



March 24, 2017

South Dakota Board of Examiners of Psychologists
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Dear Board of Examiners:

A number of psychologists were concerned about HB 1183 (copy attached) and were unsuccessful in proposing friendly amendments to this 2017 bill that would have addressed concerns about the quality of care provided to the citizens of our state. That bill has now been signed by the governor.

Our concerns specifically relate to HB 1183 Sections 18 and 19 which involve evaluations for competency to stand trial. Certain counselors, social workers and advanced practice nurses, the great majority of whom likely have never been trained in this area, will now be able to conduct "*psychiatric or psychological examinations*" after they receive training on "*how to conduct and score competency evaluations.*" The bill does not specifically state they are eligible to actually interpret the findings of such tests, however. No provisions for, or definitions of, training were described.

FORENSIC EVALUATIONS

There are many differences between evaluations for the court and evaluations for clinical purposes that forensic practitioners should appreciate. (Greenburg, S. & Schuman, D., 1997, *Irreconcilable Differences Between Therapeutic and Forensic Roles*, Professional Psychology: Research and Practice, Vol. 28, 50-57). For example, those who are seen for a court-ordered competency evaluation are not the examiner's patients; the defendants don't sign a consent form; forensic interviews, as opposed to clinical interviews are conducted; and the purpose of the evaluation is not to help the defendant, but rather to provide an objective, probative evaluation to assist the court.

FRE 702 indicates "*A witness is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case*" (also SDCL 19-19-702).

The American Bar Association's recent Criminal Justice Standards on Mental Health, 2016, addresses expectations regarding the competency of mental health professions who provide legal services (see Standard 7-3.9 and Standard 7-3.10), and recommends the establishment of minimum standards for education and training of mental health experts.

There are various differences between clinical and forensic reports (Otto, R., DeMier, R. and Boccaccini, M., 2014, Forensic Reports and Testimony: A Guide to Effective Communication for Psychologists and Psychiatrists, Wiley) and "*the language employed by forensic experts affects the inferences fact finders draw, sometimes producing conclusions in the minds of fact finders quite different from what the expert witnesses purportedly intend.*" (McQuiston-Surrett, D. & Saks, M., *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, Hastings Law Journal, Vol. 59:1159-1189, p. 1189).

Not surprisingly significantly improved quality of forensic reports have been found for those who have been recently trained in such report writing (Robinson, R. & Acklin, M., 2010, *Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary*, International Journal of Law and Psychiatry, 33, 131-137).

As a psychologist who has often been retained to critique the evaluations and testimony of other mental health professionals in various types of cases by counsel or the court, I've encountered a number of cases where the methods employed, or conclusions reached by examiners have been problematic and may be more prejudicial than probative.

A forensic examiner should of course be sufficiently prepared to respond to a Daubert hearing regarding the methods they'd employed. When psychological testing has been administered this challenge would typically include testifying about such factors as the internal consistency, inter-rater reliability, test-retest reliability, content validity, construct validity, face validity, sensitivity, specificity, positive predictive power, negative predictive power and generalizability of the tests, as well as discussing the scientific literature supporting and not supporting those tools. (see Petrosinelli, J., 2012, *Daubert and Psychological Expert Testimony*, in Faust, D., Coping With Psychiatric and Psychological Testimony, Sixth Edition, Oxford, 28-38).

Given the higher level of board complaints and potential liability for performing forensic evaluations, such examiners should also take great care to ensure the detailed documentation of all of their activities and have adequate professional liability insurance coverage, including increased specific coverage for attorney fees when defending board complaints against them.

THE USE OF PSYCHOLOGICAL TESTS

It is my understanding that the state board that met to make changes in certain criminal procedures sought no input from psychologists before drafting HB 1183.

It is not clear why the bill authorized non-psychologists to use psychological tests given that they are not necessary in competency to stand trial evaluations (Mossman D., et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 2015, Vol. 35, No. 4, Supplement, S3- S72, p. S36; Melton, G., Petrilla, J., et al., 2007, Psychological Evaluations For the Courts, Third Edition, Guilford, p. 161).

One concern is that it appears this new law implies a misunderstanding of psychological tests related to competency. None of these tools can be scored to determine if a particular defendant is competent or not. As all of their manuals state, they are merely designed to be utilized by well-trained psychological experts only to generate hypotheses that must be confirmed by other sources of information via a comprehensive competency evaluation. (Heilbrun, K., Marczyk, G. & DeMatteo, D., 2002, Forensic Mental Health Assessment: A Casebook, Oxford.)

As noted by Michael Fogel and colleagues “... *no major study has compared defendants’ performance on AC (Adjudicative Competency) tools to parallel behaviors while they are actually performing the role of a defendant in legal proceedings subsequent to their AC evaluations.*” (Fogel, M., et al., 2013, *Ten Year Update (2001-2010): Evaluations for Competency to Stand Trial [Adjudicative Competence]*, Behavioral Sciences and the Law, 31, 165-191, p. 185).

Publishers of psychological tests (i.e., Pearson, Psychological Assessment Resources, MHS Assessments) prohibit the purchasing of products by those lacking at least minimal coursework and training. It would seem that a great many social workers, nurses and counselors in SD would likely fall into this category.

Although HB 1183 addresses only competency to stand trial evaluations is the real impact that SD counselors, social workers and nurse practitioners can now practice in all areas of psychological testing without any training in psychology and without having a psychology license?

The new law does not define or limit what psychological tests may be utilized. Are these groups now authorized to utilize psychological tests that:

- are specifically designed to assist a psychologist in undertaking an evaluation for competency to stand trial in adults (i.e., Evaluation of Competency to Stand Trial – Revised, MacArthur Competence Assessment Tool-Criminal Adjudication)?
- are designed to assess competency-related capacities for defendants who have an intellectual disability (i.e., Competence Assessment for Standing Trial for Defendants With Mental Retardation)?
- assess intelligence and adaptive behaviors (Wechsler Adult Intelligence Scale, Fourth Edition, Adaptive Behavior Assessment System, Third Edition) since a number of these defendants have an intellectual disability?

- assess response style (i.e., Inventory of Legal Knowledge, Miller Forensic Assessment of Symptoms Test, Structured Interview of Reported Symptoms, 2nd Edition)?
- assess neuropsychological functioning (since some such defendants will have TBI or other neurocognitive disorder)?
- are specific to juveniles, such as those involving juvenile transfer waver (i.e., Risk-Sophistication-Treatment Inventory)?
- assess specific conditions for adults (i.e., Hare Psychopathy Checklist-Revised, 2nd Edition,) or juveniles (Hare Psychopathy Checklist: Youth Version)?
- assesses other forensic areas such as the capacity to waive Miranda rights (i.e., Standardized Assessment of Miranda Rights) or suggestibility to influence related to false confessions (i.e., The Gudjonsson Scales),
- those that could be used to assess various other legal competencies (i.e., capital mitigation, the right to consent to execution, testamentary competency, competence to consent to treatment and research, risk of violence in adults and juveniles, workplace discrimination and harassment, workplace disability, parenting capacity in child protection matters, sexual offender risk, etc.)?
- or others for non-forensic or clinical purposes?

Are the standards for education, training and administration of any or all psychological tests are within the purview of the SD Board of Examiners of Psychologists or in some other group(s) who are likely to be unfamiliar with even basic issues regarding the appropriate use of psychological tests.

UNDERTAKING COMPETENCY EVALUATIONS

The great majority of those who are referred for such evaluations represent a very vulnerable population of our citizens.

Many such defendants have a chronic and persistent mental illness, and they may or may not be taking psychiatric medications to alleviate their symptoms at the time of the referral. They may well have chemical use disorders, and in many cases they have both mental illness and substance use disorders. A sizeable minority have an intellectual disability or severe learning disabilities. Some have a major neurocognitive disorder which may or may not have been evaluated by a neurologist or neuropsychologist. Some do not speak English, and thus the assessment of the mental state of the defendant must be undertaken via interpreter.

Competency examiners may need to educate themselves about the cultures of defendants who have recently arrived from locations such as Myrimar or those who are members of the Dinka people of rural South Sudan (actual recent referrals for forensic evaluation) (Tseng, W., Matthews, D., & Elwin, T., 2004, Cultural Competence in Forensic Mental Health: A Guide for Psychiatrists, Psychologists, and Attorneys, Brunner/Routledge).

The competency evaluation of juveniles requires adopting a developmental perspective and among other things requires consideration of caretaker involvement in the process (Grisso, T., 2013, Forensic Evaluation of Juveniles, Professional Resource Press, Chapter 3).

Understanding potential bias is also important to examiner objectivity as there are indications that race and ethnicity may well play a role in such evaluations (Pinals, D., et al., 2004, *Relationship Between Race and Ethnicity and Forensic Clinical Triage Dispositions*, *Psychiatric Services*, 55, 873-878; Varela, J., et al., 2000, *Do Defense Attorney Referrals for Competence to Stand Trial Evaluations Depend on Whether the Client speaks English or Spanish?*, *Law and Human Behavior*, DOI: 10.1007/s10979-010-9253-1). Developing skills in detecting malingering is also valuable.

A major reason why competent competency examiners are critical is that research indicates that judicial decisions regarding competence to stand trial rarely deviate from an examiner's opinion. Court's concur over 90% of the time, and agreement rates as high as 99.6% have been found. (i.e., Zapf, P., Hubbard, K., Cooper, V., Wheelles, M., & Ronan, k., 2004, *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, *Journal of Forensic Psychology Practice*, 4, 27-44).

Adjudicative competency evaluations involve considerably more than simply making a DSM diagnosis and deciding if a defendant is competent on the basis of their diagnosis (for example, defendants with schizophrenia or intellectual disability may be competent to stand trial) (Grisso, T., 2003, Evaluating Competencies: Forensic Assessments & Instruments, Second Edition, Kluwer Academic/Plenum Publishers; Zapf, P. & Roesch, R., 2000, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, *Court Review*, Summer, 28-35).

The US Supreme Court, in *Dusky v. United States*, (1960), held that the “*test must be 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 a factual understanding of the proceedings against him.*” (p. 789). SDCL 23A-10A-1 defines incompetency in this state.

A finding of adjudicative incompetence must be based on the presence of a mental disease, developmental disability or defect. The examiner must determine the defendant's relevant specific functional abilities and deficits, and needs to ascertain if there is a causal link between the disorder and any functional defects. The examiner should provide a specific rationale as to how those defects adversely impact adjudicative competence.

Briefly, as listed by Patricia Zapf & Ronald Roesch (2009) some competence-related domains include: the capacity of the defendant to understand the arrest process/Miranda warning, the capacity to comprehend and appreciate the charges, the capacity to disclose to counsel pertinent facts and events and the state of mind of the defendant, the capacity to comprehend and appreciate the range and nature of potential penalties that could be imposed, the capacity to appreciate the likely outcome of the proceeding, basic knowledge of legal strategies and pleas, the capacity to engage in reasoning regarding the choice of legal strategies and options (decision making), the capacity to grasp the adversarial nature of the proceedings, the capacity to manifest appropriate courtroom behavior, the capacity to participate in a trial, the capacity to testify relevantly, and the relationship with counsel (pp. 181-183).

The competency to stand trial examiner needs to assess the person-context interaction in each case. The same defendant potentially could be found to be competent to stand trial if the demands of the trial are minimal but incompetent if the demands are great (i.e., numerous charges or witnesses, complex evidence, multiple and long hearings). *Indiana v. Edwards (2008)* indicated a pro se defendant may require a higher level of competence than one with counsel, although a more recent case suggests that may not be necessary.

A forensic examiner should have at least some familiarity with the various federal and state statutes and case law as they relate to the particular aspects of a competency case they are ordered to undertake. For example, it is important to know about *Wilson v. United States* and *United States v. Borum*, among others, in cases involving amnesia (Frederick, R., DeMier, R. & Towers, K., 2004, Examinations of Competency to Stand Trial: Foundations in Mental Health Case Law, Professional Resource Press, 219-253).

As noted by Zapf & Roesch (2009) competency experts are expected to consider, relevant third-party information. This may include obtaining and considering: written documents, previous competency evaluations, crime reports, police reports, crime scene evidence, witness statements, deposition transcripts, mental health records, medical records, criminal records, school records, employment records, military records, jail/prison records, and other information. The examiner should also consider obtaining interviews with others such as: defense attorney, police/arresting officers, parole/probation officers, jail staff, community case managers, hospital/correctional facility staff, witnesses, family members and mental health professionals who provided treatment or evaluation, and others. (Zapf, P. & Roesch, 2009, Evaluation of Competence to Stand Trial, Oxford University Press, pp. 177-178.; Heilbrum, K., NeMoyer, A., King, C., & Galloway, M., 5015, *Using Third-Party Information in Forensic Mental-Health Assessment*, Court Review, Vol. 51, 16-35). The use of such third-party information is admissible under SDCL 19-15-3.

As outlined by Zapf & Roesch (2009) the evaluation findings should: be detailed and carefully written, be descriptive of the examiner's observations and the statements of the defendant, detail the data sources considered and the degree to which they were consistent or inconsistent with other information, report why the examiner didn't obtain

other potential sources of information, explain how they'd assessed possible malingering (which is common), delineate the defendant's competence-related deficits and abilities and state the cause of those deficits, provide a rationale as to how the examiner came to their decision regarding the ultimate issue, and provide an explanation as to why they'd rejected alternative hypotheses or why they couldn't come to a decision about competency.

The examiner must of course prepare to defend their report in court and, if necessary, testify as to why the court should accept their opinion when another expert has an opposing opinion. Some research has found that such disagreements happen 29% of the time when experienced examiners are involved (Gowensmith, W., Pinals, D. & Karas, A., 20015, *State's Standards for Training and Certifying Evaluators of Competency to Stand Trial*, Journal of Forensic Psychology Practice, 15, 295-317, 296; Gowensmith, W., Murrie, D., & Boccaccini, 2012, *Field Reliability of Competence to Stand Trial Opinions: How Often Do Evaluators Agree, and What Do Judges Decide When Evaluators Disagree?*, Law and Human Behavior, 36, 130-139).

POSSIBLE APPROACHES

It is hoped that consideration will be given to addressing these issues.

There are concerns about how this training will be conducted.

I'd advocate for the development of a joint SD certification program for these new competency examiners (perhaps like the QMHP certification) that would require initial training, mentoring and testing that would ensue competency for those who seek to be included on the lists described in Section 19 of the bill. This would be followed by annual (or every other year) training and re-evaluation for continued certification.

If finances are an issue for the state, professionals who wish to be included on a list should pay a fee for their training, mentoring and examination that would cover estimated costs of state certification and pay a renewal fee.

Given the surprising current lack of any SD regulation of those who provide mental health expertise for the courts, I would alternatively be supportive of a broader certification for SD forensic mental health practice even though this would involve additional training and costs for those listed. This would not only greatly increase the probative value of testimony in criminal and civil cases but may also reduce the number of those who currently testify as self-identified mental health experts without any state licensure or even a degree in a mental health field.

I'd been in touch with Dr. W. Neil Gowensmith, assistant clinical psychology professor, University of Denver, neil.gowensmith@du.edu, who was the state forensic director for HI. He designed and implemented a competency to stand trial program for new examiners and has worked with other states in developing their training and certification

programs for examiners. He's indicated a willingness to assist our state, although there are certainly others who could function as consultants as well.

Thank you for your consideration,



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