defendant] is presently suffering from a mental disease or defect rendering him. . . unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."² Most state competency statutes contain similar language, requiring

mental disorder (or disability, disease, or defect) that renders the defendant unable to understand the proceedings (or the nature of the proceedings) and to assist in his or her defense (or to cooperate with counsel in his or her defense).

The absence of a legislatively imposed "rationality" requirement seems strange in light of the Supreme Court's interpretation of the federal competency statute in 1960, more than 40 years ago. In *Dusky v. U.S.*,³ the Court held that a defendant's competency was measured by "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (Ref. 3, p 402). The *Dusky* opinion is extremely brief—a mere two paragraphs containing fewer words than were uttered by Lincoln in his Gettysburg Address. The Court did not explain why it adopted that standard, and it did not explain the meaning of any of the

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terms, such as “consult with his lawyer” or “reasonable degree of rational understanding,” contained in the standard.

Although state legislatures have not rushed to embrace the *Dusky* “rational understanding” standard, many state courts have done so. Even though the Supreme Court in *Dusky* was interpreting only the federal competency statute, state courts in interpreting their states’ competency statutes have quoted the *Dusky* language verbatim, accepting the *Dusky* standard as the required standard for measuring competency. These decisions have occurred with such frequency that Gerald Bennett⁴ once declared: “In considering the criteria for determining competence to stand trial, one must begin—and indeed, end—with the criteria set forth in *Dusky v. United States*” (Ref. 4, p 376).

There is, however, another standard of rationality, one that predates *Dusky* by more than 100 years. In 1847, the New York competency statute prohibited trial of insane persons. In *Freeman v. People*,⁵ the Supreme Court of New York County, in construing that statute, held that sanity for purposes of competency to stand trial (i.e., the standard of present sanity) is not measured by whether the defendant knows right from wrong (i.e., the standard of sanity at the time of the criminal act). Rather, if the defendant:

... is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner he is, for the purpose of being tried, to be deemed sane [Ref. 5, pp 24–5].

The case is of more than historical interest. More than 50 years after *Freeman* was decided, the California Supreme Court⁶ quoted that same language and asserted: “If this is the true construction of the New York statute, as I have no doubt it is, it is equally the true construction of our own” (Ref. 6, p 1121). In 1974, the California legislature amended its competency statute to include specifically, as a requirement of competency, the ability of the defendant “to assist counsel in the conduct of a defense in a rational manner.”⁷ Today, eight states, including such populous states as California,⁷ Illinois,⁸ Michigan,⁹ and North Carolina,¹⁰ use the “rational manner” or “rational or reasonable manner” standard.

The *Dusky* standard can be viewed as a cognitive test, one that clearly focuses on the defendant’s thinking—whether the defendant has a rational understanding of the proceedings and can consult with

his or her attorney with a reasonable degree of rational understanding. In contrast, the “rational manner” standard can be construed as a behavioral test—whether the defendant has the ability to conduct the defense or to assist in his or her defense in a rational manner. The distinction is not purely hypothetical. For example, in a recent case heard in the San Diego County Superior Court, the trial judge, acting on the prosecutor’s request, instructed one of the coauthors of this article (DN) that in testifying about the ability of the defendant to assist counsel, the witness should not testify about the defendant’s ability to think, because under the California competency standard, the question of the defendant’s ability to assist counsel is determined solely by the extent to which the defendant’s capacity to act rationally has been impaired by his or her mental condition. We do not claim that this interpretation is necessarily correct or even that it is the most appropriate interpretation of that term. Nevertheless, it is a statutory construction that is being applied today by some courts.

This article reports on a survey of forensic psychiatrists and psychologists who were asked to read two case study vignettes and assess the competency of each criminal defendant by using three standards of competency: *Dusky*’s “rational understanding” standard, the “rational manner” standard, and a third standard that does not use the word “rational.” The objective was to discover whether forensic examiners would distinguish among the standards (i.e., find the defendant competent under one standard but not under the others) or whether they would find the defendant competent under all standards or incompetent under all standards.

Methods

A questionnaire was mailed to the 922 individuals who are board certified in forensic psychiatry and who are also members of the American Academy of Psychiatry and the Law (AAPL), and to the 189 individuals who are diplomates in forensic psychology from the American Board of Forensic Psychology. Of the 1,111 questionnaires distributed, 48 (i.e., 35 sent to psychiatrists and 13 sent to psychologists) were returned by the post office as undeliverable. Thus, the questionnaire was mailed successfully to 1,063 individuals. The two case study vignettes appear in Table 1. In the first vignette, the facts indicate that the defendant’s thinking was impaired, although his behavior, other than in committing the crime

itself, was normal. Thus, we hypothesized that the defendant in the first vignette could be viewed as not having a rational understanding of the issues but as able to conduct his arguably irrational defense in a rational manner. In contrast, in the second vignette, the defendant's behavior was impaired—she was belligerent, screamed profanities, and refused to comply with directions—but her thinking was not. We hypothesized that the defendant in the second vignette could be viewed as having a rational understanding of the proceedings but not able to conduct her defense in a rational manner.

Following each vignette, three standards of competency were presented. Standard A is the *Dusky* “rational understanding” standard. Standard B is the “rational manner” standard. Standard C is the current federal statutory standard of competency to stand trial.² This standard does not use the word “rational” at all, but merely requires that the defendant be able to “assist properly” in his or her defense. This standard was interpreted by the Supreme Court in *Dusky* to be the “rational understanding” standard. After each standard, the evaluator was asked whether the defendant in the preceding vignette was competent to stand trial under that standard. The same standards and questions were presented for each vignette. Table 2 lists those competency standards and the questions asked.

After each vignette and questions, space was provided for respondents to offer comments about the

Table 1 Competency to Stand Trial Vignettes

Vignette #1. A 42-year-old male defendant is charged with stalking a famous movie actor. He tells the forensic examiner that he will plead “not guilty” as he was acting in “self defense”. The defendant completely understands the nature of the criminal proceedings. Regarding his defensive strategy, he explains that the actor implanted microchips into his brain and was controlling his behavior through these microchips by administering painful electric shocks to him each time the defendant behaved in a way that the actor did not like. Apart from the alleged stalking, the defendant's behavior and speech was and remains normal.

Vignette #2. A 23-year-old female defendant is charged with murdering her husband after learning that he was having an affair with her sister. Upon being arrested, she became belligerent with the sheriff leading to her being “hog tied”. Once in jail, she was “pepper sprayed” by the jail staff after she refused to comply with directions. The jail psychiatrist diagnoses the defendant with impulse control disorder NOS and offers her medication, which she refuses. In court, she screams profanities at the judge, spits at the bailiff, and turns over the defense table. She is selectively mute with the forensic examiner but knows why she is in jail and argues: “The dirty bum deserved what he got.”

Table 2 The Competency Standards and Questions Applying Them to the Vignettes

A. Assume that to be found competent to stand trial in this jurisdiction, the defendant must: “have sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of proceedings against him or her.”
 Under standard A, is the defendant in Vignette (1) (2) competent to stand trial? Yes _____ No _____

B. Assume that to be found competent to stand trial, the defendant in this jurisdiction must: “be able to understand the nature of the criminal proceedings and to assist counsel in the conduct of a defense in a rational manner.”
 Under standard B, is the defendant in Vignette (1) (2) competent to stand trial? Yes _____ No _____

C. Assume that to be found competent to stand trial, the defendant in this jurisdiction must: “be able to understand the nature and consequences of the proceedings against him or her and to assist properly in his or her defense.”
 Under standard C, is the defendant in Vignette (1) (2) competent to stand trial? Yes _____ No _____

vignette. At the end of the questionnaire, each respondent was asked to indicate whether he or she was a psychiatrist or psychologist, the state where his or her primary practice was located, and approximately how many competency to stand trial examinations he or she had performed.

Results

Of the 1,063 questionnaires that reached the addressees, 273 psychiatrists and psychologists responded to the questionnaire, a response rate of 25.7 percent. Although most respondents answered all questions (259 answered all three questions to the first vignette; 237 answered all three questions to the second vignette), a few did not (14 responded to only some or none of the questions to the first vignette; 36 responded to only some or none of the questions to the second vignette). Table 3 includes all answers that were submitted by those who responded. The percentages following the numbers in Tables 3 and 4 are based on the total number of responses to the specific question asked.

The data reveal that in answering questions regarding Vignette 1, respondents were divided almost equally in deciding whether the defendant was competent to stand trial. In applying *Dusky*'s “rational understanding” standard—the standard applied in most jurisdictions today—47.6 percent found the defendant competent, and 52.4 percent found him incompetent. In applying the “rational manner” standard, 39.4 percent found the defendant compe-

Table 3 Combined Responses

Vignette 1		
Standard Applied	Defendant Competent	Defendant Incompetent
A. Rational understanding	128 (47.6%)	141 (52.4%)
B. Rational manner	104 (39.4%)	160 (60.6%)
C. Assist properly	130 (49.2%)	134 (50.8%)
Respondents who reached the identical conclusion under all three standards: 196 (75.7%)		
Defendant competent under all three standards: 87 (44.4%)		
Defendant incompetent under all three standards: 109 (55.6%)		
Respondents who did not reach the identical conclusion under all three standards: 63 (24.3%)		
Defendant competent under Standards A and C, but incompetent under Standard B: 14 (5.4%)		
Defendant incompetent under Standards A and C, but competent under Standard B: 2 (0.8%)		
Vignette 2		
Standard Applied	Defendant Competent	Defendant Incompetent
A. Rational understanding	169 (70.1%)	72 (29.9%)
B. Rational manner	149 (61.1%)	95 (38.9%)
C. Assist properly	149 (62.1%)	91 (37.9%)
Respondents who reached the identical conclusion under all three standards: 185 (78.1%)		
Defendant competent under all three standards: 130 (70.3%)		
Defendant incompetent under all three standards: 55 (29.7%)		
Respondents who did not reach the identical conclusion under all three standards: 52 (21.9%)		
Defendant competent under Standards A and C, but incompetent under Standard B: 6 (2.5%)		
Defendant incompetent under Standards A and C, but competent under Standard B: 3 (1.3%)		

ent, and 60.6 percent found him incompetent. The result was closest when respondents applied the federal statutory standard, which does not use the word “rational” at all and focuses only on whether the defendant can “assist properly” in his defense. Under that standard, 49.2 percent found the defendant competent (130 respondents), and 50.8 percent found him incompetent (134 respondents).

There was somewhat greater agreement among respondents in analyzing Vignette 2. In applying the “rational understanding” standard, 70.1 percent found the defendant competent, and 29.9 percent found her incompetent. In applying the “rational manner” standard, 61.1 percent found the defendant competent, and 38.9 percent found her incompetent. In applying the “assist properly” standard, 62.1 percent found the defendant competent, and 37.9 percent found her incompetent.

In responding to both vignettes, more than three-fourths of respondents either found the defendants competent under all three standards or incompetent under all three standards. For the first vignette, 75.7 percent did not differentiate the result based on the standard applied; for the second vignette, 78.1 percent did not. Of those who did not differentiate, 44.4 percent found the Vignette 1 defendant competent, and 55.6 percent found the defendant incompetent under all three standards. Of those who did not differentiate, 70.3 percent found the Vignette 2 defendant competent, and 29.7 percent found the defendant incompetent under all three standards. If our hypothesis regarding the vignettes is correct, the Vignette 1 defendant should have been found incompetent under standard A (*Dusky*) and standard C (the federal standard interpreted to be the *Dusky* standard), but competent under standard B (rational manner). Only 2 (0.8%) of the 259 respondents reached that conclusion. In fact, 14 (5.4%) respondents reached the opposite conclusion. By our hypothesis, the Vignette 2 defendant should have been found competent under standards A and C, but incompetent under standard B. Only 6 (2.5%) of the 237 respondents reached that conclusion; 3 (1.3%) reached the opposite conclusion.

Table 4 presents the data from respondents divided into various categories. The first category is the discipline of the respondent. Of the 273 respondents, 224 (82.1%) identified themselves on the questionnaire as psychiatrists, and 49 (17.9%) identified themselves as psychologists, representing a response rate of 25.3 percent of the 887 psychiatrists and 27.7 percent of the 176 psychologists to whom the questionnaire was successfully mailed.

The second category is the jurisdiction in which the primary practice of the respondent is located. There were 208 (77.6%) individuals who practiced primarily in one of the 42 states that employs the *Dusky* “rational understanding” standard (as adopted by the legislature or through court interpretation), and 60 (22.4%) who practiced primarily in one of the eight states (California, Illinois, Louisiana, Maine, Michigan, North Carolina, South Dakota, and Wyoming) that employs the “rational manner” standard (as adopted by the legislature or through court interpretation). These data approximate the percentage of persons in the United States who live in states that utilize the two standards. Of a total population of 281,421,906 (2000 census), 210,150,683

Table 4 Responses Divided Into Various Categories

	Discipline		Jurisdiction		Experience	
	MDs	PhDs	<i>Dusky</i>	Rat'l Manner	Great	Slight
Total respondents (<i>n</i> = 273)	224 (82.1%)	49 (17.9%)	208 (77.6%)	60 (22.4%)	204 (76.4%)	63 (23.6%)
Vignette 1						
Defendant competent under Standard A	109 (48.7%)	19 (38.8%)	100 (48.1%)	26 (43.3%)	80 (39.2%)	45 (71.4%)
Defendant incompetent under Standard A	111 (49.6%)	30 (61.2%)	104 (50.0%)	34 (56.7%)	121 (59.3%)	17 (27.0%)
Defendant competent under Standard B	84 (37.5%)	20 (40.8%)	80 (38.5%)	23 (38.3%)	67 (32.8%)	34 (54.0%)
Defendant incompetent under Standard B	131 (58.5%)	29 (59.2%)	120 (57.7%)	36 (60.0%)	131 (64.2%)	26 (41.3%)
Defendant competent under Standard C	106 (47.3%)	24 (49.0%)	98 (47.1%)	31 (51.7%)	86 (42.2%)	41 (65.1%)
Defendant incompetent under Standard C	109 (48.7%)	25 (51.0%)	103 (49.5%)	27 (45.0%)	112 (54.9%)	19 (30.2%)
Number responding to all three questions	210 (93.8%)	49 (100.0%)	196 (94.2%)	58 (96.7%)	194 (95.1%)	59 (93.7%)
Number reaching identical conclusions under all 3 standards	156 (74.3%)	40 (81.6%)	149 (76.0%)	43 (74.1%)	151 (77.8%)	39 (66.1%)
Defendant competent under all 3 standards	71 (45.5%)	16 (40.0%)	67 (45.0%)	19 (44.2%)	55 (36.4%)	29 (74.4%)
Defendant incompetent under all 3 standards	85 (54.5%)	24 (60.0%)	82 (55.0%)	24 (55.8%)	96 (63.6%)	10 (25.6%)
Number not reaching identical conclusions under all 3 standards	54 (25.7%)	9 (18.4%)	47 (24.0%)	15 (25.9%)	43 (22.2%)	20 (33.9%)
Defendant competent under A and C, but incompetent under B	12 (5.4%)	2 (4.1%)	11 (5.3%)	3 (5.0%)	8 (3.9%)	6 (3.2%)
Defendant incompetent under A and C, but competent under B	2 (0.9%)	0 (0.0%)	1 (0.5%)	1 (1.7%)	1 (0.5%)	1 (1.6%)
Vignette 2						
Defendant competent under Standard A	135 (60.3%)	34 (69.4%)	122 (58.7%)	43 (71.7%)	132 (64.7%)	34 (54.0%)
Defendant incompetent under Standard A	63 (28.1%)	9 (18.4%)	60 (28.8%)	12 (20.0%)	50 (24.5%)	21 (33.3%)
Defendant competent under Standard B	120 (53.6%)	29 (59.2%)	109 (52.4%)	36 (60.0%)	115 (56.4%)	32 (50.8%)
Defendant incompetent under Standard B	82 (36.6%)	13 (26.5%)	74 (35.6%)	21 (35.0%)	67 (32.8%)	26 (41.3%)
Defendant competent under Standard C	120 (53.6%)	29 (59.2%)	110 (52.9%)	35 (58.3%)	115 (56.4%)	32 (50.8%)
Defendant incompetent under Standard C	78 (34.8%)	13 (26.5%)	70 (33.7%)	21 (35.0%)	65 (31.9%)	24 (38.1%)
Number responding to all three questions	195 (87.1%)	42 (85.7%)	178 (85.6%)	55 (91.7%)	179 (87.7%)	54 (85.7%)
Number reaching identical conclusions under all 3 standards	152 (77.9%)	33 (78.6%)	140 (78.7%)	41 (74.6%)	144 (80.4%)	39 (72.2%)
Defendant competent under all 3 standards	103 (67.8%)	27 (81.8%)	95 (67.9%)	31 (75.6%)	103 (71.5%)	25 (64.1%)
Defendant incompetent under all 3 standards	49 (32.2%)	6 (18.2%)	45 (32.1%)	10 (24.4%)	41 (28.5%)	14 (35.9%)
Number not reaching identical conclusions under all 3 standards	43 (22.1%)	9 (21.4%)	38 (21.3%)	14 (25.5%)	35 (19.6%)	15 (27.8%)
Defendant competent under A and C, but incompetent under B	6 (2.7%)	0 (0.0%)	4 (1.9%)	2 (3.3%)	4 (2.0%)	2 (3.2%)
Defendant incompetent under A and C, but competent under B	3 (1.3%)	0 (0.0%)	2 (1.0%)	1 (1.7%)	1 (0.5%)	2 (3.2%)

(74.7%) live in the 42 *Dusky* states and 71,271,223 (25.3%) live in the 8 “rational manner” states.

The third category is the experience of the respondents in conducting competency to stand trial evaluations. We arbitrarily chose 20 evaluations as the dividing line between experienced and inexperienced evaluators. By that dividing line, the respondents were extremely experienced. There were 204 (76.4%) individuals who reported that they conducted 20 or more competency to stand trial evalu-

ations, and 63 (23.6%) who reported that they conducted fewer than 20 evaluations. A total of 177 (66.3%) respondents reported conducting 50 or more evaluations, 154 (57.7%) reported conducting 100 or more, and 71 (26.6%) reported conducting 500 or more. Thus, more respondents reported conducting 500 or more evaluations than reported conducting fewer than 20. The most experienced evaluator reported conducting over 8000 evaluations.

Generally, the Table 4 data for the various categories parallels the Table 3 data for combined responses. However, there are some notable differences. For example, in assessing the Vignette 1 defendant using the *Dusky* “rational understanding” standard, Table 3 reports that 47.6 percent of all respondents found the defendant competent. Applying that same standard, Table 4 reports that psychiatrists and respondents who practice primarily in *Dusky* jurisdictions also divided nearly equally on whether defendant was competent—48.7 percent of psychiatrists found him competent, and 48.1 percent of *Dusky* jurisdiction respondents found him competent. However, in applying the *Dusky* “rational understanding” standard to the Vignette 1 defendant, psychologists and respondents who practice primarily in “rational manner” jurisdictions found the defendant competent less frequently—38.8 percent of psychologists and 43.3 percent of “rational manner” jurisdiction respondents found him competent. An even greater disparity exists between experienced and inexperienced respondents. Only 39.2 percent of experienced respondents found the Vignette 1 defendant competent, using the *Dusky* standard. In contrast, 71.4 percent of inexperienced respondents found him competent.

In assessing the Vignette 1 defendant using the “rational manner” standard, Table 3 reports that 39.4 percent of all respondents found the defendant competent. Applying that same standard, Table 4 reports that similar conclusions were reached by psychiatrists (37.5% competent), psychologists (40.8% competent), *Dusky* jurisdiction respondents (38.5% competent), and “rational manner” jurisdiction respondents (38.3% competent). Experienced respondents found the defendant competent at a slightly lower rate (32.8%), but a majority of inexperienced respondents found the defendant competent (54.0%).

In assessing the Vignette 1 defendant using the federal statutory (“assist properly”) standard, Table 3 reports that 49.2 percent of all respondents found the defendant competent. Applying that same standard, Table 4 reports that a similar near-equal division of opinion occurred among psychiatrists (47.3% competent), psychologists (49.0% competent), *Dusky* jurisdiction respondents (47.1% competent), and “rational manner” jurisdiction respondents (51.7% competent). It is somewhat surprising that psychologists would divide almost equally on this assessment

when approximately 60 percent of psychologists found the Vignette 1 defendant incompetent under both the *Dusky* standard—interpreted by the Supreme Court to be the federal standard—and under the “rational manner” standard. Experienced respondents applying the “assist properly” standard found the defendant competent at a slightly lower rate (42.2%), but almost two-thirds of inexperienced respondents found the defendant competent (65.1%) under that standard.

Far greater agreement occurred in assessments of the competency of the Vignette 2 defendant. Table 3 reports that 70.1 percent of all respondents found the defendant competent under the *Dusky* standard, 61.1 percent under the “rational manner” standard, and 62.1 percent under the “assist properly” standard. When the data are divided into categories, Table 4 reports that the Vignette 2 defendant was found competent by a higher percentage of respondents than respondents who found her incompetent, regardless of which standard was applied, ranging from a low of 50.8 percent of inexperienced respondents applying either the “rational manner” standard or the “assist properly” standard to a high of 71.7 percent of respondents from a “rational manner” jurisdiction applying the *Dusky* standard.

Table 3 reports that 75.7 percent of all respondents either found the Vignette 1 defendant competent under all three standards or incompetent under all three standards. By comparison, Table 4 reports the same consistency of response from 74.3 percent of psychiatrists, 81.6 percent of psychologists, 76.0 percent of respondents who practice primarily in a jurisdiction that employs the *Dusky* “rational understanding” standard, 74.1 percent of respondents who practice primarily in a jurisdiction that employs a “rational manner” standard, 77.8 percent of experienced respondents, and 66.1 percent of inexperienced respondents.

Similarly, Table 3 reports that 78.1 percent of all respondents either found the Vignette 2 defendant competent under all three standards or incompetent under all three standards. By comparison, Table 4 reports the same consistency of response from 77.9 percent of psychiatrists, 78.6 percent of psychologists, 78.7 percent of *Dusky* jurisdiction respondents, 74.6 percent of “rational manner” jurisdiction respondents, 80.4 percent of experienced respondents, and 77.2 percent of inexperienced respondents.

Table 3 reports that 44.4 percent of respondents who did not differentiate between the three standards found the Vignette 1 defendant competent. Similar results were recorded in Table 4 when the data were divided by professional discipline (psychiatrists: 45.5% competent; psychologists: 40.0% competent) and by jurisdiction of primary practice (*Dusky* jurisdiction: 45.0% competent; “rational manner” jurisdiction: 44.2% competent). However, a significant difference was recorded based on the experience of the respondent. Only 36.4 percent of experienced respondents (20 or more competency evaluations performed) found the Vignette 1 defendant competent, compared with 74.4 percent of inexperienced respondents (fewer than 20 competency evaluations performed).

Table 3 reports that 70.3 percent of respondents who did not differentiate between the three standards found the Vignette 2 defendant competent. Similar results were recorded in Table 4 when the data were divided by professional discipline, jurisdiction of practice, and degree of experience, ranging from a low of 64.1 percent competent for inexperienced respondents to a high of 81.8 percent competent for psychologists.

Discussion

The Divided Response to the First Vignette

The nearly equally divided response to the first vignette is not merely surprising, it is shocking. When 109 forensic psychiatrists analyze a fact situation (including the defendant’s mental condition) and, applying the *Dusky* standard, find the defendant competent to stand trial, and 111 forensic psychiatrists analyze the same facts and apply the same legal standard but reach the opposite conclusion, the message is clear: Something is terribly wrong. This split of opinion is certainly not a mere fluke of the sample. Even if the true population of forensic psychiatrists would agree on the defendant’s competence only 70 percent of the time, the chances of obtaining the relatively even split of opinion that was observed in the sample would be less than one in one billion (9.41×10^{-10} or .000000000941). If an 80 percent rate of agreement among the true population of forensic psychiatrists could be anticipated, the chances of obtaining the relatively even split of opinion that was observed in the sample would be less than one in ten quadrillion (or one in 10,000 trillion or one in 10

million billion, i.e., 10^{-16}). Although 1 in 1 billion and 1 in 10 quadrillion are mathematically very different, they are really just two different ways of saying “never.”

When 100 forensic psychiatrists and psychologists whose primary practice is located in a *Dusky* jurisdiction analyze a fact situation (including the defendant’s mental condition) and, applying the *Dusky* standard, find the defendant competent to stand trial, and 104 forensic psychiatrists and psychologists whose primary practice is located in a *Dusky* jurisdiction analyze the same facts and apply the same legal standard but reach the opposite conclusion, the message is clear: The defendant’s fate depends only on who performs the evaluation. Again, even if the true population of forensic psychiatrists and psychologists whose primary practice is located in a *Dusky* jurisdiction would agree on the defendant’s competence only 70 percent of the time, the chances of obtaining the relatively even split of opinion that was observed in the sample would be less than one in one billion (9.65×10^{-9} or .00000000965).

In determining competency to stand trial, studies have shown that in over 90 percent of the cases judges abdicate their independent decision-making authority and simply concur with the conclusion reached by the forensic evaluator.¹¹ One recent study reported that courts agreed with the forensic evaluator’s judgment in 327 of the 328 cases studied—a 99.7 percent rate of agreement.¹² Another study reported that “59 percent of the judges indicated that they typically did not hold a formal hearing, relying entirely upon the evaluation recommendation” (Ref. 11, p 193). But if the court’s finding of competence or incompetence depends not on a scientific evaluation of the facts and the application of a legal standard to those facts, but rather, on an evaluation process that has no interrater reliability, the message is clear: We are truly flipping coins in the courtroom!

We acknowledge that the use of a vignette format to assess a defendant’s competence—especially when the vignette provides very limited data—does not equate with a forensic evaluation of the defendant. Obviously, the psychiatrists and psychologists who participated in our survey did not have the opportunity to ask the questions they wanted to ask. They did not make their own diagnostic assessment and apply their findings to the applicable legal standard. To encourage them to respond to the questionnaire, we intentionally summarized the information available

and did not include information that many evaluators might think important, if not determinative of their findings—for example, information on the interaction of the defendants with their attorneys.

Both vignettes, however, were based on actual cases. Although the information provided was limited, we believe that the data provided were sufficient—at least minimally sufficient—for the respondent to make a decision. In fact, some respondents commended us for the first vignette, declaring: “Good example” and “Excellent vignette.” One respondent asserted: “It’s a no brainer.” Nevertheless, the respondents who evaluated these facts divided almost equally on whether the defendant was competent. In addition, the first vignette involves a real-world situation in which defense counsel might well consider raising the issue of competency to stand trial. The defendant had committed a criminal act because of a delusional belief but was unwilling to consider an insanity defense because he did not consider his belief to be delusional.

Although we provided no information about the actual interaction of the defendant with his attorney, often such information is not available. As Richard Bonnie noted, “In most cases, questions about ‘competence to assist counsel’ arise at the outset of the process, before significant interactions with counsel have occurred and before strategic decisions regarding defense of the case have been encountered or considered” (Ref. 13, p 556). Even when such interaction has occurred, as Gary Melton and his colleagues observed: “In our experience most attorneys have neither the time nor the inclination to observe, much less participate in, competency-to-stand-trial evaluations” (Ref. 14, p 142). In any event, we note that currently evaluators are asked to assess the defendant’s ability or capacity to assist his or her attorney, not the quality of the actual interaction that has occurred between them.

Almost all respondents were willing to answer the first vignette despite the lack of information about the defendant’s interaction with his attorney. Only 2 (0.7%) of the 273 respondents failed to answer at least one question about Vignette 1. In contrast, 28 (10.3%) failed to answer at least one question about Vignette 2. Most of those simply asserted that they were unable to make a judgment without more information. Five of the 28 specifically mentioned the lack of information about the defendant’s interaction with her attorney. If, however, such information is

not commonly available to forensic evaluators, then the fault lies not with the researchers who failed to provide the information in their questionnaire. Rather, the fault lies with a legal system that routinely permits a defendant’s competence to be evaluated without providing the evaluator with information about the attorney/client interaction that is essential to that evaluation. Ironically, although respondents were more reluctant to answer the second vignette questions than the first, among those who did respond, there was far more agreement in their answers to the second vignette than to the first.

Analysis of Respondents’ Comments

Vignette 1: An Irrational Defendant Who Acts in a Rational Manner

To encourage a large response to the questionnaire, respondents were not required to explain their answers. Thus, the reasons that justify respondents’ conclusions cannot be systematically evaluated. Nevertheless, we provided space on the questionnaire for respondents to comment on each vignette and their responses to each vignette if they wanted to do so. Approximately half the respondents availed themselves of the opportunity, and the comments provide insight into their decision making. For example, those who found the Vignette 1 defendant incompetent focused on the defendant’s delusion (that the actor implanted microchips in his brain and was controlling the defendant’s behavior by administering electric shocks to the defendant through those microchips) and his self-defense plea based on that delusion. Several expressed the opinion that the defendant’s decision making was so impaired that he would not be able to assist in his defense. Others expressed concern that the defendant’s delusion would preclude him from rationally considering an insanity defense or a plea of guilty.

Although the defendant’s delusional self-defense argument is not likely to be successful, his “not guilty” plea might be. For example, to be guilty of the crime of stalking in California, the defendant must “willfully, maliciously, and repeatedly” follow another person.¹⁵ It is quite possible that the defendant in the first vignette might be found “not guilty” of the crime because he acted in response to his delusional belief and not with the requisite malice. Under such a scenario, the defendant would have a delusional reason for pursuing a rational defense. Even if that argument would not succeed, one might well

question whether the defendant is incompetent simply because he might not allow his lawyer to raise an insanity defense that might prevent criminal conviction. In California, unless either a temporary restraining order or injunction has been issued against the stalker, or unless the stalker has previously been convicted of certain enumerated felonies—prerequisites that were not mentioned in the vignette—the penalty for the crime of stalking is only one year in the county jail. Most criminal defense lawyers would not want to risk an insanity defense (and indefinite post-trial commitment of their client) when conviction would result in such a relatively small punishment. These insights suggest that forensic evaluators should not “play lawyer” and make assumptions about what defenses are likely to be raised at trial and their potential for success. They also suggest that evaluators should interact with defense attorneys prior to conducting their evaluations to understand why the issue of competence to stand trial was raised (whether by the defense attorney, prosecutor, or court on its own motion) and what the defense strategy is likely to be.

Respondents who found the Vignette 1 defendant competent typically explained that although the defendant was delusional regarding the actor he stalked, the defendant’s delusion was “encapsulated” and did not affect his understanding of the criminal procedure or his ability to assist his attorney. Several expressed their view that the defendant was competent but should be found not guilty by reason of insanity. A few suggested that although “this is a close call,” the information that was provided did not overcome the presumption of competency.

Vignette 2: A Rational Defendant Who Acts in an Irrational Manner

In responding to Vignette 2, those who found the defendant incompetent focused on her behavior when she was arrested (she became belligerent), in jail (she refused to comply with directions), in court (she screamed profanities at the judge, spit at the bailiff, and turned over the defense table), and with the forensic examiner (she was selectively mute). Such behavior suggested that the defendant would not be able to work cooperatively with or assist counsel. A few characterized the defendant as “out of control.” Some questioned the jail psychiatrist’s diagnosis, asserting that the defendant may be psychotic or manic. A few commented that although the defen-

dant was presently incompetent, the problem was not likely to be long-term.

In contrast, those who found the Vignette 2 defendant competent (and they were the clear majority of all respondents), typically asserted that the defendant had the capacity, but not the willingness, to cooperate. Despite her anger, her decision to be uncooperative was her voluntary choice. As a second major reason for finding competency, many respondents focused on the psychiatric diagnosis. Several noted that the defendant either had no mental disorder or only a personality disorder but did not have a psychosis or other Axis I disorder that interfered with her cognitive abilities. Of those who questioned the jail psychiatrist’s diagnosis, one characterized the diagnosis of impulse control disorder not otherwise specified (NOS) as “next to useless.” Another declared that the diagnosis “sounds improbable.” One suggested that borderline personality disorder and antisocial personality disorder might be more appropriate diagnoses, and another suggested malingering. A few relied on the presumption of competence and the lack of any evidence of belligerence toward her attorney.

In most states, to find a defendant incompetent to stand trial, his or her lack of capacity to understand the proceedings or to assist in the defense must be the result of mental disease or defect. We specifically included the information about the jail psychiatrist’s diagnosis to assure that respondents directed their attention to the capacity issue and did not simply claim that the Vignette 2 defendant was merely angry but not mentally disordered. Frankly, we were surprised that so many respondents took issue with the jail psychiatrist’s determination that the defendant had a mental disorder and with the jail psychiatrist’s specific diagnosis of impulse control disorder NOS. After all, the law does not require psychosis as a prerequisite for incompetency. And yet, many respondents seemed to impose just such a requirement. In essence, unless the defendant was psychotic, he or she was not considered to be “sick” enough to be found incompetent to stand trial.

Admittedly, a psychotic defendant is a prime candidate for a finding of incompetency, especially if his or her delusions relate specifically to the criminal process or the defense attorney. Such a defendant may well lack a rational understanding of the proceedings and may not be able to consult with the attorney with a rational understanding, as required

by the *Dusky* standard. But if competency is measured by whether the defendant can assist counsel in a rational manner, other mental disorders may qualify. The DSM¹⁶ states that “[t]he essential feature of Impulse-Control Disorders is the failure to resist an impulse, drive, or temptation to perform an act that is harmful to the person or to others” (Ref. 16, p 663). Although a person can be diagnosed with impulse control disorder even if he or she is not completely unable to control his or her harmful behavior, nevertheless, some degree of difficulty in controlling one’s harmful impulse is necessarily implied by the diagnosis. After all, if a person has normal impulse control, he or she should not be diagnosed with this mental disorder. If the difficulty in controlling one’s harmful impulses is sufficiently severe, it might well result in courtroom outbursts or other behavior that prevents the defendant from assisting in his or her defense in a rational manner.

Other Comments: Confusing Clinical Considerations with Forensic Assessment

There is other evidence to suggest that at least some evaluators equated a finding of incompetency with the severity of the defendant’s mental disorder rather than how that disorder would prevent the defendant from achieving the level of competency required by the law’s standard. Diagnosis, however, was not the only criterion used by these evaluators. In addition, consideration was given to treatment that would enhance the defendant’s capabilities—even if the defendant might be competent at the time of the evaluation. For example, in finding the Vignette 1 defendant incompetent, one respondent wrote, “[I]n our jurisdiction, we error [sic] on the side of providing treatment to impaired individuals so that the integrity of the trial is protected.” Another wrote: “Defendant should have [an] opportunity to be treated before he makes a final choice of defenses.” And a third asserted: “In my state this individual would be treated prior to determining whether he could be tried despite the delusional beliefs that were the basis of his crime.”

Treatment concerns were also a consideration for some of those who found the second vignette defendant incompetent. For example, one asserted: “This woman most likely is a behavior problem but, in my opinion, should be assessed and treated if possible on an inpatient unit where she would be court committed (forensic unit) as incompetent.” Another wrote: “She appears to need medication. I would lean to-

ward unfit with a greater period of observation as an inpatient.” Some would find the defendant incompetent so that she would have an opportunity to calm down before trial proceeds. As one respondent phrased it: “In real life where I practice, this lady would be given the opportunity to ‘chill,’ during which time she might better understand where her best interests lie.” Evaluators eager to improve the mental condition of a criminal defendant should not be tempted to find a competent defendant incompetent in order to delay trial and provide treatment that the evaluator believes is desirable.

We do not mean to suggest that only clinical concerns may bias an evaluator’s findings. For example, one respondent offered a policy judgment to support his conclusion that both vignette defendants should be found competent. He asserted: “A rational system of criminal justice would never permit depriving a defendant of the right to a speedy trial.” That policy judgment, which would preclude competency evaluations, is not one that our society has adopted. If an evaluator accepts the responsibility of performing an evaluation for court, he or she should also accept the rules under which that evaluation is performed.

Assessing Competency: Three Standards or Only One?

How can one explain why more than three-fourths of all respondents did not differentiate among the various standards of competency in answering the questions posed in Vignette 1 and Vignette 2? There are several possible explanations. As we have suggested, some respondents may have based their decisions, not on the language of the competency standards, but rather, on clinical issues such as the defendant’s diagnosis (was he or she “sick” enough) or the perceived need for treatment (would the defendant benefit from treatment before he or she stands trial).

Several comments suggest that differences in the competency standard were irrelevant to some respondents’ decision making on the first vignette. For example, one respondent wrote: “This defendant should be incompetent to stand trial under *any* standard.” (emphasis in original). Another wrote: “It is hard to imagine any standard by which an individual with such a bizarre delusion about the offense [would be competent].” A third asserted: “This one’s a bit obvious—the defendant is so clearly irrational.” And a fourth: “He seems clearly impaired—regardless of

the standard.” A fifth also acknowledged the irrelevancy of the legal standard, asserting: “Irrespective of the specific legal definition of competency, . . . I’d conclude he is incompetent based on active psychosis that impairs his reasoning ability and judgment.”

In answering the second vignette, one respondent, who questioned the impulse control disorder diagnosis, seemed to suggest that the defendant should be found incompetent, under all three standards, so that she could be medicated over her objection. The respondent wrote: “[G]iven the severity of her control lapses, I have to wonder about a mood disorder. Her refusal of medications, if it persists, may result in the court ordering medication over objection, for which she must first be found incompetent to stand trial.”

Some respondents may have based their decisions on the competency standard used in the jurisdiction in which they practice and then applied that decision to the other standards with which they were less familiar. Some may not have understood the differences between the standards or did not accept those differences even if they understood them. For example, one respondent asserted, “I’m not impressed with the standards (A, B, C) really being different.” Another perceived the issue in the first vignette as being the defendant’s ability to make a rational choice of defense strategy not affected by his delusion “regardless of the test’s wording.” This same respondent asserted that for the second vignette, “Again, the test really doesn’t matter. . . . The exam would focus on what she’s capable of, not simply the way she now acts, but the wording of the competency standard is no real help otherwise.” Other respondents did not claim that the wording of the tests was irrelevant but asked for an explanation of operative terms in the various standards. For example, several questioned the meaning of the words “to assist properly” in Standard C. Others questioned the meaning of the words “to assist counsel. . . in a rational manner” in Standard B and “a reasonable degree of rational understanding” or “a rational as well as factual understanding” in Standard A.

In our judgment, only 1 of the 273 respondents adequately explained why the Vignette 1 defendant might be judged competent under the “rational manner” language in Standard B but incompetent under Standards A and C. The respondent commented: “B seems less restrictive in determining how well he can assist his attorney. The manner is rational, but his premise is psychotic.” The respondent added that the

“properly” requirement of Standard C and the “reasonable degree of rational understanding” requirement of Standard A “raise the threshold needed to be competent.”

Perhaps, however, one should not accept the suggested distinction between *Dusky’s* cognitive focus and the “rational manner” standard’s behavioral focus. Perhaps there is only one appropriate standard of competency, not two or three. For example, Michigan’s competency to stand trial statute specifically uses the “rational manner” standard.⁹ The Michigan Court of Appeals rejected a defendant’s assertion that a higher standard of competence is necessary to plead guilty than to stand trial.¹⁷ The court quoted the Supreme Court’s *Dusky* “rational understanding” standard, and then stated: “We feel this is sufficient protection for any defendant, either in standing trial or in submitting a plea” (Ref. 17, p 477). The court then quoted, without further comment, the Michigan statutory standard. The implication is that the two standards are identical.

The Illinois competency statute merely states: “A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.”¹⁸ In two cases decided in the 1960s, the Supreme Court of Illinois interpreted that statutory standard to be whether the defendant “can, in cooperation with his counsel, conduct his defense in a rational and reasonable manner.”^{8,19} Although those cases are not of recent vintage, they appear to be the most recent pronouncements on the subject by the Illinois Supreme Court, and both cases were decided post-*Dusky*. That is why we included Illinois as a “rational manner” jurisdiction. Nevertheless, in 1980, the Illinois Court of Appeals applied *Dusky’s* “rational understanding” standard,²⁰ and in 1996, the Seventh Circuit Court of Appeals applied *Dusky* in a federal *habeas corpus* proceeding involving a state prisoner.²¹

California is also a “rational manner” jurisdiction. Although the California Supreme Court noted that the *Dusky* decision involved only the United States Supreme Court’s implementation of the federal statute, nevertheless, the California Supreme Court asserted that the *Dusky* standard is “nearly identical” to the standard of competency under the California statute (Ref. 22, p 593). The Indiana Court of Appeals, in comparing the “rational understanding” standard with the “rational manner” standard, ruled:

“[R]ather than posing different tests, these statements represent differently worded versions of the same inquiry” (Ref. 23, p 1158). If the standards are identical, or are at least virtually identical, then respondents who did not distinguish between them did not err in treating them as the same.

Even the United States Supreme Court has suggested that *Dusky* may be the universal standard. In 1996, the Court stated that the standard for measuring competence “is well settled” and then quoted the *Dusky* standard as the “well settled” standard (Ref. 24, p 354). Nevertheless, three years earlier, the Court merely ruled that the *Dusky* standard meets the minimum constitutional requirement for competency. The Court noted, “[W]hile States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements” (Ref. 25, p 402). Thus, while *Dusky* is not the only possible standard that may be used to measure competency, states are not free to adopt a standard that requires a lower level of competence than is required by the *Dusky* standard. A “rational manner” standard might be acceptable if it required the defendant both to rationally understand and rationally act, but it would not be acceptable if it merely required the defendant to act rationally without also requiring that the defendant have a rational understanding. By this analysis, in the case discussed above involving a coauthor of this article, the San Diego County Superior Court judge erred in applying the “rational manner” standard when he refused to consider the quality of the defendant’s thinking—that is, whether the defendant could consult with counsel with a reasonable degree of rational understanding.

Recommendations

Psychiatrist and critic Thomas Szasz once wrote: “When it comes to judging ability to stand trial, . . . we seem to be at sea, with no compass to guide us” (Ref. 26, p 27). Whether we generally agree or disagree with Szasz’s viewpoint on other issues, at least we should acknowledge the correctness of his insight on the competency to stand trial issue. Szasz wrote his comment almost 40 years ago, but his assertion is as accurate today as when it was written, just five years after *Dusky* was decided. Our recommendations attempt to assure that Szasz’s insight does not remain accurate for at least another 40 years.

Although our data are disturbing, one need not conclude that it is impossible to assess competency competently and that we should abandon the effort altogether. The Supreme Court will not allow us to do so. The Court specifically prohibits the trial of an incompetent criminal defendant, saying that such prohibition “is fundamental to an adversary system of justice” (Ref. 27, p 172). Trial of potentially incompetent defendants without an inquiry into their competency is simply not a viable option.

Even Szasz did not call for elimination of the competence inquiry. Szasz’s remedy was to exclude psychiatrists and psychologists from the process of evaluating the defendant and from deciding the defendant’s competence to stand trial or serving as expert witnesses on the subject. Rather, he would place that responsibility in the hands of a judge or panel of judges, a lawyer or panel of lawyers, or a lay jury (Ref. 26, pp 255–9). But our data do not support this remedy. The two vignettes we used in our study were not typical cases. Rarely do evaluators confront defendants who are irrational but act in a rational manner (Vignette 1) or who are rational but act in an irrational manner (Vignette 2). Often the issue of competence is easier to assess and determine. We are not prepared to exclude psychiatrists and psychologists from assisting courts in resolving the competency issue. Although our recommendations are more modest, we believe they are essential to assure that competency is assessed competently.

1. *The “rational manner” standard for judging a defendant’s competency to stand trial should be eliminated.* The “rational manner” standard was introduced into American jurisprudence in 1847. However appropriate it may have been for decision making at that time—a time when James Polk was President—it is inappropriate today. The standard is ambiguous. Some courts have construed it as a behavioral standard that focuses only on the defendant’s capacity to act rationally—that is, to behave appropriately in the courtroom or in interactions with defense counsel. Others have construed it as a cognitive standard, equating it with *Dusky*’s “rational understanding” test.

As a behavioral standard, the “rational manner” standard fails as an appropriate measure of the defendant’s competence. Although the dignity of the court proceedings will not be disrupted by a defendant who sits quietly through the trial, the adversarial process necessarily assumes that the defendant will be a

rational participant in that process. The objective of providing the defendant a fair trial cannot be achieved unless the defendant has the requisite rational understanding. As the Supreme Court noted in *Drope v. 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 a trial” (Ref. 27, p 171).

As a cognitive standard, the “rational manner” standard is both confusing and unnecessary. *Dusky*’s “rational understanding” standard, which by its language focuses attention on the defendant’s thinking, is a preferable alternative.

2. *Legislatures and appellate courts should refine the Dusky “rational understanding” standard.* Although the *Dusky* standard is preferable to the “rational manner” standard, it too, is woefully deficient. The *Dusky* standard has been described as “unsatisfactorily vague,” “confusing and ambiguous,” “sketchy,” and lacking in “specificity” and “detail.” What is meant by a “sufficient present ability” to consult with one’s lawyer? What is meant by “a reasonable degree of rational understanding?” But rather than promoting legislative and judicial efforts to clarify the competency standard by answering those questions, the *Dusky* standard, by its very existence as the Supreme Court’s articulated standard, has obstructed and prevented such efforts. Appellate courts in particular seem unwilling to risk reversal by suggesting language that would give real meaning to *Dusky*’s largely undefined competency construct. Rather, courts take the safe route and merely quote the *Dusky* standard as being the standard applicable to the case before it. *Dusky* has been deified.

Although both Florida and Utah have adopted the *Dusky* standard by statute, at least they have also enacted legislation that provides some further guidance to mental health professionals on what issues are to be considered in the competency evaluation.^{28,29} With these few exceptions, the legal profession has left it to mental health professionals to develop their own competence assessment instruments to operationalize the *Dusky* standard. But those instruments are not without their limitations. Until recently, such instruments did not provide for standardized administration and scoring. The recently developed MacArthur Competence Assessment Tool—Criminal Adjudication [MacCAT-CA] broadly assesses

both the defendant’s cognitive and decision-making capabilities and is a standardized and nationally norm-referenced clinical measure. However, the MacCAT-CA has been criticized for its primary reliance on a hypothetical vignette format, which limits the evaluator’s ability to assess the defendant’s competence to deal with the specific problems involved in defending his or her particular case.³⁰

Some writers have suggested that contemporary assessment tools and continued efforts to improve them will fail because of the inherent problems in the legal definition of competency.³¹ Until the courts and legislatures clarify the language of *Dusky*, competence assessment instruments are merely attempts to quantify the unquantifiable. Even if these instruments can be improved in the future, they are of no value unless they are used. Research indicates that, at least currently, the overwhelming majority of psychiatrists and psychologists do not use psychological tests in assessing a defendant’s competency.³² Rather, they rely primarily on their own forensic interview with the defendant.

3. *Judges, lawyers, and forensic evaluators should understand and accept their roles in the competency assessment process.* Improving the standard used to measure the defendant’s competency will not, in and of itself, assure that the process for determining competency is improved. Problems in the process itself must be addressed. For example, trial court judges should not be allowed to relinquish to mental health professionals their responsibility for deciding the defendant’s competency to stand trial. It is simply unacceptable for judges to assert that psychiatrists and psychologists are better trained and better qualified to answer the question of competency than they are. Mental health professionals are expert in assessing whether the defendant has a diagnosable mental disorder or whether the defendant is malingering. Mental health professionals can explain how a person’s mental disorder affects, or may affect, his or her understanding of issues and decision-making capability. But mental health professionals are not expert in deciding whether the defendant has a “sufficient” ability to consult with his or her attorney or has a “reasonable” degree of rational understanding. Those decisions are legal policy decisions appropriately within the province of the judge.

Attorneys, especially defense attorneys, have an important role to play in the competency evaluation process. It is simply unacceptable for them to claim

that they lack the time and inclination to provide information to the forensic evaluator about their interactions with their client and the defense strategy in the case that may be helpful in assessing the defendant's capacity to consult with counsel. Admittedly, the law only requires a "global" assessment of the defendant's competence to stand trial—that is, it asks only for an analysis of the defendant's ability to consult with his or her attorney, not an analysis of the actual consultations between them. Nevertheless, information on the actual interactions between the defense attorney and the defendant and probable defense strategy may be important, if not critical, to the evaluator's assessment. Such information is especially significant in cases in which the defense attorney has raised the question of the defendant's competence. The American Bar Association has approved a standard that encourages defense attorneys to attend forensic evaluations of their clients' competence to stand trial,³³ acknowledging that a "thorough evaluation may require that counsel be present at the interview to enable the evaluating professional to observe the attorney-client relationship" (Ref. 33, p 104 (commentary)). Even if the attorney does not attend the evaluation, more should be done to assure that a needed dialogue occurs between the attorney and the evaluator before the evaluation is performed. To protect adequately the defendant's legitimate interest in maintaining confidentiality regarding defense strategy and the privilege against self-incrimination, courts can place constraints on the contents of the forensic report before it is disclosed to the prosecution and can limit the testimony of the forensic evaluator when the competency question is considered in court.

Finally, psychiatrists and psychologists who perform competency-to-stand-trial evaluations must learn to differentiate clinical issues from forensic issues. Numerous comments from respondents in the study we conducted clearly suggested that decisions on competence were determined by clinical considerations—did the defendant have a serious mental illness, was the defendant psychotic, would the defendant benefit from treatment—and not by the legal standard for competency that was supposedly applicable to the assessment. It is simply unacceptable for an evaluator to assert, as did one respondent who analyzed Vignette 1, that the defendant was incompetent based on the presence of active psychosis "[i]r-

respective of the specific legal definition of competency. . . ."

Although we do not condone this response, we may be able to explain it. If courts and legislatures are unwilling to develop and refine a better standard for measuring competency than the vague *Dusky* standard, the evaluator cannot be expected to divine a more definitive standard. If trial judges express interest only in the evaluator's ultimate conclusion so that they may adopt that conclusion as their own, the evaluator is encouraged to testify only about his or her ultimate conclusion, not the information and the analysis of the information that serves as the basis for the evaluator's judgment. If defense attorneys do not provide evaluators with information about their interactions with their clients, evaluators are unable to analyze those interactions in assessing the defendant's ability to consult with his or her attorney. However, unless judges, lawyers, and forensic evaluators understand and accept their roles in the competency assessment process, the elusive goal of that process—to assure that the defendant receives a fair trial—will not be achieved.

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