

Commentary: No Rational Reasons for Changing Competency-to-Stand-Trial Standard

Gregory B. Leong, MD

J Am Acad Psychiatry Law 32:246–9, 2004

Law Professor Grant Morris and his psychiatrist colleagues have delved into the nuances of competency to stand trial statutes.¹ Through their exploration via a survey of forensic psychiatrists and psychologists, they have effectively raised concerns about the assessment of competency to stand trial. They subsequently offer recommendations from their data. Rethinking their work from methodologic, clinical, and legal perspectives highlights some shortcomings in the design of their survey and subsequent analysis of the data to support their recommendations as well as other findings they assert flow from their information regarding the competency assessment by forensic clinicians.

The authors' survey of forensic psychiatrists and psychologists revolved around three different legal definitions of competency to stand trial. Survey participants were asked to assess the competence of two defendants presented in case vignettes, by using three different competency standards: (A) the "rational understanding" standard based on *Dusky v. U.S.*²; (B) the "rational manner" standard; and (C) the "assist properly" standard. The authors viewed standard A as a cognitive test and standard B as a behavioral test. Presumably, they would have also categorized standard C as a behavioral test. Based on their findings, the authors recommended: (1) eliminating the

"rational manner" standard currently in use in eight states; (2) calling on legislatures and appellate courts to refine the "rational understanding" standard promulgated by *Dusky*; and (3) calling on judges, attorneys, and forensic clinicians to understand and accept their roles in the process of the assessment and determination of competence.

While the authors' survey data on competence to stand trial can, on the surface, appear compelling because of the volume of data obtained, there are significant limitations to their findings, including some possibly questionable assumptions. There may be some confusion on the part of the authors in categorizing the *Dusky* "rational understanding" standard as purely a cognitive test. The *Dusky* standard can be conceptualized as having both cognitive and volitional (i.e., behavioral) components, with the former component involving the capacity to comprehend relevant legal concepts and procedures and the latter component involving the capacity to utilize information appropriately in one's own defense and to function effectively in the legal environment.³ Although this realization may not necessarily alter the authors' recommendations, their rationale for elimination of the "rational manner" standard appears less vibrant, as all three standards can be conceptualized as having at least some behavioral component.

The authors made no visible attempt to validate their survey questions by a pretest. They assumed that what they had intended should be clear to the survey takers. This deficiency becomes an important matter when considering their outcomes. Also, the order effect (see Ref. 4, p 256) may have influenced the results, as each subject was asked to evaluate the competency of the vignette's defendant in a certain

Dr. Leong is Staff Psychiatrist, Program for Forensic Evaluations in Corrections and the Community, Center for Forensic Services, Western State Hospital, Tacoma, WA; and Clinical Professor of Psychiatry, School of Medicine, University of Washington, Seattle, WA. The views expressed in this paper are those of the author and do not necessarily represent the views of the Washington Department of Social and Health Services or the University of Washington. Address correspondence to: Gregory B. Leong, MD, Center for Forensic Services, Western State Hospital, 9601 Steilacoom Blvd, SW, Tacoma, WA 98498-7213. E-mail: leonggb@dshs.wa.gov

sequence, presumably beginning with standard A, thereby potentially contaminating the outcomes for standards B and C. Moreover, the vignettes were ambiguous and minimal, so that the survey takers would have inadequate information on which to form an opinion, forcing them to create assumptions to fill in the gaps. Finally, we have no idea of what the survey takers would have done if presented with cases more representative of those encountered in everyday practice, though clinical intuition argues that the results would not have been as skewed as those presented by the authors.

Law Professor Ralph Slovenko has pointed out that *Dusky* establishes a minimal constitutional standard for competency.⁵ If one considers a behavioral test to be more favorable to the defendant, then the “rational manner” and “assist properly” standards would be constitutionally permissible. In addition, when considering laws pertaining to mental health across jurisdictions in terms of both statutory and case law, we do not find any uniformity in such areas as the insanity defense, civil commitment, duty to warn/protect, and sexually violent predator laws. Homogenization and nationalization of a competency-to-stand-trial standard would indeed be a historic event in mental health law. A few states have already attempted to spell out specifics for their test of competency to stand trial.⁵ However, none of these states has established the same additions, suggesting that a uniform standard would probably be difficult to achieve.

The American Bar Association’s recent publication on mental health evidence and testimony in the criminal arena,⁶ as well as a law professor’s encyclopedic work encompassing the topic,⁵ suggest that the legal community has essentially not sought to define competency to stand trial beyond that provided by *Dusky*. Both of these publications reference work by forensic psychiatrists and psychologists in defining the *Dusky* standard. As the survey authors have noted, in the post-*Dusky* years the U.S. Supreme Court has, for all intents and purposes, affirmed the *Dusky* competency-to-stand-trial standard.^{7,8} Given that in the 40-plus years since *Dusky*, there has been little legal refinement except to borrow from the clinical community, we should not expect much movement, if any, in the foreseeable future in the legal profession.

Shortly after the *Dusky* decision, the forensic clinical community embarked on the task of operation-

alizing the assessment of competency to stand trial. Probably the earliest in-depth work undertaken in this area has been associated with McGarry. McGarry and colleagues published their findings over three decades ago and identified 13 areas of functioning to be considered in competency-to-stand-trial assessments. These 13 areas include the following (as listed in Ref. 9, p 268):

- (1) Ability to appraise the legal defenses available, (2) Level of unmanageable behavior, (3) Quality of relating to attorney, (4) Ability to plan legal strategy, (5) Ability to appraise the roles of various participants in the courtroom proceedings, (6) Understanding court procedure, (7) Appreciation of the charges, (8) Appreciation of the range and nature of possible penalties, (9) Ability to appraise the likely outcomes, (10) Capacity to disclose to the attorney available pertinent facts surrounding the offense, (11) Capacity to challenge prosecution witnesses realistically, (12) Capacity to testify relevantly, and (13) Manifestation of self-serving versus self-defeating motivation.

At least 5 of these 13 items (numbers 2, 3, 4, 10, and 12) appear to have a significant behavioral component.

Other competency-to-stand-trial tools have subsequently been developed, with the most recent being the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA).¹⁰⁻¹² The MacCAT-CA was a collaborative effort by experts from the disciplines of psychology, psychiatry, and law. The MacCAT-CA underwent rigorous development as a psychometric instrument¹¹ and attempts to tap into 22 elements involving understanding, reasoning, and appreciation. The eight understanding items involve:

- (1) roles of defense attorney and prosecutor, (2) elements of an offense, (3) elements of a lesser included offense, (4) role of the jury, (5) role of the judge at trial, (6) consequences of conviction, (7) pleading guilty, and (8) rights waived in making a guilty plea.

The eight reasoning items involve:

- (1) self-defense, (2) mitigating the prosecution’s evidence of intent, (3) possible provocation, (4) fear as a motivator for one’s behavior, (5) possible mitigating effects of intoxication, (6) seeking information, (7) weighing consequences, and (8) making comparisons.

The six appreciation items are:

- (1) likelihood of being treated fairly, (2) likelihood of being assisted by defense counsel, (3) likelihood of fully disclosing case information to the defense attorney, (4) likelihood of being found guilty, (5) likelihood of punishment if convicted, and (6) likelihood of pleading guilty [Ref. 12, p 10].

These 22 items are clearly slanted toward cognitive abilities. However, the MacCAT-CA authors also recognized that there were other possibly relevant items, such as, but not limited to, the ability to remember relevant events, the ability to communicate in a coherent manner, and the ability to function in courtroom roles.¹¹ These other abilities are predominately behavioral in nature. In other words, the clinical world has recognized the predominance of cognitive capacities in assessing competence to stand trial, but does allow for behavioral impairments. This allowance appears to be in line with the behaviorally based reasons for which defense attorneys often request competency evaluations and judges subsequently rule the defendant incompetent. Morris and colleagues¹ fail to appreciate the value and findings of these tools and instead point toward some future revision of the competency standard. However, as previously pointed out, the legal system has for the most part shown minimal interest in revising the competency standard, and if history is any indication, there will probably be little interest for the foreseeable future. It is noteworthy that the authors themselves offer no replacement competency standard.

The authors suggest that the most prominent finding was the matter of the competence opinion itself. They analogized competency evaluations to “flipping coins in the courtroom.” They further postulated that the “defendant’s fate depends only on who performed the evaluation.” But revisiting the previously mentioned methodologic shortcomings, the more obvious conclusion is that the survey questions were flawed, as there was no pretest to assess for validity and no attempt to utilize representative cases to see whether there would be an appearance of pure chance. Only 0.8 percent of the respondents answered the first vignette and only 2.5 percent of the respondents answered the second vignette as the authors believed they should have, which clearly infers that the vignettes failed to test what the authors had intended and not that the forensic psychiatrists and psychologists lacked the ability to assess competency to stand trial. Of course, in the actual courtroom setting, the prosecution or defense can challenge the forensic expert’s opinion and the trier-of-fact remains the final decision-maker on the competency question. If what the authors assert were really true, there would be more contested competency hearings than presently occur.

Another recent survey that utilized a hypothetical case also found a wide variance among both mental health professionals and attorneys in regard to the competence opinion.¹³ This survey utilized a single case vignette involving an atypical and ambiguous situation and thereby has the same shortcomings as the index survey. Although extrapolating from the other survey suggests that the determination of competence by mental health professionals can be problematic in certain cases, it also highlights disagreement among attorneys, leading to the conclusion that leaving any reengineering of process or procedures for competency to stand trial to attorneys would not be expected to yield any improvement over what the clinical world has to offer.

Thus, we are led back to the need to operationalize criteria for competency to stand trial in clinical terms, since psychiatrists and psychologists are experts in mental disorders and many jurisdictions require incompetence to stand trial to be the result of a mental condition. While the MacCAT-CA emphasizes the cognitive aspects of the *Dusky* competency standard, as it has a more solid foundation in terms of validity and reliability, nonetheless, the behavioral aspects of the *Dusky* competency standard should not be underappreciated. Courts operate in real time, and defendants who lack the abilities to navigate behaviorally through the judicial process because of active mental disorders are just as incompetent as those who lack the purely cognitive capacities.

Notwithstanding the psychometric sophistication of our latest available competency tool, the MacCAT-CA, the role of the forensic evaluator remains that of informing the court of the impairments and abilities of the defendant so that the court can render an informed decision. It would then be up to the court to apply the legal standard. As noted earlier, the behavioral aspects of competency to stand trial remain important, and so those states that retain a more behavioral standard should be encouraged to apply it. In fact, in contradistinction to the authors’ recommendations, perhaps more states should entertain a different standard to include a behavioral component.

The authors allude to the importance of improved communication between the legal system and forensic evaluator prior to the competency assessment. Their discussion suggests that information from defense counsel could be especially illuminating. Translating that into practical terms, defense counsel

should transmit relevant observations (from the perspective of a non-mental health professional), cognitive and/or behavioral, to the forensic evaluator along with the court order or request for competency assessment. This requirement would apply whether or not defense counsel raised the doubt about the defendant's competence. In some cases defense counsel believes the defendant is incompetent and would have a professional duty to raise the issue. Even in cases in which the court or prosecutor has raised the doubt, the defense may have an interest in the subsequent determination of competence. In some jurisdictions, the requesting party has to formalize the reason for the competency evaluation, thereby providing the forensic evaluator with the origins of the doubt of the defendant's competence. However, in many jurisdictions the usual practice involves merely the ordering of the competency evaluation without further annotation or comment. National support for providing this information not only would be of practical value, but also would not require any fundamental changes in the competency standard. Furthermore, it would encourage some defense attorneys who decline to provide any input, claiming attorney-client privilege, to communicate their concern or lack of concern about their clients' competence. Defense counsel could readily redact any critical information and provide cogent observations to the forensic examiner. This suggestion seems to be the highlight of the authors' article.

If there were to be further study of the competency issue, the first step would be to collect data prospectively. For example, a possible approach might follow defendants through the legal proceedings, beginning with the initial reason(s) for the evaluation and identification of the party or parties who raised the competency issue. Collecting relevant clinical data during the evaluation, adjudication, and possible restoration of competence would also be a part of the study. In other words, a large-scale project similar to the recent MacArthur study on the dangerousness of released psychiatric inpatients might further elucidate the strengths and weaknesses of the present system of competence determinations.

The problematic methodology and analysis of the index survey provide no scientific justification for either an overhaul of the current competency assessment process, or reengineering of the "rational manner" statutes in the eight states. It remains my view that the authors have not solidly buttressed their conclusion that a competency opinion resembles a flip of the coin.

Finally, the recently decided U.S. Supreme Court case of *Sell v. U.S.*¹⁴ may be pivotal among the recent set of competency-to-stand-trial cases. *Sell* has shifted the focus in the competency-to-stand-trial debate to restorability. Future clinical research and legal commentary will, in all likelihood, be called on to address the questions embedded in *Sell*.

References

1. Morris GH, Haroun AM, Naimark D: Assessing competency competently: toward a rational standard for competency to stand trial assessments. *J Am Acad Psychiatry Law* 32:231-45, 2004
2. *Dusky v. U.S.*, 362 U.S. 402 (1960)
3. Miller RD: Criminal competence, in *Principles and Practice of Forensic Psychiatry* (ed 2). Edited by Rosner R. London: Arnold, 2002, pp 186-212
4. Dooley D: *Social Research Methods*. Englewood Cliffs, NJ: Prentice-Hall, 1984
5. Slovenko R: *Psychiatry in Law/Law in Psychiatry*. New York: Brunner Routledge, 2002
6. Parry J, Drogin EY: *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony*. Chicago: American Bar Association, 2000
7. *Godinez v. Moran*, 509 U.S. 389 (1993)
8. *Cooper v. Oklahoma*, 517 U.S. 348 (1996)
9. Gutheil TG, Appelbaum PS: *Clinical Handbook of Psychiatry and the Law* (ed 3). Philadelphia: Lippincott Williams & Wilkins, 2000
10. Otto RK, Poythress NG, Nicholson RA, *et al*: Psychometric properties of the MacArthur Competence Assessment Tool-Criminal Adjudication. *Psychol Assess* 10:435-43, 1998
11. Hoge SK, Bonnie RJ, Poythress N, *et al*: *MacArthur Competency Assessment Tool-Criminal Adjudication*. Odessa, FL: Psychological Assessment Resources, 1999
12. Poythress NG, Nicholson R, Otto RK, *et al*: *MacArthur Competency Assessment Tool-Criminal Adjudication, Professional Manual*. Odessa, FL: Psychological Assessment Resources, 1999
13. Cheatham CS, Litwack TR: Professionals' attitudes regarding whether a New York defendant who delusionally refuses a viable, counsel-recommended insanity defense should be found competent or incompetent to stand trial. *J Am Acad Psychiatry Law* 31:433-60, 2003
14. *Sell v. U.S.*, 539 U.S. 166 (2003)