AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: An American Legal Perspective

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The *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* provides a rich discussion of the legal standards and procedures for evaluating and determining a criminal defendant's trial competence and for restoring to competence defendants found to be incompetent. The document includes an up-to-date discussion of the applicable case law, examines ethics considerations for forensic examiners, addresses cultural issues, and offers practical templates for interviewing defendants and preparing reports. Although its focus is on trial competence in adult criminal court, the document also attends to competency considerations for minors facing delinquency proceedings in juvenile court. Comprehensive and incisive, if not optimally organized and tabulated, the Guideline will serve as the standard reference for psychiatrists asked to provide trial competence assessments in criminal and juvenile court cases.

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The *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*[1] is an extraordinarily comprehensive and informative document. It is thoroughly researched and clearly written. Considering the knowledge and expertise of its authors and of those acknowledged for their assistance and advice, this comes as no surprise. The Guideline should serve as the standard reference for psychiatrists who perform these evaluations. As good as it is, however, the document may present challenges for some readers.

The one general criticism that can be made is that the document's vast breadth and treatise format may impede its accessibility to many of the psychiatrists who need it most—those "occasional" experts who have not completed fellowship training in forensic psychiatry and do not devote a substantial portion of their practice to this subspecialty. One might argue that such generalists should not accept referrals to evaluate trial competence. Realistically, however, generalists provide these evaluations for public-sector agencies in nearly every state. And it is in the public sector, of course, that the bulk of these evaluations are conducted—evaluations of indigent defendants court ordered to the state mental health authority.

No one would argue that public sector psychiatrists responsible for these evaluations need not attend to the concerns covered in this Guideline; quite the contrary. But if the material is to be useful, it must be easily accessed. This requires thoughtful organization and meticulous tabulation (multiple headings, subheadings, and cross-referencing), enabling the reader quickly to locate material addressing the variety of questions that may arise. Head notes, summarizing main points, would be of value as well. A more detailed table of contents would help enormously. Some material might be better suited for an appendix. The discussion of relevant case law, for example, while wonderfully presented, takes up nearly the entire first third of the document (more than 13,000 words). Indispensable as a reference, its attention to detail (multiple cases on many issues, some finely dissected) may detract from the docu-

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ment's value as a practical guide for the busy practitioner. Better, perhaps, to have summarized the major court decisions in the Guideline's body and left the exposition for an appendix.

In addition, the authors may have missed valuable opportunities to tie the lessons of the many court decisions presented early on to the more "how-to" material appearing later in the document. For example, there is an incisive discussion of the courts' recognition that, while statements a defendant makes during a competence evaluation may not be used by the government to prove the crime charged, such statements may be used at trial for impeachment purposes (should these statements be inconsistent with statements the defendant makes later on the stand). Yet there is no mention of this important principle in the sections, "Confidentiality, Notice, and Assent," or, "The Interview," where the reader is instructed what to tell a defendant before beginning questioning. It is standard practice in most states to advise defendants that the statements they make during an evaluation, while not confidential, may not be used as evidence against them. In Maryland, where the trial competence statutes recently were amended to permit a defendant's statements during an evaluation to be used at trial for impeachment (if inconsistent), new "warnings" have been devised to cover this contingency. A similar concern (and possible need for a warning) is raised by recent court decisions permitting imposition of enhanced sentences on defendants found to have malingered during court-ordered evaluations.[2]

The Guideline begins with a succinct history of the trial competence requirement in American law. The discussion of landmark cases that follows is exceptionally good, though, again, perhaps more detailed than necessary for the body of the document. The Guideline's discussion of standards for waiving constitutional rights, however, fails to make an important point bearing on trial competence. In *Faretta v. California*,[3] the U.S. Supreme Court ruled that a defendant may waive the right to counsel and proceed to trial *pro se* if he or she is competent to do so. In *Godinez v. Moran*,[4] the Court decided that, although there must be a finding that the waiver was knowing, voluntary, and intelligent, the applicable competence standard was no higher than that governing trial competence generally. The decision to waive the right is "no more complicated" than other decisions a defendant must be capable of making to be competent for trial, the Court declared. Moreover, the defendant need have no heightened ability to lawyer his or her case to be competent to waive the right to counsel. The Guideline ably summarizes these findings, but the unwary reader may be misled to conclude that a defendant who is competent for trial while represented (and thus competent to waive the right to the lawyer) is then competent to proceed without the lawyer.

It is important for evaluators to recognize that trial competence always is context-dependent. As the Guideline points out, a defendant facing complex charges such as tax evasion will require greater abilities to be deemed competent than a defendant facing simple charges such as assault. Similarly, a defendant proceeding *pro se* will require greater abilities (in order effectively to "assist in his defense") than a defendant who is represented. Accordingly, though competence to waive the right to counsel may require no consideration of the defendant's ability to act as his or her own counsel (*Godinez*), competence to stand trial surely will. Anytime a defendant who has been found competent to stand trial elects to proceed *pro se*, the defendant's trial competency must be reconsidered. This is an important point that may be lost on psychiatrists (and attorneys) who read the *Godinez* opinion too narrowly. A notorious case in which this mistake may have been made is that of Colin Ferguson, who was tried in New York for killing six people on the Long Island Railroad in 1993. After being found competent to stand trial (while represented by counsel), Ferguson asked to waive his right to counsel and proceed *pro se*. The court in Ferguson's case was reported to have concluded that, because Ferguson had been found competent to stand trial, it was obliged under *Godinez* (decided only months before) to accept his waiver and allow the prosecution to proceed. The ensuing debacle, featuring a defense steeped in psychosis, was captured for all to see on Court TV.

The Guideline presents a fine discussion of the courts' treatment of defendants with hearing impairments, noting that judges sometimes order measures to compensate for this disability so that a case may proceed. Similarly, measures might be taken in the case of a defendant with a mental disability. Professor Richard Bonnie[5] has written that some defendants whose trial competence is compromised by mental retardation may be able to proceed (and participate meaningfully) if the court assigns a mental retarda-

tion specialist to work with the defense team to facilitate communications with the defendant. The question in these cases may be as much counsel's competence to work with the defendant as the defendant's competence to work with counsel. Given that the alternative in many cases involving defendants with mental retardation is a finding of permanent incompetence (with no resolution of the charges) —or trial despite the defendant's compromised abilities—psychiatrists faced with such defendants should recognize this possible option.

The Guideline nicely lays out the dangers inherent when the bench or bar attempts to use the competence evaluation procedure to serve purposes other than those for which it was intended. The trial competence question is narrowly drawn: the law will require defendants to submit to evaluations only because the risks are minimal that prejudicial information will be elicited. As the Guideline suggests, evaluators ordinarily can (and should) avoid including in their reports or in testimony incriminating statements a defendant may make during an evaluation. If an evaluator is asked to include extraneous information addressing a defendant's more general psychiatric condition (or violence risks), again, important legal protections might be jeopardized. The Guideline properly provides, "reports should be free of gratuitous comments about defendants' behavior, need for incapacitation, dangerousness, or lack of remorse" and should not address "other legal issues such as . . . considerations that may make up a presentencing evaluation . . ." (Ref. 1, p S51).

As the Guideline observes, courts sometimes refer defendants for joint evaluations of competence to stand trial and criminal responsibility. Criminal responsibility evaluations almost always entail a discussion of the defendant's account of the offense, including statements that may be incriminating. What should an evaluator do if a defendant makes incriminating statements (relevant to the question of criminal responsibility) but appears to be incompetent to stand trial? Unless the law provides some other protection against the disclosure or misuse of these statements, the Guideline would have the evaluator refrain from submitting a report on criminal responsibility (except, perhaps, to the defendant's counsel) until such time as the defendant became competent (and could deliberate whether to proceed with or withdraw the evaluation request). Should the court object and insist on a report, the evaluator might reply that he or she is unable to reach an opinion with reasonable medical certainty, not having examined the defendant while competent. Otherwise, as the Guideline suggests, the evaluator may feel ethically constrained to withdraw from the case. Note, however, that evaluators working for the state may not have this option.

A question that is debated endlessly by scholars and practitioners alike is whether it ever is appropriate for a psychiatrist to serve as both a forensic evaluator and a treatment provider for an individual. Although the general rule is never to serve in the dual role, the Guideline recognizes one very important exception—that is, when the individual is committed to a facility or program by the court for the purpose of competency restoration and the facility (or program) is required by law to report back periodically regarding the individual's progress toward restoration. Given that the records of treatment under these circumstances invariably will be considered by staff preparing reports for the court, to assign treatment providers independent of the evaluation staff not only would offer the individual little protection over his or her communications, it might lead the defendant falsely to believe these communications were protected and thus work a cruel deception, perversely counter to the intended purpose of the arrangement.

It is important that forensic evaluators recognize that their role in trial competence cases is to provide clinical information to help the court resolve what ultimately is a legal question. It is never enough simply to present an opinion on the ultimate issue. The Guideline recognizes this, noting that "an expert should describe the strengths and weaknesses of the defendant, regardless of whether the jurisdiction allows or requires an opinion on the ultimate issue" (Ref. 1, p S28). The point, however, cannot be overstated. The only reason psychiatrists are asked to make these assessments is that they have "knowledge or skills beyond the ken of the lay person" (definition of any expert) that may help the judge (in some states, the jury) better understand some aspect of the competence question. The psychiatrist's role is to describe the effects of any mental disorder the defendant may have on the defendant's relevant functional abilities, phenomena the judge might not comprehend as fully without the psychiatrist's input. Ultimately, however, the competence determination requires a social value judgment that only the court can

make—whether the defendant's ability to understand the proceedings and assist is sufficient to allow the defendant to participate in the case well enough to get a fair shake (i.e., due process). The psychiatrist may describe the quality and degree of the defendant's impairment, and even offer an opinion, but it is the judge's call whether that impairment crosses the legal threshold, requiring a determination of incompetence and an adjournment of the case.

The role of the psychiatrist asked to evaluate the competence of a minor facing delinquency proceedings in juvenile court is particularly unclear. The requirement that minors be competent for adjudication is relatively new to the law. As the Guideline points out, the legal threshold is not well defined. Could it be the same as for adult criminal defendants? In every state, juvenile courts may exercise jurisdiction over very young children, children the research suggests will almost never meet an adult trial competence standard. Has the court lost its delinquency jurisdiction over these children? Or is the proper measure of competence in delinquency proceedings that level of ability possessed by the ordinary child at the minimum age for adjudication? In Maryland, the minimum age is seven. Is any child who understands the proceedings and can assist as well as the ordinary seven-year-old competent for adjudication? The Guideline suggests that the standard might be flexible, to account for the seriousness of the charges and the likelihood that the minor will be detained for an extended period if found delinquent. Because the law is unclear, psychiatrists may wish to describe the children they examine in comparison to average children of the same age and leave the line-drawing to the court.

The Guideline does a fine job of describing the factors that may affect the competency of minors, factors the authors suggest the psychiatrist address in every evaluation. These include not only psychopathology but also age, developmental immaturity, and maturity of judgment. But are these all within the scope of the psychiatrist's special expertise? Presumably juvenile court judges understand the age-related abilities and maturity levels of ordinary children well enough to determine their "adjudicability" without calling on an expert. If the expert's role is to address only those matters beyond the judge's understanding, then the psychiatrist's job arguably should be limited to describing any mental or emotional disturbance (or perhaps developmental delay) that the child may have that bears on the legal standard.

The Guideline makes the important observation that juvenile courts may modify their procedures to take into account a child's limitations (e.g., courtroom accommodations for learning disabilities or limitations of attention). The juvenile court itself, after all, was established to accommodate the special needs of children. Thus, an appropriate working standard for trial competency in juvenile court, drawing on the principles in *Dusky v. U.S.*[6] and *Drope v. Missouri*,[7] and accounting for the court's flexibility, might read as follows:

> A child is incompetent to proceed in a delinquency matter in juvenile court if his or her ability to understand the proceedings and assist in the defense is so substantially impaired that, even with accommodations provided by the court, a fair proceeding cannot be conducted.

The Guideline's presentation of a trial competence evaluation protocol and reporting format is of much practical value. The stages of the interview are neatly catalogued, the management of collateral information is well delineated, and the role of psychological testing and proper use of standardized competency assessment instruments are addressed in a balanced way. The primary product of the evaluation, of course, is the report for the court. Courtroom testimony on trial competence is rare in most states, so it is important that the report organize the findings and present the opinion in a clear and well-reasoned manner, using terminology the court will understand. The Guideline directs the evaluator to begin by identifying the defendant's symptoms and diagnoses (if relevant), then continue by describing the relationship between any psychiatric impairment and the applicable trial-related abilities, and finish by addressing the defendant's potential for restoration, should the defendant be found incompetent.

The Guideline notes research showing the poor predictability of a defendant's restorability and observes that a trial of treatment nearly always is indicated. Competency restoration protocols are presented, including several that feature educational modules. For defendants with mental retardation, education and competency "training" may be useful, but for most defendants, whose incompetence is driven by major psychopathology, treatment of the underlying mental disorder must be primary. For these defendants, it is not that they lack information about the court process but that they are unable to

use this information in a meaningful way because of the symptoms of their illnesses.

Every mental health professional who performs trial competence evaluations, whether psychiatrist, psychologist, or social worker, should read and keep close at hand the *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*. The document provides a treasure chest of information. As the law evolves and new assessment protocols emerge, of course, the document will require updating. In its next edition, one would hope only for a clearer map to the treasure.

References

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