OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION

A HANDBOOK FOR ATTORNEYS
PRACTICING IN TEXAS

A collaboration of Texas Appleseed and Houston Endowment

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TEXAS APPLESEED MISSION

Texas Appleseed's mission is to promote justice for all Texans by using the volunteer skills of lawyers and other professionals to find practical solutions to broad-based problems. Texas Appleseed has worked on some of the state's most pressing issues. Our work to improve the rights of poor people in the criminal justice system alerted us to the special needs of defendants with mental retardation and their families. We hope this handbook will help attorneys better represent defendants with mental retardation.

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Texas Appleseed presents the information in this handbook as a service to attorneys who represent defendants with mental retardation. While we worked to provide accurate and up-to-date information, this handbook is not intended to provide legal advice. Non-lawyers should seek the advice of a licensed attorney in all legal matters. Texas Appleseed makes no warranties, express or implied, concerning the information contained in this handbook or other resources to which it cites.

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About This Handbook

Texas Appleseed issued its *Fair Defense Report: Analysis of Indigent Defense Practices in Texas* five years ago. Our work to assess the condition of indigent persons in the criminal justice system revealed the special needs of defendants with mental retardation and the inadequate representation they often receive. Defense attorneys, like other court officials, often fail to recognize mental retardation. Even when attorneys recognize clients as having mental retardation, many attorneys are not familiar with the special procedures and laws that apply to persons with mental retardation. Lack of knowledge can be compounded by the client's desire to get out of jail quickly. Together, these factors may result in a defendant pleading guilty to an alleged offense when he or she is not competent to do so. When an intellectual disability impairs the defendant's ability to understand what is happening to him or her or to participate in his or her own defense, it is imperative that attorneys and court personnel are well-versed in the special procedures that exist to divert vulnerable clients away from the criminal justice system.

The Fair Defense Report revealed many other shortcomings in the treatment and representation of defendants with mental retardation. Except in death penalty cases, attorneys rarely request and courts rarely appoint mental retardation experts. Many attorneys lack expertise in finding, evaluating, and questioning experts; at the same time, few credible and impartial experts are available to conduct evaluations. As a result, attorneys may not use experts to advocate for their clients in critical areas such as mitigation and sentencing. The general lack of understanding of mental retardation and habilitation options contributes significantly to harsher sentences, longer stays in jail, and frequent revocations of probation for defendants with mental retardation.

This handbook is part of Texas Appleseed's ongoing effort to improve legal representation for criminal defendants who have mental retardation. It was developed and reviewed by experts in intellectual disabilities and attorneys experienced in criminal law. However, it is not a comprehensive guide on the law pertaining to mental retardation or on how to represent defendants with intellectual disabilities. Attorneys should use this handbook as a starting point for their work with adult clients who have mental retardation. We hope it will alert attorneys to some basic legal options they may want to consider, and give them some ideas about where to go for assistance.

We encourage attorneys who represent defendants with mental retardation to go the extra mile for their clients. It could make all the difference.

Top Ten Things To Keep in Mind As You Represent A Client With Mental Retardation

1. IF YOUR CLIENT HAS MENTAL RETARDATION, HE OR SHE MAY TRY TO "MASK" THE DISABILITY: As a result, law enforcement, judges, and even you may have difficulty identifying your client as a person with mental retardation. If you suspect your client has mental retardation, investigate further. Do not rely solely on his/her assurance to the contrary.

2. INDIVIDUALS WITH MENTAL RETARDATION ARE VULNERABLE AT EVERY STAGE IN THE CRIMINAL JUSTICE SYSTEM: This means that it is particularly important for you to consider your client's disability at each point that he/she came into contact with the system, from his/her ability to understand Miranda warnings to his/her competence to stand trial. You should be familiar with the unique characteristics that some persons with mental retardation share, which increase the potential for an inequitable outcome.

3. IF YOUR CLIENT IS INCOMPETENT, STOP AND ORDER AN EVALUATION: If your client is incompetent, he/she may not be able to make informed decisions about fundamental issues, such as whether or not to enter into a plea bargain agreement or, instead, proceed to trial. Do not allow your client to accept a plea bargain, or make any other decisions regarding the case, when you have reason to believe that he/she is incompetent. Instead, immediately request a competence evaluation.

4. FIND THE RIGHT EXPERT(S): It is important that you find someone who has substantial experience in working with clients with mental retardation. Most psychologists and psychiatrists do not have this training or experience. You should not assume that someone who is qualified to work with clients who have a mental illness is also qualified to work with your client.

5. REMEMBER THAT DIAGNOSIS INVOLVES MORE THAN JUST A LOW SCORE ON AN IQ TEST: Determining whether a person has mental retardation has three components: a score on an IQ test that is 70 or below (taking the standard error of measurement into account), deficits in adaptive behavior, and onset during the developmental period. Do not focus solely on IQ scores when you are attempting to determine whether your client may have mental retardation.

6. MITIGATE, MITIGATE, MITIGATE: Mental conditions that inspire compassion, without justifying or excusing the crime, can be powerful mitigation evidence. Part of your job as an attorney is to present the judge or jury with evidence that reveals your client as someone with significant impairments and disabilities that limit his/her reasoning or judgment. Mitigation evidence can be used to argue for a shorter term of incarceration or for probation instead of incarceration. In capital cases, showing that your client has mental retardation could mean the difference between life and death.

7. OVERCOME YOUR OWN PREJUDICES BEFORE YOU HURT YOUR CLIENT AND HIS OR HER CASE: There are many stereotypes surrounding mental retardation that can be harmful to your client. It is important for you to examine your own misconceptions so that you can be an effective advocate for your client. Representing a person with mental retardation is not only an opportunity to help the person you represent – it is an opportunity for you to educate the judge, jury, prosecutor, and probation officer about mental retardation. Be a responsible advocate, not only for your client but for others with mental retardation who must navigate the criminal justice system after your client's case is resolved.

8. INCARCERATION IS PARTICULARLY HARMFUL TO INDIVIDUALS WITH MENTAL RETARDATION: Offenders with mental retardation are more likely than others to be victimized by other inmates or jail staff. They also have difficulty understanding and following prison rules and schedules. This means that they may spend more time in jail due to disciplinary infractions. If possible, try to get your client's case dismissed quickly and, where appropriate, try to get him/her released on bond. Determine whether the county has instituted a jail diversion program that could help your client avoid incarceration.

9. DO NOT LET YOUR CLIENT GET CAUGHT IN THE "REVOLVING DOOR": Many adults with mental retardation are arrested for minor offenses that directly relate to their disability or their poverty. They are often used by other criminals as scapegoats or "lookouts." They may cycle repeatedly through the courts and jails, charged with the same petty offenses. This "revolving door" is not only a burden to the courts and the criminal justice system, but it is costly to society, to these individuals, and to their families. By quickly pleading your client to "time served" without exploring his/her disability, you may lose the opportunity to help your client get needed services that will help him/her keep out of trouble. While it is important to get your client out of jail as soon as possible, it is equally important to keep him/her from returning to jail. Releasing persons with mental retardation back into the community with no plan for services or support is a recipe for revocation and recidivism. Don't set up your client to fail.

10. YOU OWE YOUR CLIENT A ZEALOUS REPRESENTATION: You have the ethical obligation to zealously represent your client, which may include exploring your client's case for issues related to his/her disability. It may also include bringing appropriate motions if your client's mental retardation has affected his/her case in any of the ways discussed in this handbook. You should be aware that the failure to request appointment or otherwise obtain the assistance of qualified mental retardation experts when indicated can be a violation of your client's Sixth Amendment right to effective assistance of counsel.

SECTION 1

WHAT IS MENTAL RETARDATION AND WHY SHOULD YOU CARE?

WHAT IS MENTAL RETARDATION?

"Mental retardation" is a developmental disability that generally refers to substantial limitations in a person's present levels of functioning.[1] These limitations may be manifested by:

- Delayed intellectual growth;
- Inappropriate or immature reactions to one's environment; and/or
- Below average performance in academic, psychological, physical, linguistic, and social domains.[2]

The Texas Health & Safety Code defines mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."[3] This definition contains three components, all of which must be present for a diagnosis of mental retardation:

1) "Significantly subaverage general intellectual functioning," which "refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used."[4]

2) Deficits in adaptive behavior, which "means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group;"[5] and

3) Origination during the developmental period.[6] This term is not defined by the Health and Safety Code. However, the "developmental period" is defined in the Texas Administrative Code as the period from birth to 18 years of age.[7] Other sources suggest that the developmental period is not complete until a person's early 20's.[8]

The Health and Safety Code definition is cross-referenced whenever mental retardation is mentioned in Texas criminal statutes.

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[1] MARY BEIRNE-SMITH, JAMES R. PATTON & SHANNON H. KIM, MENTAL RETARDATION 40 (7th ed. 2006). As you represent clients with mental retardation, keep in mind that advocates for people with mental retardation are moving away from using the term "mental retardation" and replacing it with "intellectual disability." The new term reflects a respect for those with the disability. When you are advocating on behalf of your clients, the best practice might be to use this term when possible. However, keep in mind that the term "mental retardation" is also a legal term.

[2] *Id.*

[3] TEX. HEALTH & SAFETY CODE ANN. § 591.003. For more information about definitions of mental retardation, IQ tests, and assessment of adaptive behavior, see Section 12.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] 40 TEX. ADMIN. CODE §5.153(6) (the Administrative Code is used by the agencies that are charged with carrying out Health and Safety Code mandates relating to services provided to people who have mental retardation); *see also* AMERICAN ASSOCIATION OF MENTAL RETARDATION (AAMR), DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002).

[8] RICHARD BURR ET AL., A PRACTITIONER'S GUIDE TO DEFENDING CAPITAL CLIENTS WHO HAVE MENTAL RETARDATION 10 n.4 (2004).

"MENTAL RETARDATION" IS NOT A "MENTAL ILLNESS"

Many people confuse mental retardation and mental illness.[9] Mental retardation and mental illness are not the same thing. Mental retardation is distinguished from mental illness in a number of ways:

- Mental retardation is not an illness.
- Individuals with mental illness encounter disturbances in their thought processes and emotions, while persons with mental retardation simply have a limited ability to learn and process information.
- Mental illness is often temporary, while mental retardation is usually lifelong. There is no "cure" for mental retardation.[10]

However, there are many individuals with mental retardation who also suffer from some type of mental illness. This is often referred to as a "dual diagnosis," which is covered in Section 6 of this handbook.

DETERMINING MENTAL RETARDATION

IQ Tests

The American Association on Mental Retardation (AAMR) defines intelligence as "a general mental ability [that] includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience."[11] The assessment of intellectual functioning is one element of diagnosing mental retardation.[12]

A score on an IQ test is an essential component of assessing intellectual functioning for purposes of a determination of mental retardation, but should not be used in isolation. It is generally agreed that a full-scale IQ of 70 or below satisfies the requirement of "subaverage intellectual functioning."[13] The majority of people in the U.S. score between 80 and 120 on IQ tests, with an IQ of 100 considered average.[14] Scoring below 70 on an IQ test places a person in the bottom 2 percent of the American population.[15]

Because IQ tests are not considered to be absolutely accurate, a "standard error of measurement" (SEM) is taken into account when interpreting a score. Generally speaking, the conventional SEM is a range of plus or minus five points.[16] This means that a score of up to 75 may still make a person eligible for a determination of mental retardation. Accordingly, a person's IQ is not represented by a specific number; rather, scientists profess to be 95.5 percent confident that his/her IQ falls within a range of + or – 5 points on either side of the "full scale" test score.[17]

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[9] *See* James W. Ellis & Ruth A. Luckasson, *Symposium on the ABA Criminal Justice Mental Health Standards: Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423-24 (1985).

[10] The Arc of New Jersey, Defendants with Mental Retardation A Guide for Attorneys 6 (1996).

[11] AAMR, *supra* note 7, at 51.

[12] *Id.*

[13] Burr et al., *supra* note 8, at 8.

[14] Human Rights Watch, *Mental Retardation: an Overview, in* Beyond Reason: The Death Penalty and Offenders with Mental Retardation (2001), *available at* www.hrw.org/reports/2001/ustat.

[15] For a full discussion of IQ testing, see Section 12.

[16] Burr et al., *supra* note 8, at 8.

[17] AAMR, *supra* note 7, at 59.

Measuring Adaptive Behavior

Adaptive behavior describes the way that people care for themselves and relate to others in the course of daily living. The acquisition of adaptive skills for most people is continuous and occurs naturally, but can be difficult for persons with mental retardation.[18]

The AAMR defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."[19] Representative skills for each area are:

- **Conceptual skills** – language, reading and writing, money concepts, and self-direction.
- **Social skills** – interpersonal skills, responsibility, self-esteem, gullibility, naiveté, ability to follow rules, obey laws and avoid victimization.
- **Practical skills** – activities of daily living, occupational skills, and the maintenance of a safe environment.

Persons with mental retardation rarely have deficits in each area of adaptive behavior – in fact, limitations and strengths can often be found within the same domain.[20]

Adaptive behavior and intelligence are related and complementary concepts, but they are not the same.[21] While adaptive behavior and intelligence share much in common, they differ in several ways:

- Adaptive behavior measures focus on a person's usual actions, whereas intelligence tests obtain information about maximal performance.
- Adaptive behavior measures examine how people care for themselves and relate to others as part of everyday living, whereas intelligence tests focus only on higher-order reasoning abilities.
- Intelligence tests are given under controlled conditions, while information about adaptive behavior is usually obtained through interviews with third parties.[22]

A number of standardized instruments exist for measuring adaptive behavior. However, if your client was not assessed before his/her 18th birthday, your knowledge in this area will also be based on information from other sources, including interviews with people who have known your client over the course of his/her life. A structured interview with the defendant and family members or friends, combined with a review of pre-incarceration social history and institutional adjustment, can provide a measure of adaptive behavior.[23]

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[18] Beirne-Smith et al., *supra* note 1, at 105.

[19] AAMR, *supra* note 7, at 73.

[20] Burr et al., *supra* note 8, at 9.

[21] Beirne-Smith et al., *supra* note 1, at 109.

[22] *Id.*

[23] Jane Nelson Hall, *Correctional Services for Inmates with Mental Retardation, in* The Criminal Justice System And Mental Retardation 167, 175 (Ronald W. Conley et al., eds. 1992). For background questions to ask the defendant and others during an assessment of adaptive behavior, see lists provided by Dr. James R. Patton in Appendix A on the CD included in the front cover of this handbook.

Onset Before Age 18

Because mental retardation is a developmental disability, onset must have occurred before the age of 18. This does not mean that mental retardation must be diagnosed prior to age 18. Rather, the person must have exhibited limitations in adaptive functioning before the age of 18, and IQ testing (before or after age 18) must reliably establish an IQ of 75 or below (taking the highest SEM into account). You must also be able to show that there was no intervening reason for the person's intellectual or adaptive behavior functioning to have diminished since the age of 18.[24]

If your client's mental retardation is going to play a role in your defense, you need to have a good understanding of the process for determining mental retardation.

Section 12 includes a more thorough discussion of definitions, evaluations, and problems associated with making determinations of mental retardation. This information is vitally important if you are representing a client in a capital case.

MISCONCEPTIONS ABOUT MENTAL RETARDATION

There are a number of misconceptions and stereotypes of mental retardation that you must guard against if you are advocating for a client with mental retardation. Some of these are:

- *All individuals with mental retardation are the same.* Persons with mental retardation, like all people, are complex human beings with unique and individualized strengths and limitations.

- *Individuals who have mental retardation are more likely to commit crimes.* Though it is generally true that individuals with mental retardation are overrepresented in the criminal justice system, this is most likely due to the way that they are treated at various stages of the criminal justice process, including contact with police officers and lawyers, the legal process more generally, and the prison experience.[25]

- *"Mild" mental retardation does not significantly impact a person's life.* Even "mild" mental retardation constitutes a substantial disability. An IQ in the 60 to 70 range is approximately the scholastic equivalent to the third grade.[26] In fact, the AAMR discarded the "mild-moderate-severe-profound" classification system because of its concern that "mild mental retardation" was incorrectly viewed as something less than a condition that represents considerable disadvantage.[27]

- *Individuals with mental retardation "look" a certain way.* Persons with mild mental retardation often go undetected in screening and processing after arrest. Many people with mental retardation cannot be identified by their physical appearance alone.[28]

- *You can tell if someone is a person with mental retardation by his/her ability to do certain things.* For example, if a person can plan an activity or read, he/she must not have mental retardation. It is generally a person's difficulty with a task that identifies him/her as a person with mental retardation, not the person's ability to do certain things.[29] Not all individuals with mental retardation will display each of the characteristics associated with mental retardation.[30] Individuals with mental retardation, like everyone, will have strengths as well as weaknesses.

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[24] Burr et al., *supra* note 8, at 10.

[25] Criminology Research Centre, Simon Fraser University, Occasional Paper #2003-01, Developmental Disability, Crime, and Criminal Justice: A Literature Review 30 (2003); *see also* Ellis & Luckasson, *supra* note 9, at 426-27.

[26] Human Rights Watch, *supra* note 14, at 1.

[27] AAMR, *supra* note 7, at 26.

[28] Human Rights Watch, *supra* note 14, at 4.

[29] *See* Burr et al., *supra* note 8, at 9.

[30] *See* Beirne-Smith et al., *supra* note 1, at 290.

- *Mental retardation is determined simply by looking at scores on IQ tests.* IQ tests are but one of the measures used to reach a determination of mental retardation. Measurement of adaptive behavior and age of onset are also considered.[31]

It is important for us to consider that our own biases, as well as those of the police, court officials, and prosecution, can play a role in the way that persons with mental retardation are treated in the criminal justice system. Ruth Luckasson, an authority on the barriers that individuals with mental retardation experience, created a list of the "reasons" that she had heard prosecutors, defense attorneys, and judges give to support their claim that a defendant did not have mental retardation:

"He can't possibly [have mental retardation]…

- Because he doesn't drool.
- Because you can see how normal he looks.
- Because he's so big.
- Because he's so mean.
- Because he played cards with the police officers who [brought] him over in the van, and one day he won.
- Because he can write.
- Because he can draw.
- Because he can do some things better than other things.
- Because no one knows it.
- Because I asked him and he said he's not, and he started crying.
- Because I talked to his family and they all denied it.
- Because I can talk to him easily. He's one of my favorite clients. He does everything I want him to.
- Because he tried to cover up his involvement in the crime.
- Because I know he's mentally ill.
- Because he talks so much.
- Because I saw in his file that ten years ago someone gave him an (unidentified) IQ test, and he had an IQ of 86.
- Because he can drive a car.
- Because we know he's competent to stand trial.
- Because he knows right from wrong.
- Because he's so street smart.
- Because he can operate a fork lift."[32]

When representing clients and considering whether they have mental retardation, it is important to guard against biases and misconceptions – in our adversaries and ourselves.

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[31] *See* AAMR, *supra* note 7, at 16-17.

[32] Robert Perske, Unequal Justice? What Can Happen When Persons with Mental Retardation or Other Developmental Disabilities Encounter the Criminal Justice System 41-42 (1991).

WHY SHOULD YOU CARE IF YOUR CLIENT IS A PERSON WITH MENTAL RETARDATION?

If you represent a client with mental retardation, you need to be aware that this could affect the case in a number of significant ways, including:

- **Your client's level of involvement in the crime itself.** Persons with mental retardation are often used by other criminals to assist in illegal activities without their understanding the significance of their actions or the consequences.[33]

- **Whether your client's statements are viewed as voluntary.** Though a person's statements are generally not excluded without evidence of impermissible coercive conduct, some advocates argue that the threshold for showing "coercive conduct" is lower if the defendant is mentally retarded.[34]

- **Your client's ability to understand explanations of his/her rights, including Miranda warnings.**[35]

- **Your client's ability to understand court proceedings.**

- **The reliability of your clients' statements.** Individuals with mental retardation often say what they think a police officer wants to hear.[36]

- **The ability of your client to remember and recall events.**[37] Some people with mental retardation have limited ability to recall and remember events, particularly if they did not deem the event significant.

- **The ability of your client to knowingly, voluntarily, and intelligently waive rights**, including the right to counsel, right to be present, right to trial and appeal, and right to testify.[38] Persons with mental retardation often sign waivers that they cannot read or understand.

- **The ability of your client to meaningfully participate in trial preparation and at trial.**[39]

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[33] Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice System: Victims and Suspects* (2005), *at* http://www.thearc.org/faqs/crimjustice.doc (last visited Aug. 23, 2005).

[34] *See* Ellis & Luckasson, *supra* note 9, at 450-452.

[35] *Id.* at 449.

[36] The Arc of New Jersey, *supra* note 10, at 10.

[37] *Id.* at 5.

[38] Ellis & Luckasson, *supra* note 9, at 447-450.

[39] *Id.* at 452-54.

SECTION 2

WHAT PROBLEMS DO INDIVIDUALS WITH MENTAL RETARDATION FACE IN THE CRIMINAL JUSTICE SYSTEM?

Persons with mental retardation are overrepresented in the criminal justice system. Although the prevalence of mental retardation within the general population is estimated at 2 to 3 percent,[40] studies indicate that individuals with mental retardation in the criminal justice system make up between 4 and 10 percent of the overall prison population.[41] There are approximately 25,000 persons with mental retardation and other developmental disabilities in state and federal prisons.[42] These estimates are probably low, however, because individuals who have mental retardation are rarely identified in the criminal justice system.[43] Individuals with mental retardation make up an even higher percentage of the population in jails and juvenile facilities.[44]

Most offenders with mental retardation are arrested for committing misdemeanors and public disturbances, as opposed to serious felonies.[45] Despite research suggesting that on average the crimes of defendants with mental retardation tend to be less serious than those of their nondisabled peers, their rates of conviction and incarceration are higher.[46] This is largely due to the unique challenges that defendants with mental retardation face in navigating the complexities of the criminal justice system.

Some characteristics that make individuals with mental retardation particularly vulnerable in the criminal justice system are:

- **Acquiescence.** When asked a "yes/no" question, persons with mental retardation are significantly more likely to answer "yes," regardless of the appropriateness of the response. This tendency is so strong that, in a study done in Texas, 73 percent answered "yes" to the question, "Does it ever snow here in the summer?"[47]

- **Concrete thinking.** Persons with mental retardation have difficulty thinking abstractly. One advocate gives the following example: "[T]he cliché 'That's the way the cookie crumbles' serves as an interesting abstract response to a perplexing situation. Some of us with mental disabilities, however, may miss the larger meaning. We will look for the cookie."[48]

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[40] JOAN PETERSILIA, DOING JUSTICE? THE CRIMINAL JUSTICE SYSTEM AND OFFENDERS WITH DEVELOPMENTAL DISABILITIES 4, *available at* http://www.seweb.uci.edu/users/joan/Images/offenders_with_dd.pdf (May 2002). There is, however, some disagreement as to the prevalence of mental retardation in the general population – some place it at closer to 1%. *See* BEIRNE-SMITH ET AL., *supra* note 1, at 69.

[41] PETERSILIA, *supra* note 40, at 4. *See also* Davis, *supra* note 33; Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 60 U. CHI. L. REV. 495, 501 (2002).

[42] RAY GAGNE ET AL., EQUAL JUSTICE FOR PEOPLE WITH MENTAL RETARDATION, INDIVIDUALS WITH MENTAL RETARDATION AND THE CRIMINAL JUSTICE SYSTEM: A TRAINING GUIDE FOR ALLIES 7 (2002).

[43] According to the Texas Correctional Office on Offenders with Medical and Mental Impairments (TCOOMMI), a September 2004 census of TDCJ-CID inmates indicated that over 33,000 inmates (22 %) had a prior service history with MHMR. The census did not break out the number of people who received services related to a mental illness rather than mental retardation. The same report acknowledges a problem identifying people with mental retardation who come into the system. 2005 TCOOMMI BIENNIAL REP. 16.

[44] PETERSILIA, *supra* note 40, at 4.

[45] Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System* (2000) (on file with author).

[46] PETERSILIA, *supra* note 40, at 4.

[47] Solomon M. Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions, in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 163, 169 (G. Daniel Lassiter ed., 2004).

[48] PERSKE, *supra* note 32, at 16.

- **"Outer-directed" behavior.** Failures in academic and social settings may cause some individuals with mental retardation to rely more on social and linguistic cues provided by others when they are trying to answer questions. They may be more unsure of their answers, making them more easily influenced by an interviewer's verbal and non-verbal cues.

- **Strong desire to please others.** Many persons with mental retardation want to provide a "socially desirable" response, so much so that they often will answer a question incorrectly just because they think they are telling the interviewer what he/she wants to hear.

- **Difficulty with "social intelligence."** Persons with mental retardation cannot easily decipher the motives of other people and act on that information appropriately. As a result, they are more easily deceived than the general population. When they are asked why they confessed to a crime, many individuals with mental retardation respond, "They told me if I told them I did it, we could all go home."

- **Highly "suggestible."** Persons with mental retardation are much more likely to accept a suggested message as true than the general population. This makes them more likely to be influenced by leading questions and coercion in an interrogation setting.

- **Deference to authority figures.** Persons with mental retardation are accustomed to being wrong. So, if criminal justice professionals declare that the defendant has committed a crime, the defendant with mental retardation is apt to believe them. They may even tell authorities, "I don't remember doing that, but if you say so…"

- **Problems with receptive and expressive language.** Persons with mental retardation often have difficulty expressing themselves. They may also have difficulty understanding the ordinary flow of language. They may not understand complex sentences. You may need to speak to them more simply and clearly.

- **Limited memory and impaired recall.** Persons with mental retardation may have difficulty remembering and recalling events, particularly if they did not deem them to be important.

- **Impulsivity and short attention span.** Persons with mental retardation may have difficulty with attention span and focus.

- **"Cloak of Competence."** The stigma of mental retardation is so great that individuals with mental retardation will often "mask" their disability in order to avoid its detection. This is true even when the consequences of having the disability identified would be beneficial to the person. Persons with mental retardation have often learned ways to avoid having their disability detected, and will go to great lengths to cover it up.[49]

These characteristics come into play at each level of contact with the criminal justice system.

[49] Fulero & Everington, *supra* note 47, at 169-70; The Arc of New Jersey, *supra* note 10, at 4-5.

ARREST & DETENTION

Police Interrogation

Individuals with mental retardation may respond differently in interactions with police. This is due, in part, to the characteristics outlined above, but it is also often due to the limited amount of information they may have about the criminal justice system. Many of us gain this information in school; however, it is often overlooked in the standard special education curriculum.[50] Much of the information that persons with mental retardation have about the justice system comes from popular television dramas.[51] This puts individuals with mental retardation at a distinct disadvantage when they come into contact with the criminal justice system.

Persons with mental retardation may:

- **Not want their disability to be recognized because of the stigma associated with mental retardation.** This results in "masking" – trying to conceal their disability.[52] It may also lead them to overrate their own skills.[53] Law enforcement officers, who are often poorly equipped to identify mental retardation, may have difficulty recognizing a person who is attempting to mask a disability.[54]

- **Have difficulty discerning when they are in an adversarial situation with police officers.** Often, they have been taught that police officers are people that they can trust and who have their best interests at heart. It may be difficult for them to distinguish the police officer's role of helping people from their role of interrogating suspects.[55]

- **Have a desire to please authority figures that can lead them to agree that they did something they did not do.** It is often difficult for individuals with mental retardation to consider a situation independently, or to think critically, when they encounter an authority figure.[56]

DID YOU KNOW. . .

A survey of persons with mental retardation found:

- 38% think they could be arrested for having a disability;
- 50% would disclose that they have a disability when arrested;
- 58% would talk to the police before talking to a lawyer; and
- 68% believe that the arresting officer would protect them.[57]

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[50] Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 3, 212, 219 (1999); PETERSILIA, *supra* note 40, at 7; Hubert R. Wood & David L. White, *A Model for Habilitation and Prevention for Offenders with Mental Retardation, in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 153, 165 (Ronald W. Conley et al. eds., 1992).

[51] Interview with Lilli Hallaam, former director of the Arc of Dallas Criminal Justice Initiative, August 9, 2005.

[52] BURR ET AL., *supra* note 8, at 18.

[53] *Id.*

[54] Cloud et al., *supra* note 41, at 513-14.

[55] *Id.* at 512.

[56] PETERSILIA, *supra* note 40, at 24, 30; *see also* AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.9 cmt (1989).

[57] PETERSILIA, *supra* note 40, at 24.

- **Be overwhelmed by police presence, or agitated, frightened, or combative.**[58]

- **Say what they think the police want to hear, even if it isn't true.** Persons with mental retardation may defer to authority figures when faced with situations in which they are unsure.[59]

- **Be confused about who is responsible for the crime and "confess" even if they are innocent.** A person with mental retardation may have difficulty distinguishing between an incident that results from culpable behavior, and one that results from events that are beyond his/her control.[60]

- **Not understand their rights, including their right to be free from search and seizure and to refuse to consent.** Persons with mental retardation often answer affirmatively when they are asked if they understand their rights, even if they don't, in an effort to hide their disability or to gain approval. They may also fail to invoke their rights, even when they understand them.

- **Have difficulty with problem solving**, which may lead them to attempt to gain the friendship of authority figures who they perceive to be good problem solvers.

- **Act upset at being detained and/or try to run away.**

- **Have difficulty describing the facts or details of the offense.**[61]

Difficulty Understanding Miranda Warnings

Miranda warnings may be particularly difficult for individuals with mental retardation to grasp because they require an understanding of several abstract concepts. As mentioned above, persons with mental retardation tend to think in concrete terms. For example, some individuals with mental retardation may not understand what it means to waive a constitutional right. They may think instead that they are being asked to literally wave to the right, or wave their right hand.[62]

Several studies have examined the difficulties that persons with mental retardation encounter with Miranda warnings.[63] These studies showed that the majority of individuals with mental retardation have great difficulty understanding the concepts conveyed in a Miranda warning, so much so that they would not be able to "knowingly and intelligently" waive their rights.[64]

The most recent study suggests that the number of people who have difficulty understanding Miranda warnings is larger than previously understood. It includes not only people with "severe" mental retardation, but also people whose mental retardation puts them at the upper end of functioning, previously classified under the old AAMR definition as "mild."[65] The researchers note that no matter what other factors are present (using the "totality of the circumstances" factors -- IQ, age, educational level, experience with the criminal justice system, and history of being "Mirandized"), the "factor that matters" is whether a person has mental retardation.[66] They concluded, "If mental retardation is present, then the disabled person will not understand the warnings, regardless of the presence of other factors."[67]

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[58] The Arc of Dallas, Capital Trial Advocacy and Mental Retardation – *Atkins* and Beyond, materials from presentation by The Center for American and International Law (October 28, 2002).

[59] *Id.*

[60] Cloud et al., *supra* note 41, at 512.

[61] Davis, *supra* note 33, at 2; Robert Perske, The Police Interrogation of Persons with Mental Retardation and Other Cognitive Disabilities, An Abridgement from Unequal Justice (1991); Ellis & Luckasson, *supra* note 9, at 428-32.

[62] Perske, *supra* note 32, at 17.

[63] Fulero & Everington, *supra* note 47, at 163-80; Everington & Fulero, *supra* note 50, at 212-220.

[64] Fulero & Everington, *supra* note 47, at 168.

[65] Cloud et al., *supra* note 41, at 501.

[66] *Id.* at 502.

[67] *Id.*

An alternate set of "simplified" Miranda warnings has been created for individuals with mental retardation. (See Appendix A on the CD included in this handbook). However, there is some disagreement as to whether these warnings are, in fact, more easily understood. One study suggests that persons with mental retardation may not understand the workings of the legal system sufficiently to understand the contextual meaning of even simplified warnings.[68]

A standardized assessment, Assessing Understanding and Appreciation of Miranda Rights, exists for determining whether a person understands Miranda warnings. This test was originally designed for juveniles, but it has been used successfully with persons with mental retardation.[69]

DID YOU KNOW. . .

Experts have determined that the Miranda warnings are written at a 7th grade reading level. While a small percentage of individuals at the upper end of functioning of mental retardation (IQ of 60-70) may be able to read at a 6th grade level, most will read at a significantly lower level. This means that even those who are at the upper level of functioning, formerly classified as "mild" mental retardation, will have great difficulty understanding Miranda warnings.[70]

Danger of False Confession

Each of the attributes of mental retardation leads to an increased danger of false confession.[71] If someone has an enhanced desire to please authority figures, doesn't fully understand his/her constitutional rights, is highly suggestible, acquiesces easily, is more easily influenced by verbal and non-verbal cues, and has a tendency to be more gullible or naïve than others, he/she is clearly at increased risk of "confessing" to something that he/she didn't do. Certainly, even someone who exhibits only one of these characteristics is at higher risk for falsely confessing.

These characteristics are particularly problematic in the context of modern interrogation techniques, which may include an interrogator who:

- Establishes a position of authority, then endeavors to convince the suspect that the police are convinced of his/her guilt;
- Posits the suspect's guilt as fact;
- Cuts off a suspect's denial of guilt and dismisses and discourages exculpatory explanations;

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[68] *Id.* at 581.

[69] Celia S. Feinstein et al., Equal Justice for People with Mental Retardation, Individuals with Mental Retardation and the Criminal Justice System: A Training Guide for Psychologists 103 (2002).

[70] *Id.* (noting that most individuals with mental retardation attain, at best, a 4th grade level of reading). *See also* Fulero & Everington, *supra* note 47, at 174. While we do not advocate using "mental age" to describe people with mental retardation, this illustrates the significance of the problem for people at the upper range of functioning of mental retardation who try to read or understand Miranda warnings.

[71] The American Bar Association's Criminal Justice Mental Health Standards recognize that mental retardation affects both reliability and voluntariness of statements, even in the absence of coercion. American Bar Association, Criminal Justice Mental Health Standards § 7-5.8 (1989).

- Emphasizes reasons why the suspect committed the act, rather than asks the suspect whether he/she did it; and
- Alternates shows of "kindness" with shows of hostility ("good cop, bad cop").[72]

Thus, individuals with mental retardation experience inequity at two levels of the interrogation process: they are unable to understand (and therefore protect) their constitutional rights, as read to them in Miranda warnings; and commonly used police interrogation techniques play on their vulnerabilities.

This is made clear by numerous anecdotes of innocent people with mental retardation who were convicted of crimes after falsely confessing.[73]

CASE STUDY

CASE STUDY – JOHNNY LEE WILSON

Johnny Lee Wilson was diagnosed with organic brain damage and determined to have mental retardation by the public school that he attended as a child. He was convicted of murdering the 79-year-old friend of his grandmother after "confessing" to the crime. After Wilson spent a decade in prison on a life sentence, evidence ultimately emerged supporting Wilson's innocence, and another man admitted guilt.

The transcript of his police interrogation illustrates the problems posed by employing the interrogation methods discussed above with a person with mental retardation. Although Wilson initially insisted he had been with his mother at the time of the murder, the police continued their interrogation. They told Wilson that if he confessed, "we can all go home." Wilson thought they meant he could also return home. The police told him that they were his friends and wanted to help him:

Q: And you know, this…isn't the end of the world for anybody…And so, you got a problem. And you need help. And we're the people that can get that done, John.

A: Uh huh.

Q: Rather than go through all this, John, rather than put you through the punishment, Steven and I, we want to help you tonight. We don't want you to be drug all through this. If there's something we can do tonight to help you, that's what we want to do.

The police indicated that they had ample evidence of Wilson's guilt:

Q:…You better start figuring out what's going to happen to John Wilson. That's what you better do.

A: Uh huh.

Q:…We've got the circumstantial evidence of you knowing about it before anybody else. We've got a case made. Doesn't it look to you like someone would be convinced that you did it based on what I just told you?

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[72] Cloud et al., *supra* note 41, at 515.

[73] Human Rights Watch, *Defendants with Mental Retardation: Their Stories, in* Beyond Reason: The Death Penalty and Offenders with Mental Retardation, *available at* http://www.hrw.org/reports/2001 (March 2001); Perske, *supra* note 32.

CASE STUDY

A: Yeah.

Q: It sure does.

The police asked questions that suggested the answers. When Wilson told the officers that the victim's shirt was "white, kind of white or bluish blouse," the officer responded:

Q: Okay, how about bluish? I'll go for that.

A: Yeah.

Q: How about bluish-green maybe?

A: Yeah.

And in discussing the way the victim was bound:

Q: What besides, what besides a rope was around her ankles? Something else. This is another test. I know. And you know. Just think. Come on, John.

A: I'm thinking.

Q: What are some things that could be used?

A: Handcuffs, I think.

Q: No. No. Wrong guess. What are some things you could tie somebody up with?

A: Rope is all that he had, but –

Q: That tells me something, John. That tells me something. That tells me something. I told you it's important that you be straight with me. You took the tape up there.

A: Huh?

Q: You took the tape up there, didn't you?[74]

Knowing more about some of the personality traits that are common to individuals with mental retardation makes it easy to see how this type of questioning results in false confessions.

PRE-TRIAL

Identification of Disability

The Texas Correctional Office on Offenders with Mental and Medical Impairments (TCOOMMI) recently found that there is a need for "improved identification and service delivery [to] juvenile and adult offenders with mental retardation."[75] While TCOOMMI acknowledged that more effort has been made to identify offenders with a mental illness, it cited a need for the

[74] PERSKE, *supra* note 32, at 44-45.

[75] TCOOMMI, *supra* note 43, at 34.

same level of effort for offenders with mental retardation.[76]

Law enforcement officers may not have training in recognizing mental retardation, and may mistake a person with mental retardation as someone who is drunk, on drugs, or who has a mental illness.[77] There is also some indication that counsel for defendants with mental retardation may not request pre-trial evaluations when they are needed.[78]

Because the system fails to identify defendants with mental retardation early in the process, there is a resulting failure to trigger the special procedures that exist to ensure that persons with mental retardation are diverted away from the criminal justice system. (See Section 6 for a discussion of pretrial options).[79]

As a result, you may not be alerted to the possibility that your client is a person with mental retardation. It is therefore critical that attorneys learn to recognize possible signs of mental retardation, and follow up with appropriate evaluations. Recognizing these signs early will allow you to take the steps necessary to protect your client's constitutional rights, especially in cases in which your client has waived his/her rights and given a statement to the police.

DID YOU KNOW. . .

"Mental retardation is:

- Rarely identified at the time of the arrest.
- Rarely identified at the time of police questioning.
- Rarely identified at arraignment.
- Infrequently identified at pretrial.
- Occasionally (10%) identified at trial.
- Often not identified until the person is in prison or even on death row."[80]

Competence to Plead Guilty

Some research suggests that defendants with mental retardation are more likely to plead guilty, and often do so without the benefit of a plea bargain.[81] Guilty pleas by defendants with mental retardation raise two concerns:

- Reliability of admissions embedded within the plea; and
- Competence to plead guilty – a defendant with mental retardation may lack the capacity to make a sufficiently autonomous decision.[82]

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[76] *Id.*

[77] Davis, *supra* note 45.

[78] The Arc of New Jersey, *supra* note 10, at 10; Joan Petersilia, *Justice for all? Offenders with Mental Retardation and the California Corrections System*, 77 PRISON J. 358 (1997); Russell C. Petrella, *Defendants with Mental Retardation in the Forensic Services System, in* The Criminal Justice System and Mental Retardation 79, 85 (Ronald W. Conley et al. eds., 1992).

[79] Petersilia, *supra* note 40, at 10; John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, *in* The Criminal Justice System and Mental Retardation 55, 63 (Ronald W. Conley et al. eds., 1992).

[80] William Edwards et al., Equal Justice for People with Mental Retardation, Individuals with Mental Retardation and the Criminal Justice System: A Training Guide for Attorneys 37 (2002).

[81] Frank J. Laski, *Sentencing the Offender with Mental Retardation, in* The Criminal Justice System and Mental Retardation 137, 138 (Ronald W. Conley et al. eds., 1992); The Arc of New Jersey, *supra* note 10, at 10; Petersilia, *supra* note 78.

[82] Ellis & Luckasson, *supra* note 9, at 460; Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense, in* The Criminal Justice System and Mental Retardation 97, 108 (Ronald W. Conley et al. eds., 1992).

As with a confession, the admissions contained within a guilty plea are suspect when the defendant has mental retardation. Just as there may be concerns regarding a client's competence to waive Miranda rights and to stand trial, there may be concerns about a client's competence to plead guilty. A defendant with mental retardation is at higher risk of waiving all of his/her rights in the adjudicative process by pleading guilty without fully understanding the implications of doing so.

TRIAL

Competence to Stand Trial

Attorneys frequently overlook competence to stand trial as an issue for clients with mental retardation.[83] Yet, some defendants with mental retardation may have difficulty understanding the elements of the crime they have been charged with as well as basic trial procedures.[84] If you suspect that your client is not competent, you may be ethically bound to ask the court for an evaluation, even if your client does not want one. (See Section 8 for a discussion of the procedures relevant to a determination of competence.)

Juror Misconceptions of Mental Retardation

Many jurors have misconceptions about mental retardation. If your client does not exhibit any of the stereotypes that jurors expect to see in a person with mental retardation, they may believe a prosecutor's claim that your client is malingering.[85] You may want to ask prospective jurors questions about their understanding of mental retardation during voir dire.

The U.S. Supreme Court noted in *Atkins v. Virginia* [86] that defendants with mental retardation risk being unfairly judged during sentencing proceedings because their behavior may be misinterpreted as lack of remorse. Inappropriate behavior also can be a factor during the trial itself.

Some defendants with mental retardation may exhibit behavioral characteristics that, if misunderstood, could influence a jury's decision. For example, many individuals with retardation smile a lot, sometimes inappropriately.[87] They may also laugh inappropriately. A jury may misinterpret these inappropriate responses as a lack of remorse.[88]

A short attention span may spark behavior that a jury can misinterpret. For example, during the prosecutor's closing arguments at Johnny Paul Penry's retrial, Penry drew pictures on a piece of paper while the prosecutor listed reasons that Penry was vicious and deserved to die.[89]

Defendants also may exhibit behavior that gives the impression that they do not have mental retardation. In an effort to "mask" disabilities, some defendants may take copious notes during trial in order to appear to be following and participating in the proceedings.[90]

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[83] Feinstein, *supra* note 69, at 95.

[84] Ellis & Luckasson, *supra* note 9 at 455-58.

[85] Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 20 Mental & Physical Disability L. Rep. 529, 536 (1998).

[86] Atkins v. Virginia, 536 U.S. 304, 320-21.

[87] Perske, *supra* note 32, at 19; The Arc of New Jersey, *supra* note 10, at 5.

[88] Perske, *supra* note 32, at 19; Human Rights Watch, *supra* note 73, at 9.

[89] Perske, *supra* note 32, at 22.

[90] Burr et al., *supra* note 8, at 82.

CONVICTION & SENTENCING

Research suggests that defendants with retardation are more readily convicted and receive longer terms than offenders without disabilities.[91] Probation and other diversionary programs are not used as frequently for offenders with mental retardation.[92] Eligibility requirements for some diversionary programs may specifically exclude those who are physically or mentally disabled.[93] Convictions are appealed less frequently, and post-conviction relief is not often requested.[94]

PRISON

Persons with mental retardation generally do not fare well in a typical prison environment. Inmates with mental retardation are more likely to be victimized, exploited, and injured than non-disabled inmates.[95] They may have difficulty understanding jail and prison rules, and may spend more time in segregation as a result.[96] They may receive frequent disciplinary write-ups for failing to follow directions or pay attention.[97]

Their difficulty understanding and following prison rules may also make them less likely to receive good-time or work-time credits and parole, and more likely to serve longer sentences.[98] When inmates with mental retardation are considered for parole, they often have a poor prison record with little program participation and many infractions and violations.[99] They may have difficulty during interviews with the parole board.[100]

Although Texas does offer post-release programs to offenders with mental retardation, the difficulty in identifying those who need these programs means that they are not offered to everyone who is eligible. Without post-release programs, individuals with mental retardation are at higher risk for violating parole and for recidivism.[101] Thus, persons with mental retardation may cycle in and out of the criminal justice system.

DID YOU KNOW. . .

"[C]ompared to people who do not have mental retardation, the inmate with mental retardation does more time, does harder time, gets less out of his time, and is more likely to be returned once released from prison."[102]

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[91] Petersilia, *supra* note 40, at 10; The Arc of New Jersey, *supra* note 10, at 10.

[92] The Arc of New Jersey, *supra* note 10, at 10; Frank Laski, *supra* note 81, at 143.

[93] Petersilia, *supra* note 78.

[94] *Id.*

[95] Ellis & Luckasson, *supra* note 9, at 480; McGee & Menolascino, *supra* note 79, at 69.

[96] Petersilia, *supra* note 40, at 4.

[97] Edwards, *supra* note 80, at 134.

[98] Petersilia, *supra* note 78.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] James G. Exum et al., *Points of View Perspectives on the Judicial, Mental Retardation Services, Law Enforcement, and Corrections Systems, in* The Criminal Justice System and Mental Retardation 1, 12 (Ronald W. Conley et al. eds., 1992).

SECTION 3

THE INITIAL INTERVIEW

HOW CAN YOU TELL IF YOUR CLIENT HAS MENTAL RETARDATION?

As mentioned in Section 2, individuals with mental retardation tend to think in very concrete terms. They have difficulty understanding abstract issues. They may have difficulty with their receptive and expressive language skills. You may find that they have a short attention span.[103]

Persons with mental retardation:

- May not communicate at age level and have a limited vocabulary.
- May have difficulty understanding/answering questions.
- May mimic answers/responses.
- May not be able to communicate events clearly in their own words.
- May not be able to explain your questions in their own words.
- May be easily led or persuaded by others.
- May have a naïve eagerness to confess or please.
- May be unaware of social norms and appropriate behavior.
- May act younger than their actual age.
- May display low frustration tolerance and/or poor impulse control.
- May have difficulty staying focused and be easily distracted.
- May have awkward or poor motor coordination.
- May laugh or smile at inappropriate times.
- May have difficulty making eye contact.[104]

They may also have difficulty reading and writing (apart from signing their name), telling time, obtaining a driver's license, recognizing coins and making change, and giving coherent directions.[105]

Keep in mind that not all individuals with mental retardation will share these traits. Some may have difficulty in some areas, but strengths in others.[106] The reason that persons with mental retardation are not consistently identified in the criminal justice system is that they often do not exhibit any outward, readily identifiable signs that distinguish them as a having a disability.

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[103] PERSKE, *supra* note 32, at 15-23.

[104] Handout on Traits Often Seen in People with Developmental Disabilities, The Arc of Dallas, pink laminated card given as part of their Criminal Justice Initiative.

[105] THE ARC OF NEW JERSEY, *supra* note 10, at 8.

[106] Ellis & Luckasson, *supra* note 9, at 427.

WHAT DO YOU DO IF YOU SUSPECT YOUR CLIENT HAS MENTAL RETARDATION?

If you have any reason to believe that your client has mental retardation, you need to explore this possibility. Mental retardation can be a significant issue at a number of different phases of criminal cases. Having your client further evaluated may be critical to a fair outcome.

However, as previously mentioned, many individuals with mental retardation will go to great lengths to hide their disability from others.[107] This is primarily due to the stigma associated with mental retardation, but may also be due to an honest inability to accurately assess their own abilities.[108]

If you suspect that your client has mental retardation, consider asking some of the following questions to help you determine whether you need to further explore this possibility:

- Did you ever take remedial reading or math classes?
- How far did you go in school? Why did you drop out?
- What do you read on a regular basis at home or work?
- Have you ever worked? Where? For how long?
- Do you have a checking account? Who takes care of it?
- Do you drive?
- Do you cook, clean the house, do laundry?
- Do you receive SSI?
- Would you describe yourself as a leader or a follower?
- Have you ever been taken advantage of?
- Have you ever been a client of (local MHMR)? What services did they provide to you?[109]

It is very important that you be tactful and respectful when you talk to your client about mental retardation. It may be a difficult or embarrassing process for them. Blunt questions like "Do you have mental retardation?" are unlikely to yield information. Such questions may also make your client uncomfortable and less likely to trust you. **Try to establish a good rapport with your client before you begin asking some of the delicate questions surrounding his/her disability. This will ensure that your client feels comfortable being open about this information.**

The following guidelines may be helpful for talking to clients with mental retardation:

- Be prepared for the interview process to require additional time and patience. You may need to repeat or rephrase questions once or twice.

- Try to arrange for a quiet and private setting, free from distractions.

- Identify yourself clearly to your client. Explain everyone's role and reason for being present at the interview.

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[107] BURR ET AL., *supra* note 8, at 18.

[108] *Id.*

[109] THE ARC OF NEW JERSEY, *supra* note 10, at 9; E-mail from Dr. James Patton (August 30, 2005)(on file with author).

- Use your usual tone and volume of voice.
- Make every effort to keep your language simple and clear.
- If possible, use visual aids.
- Avoid asking "yes or no" questions.
- Avoid legal jargon.
- Consider interviewing for short periods with frequent breaks, or conducting several short interviews instead of one long interview.
- Break complicated series of instructions or information into smaller parts.
- Avoid abstract questions about time sequences or reasons for behavior.
- Avoid rapid-fire questions.
- Treat adults with developmental disabilities in an age-appropriate manner.
- Occasionally check to make sure your client understands what you are saying – ask him/her to repeat directions or questions in his/her own words.
- Offer help or support in a sensitive and respectful manner.
- Allow ample time for a response after you've asked a question. If you do not understand what your client has said, it's OK to ask him/her to repeat his/her answer.
- Speak to your client directly – do not talk through an accompanying parent or staff person. Avoid completing your client's sentences, and do not attempt to speak for him/her.
- Do not hesitate to ask your client to explain to you what you just told him/her.[110]

AVOID BIG WORDS

weapon	charged
combative	vehicle
peace officer	suspect
victim	behavior
assailant	accused
magistrate	perpetrator
probate	conceal
bail	assault
deputy	incarcerate
attorney	confession

[110] AAMR, GUIDELINES FOR INTERVIEWING PEOPLE WITH DISABILITIES (2005); Lilli Hallaam, Address delivered at The Center for American and International Law presentation Capital Trial Advocacy and Mental Retardation – *Atkins* and Beyond (October 28, 2002).

USE A FACILITATOR

If you know that your client has mental retardation, you may want to consider having a "facilitator" or "interpreter" for the individual. Many advocates compare this to having an interpreter who uses sign language when speaking with a person who is deaf. The facilitator can be a volunteer, or someone that the defendant knows from his/her community. He/she should be someone that the defendant feels comfortable talking to, and who has experience communicating with persons with mental retardation. The role of a facilitator is to help ensure that the defendant understands what is being communicated to him/her, and to help the others in the room understand what the defendant is trying to communicate in response.

If the defendant cannot suggest someone to help facilitate your conversations, you may want to call advocacy groups like The Arc or the local MHMR Center and ask their help in finding a volunteer facilitator. (For contact and resource information, see the list at the back of this handbook.)

You may need to ask the facilitator to attend the court proceedings to make sure that your client understands what is happening inside the courtroom. If your client is going to testify, you will want to have a "cognitive interpreter," someone who operates like a facilitator but who is a mental retardation expert trained to help witnesses with mental retardation understand questions and communicate answers.[111] The presence of a facilitator or cognitive interpreter in the courtroom also serves as a continual reminder to the jury that your client is a person with a disability. This reminder may make it more difficult for jurors to disregard your client's disability as they consider the case. You should weigh the pros and cons of using a facilitator before the trial, perhaps by talking to other attorneys who have done so.

PREPARE YOUR CLIENT FOR COURT APPEARANCES

You may need to prepare your client for court appearances by discussing appropriate behavior and dress. Behavior that is inappropriate can affect the judge's or jury's view of your client. Visiting a courtroom and orienting your client to the room and court procedures will help to ease your client's anxiety and may reduce the likelihood of inappropriate behavior.

[111] Hallaam, *supra* note 110.

SECTION 4

HELPFUL HINTS FOR OBTAINING INFORMATION

If you suspect that your client may have mental retardation, you may want to look for records that will help you explore the issue further.

WHERE SHOULD YOU LOOK FOR MORE INFORMATION REGARDING MENTAL RETARDATION?

- Talk to your client's family.
- Talk informally with jail staff.
- Find out whether your client was evaluated during intake.
- Look at the police report for any indication of behavior that may suggest mental retardation.
- If an evaluation has been conducted pursuant to Texas Code of Criminal Procedure art. 16.22, you should receive a copy of the mental health expert's report. You should also know that the prosecutor and judge receive a copy of this report. This type of assessment is often used to divert individuals with mental illness from jail into treatment. If your client has been evaluated, and the assessment indicates your client may have mental retardation, you may want to use this evaluation to support an argument for diversion.
- If your client is being charged with a probation violation, ask your client's probation officer if your client is currently on a specialized probation caseload. If he or she was identified as an offender with mental retardation at an earlier point, your client may be involved in a TCOOMMI program.
- If your client has been in court before, look to see if competence proceedings were conducted.
- Look at information about your client collected by the pretrial release program.
- If your client was interviewed or confessed to a crime, try to obtain a copy of the taped interview if one exists.

WHAT RECORDS MIGHT BE HELPFUL?

- **Medical and mental health records.** Medical records may reveal that your client failed to meet normal milestones in development. They could also reveal etiological factors that may have resulted in or contributed to your client's developing mental retardation. Some of these factors are:
  - Heredity. Includes genetic and chromosomal aberrations (Down syndrome, fragile X syndrome, Tay-Sachs disease, tuberous sclerosis, etc.).
  - Alterations of embryonic development. May include chromosomal changes or prenatal damage due to toxins (maternal drug and alcohol consumption, in utero infections, etc.).

- Pregnancy and perinatal problems. May include fetal malnutrition, fetal alcohol syndrome, prematurity, hypoxia, trauma, and viral and other infections.

- General medical conditions acquired in infancy and childhood. May include infections, traumas, and poisoning (such as exposure to lead).

- Environmental influences and other mental disorders. May include lack of nurturing; deprivation of social, linguistic, and other needed stimulation; and severe mental disorders (such as Autistic Disorder).[112]

- **Medical records of family members.** Your client's family members' medical records could show a familial history of developmental disabilities. These records could also reveal problems that your client's mother experienced during pregnancy, as well as any history of substance/alcohol abuse during the pregnancy.

- **School records.** Your client may have been enrolled in special education classes. You may also be able to determine whether your client had persistent failing grades, more than one non-promotion, and/or persistent below grade-level achievement scores. School records may also include the results of psychological evaluations, if any were done. Keep in mind that schools have become increasingly wary of labeling a student as having mental retardation because of the stigma that is attached to the definition, or the additional cost of special services. Even if the records only reflect that your client is "learning disabled," there may be significant evidence that he or she tested within a range that makes your client eligible for a diagnosis of mental retardation. These records should also be evaluated by individuals who are familiar with academic transcripts and test records, since they tend to include acronyms.

- **Vocational evaluation records.**

- **Social service agency records.** If your client has received services from MHMR or other social service agencies, their records may contain useful information.

- **Social Security records.** These may show that a client has been diagnosed with mental retardation and was provided with disability payments.

- **Military records.** If your client served in the military, limitations in adaptive functioning may have resulted in a discharge, lack of advancement, or frequent disciplinary charges.

- **Employment records.** These may reveal whether your client had difficulty holding a job, or experienced disciplinary problems at work that are consistent with mental retardation. They may also reveal that your client was not able to fill out an employment application – check the handwriting on the application to see if he/she had help.

- **Juvenile and criminal records.** Many clients with mental retardation will have had numerous prior arrests or commitments within the juvenile system for relatively minor offenses.

- **Prison records.** If your client has been incarcerated in the past, there may be a record of IQ scores on intake tests. In Texas, however, the tests given during intake are group screening tests and are notoriously unreliable. (See Section 12 for more information on types of testing.) Prison records may also document difficulties following prison rules and suggest other limitations in adaptive behavior.

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[112] Robert A. Hager & Victor R. Scarano, *Making Sense of the Records, in* Mental Capacity – Special Legal Issues Relating to Mental Retardation 1 (Texas Bar CLE ed., 2003).

- **A child's history and record of substance abuse.** A history of glue or paint huffing, psychedelic substances, PCP, and other drug use provides important information, particularly if the child was hospitalized after intentionally or unintentionally overdosing on these substances.

- **A family diary or record of your client's developmental milestones.** Some mothers keep a baby book or journal to record various milestones. These documents can be helpful in determining age of onset of your client's disability.[113]

Because many local agencies and departments may not be familiar with Texas Health & Safety Code Section 614.017, ask your client sign a records release form at the time of your first interview if your client is able to do so. Even better, call the institution from which you are seeking records and request a copy of its records release form. If your client cannot sign a medical records release form, you may be able to obtain the needed records by forwarding the institution a certified copy of the order appointing you to the case. If none of these methods works, you may be able to get the records by seeking a subpoena or court order.[114]

YOU MAY ALSO CONSIDER TALKING TO:

- Knowledgeable extended family members
- Child care workers
- Teachers
- Social service providers
- Previous health care providers
- Pastors and religious education teachers
- Friends
- Co-workers
- Co-defendants in criminal offenses

You should seriously consider hiring a mitigation specialist who can gather the information discussed in this section for you. Once you have this information, see where it takes you. Retaining a mitigation specialist is also relevant to effective assistance of counsel issues. (See Section 10 for more information on mitigation specialists.)

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[113] *See* BURR ET AL., *supra* note 8, at 19-23; Victor R. Scarano & Bryan A. Liang, *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285, 304-05 (2004).

[114] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 595.001 *et seq*.

Notes

SECTION 5

DUAL DIAGNOSIS

Dual diagnosis refers to a combined diagnosis of mental retardation and either alcohol abuse, substance abuse, or mental illness.[115] Types of mental health disorders are the same in individuals with and without mental retardation.[116] However, persons with mental retardation are at increased risk for a mental illness.[117] The prevalence of common mental health disorders in individuals with mental retardation is:

- Anxiety disorder . . . . . up to 35 percent
- Post-traumatic stress disorder . . . . . 22 percent
- Psychosis . . . . . 2-5 percent
- Depression . . . . . up to 30 percent
- Personality disorder . . . . . 3 percent
- Substance abuse . . . . . up to 20 percent [118]

The prevalence of anxiety and stress disorders is greater among persons with mental retardation compared with the general population of the same age.[119]

Identifying mental illness in persons with mental retardation can be difficult.[120] Most diagnostic procedures rely heavily on a person's ability to report his/her symptoms.[121] If a person with mental retardation has difficulty communicating, reporting symptoms of mental illness may also be difficult.[122] Conventional assessment instruments are not designed for use with this population, and while specialized instruments have been developed, there is some disagreement as to whether they are very useful.[123] Often, the mental illness masks the mental retardation. Once the mental illness is treated (often through medication), the mental retardation may become evident.

The National Association for the Dually Diagnosed (NADD) is a good resource for information about dual diagnosis. Their website is www.thenadd.org.

HOW CAN I TELL IF MY CLIENT HAS A MENTAL ILLNESS?

While it may be difficult to determine whether a client with mental retardation also has a mental illness, interviews with family and friends may be helpful in discerning your client's mental health history. Your review of the records and police reports, as discussed in Section 6, may also reveal treatment for or symptoms of a mental illness. For a glossary of common mental health terms and commonly prescribed psychotropic medications, see Appendix A on the CD included in this handbook.

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115 John H. Noble, Jr. & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes, in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 17, 26 (Ronald W. Conley et al. eds., 1992).

116 AAMR, *supra* note 7, at 172-74.

117 BEIRNE-SMITH ET AL., *supra* note 1, at 200.

118 AAMR, *supra* note 7, at 174.

119 *Id.* at 172.

120 BEIRNE-SMITH ET AL., *supra* note 1, at 200; McGee & Menolascino, *supra* note 79, at 67.

121 *Id.*

122 *Id.*

123 *Id.*

It is important to know that there may be some overlap between the signs or symptoms of mental illness and the signs of mental retardation. However, during your time with your client, you may want to look for:

- **Certain types of offenses.** Offenses such as criminal mischief, criminal trespass, failure to identify, and public intoxication may signal an underlying mental illness or substance abuse problem. Many defendants with mental illness are also brought in on charges of "assault of a public servant" because they tangle with police while they are psychotic. These offenses are frequently related to the client's poverty, homelessness, substance abuse, or transient lifestyle, but if they are part of your client's offense history or if your client has been arrested several times for the same offense, he/she may have a mental illness.

- **Behavioral or physiological clues.** Your client may exhibit rapid eye blinking, vacant stares, tics or tremors, or unusual facial expressions. The symptoms of a mental illness and the medications your client may be taking may make him/her appear slow, inattentive, or sluggish. Your client may exhibit psychomotor retardation (slow reactions in movements or answering questions) or clumsiness. Your client may be excessively uncooperative. On the other hand, your client may appear very agitated, tense, or hypervigilant. Many of the common behavioral clues for mental illness may be similar to behavior that is typical of persons with mental retardation. Do not assume that your client has a mental illness based purely on these behavioral clues if you know him/her to be a person with mental retardation.

- **Circular nature of your client's conversation.** While talking with your client, you may note that he/she doesn't follow a logical train of thought. In other words, your client may be unable to get from point A to point B. Again, while this may be symptomatic of mental illness, your client may simply have difficulty with communication. It may also reflect your client's desire not to talk about his or her disability or subjects with which he/she is unfamiliar.

- **Use of mental health terms.** If your client has been in treatment, he/she may talk about his/her counselor or caseworker, about various medications, or about being treated in a hospital. He/she may use terms such as those listed in the glossary on the CD included with this handbook.

- **Paranoid statements.** Your client may make paranoid statements or accusations. Or, he/she may exhibit phobias or irrational fears, such as a fear of leaving the jail cell.

- **Reality confusion.** Your client may experience hallucinations. He/she may hear voices, see things, have illusions, or misperceive a harmless image as threatening. Your client may be disoriented and seem confused about people and surroundings. He/she may have delusions (consistent false beliefs), such as that lawyers are out to get him/her, that guards are in love with him/her, or that his/her food has been poisoned.

- **Speech or language problems.** Your client may exhibit language difficulties, including incoherence, nonsensical speech, the use of made-up language, and non sequiturs. Your client may change the subject in mid-sentence, speak tangentially, or persistently repeat himself or herself. Or, instead, he/she may exhibit rapid, racing speech, or give monosyllabic or lengthy, empty answers. Your client may be easily distracted or may substitute inappropriate words for other words. Again, a trait typical of persons with mental retardation is difficulty communicating.

- **Inappropriate emotional tone.** Your client may exhibit emotions such as anxiety, suspicion, hostility, irritability, and/or excitement; or he/she may appear downcast and depressed. On the other hand, your client may express little emotion at all or appear to have a flat affect. Your client may exhibit emotional instability. If your client has a bipolar disorder (manic depression), he/she may talk in a very rapid manner, seem excited, laugh at inappropriate times, make grandiose statements, or act very irritable. As noted earlier in this handbook, this could also be true of individuals with mental retardation who do not have a mental illness.

- **Unusual social interactions.** Your client may have problems relating to others, and experience isolation, estrangement, difficulty perceiving social cues, emotional withdrawal, a lack of inhibition, or strained relations with family members and friends.

- **Medical symptoms and complaints.** Finally, you should always be alert for physical symptoms, including hypochondria, self-mutilation, being accident-prone, insomnia, hypersomnia, blurred vision, hearing problems, headaches, dizziness, nausea, and loss of control of bodily functions. Some of these problems can develop as a result of incarceration, but many point to other, more serious or long-standing mental health problems.

- **Thoughts of death/suicide.** You may learn that your client is suicidal during discussion with the client or his/her family members.

WHEN TALKING WITH FAMILY AND FRIENDS, YOU MIGHT ASK:

• Do you know if _____ has ever been treated for a mental or emotional problem?

• Has _____ ever been treated for substance abuse?

• Is he/she currently receiving treatment? If so, with whom?

• Do you know his/her diagnosis?

• Do you know what types of medication he/she is taking? Has he/she taken medications in the past? What were those medications?

• Has _____ ever been hospitalized for a mental health problem? If so, when and where? Did a court or judge order the hospitalization?

If you have any concerns regarding your client's mental health, you should explore further. Because many symptoms and behaviors of persons with mental retardation may overlap with those of individuals with a mental illness, you should consult a mental health expert if you have any concerns regarding your client's mental health.

In talking to a client with a mental illness you may find that the communication difficulties he/she faces as a person with mental retardation are exacerbated by his/her illness. As with mental retardation, many persons with mental illness will go to great lengths to hide their illness. Some clients may not understand that they are mentally ill. If your client seems aware that he/she has a mental illness, you may try asking simplified questions similar to the ones listed above.

Use eye contact to keep control of the dialogue and keep your client focused. Do not intrude on your client's "personal space." Tell your client when you do not understand and need more information. Paraphrase your client's responses to let him/her know that you understand. Remember, your client's delusions are real to him/her. Do not minimize or try to explain away hallucinations or delusions. You will likely elicit more information with a response such as, "That's interesting – tell me more," than by arguing the logic of statements that may appear bizarre or unusual to you.

Be patient. If your client has a mental illness, he/she may be irritated, belligerent, or see you as a threat. If your client is out of control, he/she may have a mental disorder. Some of your client's actions, reactions, and mannerisms may be irritating and/or offensive. Do not take this conduct personally; your client's mental illness may be influencing his/her personality. Find out if your client has stopped taking medication. If you can get your client to start taking his/her medication again, it will likely make your experience with him/her more pleasant.

As with mental retardation, do not speak about mental illness in a disparaging or derogatory manner. Do not add to your client's feelings of helplessness, embarrassment, or shame about his/her mental illness. If you believe your client is incompetent, you should still address your client as if he/she is competent. Many clients who get better after treatment remember how you treated them and what you said to them before treatment. If your client feels that you have treated him/her with respect, you are more likely to create a good relationship with your client, which will help you represent him/her better.

If your client is exhibiting psychotic behavior, you may consider videotaping an early interview with him/her. This will allow the judge or jury to see how the client was behaving near the time of the offense. Such evidence has proven critical in several of the high-profile insanity defense cases in Texas.

TEXAS HEALTH & SAFETY CODE § 573.001

Although most of the statutes in the criminal code that apply to individuals with mental illness also apply to persons with mental retardation, there is a statute that allows a person with a mental illness to be diverted into a treatment facility if he/she was arrested without a warrant. This statute does not include individuals with mental retardation. Therefore, if your client was arrested without a warrant and has a mental illness, you may want to look at Texas Health and Safety Code § 573.001, which requires that apprehended persons with mental illness be taken to a mental health facility instead of a jail facility in certain situations. Also, there may be a memorandum of understanding between your local mental health authority and the jail in your community to divert mentally ill offenders from jail into a mental health facility. If section 573.001 applies in your client's case, or if there is a memorandum of understanding in your county, you should bring this to the attention of jail personnel who have the authority to divert your client to a mental health facility.

SECTION 6

THE FAIR DEFENSE ACT

HOW DOES THE FAIR DEFENSE ACT AFFECT YOU?

The Fair Defense Act, among other things, imposes obligations on attorneys who represent indigent defendants in Texas. When you have been appointed to represent a client, you must make every reasonable effort to:

• Contact your client by the end of the first working day after the date on which you were appointed; and

• Interview your client as soon as practicable after you have been appointed.

Once you have been appointed, you must represent your client through the final disposition of your client's case, including any appeals, or until you are replaced by other counsel after the court enters a finding of good cause on the record. In many counties, if a defendant wishes to appeal his/her case, the original appointed counsel will be replaced by another attorney who has met specific requirements to handle appeals. If you have any questions about when your representation of your client ends, you should contact the county's appointing authority.

HOW DOES THE FAIR DEFENSE ACT HELP DEFENDANTS WITH MENTAL RETARDATION?

Besides requiring that attorneys contact their clients quickly, the Fair Defense Act mandates that each county in Texas adopt objective standards that each attorney in that county must meet before qualifying to represent indigent defendants. Some counties may require that attorneys who wish to represent defendants with mental retardation meet specific requirements to do so. Together, these provisions can be particularly critical to those indigent defendants who have mental retardation. As discussed earlier, jail can be especially threatening to individuals with mental retardation. The sooner the client is interviewed by specially qualified counsel, the sooner that attorney will know if the client has mental retardation, and the sooner the attorney will be able to develop a strategy for getting the client out of jail and, if necessary, into a habilitation or treatment program.

The Fair Defense Act provides for the reimbursement of reasonable and necessary expenses, including experts.

Notes

SECTION 7

PRETRIAL OPTIONS

TRY TO GET THE CASE DISMISSED

You should explore ways to get your client's case dismissed. What may seem like a minor misdemeanor conviction could come back to haunt your client down the road. For example, a family violence assault conviction can enhance a second family violence assault charge to a third degree felony, and two convictions for prostitution or shoplifting can enhance the third charge of either of these two offenses to a state jail felony. Also, a criminal conviction may make your client ineligible for public housing. You can attempt to get a dismissal in various ways. However, if you have never represented a person with mental retardation before, get help from someone who has before you proceed.

It is likely that a client with mental retardation and/or mental illness is protected by the Americans with Disabilities Act. Be mindful of unfair or discriminatory treatment of your client by anyone in the system, including jailors or prosecutors. For information about accommodations that should be provided to your client under the ADA, go to The Arc website at www.thearc.org. Several publications are available on the website that may be helpful.

TALK WITH THE PROSECUTOR

If you have any indication that your client's mental retardation may have played a role in the charged offense, consider talking to the prosecutor about dismissing your client's case. You should also discuss the facts of the offense closely with your client to determine his/her level of involvement in the crime. Persons with mental retardation are often used by others to commit crimes. They tend to be the last to leave the scene of the crime, and the first to get caught. If your client is used by others to commit a crime, and did not understand the consequences, this may help you in getting the case against your client dismissed.

The prosecutor may be more inclined to share your conviction that your client has mental retardation and that this could have affected your client's judgment if you clearly document your client's disability and then provide that documentation to the prosecutor. However, if you are new to practice or otherwise unfamiliar with the prosecutor, you should talk to other attorneys in the community about the prosecutor's sensitivity to mental retardation issues. If you have concerns, you may want to seek out another prosecutor or speak to the prosecutor's supervisor.

Approaching a prosecutor with evidence of your client's mental retardation - before you have completed the investigation needed to conclusively prove a diagnosis - poses a risk that the prosecutor will be given early discovery and insist on having one of his/her experts test your client.[124] To determine whether this option is worth pursuing, you should consider the following:

- Does the evidence meet all three diagnostic criteria?
- Are the historic full scale IQ scores consistently 70 or lower (taking the appropriate SEM into account)?
- Is at least one of the historic IQ scores that is 70 or lower derived from a reputable, reliable test that was properly administered?

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[124] BURR ET AL., *supra* note 8, at 25.

- If the historic IQ scores include full scale IQ scores above 70, is there a reasonable basis for believing that the score overstates the client's true intelligence?

- Is there evidence of significant limitations in adaptive behavior?

- Do these limitations remain significant when the client's strengths are taken into account?

- Is there evidence that the onset of limitations in intellectual functioning and adaptive behavior occurred during the client's developmental period?

- Are there any major downsides to the administration of a reputable, reliable IQ test by a prosecution expert?

- Could the SEM, the "practice effect," and the "Flynn effect" have had an impact on your client's IQ test scores? (See Section 12 for discussion of each of these.)[125]

TALK WITH THE COMPLAINING WITNESS

The option of an outright dismissal may be more appealing to the prosecutor in a case where there is no alleged victim. If there is an alleged victim and the prosecutor does not seem to want to dismiss your client's case, you may consider contacting the alleged victim directly and, with your client's permission, presenting evidence of your client's mental retardation. The alleged victim may then go to the prosecutor and ask the prosecutor to drop the charges against your client. This approach can backfire, however. You may end up aggravating the alleged victim. Be sure to discuss the pros and cons of this option carefully with your client before you proceed.

TALK WITH THE ARRESTING OFFICER

Finally, you may want to approach the arresting officer to see if he/she would be willing to ask the prosecutor to dismiss the charges, especially if your client is charged with a nonviolent offense or the arresting officer is the complainant. You may be able to get the officer to work with you if you bring him/her evidence of your client's mental retardation.

RELEASE ON PERSONAL BOND

If a quick dismissal is not an option and your client is competent to stand trial, you should speak to your client about whether to seek his/her release on bond. The Texas Code of Criminal Procedure provides for release of defendants on personal bond if they have mental retardation and have been charged with a non-violent offense. The court can, and likely will, impose a habilitation or treatment condition.[126] These sections of the Code require an evaluation and treatment and do not protect statements made during the examination from being admitted into evidence against your client at trial, though there may be case law that would support their exclusion. You and your client may decide to forego a release on bond to avoid this evaluation or to avoid having to submit to habilitation/treatment or other conditions. Remember that the written report from the evaluation will be submitted to you, the prosecutor, and the judge, and might be used against your client later. You and your client also may decide not to pursue a release on bond if your client is homeless or does not have a safe or stable place to live. If your client is in danger of picking up additional charges while on bond or failing to report to court as required by his/her bond, release may significantly impair your chances of getting your client's case dismissed. On the other hand, the primary purpose of an article 16.22 evaluation is to determine whether habilitation is needed – even if the defendant remains in jail.

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[125] *Id.*

[126] Tex. Code Crim. Proc. Ann. arts. 16.22 & 17.032.

If you are further along in the pretrial process and your client has been determined to be incompetent, but is not considered a danger to others, the Texas Code of Criminal Procedure provides that your client can be released on bail if the court determines that he/she can be adequately "treated" on an "outpatient" basis. Much of the language assumes the offender has a mental illness rather than mental retardation, but the competency statutes apply to both.[127]

COMPETENCE ISSUES

As discussed in Section 2, many individuals with mental retardation have difficulty understanding Miranda warnings. They may also confess to crimes they did not commit. You should explore these issues fully to determine whether an appropriate pre-trial motion should be considered.

If you are considering a guilty plea, you should have your client evaluated to determine whether he/she is competent to enter a plea.

For a full discussion of competence to stand trial, see Section 8.

DEATH PENALTY ELIGIBLE DEFENDANTS

If your client is eligible for the death penalty, you should file a pretrial motion to establish his/her mental retardation. This is covered more extensively in Section 11, but it is vital that you understand the importance of this step.

[127] Tex. Code Crim. Proc. Ann. art. 46B.072.

Texas
APPLESEED

Notes

SECTION 8

COMPETENCE EVALUATIONS AND TRIALS

THE BASICS

First, you should be aware that most Texas criminal statutes that apply to persons with mental illness also apply to persons with mental retardation. Therefore, if your client has mental retardation, you should consider whether he/she is competent to stand trial.

Determinations regarding your client's competence are not determinations on the merits of your client's case. In other words, a determination of incompetence will not excuse the offense against your client.

Your client is "incompetent" to stand trial on criminal charges if he/she does not have: (1) sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding; or (2) a rational, as well as a factual, understanding of the proceedings against him/her.[128]

Your client's competence involves more than his/her ability to correctly identify the different actors in the court process (e.g., the prosecutor, judge, defense attorney, or bailiff). You may want to consider asking yourself the following questions to help determine whether it is appropriate to request a competence examination for your client:

- Does your client understand his/her legal situation?
- Does your client understand the charges against him/her?
- Does your client understand the legal issues/procedures in his/her case?
- Does your client understand the available legal defenses?
- Does your client understand the depositions, pleas, and possible penalties?
- Can your client appraise the likely outcomes of his/her case?
- Can your client appraise his/her role and the roles of defense counsel, prosecutor, judge, jury, and witnesses in his/her case?
- Can your client identify and locate witnesses?
- Does your client trust you and communicate relevant information to you, including pertinent facts, events, and states of mind?
- Does your client comprehend instructions and advice?
- Can your client make decisions after receiving advice?

[128] TEX. CODE CRIM. PROC. ANN. art. 46B.003(a).

- Is your client able to collaborate with you on developing legal strategy?
- Can your client follow his/her own testimony and the testimony of others for contradictions or errors?
- Can your client testify about relevant information and be cross-examined if necessary?
- Can your client help you challenge prosecution witnesses?
- Can your client tolerate the stress of the trial process?
- Can your client refrain from inappropriate behavior in court?
- Can your client disclose pertinent facts about the alleged offense?

A defendant is presumed competent to stand trial unless proved incompetent by a preponderance of the evidence.[129]

COMPETENCE EVALUATIONS

When is it appropriate to file a suggestion of incompetence?

Generally, issues relating to your client's competence to stand trial should be resolved before the trial on the merits. However, you can request a competence examination at any point during the proceedings at which you believe your client is not competent to stand trial – even if you are in the middle of trying your client's case on the merits. You should note that the American Bar Association (ABA) has resolved that it is improper to use competence procedures for unrelated purposes, such as obtaining mitigation information, obtaining favorable plea negotiations, or delaying proceedings.[130]

Many attorneys find themselves in an ethical bind when their client objects to having the competence issue raised. Some clients facing misdemeanor charges just want to plead to the charges, spend a short time in jail, and then get out. Often, having an evaluation means that the client will spend more time in jail pending the examination, plus a lengthy time at the state hospital if he/she is found incompetent. Be aware, however, that a defendant cannot be committed under the competency statutes for a cumulative period that exceeds the maximum term for the offense charged.[131] Additionally, the ABA stresses a lawyer's professional responsibility toward the court and the fair administration of justice as the paramount obligations in such cases, and expects an attorney to advance the issue, even over a client's objection, whenever a good faith doubt arises about a defendant's competence to stand trial.[132] Of course, if your client is competent to stand trial, he/she makes the final decision about how to dispose of his/her case regardless of whether you agree with this decision or not.

If you believe your client is incompetent to stand trial, you should file a motion under the provisions of Texas Code of Criminal Procedure art. 46B.004 suggesting that the defendant may be incompetent. The terms "suggest" and "suggestion" were intentionally used by the drafters of chapter 46B, in contrast to prior case law that required a judge to have a "bona fide" doubt about a defendant's competency before conducting an inquiry into the matter. You should also seek to get your client's case dismissed as discussed in the newly added subsection (e) to art. 46B.004. If the case is not dismissed, competence evaluations and trials can be conducted even if your client is on bond or otherwise out of jail.

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[129] Tex. Code Crim. Proc. Ann. art. 46B.003(b).

[130] American Bar Association, Standards Relating to Competence to Stand Trial § 7-4.2(e) (1989).

[131] Tex. Code Crim. Proc. Ann. art. 46B.009(b)

[132] American Bar Association, *supra* note 130, at § 7-4.29(c).

Requesting the Competence Examination

If you believe that your client is not competent to stand trial, file a motion suggesting that the defendant may be incompetent, pursuant to the provisions of Texas Code of Criminal Procedure art. 46B.004 whether your client is in jail or out on bond. Even though defense counsel usually files such a motion, the court itself or the prosecutor may raise the issue of incompetence to stand trial. Once the issue is raised, the court must determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent.[133] If, after informal inquiry, the court determines that evidence exists to support a finding of incompetency, the court must order an examination of the defendant.[134]

Evaluating Experts

On a suggestion that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to evaluate the defendant; on a determination that evidence exists to support a finding of incompetence to stand trial, the judge must appoint one or more disinterested experts for that purpose.[135] To qualify for appointment, a psychiatrist or psychologist must have the qualifications set forth in Texas Code of Criminal Procedure art. 46B.022. An expert involved in the treatment of the defendant may not be appointed for the purpose of evaluating the defendant's competence to stand trial.[136] If the defendant wishes to be examined by an expert of his/her own choice, the court, on timely request, must provide the expert with reasonable opportunity to examine the defendant.[137] Judicial decisions in Texas have required the state to provide (or reimburse the expenses for) an independent expert for indigent defendants.[138]

When you are representing a client with mental retardation, it is imperative that you make the court aware of the need for an evaluator who has experience in determining competence in clients with mental retardation. Mental retardation experts and mental health experts rarely overlap.[139] While many psychiatrists study mental retardation during their training, they may not have relevant experience in diagnosing or providing services for individuals with mental retardation.[140] Many psychologists also lack this experience. They should not be considered mental retardation experts if they do not have experience working with persons with mental retardation.[141]

There is a standardized instrument specifically designed for assessing the competence of defendants with mental retardation, the Competence Assessment to Stand Trial for Defendants with Mental Retardation (CAST*MR). This test is widely used.[142] To determine whether an evaluator is experienced in assessing individuals with mental retardation, you should consider asking whether he/she is familiar with, or has ever used, this instrument. However, it is not appropriate to make a competence recommendation based solely on the score of this test. Your expert should also spend some time interviewing your client.[143]

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133 Tex. Code Crim. Proc. Ann. art. 46B.004(c).

134 *Id.* arts. 46B.005(a), 46B.021.

135 *Id.* art. 46B.021.

136 *Id.* art. 46B.021(c).

137 *Id.* art. 46B.021(f).

138 Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness: An Analysis and Guide 70 (3rd ed. 2005) (citing DeFreece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993)). While *DeFreece* involved a defendant with mental illness, the same reasoning should apply for a defendant with mental retardation.

139 Burr et al., *supra* note 8, at 27.

140 *Id.*

141 *Id.*

142 Burr et al., *supra* note 8, at 57 (citing Stanley v. Lazaroff, 2003 WL 22290187(6th Cir. Oct. 3, 2003)).

143 Feinstein et al., *supra* note 69, at 97.

There may also be a database that lists local psychiatrists and psychologists who are qualified to assess a defendant's competence to stand trial.[144] Check with statewide advocacy organizations or your local MHMR facility to see if such a database exists.

Your Responsibilities Regarding the Evaluation

The court may order the parties to provide the appointed experts with information relevant to a determination of the defendant's competency, including copies of the indictment or information, any supporting documents used to establish probable cause in the case, and any evaluation and treatment/habilitation records.[145] You may also want to tell the evaluator why you think your client is unable to assist you or participate in his/her defense.

You should also obtain and submit to the examiner any record or information that the examiner considers necessary for conducting a thorough evaluation on the matters referred. This is a time when you can advocate for the position that is in your client's best interest. Provide the examiner with relevant documents that will help guide the diagnosis. Make sure that the evaluation is conducted promptly after you have suggested that the defendant may be incompetent to stand trial, so that your client does not languish in jail.

The law protects statements made by the defendant during the competence evaluation, the testimony of an expert based on those statements, and the evidence obtained as a result of the statements from being admitted in the trial on the merits.[146] However, be aware that these statements, testimony, and/or evidence will be admissible at any proceeding at which your client first introduces them.[147]

Preparing the Client for the Evaluation

You need to prepare your client for the competence evaluation. Explain the following to your client, using a facilitator if needed:

- The purpose and nature of the examination;
- The potential uses of any disclosures made during the examination;
- The conditions under which the prosecutor will have access to reports and other information obtained for the examination and the reports prepared by the evaluator;
- The conditions under which the examiner may be called to testify during sentencing; and
- That your client will be sent to a state hospital if he/she refuses to cooperate with the court-appointed expert during the examination.

Can You Be Present During the Competence Examination?

Some courts allow counsel to be present during an examination, while others do not. Some allow an attorney to watch but not to speak. When requesting to be present, acknowledge the concerns of the court and mental health expert, but assure them that you will do nothing to compromise the reliability of the examination. Your presence at the examination enables the

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144 For example, in Travis County, Austin Travis County MHMR has compiled a list of qualified experts that may be downloaded at the Capacity for Justice website, http://www.capacityforjustice.org.

145 Tex. Code Crim. Proc. Ann. art. 46B.021(f).

146 *Id.* art. 46B.007.

147 *Id.*

evaluating professional to observe the attorney-client relationship and get a better idea about what your client may be asked to do to assist with his/her defense. If the prosecutor initiated the examination, and it is likely that the evaluator will be a State's witness at trial, you may be better able to cross-examine the mental retardation evaluator at trial if you are present during, or have viewed or listened to, the evaluation. However, your presence at the evaluation may inhibit your client from speaking candidly with the evaluator and may also make the evaluation vulnerable to a prosecutor's challenge on cross-examination. If you are not allowed to be present during the evaluation, or decide not to attend, you should inquire about videotaping or audiotaping the interview as an alternative.

FACTORS ADDRESSED IN COMPETENCE REPORTS

The statute lists factors that the expert must consider during his/her examination and in any report based upon the examination and also sets out the required contents of the expert's report.[148] Competence evaluations in Texas must address not only competence issues, but also whether a person is mentally ill or has mental retardation.[149] You can use this information for mitigation or other purposes.

You should make sure that the evaluator's report is complete. If it is not, you should call the evaluator, cite the law, and ask for a complete report.[150] If you believe the revised report is still inadequate or inaccurate, you can ask for a second opinion. You should inquire within the legal and mental health communities about other experts who may be able to testify at the competence trial on behalf of your client.

The competence report should not contain information or opinions concerning either your client's mental condition at the time of the alleged crime or any statements made by your client regarding the alleged crime or any other crime. Even if the expert determines that your client is competent to proceed, issues concerning insanity or culpability at the time of the offense should be included in a separate report and not in the competence report.[151] You should seek to ensure that the competence report does not include any offense-related information or express the opinion of the examiner on any questions requiring a conclusion of law or a moral or social value judgment properly reserved for the fact finder.

You may also consider having another attorney interview your client. This attorney should have experience handling similar cases. This legal expert may be able to testify about the level of cooperation that is needed from a client, and whether your client is able to provide that level of cooperation.

An example of a competence report for a defendant with mental retardation is included in Appendix A of the CD included in this handbook.

CAN YOUR CLIENT "REGAIN" COMPETENCE?

This is a hotly debated issue among advocates for persons with mental retardation. Because mental retardation is a permanent condition, unlike a mental illness, it cannot be "cured." However, there are programs in Texas that focus on restoring competency for individuals with mental retardation by teaching them about court processes. One such program teaches clients about court processes using a "patient led" court class in which clients engage in mock trials. The trials are conducted to determine what punishment a person receives when they have broken the hospital's rules for behavior.

While some advocates believe that persons with mental retardation benefit from these programs, others believe they are simply being taught to "parrot" information so that they may be found "competent." If your client is "restored to competence,"

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148 Tex. Code Crim. Proc. Ann. arts. 46B.024, 46B.025.

149 *Id.* art. 46B.025.

150 *See id.*

151 *Id.* art. 46.03 § 3(g).

make sure you spend some time with him/her to determine whether he/she has a better understanding of the process than when he/she was deemed "incompetent."

THE INCOMPETENCY TRIAL

The competence determination, whether made by a judge or jury, may affect how you proceed on the merits of your client's case. The judge makes the determination if a jury is not requested. If requested by either party or on the motion of the court, a jury must make the determination.[152]

The following are recommended "next steps" depending on the outcome of the competence determination:

- **If your client is determined to be competent**, you should explore the dismissal options set out in Section 6 or, in the most severe cases, consider an insanity defense.

- **If your client is determined to be incompetent to stand trial**, the court has several options. It can commit the defendant to a facility under Texas Code of Criminal Procedure art 46B.073, or release the defendant on bail under Texas Code of Criminal Procedure art. 46B.072, depending upon the circumstances. If the court commits your client, commitment can be for a period of only 120 days, with one possible 60-day extension.

When your client is returned to the court from the habilitation facility, the court must make a determination about your client's competence to stand trial.[153] The court may make this determination based solely on the report filed by the head of the facility under Texas Code of Criminal Procedure art. 46B.080(c), unless your client or any other party objects in writing or in open court to the findings of the report.[154] However, the recently amended Code now requires the head of the facility to file a final report with the court stating the reason for the proposed discharge and including a list of the types and dosages of any medications that your client was given at the facility.[155] Defense counsel and the prosecutor receive a copy of this report.[156] If your client intends to object to the findings, he/she must make his/her objection no later than the 15th day after the date on which the head of the facility's report was served on your client.[157] Note that the hearing under art. 46B.084 can be conducted electronically using two-way interactive video transmissions. This would likely occur when the head of the facility believes that the defendant remains incompetent and needs further civil commitment.

- **If it is determined that your client is competent** pursuant to Texas Code of Criminal Procedure art. 46B.084, you should explore appropriate dismissal and release options (such as having the court set bail). You should try to secure a trial setting well in advance of your client returning from the habilitation facility. If, after regaining competence, your client decides to go to trial, you should be ready to try the case quickly.

- **If the head of the facility to which your client has been committed reports to the court that your client will not attain competency in the foreseeable future**, the court must then determine whether your client is competent to stand trial.[158] If the court determines that your client is not competent to stand trial, and all charges are not dismissed, then the court must proceed under Texas Code of Criminal Procedure arts. 46B.101 through 46B.117, to determine whether your client is a person with mental illness or a person with mental retardation who should be committed to a residential care facility. However, under the new statute, the maximum term of commitment cannot exceed the maximum sentence term for the crime with which the defendant was charged. The person can be

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152 *Id.* art. 46B.051.

153 *Id.* art. 46B.084.

154 *Id.*

155 Tex. S.B. 679, 79th Leg. R.S. (2005).

156 *Id.*

157 *Id.*

158 *Id.*

detained further only if he/she meets the requirements for civil commitment.

If the court determines that your client is not competent to stand trial, but all charges have been dismissed, then the court must proceed under the provisions of Texas Code of Criminal Procedure art. 46B.151, to determine whether there is evidence to support a finding that your client is a person with mental illness or a person with mental retardation. If there is such evidence, the court must enter an order transferring your client to the appropriate court for civil commitment proceedings.[159] If the court does not detain your client or place your client in the care of a responsible person based upon such a determination, the court must release him/her.[160] You should know, however, that just because your client is mentally retarded does not mean necessarily that he/she will meet the requirements for civil commitment.

Many criminal court judges may be unaware that dismissed cases are handled differently from cases that have not been dismissed. You may be able to use this distinction to your client's advantage, depending on the court you are in and the seriousness of the alleged offense. For example, a judge who handles misdemeanors may have never conducted a civil commitment proceeding – and may not want to start now. If you can impress upon the judge that a dismissal of your client's case will transfer the responsibility of the civil commitment proceeding to another court, the judge might urge the prosecutor to dismiss the case.

Also, you should be aware that Texas Code of Criminal Procedure art. 46B.010 requires the court, on the motion of the prosecutor, to dismiss the charges against your client if your client is charged with a Class A or B misdemeanor, is committed, and is not tried before the second anniversary of the date on which the order of commitment was entered.

If your client is going to attend the incompetency trial, you should encourage him/her to behave appropriately in court. You will probably need to have a conversation with your client about what constitutes appropriate behavior.

COURT-ORDERED ADMINISTRATION OF MEDICATION

In *Sell v. United States*, 123 S. Ct. 2174 (2003), the United States Supreme Court held that the government may involuntarily administer anti-psychotic drugs to a criminal defendant solely to render him competent to stand trial, at least in those cases meeting the criteria set out by the court. In deciding whether the involuntary medication is appropriate, the court must balance the following factors: (1) whether there is a substantial state interest in having a criminal trial, taking into account any civil confinement for the mental condition; (2) whether the medication is substantially likely to render the defendant competent without offsetting side effects; (3) whether the medication is necessary or whether a less intrusive alternative procedure would produce substantially the same result; and (4) whether the drugs are medically appropriate.

The 2003 Texas revised competency statute included a court-ordered medication provision.[161] However, the statute was enacted prior to the *Sell* decision, and *Sell* likely placed some limits on the employment of the new statute – particularly if the defendant is not dangerous to self or others. Accordingly, in 2005, the legislature amended art. 46B.086 and Texas Health & Safety Code section 574.106 to comply with *Sell* and due process requirements for court-ordered administration of medication. For a flowchart of art. 46B.086 and § 574.106 as they pertain to persons found incompetent to stand trial and medication hearings, see the Appendix included on the CD in this handbook.

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[159] *Id.* art. 46B.151(b).

[160] *Id.* art. 46B.151(d).

[161] *Id.* art. 46B.086.

OTHER AMENDMENTS

There are several other minor amendments to the statute, aside from those mentioned above. For example, the new law allows competency trials to take place via electronic broadcast where the defendant or his/her attorney and the attorney representing the State give written consent. You should familiarize yourself with these amendments if you intend to pursue a competence evaluation and hearing for your client.

SECTION 9

THE INSANITY DEFENSE

While the name of this defense implies that it applies only to persons with mental illness, it may also be used in defending clients with mental retardation. The roots of the defense predate the time when there was an understanding of the distinctions between mental illness and mental retardation.[162] Hence, the misnomer.

Article 46.03, Code of Criminal Procedure, was repealed by the 79th Legislature (SB 837). The new statute, Chapter 46C of the Code, contains the provisions relating to the Insanity Defense.

THE BASICS

A plea of not guilty by reason of insanity (NGRI) is an affirmative defense to prosecution in Texas. Insanity under Texas law means that at the time of the conduct charged and as a result of **severe mental disease or defect** (which is broad enough to encompass mental retardation), the defendant did not know that his/her conduct was wrong. To return an NGRI verdict, a jury must find that:

- the prosecution established beyond a reasonable doubt that the defendant committed the alleged act; and
- the defendant established, by a preponderance of the evidence, that he/she was insane at the time of the alleged conduct.

Neither you, the court, nor the prosecutor can inform any juror or prospective juror of the consequences to your client, described below, if a verdict of not guilty by reason of insanity is returned.

You should be very cautious in pursuing the insanity defense. Many potential jurors believe that the defense of insanity is simply an excuse or trick used by defense attorneys to get their clients "off the hook." You should also know that Texas' test for insanity is narrow compared with that of many jurisdictions; it does not include your client's ability to conform his/her conduct to the requirements of the law. If you decide to proceed with an insanity defense, you should make sure that your mental retardation expert understands this.

You should also consider the difficulty of convincing the jury that your client was insane for purposes of NGRI, but then having to convince the same jury that the public need not fear the defendant during the punishment phase of the trial if the NGRI defense is not successful.

START BUILDING A CASE EARLY

If you are contemplating an insanity defense, find a reputable mental retardation expert as quickly as you can and have that individual immediately interview your client. Have the interview videotaped if you can.

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[162] *See* W. Lawrence Fitch, *Mental Retardation and Criminal Responsibility*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 121, 121-23 (Richard W. Conley et al. eds., 1992).

If you can show that insanity will be a significant factor in the case, your client is entitled to obtain expert assistance in preparation of the defense.[163] You should file an *ex parte* application to the trial court for this expert assistance.[164] You can consult with this expert after he/she has evaluated your client and then make a decision about whether to go forward with the insanity defense. If you and your client decide not to do so, the prosecutor will know about the evaluation or the expert's findings. If you decide to go forward with the insanity defense, you should know that the court can order you to disclose the names of all your witnesses, including your mental health expert, before trial.[165] If you are pursuing the insanity defense, you also should know that the court may require your client to submit to another mental health/mental retardation evaluation, the results of which will be filed with the court and made available to both you and the prosecutor.[166] The amended code now includes a list of minimum qualifications for court-appointed experts.[167] The same expert may also be appointed by the court to examine the defendant for competency to stand trial.[168] If the expert determines the defendant is not competent to proceed, he/she may not examine the defendant for purposes of determining sanity and may not file a report regarding defendant's sanity.[169]

DISPELLING THE MYTH

There is a popular myth that a person who is found not guilty by reason of insanity just walks away. It is true that, like a simple not guilty verdict, an NGRI verdict is considered a full acquittal of all charges. However, unlike a simple not guilty verdict, the court conducts a hearing after an NGRI verdict to determine, first, whether your client's conduct was "dangerous" and, if not, whether there is evidence that the accused has a mental illness or mental retardation. A person's conduct is "dangerous" if it caused serious bodily injury, placed another in imminent danger of serious bodily injury, or consisted of a threat of serious bodily injury through use of a deadly weapon.[170]

- If your client's conduct was not dangerous, but there is evidence of present mental illness/mental retardation, then the criminal court must transfer the case to the appropriate civil court for civil commitment proceedings.[171]

- If your client's conduct was not dangerous, and there is no evidence of present mental illness/mental retardation, then your client must be discharged.[172]

- If your client's conduct was dangerous, the criminal court retains jurisdiction and must order your client committed to the maximum security unit within the Texas Department of State Health Services.[173] The criminal court must conduct a commitment hearing pursuant to the Mental Health Code within 30 days of the acquittal. The court retains jurisdiction for further inpatient treatment or residential care, or outpatient treatment if it can be safely provided, until: 1) the maximum sentence is reached; or 2) the acquitted person establishes that he/she either no longer has a severe mental illness or mental retardation or is not likely to cause injury to another as a result of severe mental illness or mental retardation.[174] The court must review orders for treatment annually, and retains the authority to modify or revoke an order for outpatient care.[175] It can lose jurisdiction if your client is found later to be no longer dangerous, unless: 1) the non-dangerous status is contingent on continued medication; 2) your client is likely to cause

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163 DeFreece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 905 (1993).

164 Williams v. State, 958 S.W.2d 186, 192 (Tex. Crim. App. 1997).

165 Tex. Code Crim. Proc. Ann. art. 39.14(b).

166 *Id.* art. 46C.105(a).

167 *Id.* art. 46C.102.

168 *Id.* art. 46C.103.

169 *Id.*

170 *Id.* art. 46C.157.

171 *Id.* art. 46C.201

172 *Id.*

173 *Id.* art. 46C.251.

174 *Id.* art. 46C.256 et seq.

175 *Id.*

harm without the medication; and 3) he/she is likely to fail to comply with the medication order.[176] Your client's term of commitment cannot exceed the maximum term for the crime for which he/she was tried.[177]

KNOWING THE LAW WILL GIVE YOU A BIG ADVANTAGE

Unfortunately, the myth surrounding the NGRI verdict is held not just by the public at large, but by many judges, defense lawyers, and prosecutors. You will have a big advantage if you know the law. For example, if you try your client's case to the judge, the judge might be reluctant to find your client not guilty by reason of insanity if he/she is operating under the myth that your client will automatically go free upon a NGRI verdict – especially if your client is charged with a violent crime. The judge may feel that a guilty verdict, coupled with probation, will allow your client to get treatment, but will also allow the court to retain some degree of control over your client. By advising the judge that the court can likely both reach a verdict of not guilty by reason of insanity and maintain jurisdiction over your client, you can go a long way toward giving your client a zealous defense.

Knowing the law will also help you and your client decide whether the case should be tried before a judge or a jury. You may want to consider trying your case to the judge instead of a jury because you cannot advise the jury, or jury panel, of the consequences to your client if a verdict of not guilty by reason of insanity is returned. It is highly likely that the jury will be operating under the myth that your client will simply go free if a NGRI verdict is returned and feel some pressure to return a guilty verdict.

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[176] *Id.*

[177] *Id.*

Notes

SECTION 10

USE OF EXPERT WITNESSES, MITIGATION, AND SENTENCING STRATEGIES

EXPERT MENTAL RETARDATION WITNESSES

How They Can Help You

Information obtained from mental retardation experts can help you make informed decisions about:

- the manner in which you relate to your client;
- your client's competence to proceed;
- a determination of mental retardation;
- plea negotiations;
- jury selection;
- whether or not your client should testify;
- habilitation or other services for your client while the case is pending;
- what types of assessments or evaluations are needed; and
- selection of witnesses for the trial, including the penalty phase.

How Can You Get Them?

The incremental approach set out below may not always be practical. Some judges may determine that a misdemeanor case does not warrant the use of an expert witness or that one expert is all you get. This may even be true in some felony cases. Consult with attorneys in your community about how to have experts appointed in your case and whether there are some standard form motions that you can use. Also, remember that the Fair Defense Act provides for the reimbursement of reasonable and necessary expenses, including mental health/mental retardation experts. Be sure to make a record if the court will not provide reimbursement for the experts or resources you need.

The Incremental Approach – Start With a Mitigation Specialist

When deciding whom to retain as your mental retardation expert(s), you may want to consider first consulting a mitigation specialist, who will often be a licensed social worker. The mitigation specialist will:

- conduct a thorough evaluation;
- interview your client;
- conduct collateral interviews;
- gather your client's records; and
- determine what cultural, environmental, and genetic circumstances might have factored into your client's case.

Mitigation specialists are superior in many cases to traditional law enforcement-type investigators in developing mitigating evidence. Mitigation specialists have training in the human sciences and an appreciation for the variety of influences that may have affected your client's development and behavior. At any rate, the person conducting the investigation should have the training, knowledge, and skills to detect the presence of factors such as:

- mental retardation;
- mental illness;
- neurological impairments;
- other cognitive disabilities;
- physical, sexual, or psychological abuse;
- substance abuse; and
- other influences on the development of your client's personality and behavior.

Mitigation investigations need to be thorough and extensive. **If you are defending someone who could receive the death penalty, his/her life quite literally may depend upon your ability to show that he/she is a person with mental retardation.** The U.S. Supreme Court has held that failure to investigate such matters in a capital case can constitute ineffective assistance of counsel.[178] On the other hand, if your client is charged with a misdemeanor, it may be enough simply to use a social worker mitigation expert, or another qualified investigator, as your only expert in the case.

Keep in mind that you only have to prove the existence of your client's mental retardation, not its cause.[179] The cause of your client's disability may not be discoverable.[180]

Using a Non-testifying Expert as a Consultant

The mitigation expert may then confer with a consulting psychologist (or other mental retardation expert), who will review the records and determine what kinds of expert witnesses you may need and what role you want them to play. If you suspect dual diagnosis, or physical or sexual abuse (children with any disability are 3.4 times more likely to be abused than children without disabilities)[181], you may want someone specialized in these areas. The consulting psychologist will refer only specific aspects of your client's case to the testifying experts, who will interview your client in preparation for courtroom testimony.

Expert for IQ Tests

Most psychiatrists are not trained in the proper method of administering IQ tests. You should not assume that a psychiatrist can help you with this phase of an evaluation. A psychologist, social worker, or diagnostician may be better qualified to administer IQ tests.

You may consider having a non-testifying expert other than the consulting psychologist administer the test. This can be helpful because, if you like the result of the test, this person will most likely become a testifying expert. A consultant may be exposed to information during the course of his/her evaluation that you would not want discussed at trial. Having a testifying expert administer the test can backfire for similar reasons – if the results are not favorable, you do not want them discussed during trial.

Focus on Your Testifying Experts

You need to pay attention to the testifying expert's qualifications and select someone who will be credible and persuasive to the court and jury. It is important that testifying experts be forensically trained so that they will have a better understanding of the legal questions that need to be answered. You should thoroughly investigate the expert's background and prior testi-

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[178] Wiggins v. Smith, 123 S. Ct. 2527 (2003); Rompilla v. Beard, 125 S. Ct. 2456 (2005).

[179] Keyes et al., *supra* note 85, at 534.

[180] *Id.*

[181] Davis, *supra* note 33, at 1.

mony. It is good to have someone who has testified before and knows how to handle cross-examination. If your client's primary language is not English, you may want to consider hiring an expert who is fluent in your client's primary language, if possible. Testifying expert witnesses fall into several categories, and you should pick one who can best meet your needs:

- For testimony related to diagnosis of mental retardation, you should obtain a psychologist or someone who has extensive experience in working with individuals with mental retardation. This may be a psychologist, social worker, or a person who has a degree in education and has focused on special education.

- For testimony related to mental illness, or administering and interpreting tests related to mental illness, you should retain a psychologist.

- For testimony related to a brain injury or problems with memory, language, or orientation functions (that are not related to mental retardation), you may want to obtain the services of a neuropsychiatrist or neuropsychologist.

You also may want to use a pharmacologist, or specialists in addiction medicine or in sexual trauma, if appropriate. You may want to consult a medical doctor if your client has Fetal Alcohol Syndrome or been exposed to other toxins, or a neurologist if your client has brain damage.

Local mental retardation professionals may not have the expertise you need. Also, some experts may feel beholden to local authorities for future income. If any circumstances cause you to question the objectivity of the local professional, you should seek expert assistance elsewhere. This incremental approach to developing mitigation evidence may be more cost efficient, more likely to produce information that will advance your theory of the case, and less likely to generate information that will be of no use or, worse, will harm your client. Ideally, the same professional should not fill more than one role (evaluator, non-testifying consultant, or treatment/service provider).[182]

MITIGATION

Mitigation is not a defense to prosecution. It is not an excuse for committing a crime. It is not a reason the client should "get away with it." Instead, it is evidence of a disability or condition that invites compassion. Mitigation is the explanation of which influences converged in the years, days, hours, minutes, and seconds leading up to the crime; how information is processed by a person with mental retardation; and the behavior that resulted. Well-presented mitigating evidence can help to describe the "window" through which the client views his/her world. Each of us views the world through a different window, the size and clarity of which is often determined by factors over which we have no control.

Human beings can react punitively toward a person whom they regard as defective, foreign, deviant, or fundamentally different from themselves. A client's behavior or symptoms may be misunderstood by jurors or engender such fear that this behavior becomes an excuse to punish the defendant rather than a basis for mercy. Good mental retardation experts can provide testimony at the punishment phase to help the jury understand who your client is, how he/she experiences the world, and why your client behaves as he/she does. They help you humanize your client so that the judge and jury see him/her as a person who deserves empathy and compassion. Your ability to help the jurors reach an empathetic understanding of the circumstances that may have led to your client's behavior can have a profound impact on the sentence. There are few limitations on the evidence that can be offered in mitigation of a crime.[183] However, while a "nexus" is no longer required, mitigation evidence is most persuasive when you are able to show the relationship between the client's disability and the conduct. It is not the "What?" - it is the "So what?" You should explain to the jury not just that your client has mental retardation, but how this affected his or her perspective and behavior. If you cannot answer the "So what" question that each juror will be asking, the evidence of mental retardation will look like an excuse, not an explanation.

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[182] American Bar Association, Criminal Justice Mental Health Standards § 7-1.1 (1989).

[183] Tennard v. Dretke, 124 S. Ct. 2562 (2004); *see also* Penry v. State, No. AP-74,445 (October 5, 2005) (in capital case, if jury finds defendant does not have mental retardation, evidence of mental impairment falling short of mental retardation shold be reconsidered when determining whether any other mitigating circumstances exist).

Make sure your expert anticipates some of the common arguments prosecutors make against finding mental retardation.

There are several arguments that prosecutors often raise:

- The defendant is malingering, and he/she "faked" a poor score on an IQ test or tests of adaptive behavior. However, because any definition of mental retardation requires a finding that onset occurred during the developmental period, it is almost impossible to "fake" mental retardation.[184]

- The defendant doesn't have any stereotypical behavioral or physical characteristics associated with individuals who have mental retardation, therefore he/she isn't a person with mental retardation.

- The defendant's behavior is caused by a conduct disorder (anti-social personality disorder is often raised) or substance abuse, not mental retardation.

- The crime was too complex for a person with mental retardation to commit. Most mental retardation experts will say that, unless a crime involves an unusual amount of mental acuity (such as an accounting fraud scheme), the manner in which the crime was committed has little probative value.

- The defendant's disability is not very severe.[185]

Prosecutors also commonly rely on outdated or unreliable tests, and use experts who are not trained in mental retardation.[186]

SENTENCING STRATEGIES

When thinking about sentencing strategies, there are a number of things you should consider and weigh.

Mental Retardation Information as Mitigation Can Sometimes Hurt You

You need to consider carefully the decision to raise your client's mental retardation to the jury. Some jurors do not understand mental retardation and may believe that "mild" mental retardation is not a substantial disability. Some jurors may not want your client to be in the community on probation, because they believe the myth that persons with mental retardation are more likely to commit crimes. On the other hand, you must remember that failing to raise the issue of your client's mental retardation may result either in a probated sentence that your client cannot comply with or in a period of incarceration that will further damage your client. As discussed previously, individuals with mental retardation are often victimized in prison.

If you decide to raise your client's mental retardation at the punishment phase, be sure you have sufficient evidence and expert help. It is not enough to say that your client is mentally retarded. You need to explain how your client's mental retardation affects his/her decision-making and other adaptive skills. Otherwise, jurors may not think that your client's mental retardation is a significant mitigating factor. Remember, the scope of the jury's inquiry at the punishment phase is much broader than at the guilt/innocence phase. Different types of experts and resources may be helpful. Simply interviewing your client or submitting him/her for a single evaluation almost always will result in an incomplete picture.

You may be better off advising your client to waive a jury and taking the mental retardation evidence directly before the judge. The decision to go to the jury or the judge for sentencing depends on several factors, including the charges

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[184] EDWARDS, *supra* note 80, at 135.

[185] *Id.* at 136-37.

[186] *Id.*

involved, the judge, and the prosecutor's willingness to work with you. If your client decides to go to the judge for sentencing and you are seeking probation, you should have a plan for the judge to consider – a stable place for your client to live, a doctor to go to, and programs to provide supervision and help your client stay out of trouble. Be an advocate for your client. Bring in witnesses who know your client, such as his/her caseworker and family members. If your client is on probation and the state has filed a motion to revoke or a motion to adjudicate guilt, you should call the above-mentioned witnesses to convince the judge not to revoke your client's probation or enter a conviction on the record against your client and send him/her to jail. You can also have the probation officer handling your client's case testify about whether your client is on a specialized caseload.

Ensuring an Accurate and Complete Evaluation

If you are going to bring your client's mental retardation before the judge or jury for sentencing purposes, make sure that the experts you use do more than conduct an evaluation to determine mental retardation and offer a diagnosis. You should work with the experts to ensure that they conduct a wide-ranging inquiry into your client's history and its implications. For example, there may be a family history of mental retardation or a generational pattern of violence and abuse in the home. It is important to interview outside sources, such as family members, former teachers, and physicians, as well as to request all available records. This may be vital to determining adaptive skills and onset before age 18. A comprehensive evaluation should also look for any evidence of dual diagnosis, and should therefore include:

- A thorough physical and neurological examination;
- A complete psychiatric and mental status examination if there is any indication of mental illness;
- Diagnostic studies, including personality assessment;
- Neuropsychological testing;
- Appropriate brain scans; and
- A blood test or other genetic studies.

In capital defense litigation, it is especially important to make sure your client has thorough and comprehensive mental examinations that evaluate each area of concern as indicated by the client's bio-psycho-social history.

Recognizing Co-Occuring Substance Abuse Problems

Many persons with mental retardation are addicted to drugs and/or alcohol. A client with this problem may have trouble staying clean and/or being successful on probation. Substance abuse is a chronic, relapsing illness that requires treatment. If your client has mental retardation and a substance abuse problem, you should look into the availability of dual diagnosis treatment programs in your community. The Substance Abuse Felony Punishment (SAFP) facilities in Texas treat offenders with drug and/or alcohol addictions, but generally have long waiting lists. Some clients would rather accept a plea bargain agreement for jail time than wait to get into substance abuse or dual diagnosis treatment. Your client makes the ultimate decision about whether to get treatment, but you should talk candidly with your client about his/her options. Talk to your client about doing what is best for him/her over the long term rather than the short term. Again, ask a facilitator to help you with this conversation.

Factoring Mental Retardation Into Probation Decisions

Your client may need special attention if he/she is seeking probation. Remember that your client may not be able to hold down full-time employment, pay probation fees, keep track of appointments, navigate public transportation, perform community service, or complete schooling the way that other clients can. Special arrangements may need to be made and extra help provided if these tasks are part of the successful completion of your client's sentence. If your client receives probation, you should work to assure that your client gets probation with habilitation or has conditions placed on his/her probation that will help him/her successfully complete the probation. If your client is facing revocation of his/her probation, you should educate the court about your client's mental retardation and the court's options for conditions of probation.

The judge has the power to condition probation on habilitation. The Texas Code of Criminal Procedure specifically authorizes judges to require certain offenders with mental retardation to submit to outpatient or inpatient "mental retardation treatment" as a condition of community supervision stemming from probated or suspended sentences.[187] In general, before a court may impose a treatment condition on your client's community supervision, your client must be evaluated and the court must determine that either: (a) your client's "mental impairment" is chronic; or (b) his/her ability to function independently will continue to deteriorate without proper treatment.[188] The statute also requires the court to take steps to assure that appropriate outpatient or inpatient mental retardation services are available either through the local mental health/mental retardation authority or another provider.[189]

The judge can amend the conditions of probation. For example, if the judge mandates that a person be treated in an inpatient setting, but his/her condition improves greatly, the court can modify the order to authorize outpatient treatment. The court has a great deal of flexibility to tailor appropriate conditions of treatment for offenders with mental retardation. You should advocate for the best treatment/habilitation for your client.

Specialized probation caseloads are an important option. If your local probation department has specialized caseloads for adults with mental illness or mental retardation, you should ask that your client be placed on such a caseload. The officers who work in these special units usually have received extra training about mental retardation and mental illness and monitor a smaller number of clients. Bring your client's mental retardation to the attention of both the judge and the probation department. Tell the probation department that your client has special needs and seek accommodations for your client through the probation department. If you think that your client may deteriorate soon after being placed on probation, ask the probation department if it will authorize an evaluation. Sometimes this can be done before the plea, in which case you can use the results of this evaluation to further negotiate probation terms for your client.

Be especially careful if your client is considering deferred adjudication probation. The Texas Code of Criminal Procedure permits a court to condition deferred adjudication probation on whether your client obtains "mental retardation treatment."[190] However, if your client does not successfully complete the conditions of his/her deferred adjudication probation, the judge will convict him/her, and the judge will have the full range of punishment under which to impose a sentence. On the other hand, if your client successfully completes his/her deferred adjudication probation, he/she will avoid a criminal conviction and will still be eligible for certain housing and job opportunities that are closed to people with felony convictions.

Your Client May Not Want Treatment/Habilitation

You cannot force your client to get habilitation if he/she does not want it, even though you know it may be in his/her long-term interest. You may be limited in what you can do for your client. If your client's charges are minor and he/she has a supportive family, has a safe place to live, is usually relatively stable, and is competent, it may be better for your client to plead to jail time if you can negotiate a good deal rather than pursuing the insanity defense (if applicable), or accepting a probated sentence. However, you have an obligation to set out all the pros and cons of any plea bargain agreement for your client. If your client is considering straight jail time, you should tell him/her about the possible benefits of taking probation with conditions that require habilitation. Discuss his/her chances of staying out of trouble if he/she does not get habilitation, and explain what penalties might await your client if he/she commits another offense.

GO THE EXTRA MILE FOR YOUR CLIENT

Persons with mental retardation who are not linked with appropriate services at sentencing are likely to commit another

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187 Tex. Code Crim. Proc. Ann. art. 42.12 § 11(d).

188 *Id.*

189 *Id.*

190 *Id.*

offense,[191] perhaps with more serious consequences and penalties attached to the second or third arrest. Try to set up your client with ongoing habilitation services so that he/she will stay out of trouble. If your client is being released on probation, stable housing is especially important. Talk with the probation department about the resources it uses. Call the local chapter of The Arc or the local MHMR Center for recommendations about services. Every local MHMR Center in Texas is required to designate an individual to respond to requests for information from courts, judges, and attorneys.

[191] Petersilia, *supra* note 78.

Notes

SECTION 11

ATKINS AND PROGENY: A SHORT SUMMARY AND A LIST OF RESOURCES

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of persons with mental retardation constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Writing for the majority, Justice Stevens determined that executing defendants with mental retardation did not further the two basic rationales for the death penalty – retribution and deterrence.[192] His reasoning was based on the assumption that the death penalty should be reserved for the most morally culpable in our society.[193] Because persons with mental retardation suffer from disabilities in reasoning, judgment, and control of their impulses, the Supreme Court held that they do not act with the level of moral culpability that characterizes the "most serious adult criminal conduct" and that their "impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants."[194] Stevens wrote, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded inmate surely does not merit that form of retribution."[195] The Supreme Court also recognized the increased risk of false conviction faced by defendants with mental retardation.[196]

Though the Supreme Court's holding extends to all defendants who "fall within the range of mentally retarded offenders about whom there is a national consensus," it left the task of fashioning a definition of mental retardation to the states.[197] However, states cannot adopt a definition that encompasses a smaller group of defendants than that set out in *Atkins*.[198]

ATKINS IN TEXAS

The Texas legislature has not yet passed a statute implementing *Atkins*. The Texas Court of Criminal Appeals (CCA) has considered *Atkins* in several opinions to date. Most of these cases deny relief, finding that the defendant has not established that he/she is a person with mental retardation.

In *Ex Parte Briseno*, the first *Atkins* case considered by the CCA, the Court delineated the judicial standards for courts considering such claims, and found that the defendant bears the burden of proving mental retardation by a preponderance of the evidence.[199]

However, the definition of mental retardation that the Court set out in its opinion raises some questions. First, the Court explicitly adopted both the 1992 AAMR and Texas Health and Safety Code definitions. Next, the CCA listed a series of "other evidentiary factors" that can be used to determine mental retardation. These additional factors are:

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192 Atkins, 536 U.S. at 319.

193 *Id.*

194 *Id.* at 306-07.

195 *Id.* at 319.

196 *Id.* at 320-21

197 *Id.* at 317.

198 James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* 5, in materials from The Center for American and International Law's presentation of Capital Trial Advocacy and Mental Retardation – *Atkins* and Beyond, Austin, Texas (October 28, 2002).

199 *Ex Parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

- Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?

- Does his conduct show leadership or does it show that he is lead around by others?

- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

- Can the person hide facts or lie effectively in his own or others' interests?

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[200]

The Court did not discuss the source of these factors, many of which appear to contradict AAMR principles.[201] For example, several of these factors focus on what the defendant can do, rather than on his/her limitations. By contrast, the AAMR definition focuses on "substantial limitations."[202] The above list also includes factors which rely on the ability of a person to commit a crime as evidence weighing against a diagnosis of mental retardation, without providing any support for this reasoning.[203] Yet, the AAMR explains that "problem behavior" is "conceptually different" from adaptive behavior, and that there is a low correlation between the two.[204]

The Court then referred to the DSM-IV and 1983 American Association on Mental Deficiency (the precursor to the AAMR) definitions of mental retardation in its footnote discussion of IQ scores:

> "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." DSM-IV at 39; see also American Association on Mental Deficiency (AAMD), Classification in Mental Retardation 1 (Grossman ed. 1983). Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded. AAMD at 23. Furthermore, IQ tests differ in content and accuracy. *Id.* at 56-57. *But see State v. Lott*, 779 N.E.2d at 1015 (holding that "there is a rebuttable presumption that a defendant is not mentally retarded if his/her IQ is above 70").[205]

The CCA does not explain why it chose to deviate from its use of the AAMR and Code definitions adopted earlier in the opinion. However, its discussion of IQ does not mention the Standard Error of Measurement (SEM), a concept embraced by both the AAMR and the DSM-IV.[206]

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[200] *Id.* at 19.

[201] A Texas federal district court recognized this problem in *Moore v. Dretke*, 2005 WL 1606437 (E.D. Tex. July 1, 2005). In *Moore*, the court specifically found that these factors are not part of the AAMR definition or the Texas Health and Safety Code. It went on to say that their use was discretionary, and refused to apply them.

[202] AAMR, *supra* note 7, at 1; *see also* BURR ET AL., *supra* note 8, at 9, 38.

[203] Stephen Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, *in* WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY CATEGORY (Harvey N. Switzky & Stephen Greenspan eds.) (forthcoming 2006) (manuscript at 11, on file with the author) ("we simply do not possess normative information. . . regarding whether someone with MR can fire a gun, drive a car, case out a crime scene, assert his will on victims, etc.").

[204] AAMR, *supra* note 7, at 79.

[205] Briseno, *supra* note 199, at 15 n.24.

[206] AAMR, *supra* note 7, at 57-59.

The Court's discussion of IQ scores (and lack of discussion of SEM) correlates with its finding concerning the defendant's IQ:

> At the *Atkins* evidentiary hearing, applicant's counsel stated that there was not much dispute about applicant's IQ level. He had been tested in June 2002, when he was 45, by applicant's expert and obtained a full-scale IQ score of 72. He was tested by the State's expert approximately one year later and obtained a full-scale IQ score of 74. According to the DSM-IV, "significantly subaverage intellectual functioning" is defined as an IQ of about 70 or below…There is ample evidence in the record that supports [the trial court's factual finding that defendant is not mentally retarded] and thus we adopt the trial court's finding.[207]

Despite the fact that, under the AAMR and Code definitions, the defendant's scores would have placed him within the range of eligibility for an assessment of mental retardation, the Court refers to his scores as though 70 is a "cutoff," with anyone scoring above 70 ineligible for consideration.

The Court went on to hold that the State's evidence regarding the defendant's adaptive skills supported a finding of antisocial personality disorder rather than mental retardation.[208] In discussing its assessment of the evidence concerning adaptive behavior skills, the Court said:

> As this case amply demonstrates, determining what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used. Here, for example, the primary defense expert's background is in the treatment of mental illness and mental retardation. His overall position was that one had to look for the person's adaptive deficits and limitations, putting aside his positive adaptive skills. His focus is upon socially acceptable and successful skills. The State's expert's background is in statistical methodology and forensic diagnosis. His overall position was that one must look to the person's positive adaptive abilities and coping skills. His focus is upon whether the person has rational responses to external situations, not necessarily whether those responses are lawful or socially appropriate. The defense expert sees the glass half-empty, the State's expert sees the glass half-full. Both experts relied upon the same evidence and objective data to support their conclusions, yet the defense expert diagnosed mental retardation while the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder.[209]

Again, this discussion, along with the Court's readiness to accept the testimony of the State's expert who saw the glass "half-full," does not fully implement the AAMR and Code definitions the court adopted early in the opinion. The AAMR definition refers to "significant limitations." The Code refers to "significantly subaverage general intellectual functioning" and "deficits" in adaptive behavior. For both, diagnosis is contingent on the analysis of what adaptive skills and intellectual functioning the defendant finds difficult, rather than his "positive adaptive abilities."[210] The AAMR explicitly recognizes that individuals with mental retardation, like everyone else, will have both limitations and strengths – but emphasizes that it is their limitations that make them eligible for diagnosis of mental retardation.[211]

Early in the opinion, the Court gives us what is probably the best indicator of what it expects to see in a defendant with mental retardation. The Court says, "Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt [from the death penalty]."[212] It then goes on to question whether there would be any consensus among Texans to apply an exemption to those who fall short of the obvious limitations characterized by Steinbeck's fictitious character.[213]

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[207] Briseno, *supra* note 199, at 35.

[208] *Id.* at 45-49.

[209] *Id.* at 33-34.

[210] AAMR, *supra* note 7, at 1.

[211] *Id.* at 8.

[212] Briseno, *supra* note 199, at 11.

[213] *Id.* at 11-12.

By referring to a stereotype of persons with mental retardation, the Court indicates a resistance to applying *Atkins* in cases in which the defendant does not show obvious signs of mental retardation. This analysis is borne out by subsequent decisions in which *Atkins* was raised,[214] and is significant considering that most individuals with mental retardation on death row fall at the upper end of the spectrum of functioning.[215]

PUTTING *ATKINS* INTO PRACTICE

This handbook is not an exhaustive resource for attorneys representing clients with mental retardation in capital cases – it is merely a starting point. Space limitations keep us from fully analyzing the myriad issues that surround the complexity of Atkins and its implications for practice in Texas.

TOP 10 LIST: WHAT TO DO WHEN REPRESENTING A CLIENT WITH MENTAL RETARDATION IN A DEATH PENALTY CASE

1. Always begin by assuming that your client has mental retardation. Defendants with mental retardation who are convicted of capital crimes are almost always in the highest functioning group of individuals with mental retardation (what would formerly have been characterized as "mild" mental retardation).[216] Identifying defendants who are in this high-functioning group of persons with mental retardation is very difficult for someone who is not trained to do so. This means that if you are representing a client who is eligible for the death penalty, you should always begin by assuming that he/she is a person with mental retardation.[217]

2. Become conversant with definitions and diagnosis. Because of shortfalls in the public's understanding of the definition and classification of persons with mental retardation, it is imperative that you become conversant with the different definitions of mental retardation. You must have a good understanding of both IQ testing and identification of adaptive skills. Understand the typical errors that test givers make in scoring tests. Be familiar with the SEM, the "practice effect," and the "Flynn effect" discussed in Section 12.

3. Find experts who can explain mental retardation to the court and jury. The concepts surrounding definitions of mental retardation and assessments of IQ and adaptive skills are abstract and difficult. Therefore, you must have someone who can explain clearly to the jury and the court what the proper definition is, and the best method for assessing whether a person has mental retardation. It is important to find an expert who can explain to the court and jury what the world looks like from your client's perspective.

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214 *See Ex Parte* Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004) (trial court's finding that defendant was mentally retarded upheld where State did not contest the issue, trial court had found, during earlier proceedings that defendant was mentally retarded, and the Court of Criminal Appeals found defendant mentally retarded in a decision predating *Atkins*), *but see id.* (Hervey, J., dissenting) (defendant should not have been found mentally retarded without adversarial live hearing, despite State's concession, where "overwhelming evidence" meets few, if any, *Briseno* factors, and "applicant is nothing like Steinbeck's childlike Lennie."); Hall v. State, 160 S.W.3d 24 (Tex. Crim. App. 2004) (court upheld trial court's finding that defendant was not mentally retarded, noting that evidence included a videotaped interview in which defendant's speech was "smooth and fluid" and his thought processes "appeared to be coherent and logical"); *Ex Parte* Simpson, 136 S.W.3d 660 (Tex. Crim. App. 2004) (first holding that a live evidentiary hearing is not necessary where the habeas applicant fully litigated the issue of mental retardation during the punishment phase of the trial, then finding that while there was evidence to support defendant's claim that he was mentally retarded, there was also ample evidence supporting the trial court's finding that he was not); Howard v. State, 153 S.W.3d 382 (Tex. Crim. App. 2004) (defendant's claim of mental retardation rejected, though experts for State and defendant both testified his intellectual functioning and adaptive behavior were impaired to some degree, where testimony was not sufficiently developed to establish defendant was mentally retarded); *Ex Parte* Rodriguez, 164 S.W.3d 400 (Tex. Crim. App. 2005) (defendant's petition denied where he failed to show by a preponderance of the evidence adaptive behavior deficits sufficient to consider him mentally retarded "or place him in the category of persons for whom a national consensus against execution exists"); *see also id.* at 406 (Cochran, J., concurring) ("As school children, we were taught that King Solomon weighed all of the evidence before him and made a reasoned decision; Nero divined merit on a whim and just pointed his thumb up or down. I fear that, under *Atkins* and the subjective legal definition of the 'adaptive deficits' prong of mental retardation, we are moving farther from King Solomon and closer to Nero.").

215 Greenspan & Switzky, *supra* note 203, at ms. 2 ("Most Atkins applicants fall at the upper end of the MR severity continuum, and present a mixed competence profile.")

216 BURR ET AL., *supra* note 8, at 18.

217 *Id.*

218 Ellis, *supra* note 198, at 12.

4. Consider having a "set-up" expert explain the basics to the jury before your other experts testify. A "set-up" witness explains what mental retardation is and is not and debunks typical misconceptions. Some practitioners find that the jury is more receptive to the experts who specifically testify about your client if the stage has been set with some general information about mental retardation.

5. If you are doing a retrospective analysis of adaptive behavior, find lay witnesses who can discuss the defendant's adaptive behavior during the developmental period. Do not give up if it becomes necessary to do a retrospective assessment of adaptive behavior for a defendant who was not diagnosed during the developmental period. Interview several people and call the best of the interviewees to testify.

6. Try to have the court make a pre-trial determination. Most experts agree that a pre-trial determination of mental retardation is preferable.[218] This will not only save the State the additional cost of a capital trial, it will also prevent having the jury hear the possibly prejudicial details of the crime. Some jurors who hear such details may be reluctant to make a finding of mental retardation, even when the evidence supports such a finding.

A sample motion for a pre-trial finding of mental retardation is included in Appendix A on the CD included in this handbook.

7. Focus the court and jury on what your client can't do, not on what he/she can do. Be prepared to respond to arguments typically made by the State relating to what the defendant can do – that he can clean his cell and function reasonably well in prison, or that his ability to plan the crime shows that he is not mentally retarded.

8. Do not take at face value things that your client purportedly wrote or reads. Your client may have had considerable help or may have copied things from other documents. In an effort to mask their disability, some individuals with mental retardation may create a "dictionary" to help them remember the spelling and meaning of words. They may also check books out from the prison library, or "read" magazines. Often, you will find that they are not able to read the text – they may simply be looking at the pictures. Have your client write something without external help. You may find that this differs dramatically from the prison "writings" used by the State to dispute your claim that your client has mental retardation.

9. If your client displays behavior during trial or after commission of the crime that the jury may misunderstand, make sure you explain it. Your expert may need to explain your client's behavior after commission of the crime or during trial in order to prevent the jury from mistakenly assuming your client lacks remorse.

10. Talk to other attorneys who have tried capital cases involving clients with mental retardation. They are often the best source of information for local practices, attitudes of judges and prosecutors, and good expert witnesses.

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[219] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 46 (4th ed., text revision 2000).

ADDITIONAL RESOURCES

Materials in Print

The American Bar Association (various publications relating to the Supreme Court's decision in *Atkins*, available on its website, www.abanet.org).

Richard Burr et al., *A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation* (2004).

The Center for American and International Law, materials from presentation entitled "Capital Trial Advocacy and Mental Retardation – *Atkins* and Beyond" (October 28, 2002).

Victor R. Scarano & Bryan A. Liang, *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 Hous. J. Health L. & Pol'y 285 (2004).

Advocacy Groups/Experts

The American Bar Association
www.abanet.org

Capital Defense Network
www.capdefnet.org

The Center for American and International Law
http://www.cailaw.org/ils.html
(for CLEs focused on Capital Trial Advocacy)

Human Rights Watch
www.hrw.org

The International Justice Project
www.internationaljusticeproject.org

The Justice Project
www.thejusticeproject.org

Southern Center for Human Rights
www.schr.org

StandDown Texas
www.standdown.org

Texas Defender Service
www.texasdefender.org
(TDS includes sample motions on its website).

Texas Moratorium Network
http://texasmoratorium.org/

U.T. Law Library Death Penalty Page
http://tarlton.law.utexas.edu/vlibrary/outlines/deathpenprint.html

SECTION 12

CRITICAL INFORMATION ABOUT DEFINITIONS AND DIAGNOSIS

Understanding the definition of mental retardation is important to your client's case. This is particularly true if your client could receive the death penalty. While you should have an expert witness explain the definition to the jury, you should also be conversant with the definitions. A good understanding of the definitions will guide your investigation and the strategy for your client's case.

AMERICAN PSYCHIATRIC ASSOCIATION

According to the DSM-IV-TR, the definition of mental retardation has three components:

1) Significantly sub-average intellectual functioning (IQ of approximately 70 or below on individually administered test);

2) Concurrent deficits or impairments in present adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

3) Onset before age 18.[219]

In addition, the DSM-IV-TR sets out the following diagnostic categories:

- Mild Mental Retardation – IQ level of 50-55 to approximately 70 – can usually achieve social and vocational skills adequate to minimum self-support, but may need guidance and assistance when under unusual social or economic stress.

- Moderate Mental Retardation – IQ level of 35-40 to 50-55 – may achieve self-maintenance in unskilled or semi-skilled work under sheltered conditions, but need supervision under mild social or economic stress.

- Severe Mental Retardation – IQ level of 20-25 to 35-40 – may contribute partially to self-maintenance under complete supervision and can develop self-protection skills to a minimal useful level in a controlled environment.

- Profound Mental Retardation – IQ below 20 or 25 – may have some motor and speech development and may develop some very limited self-care, but usually need nursing care.[220]

AMERICAN ASSOCATION ON MENTAL RETARDATION (AAMR)

The AAMR sets out a similar definition:

- Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.[221]

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[220] *Id.*

[221] AAMR, *supra* note 7, at 1.

[222] *Id.* at 73.

The AAMR defines "adaptive behavior" as the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.[222] It gives the following examples of conceptual, social, and practical skills:

- Conceptual Skills – language, reading and writing, money concepts, and self direction.
- Social Skills – interpersonal skills; responsibility; self-esteem; gullibility (likelihood of being tricked or manipulated); naïveté; ability to follow rules, obey laws, and avoid victimization
- Practical Skills –
  - Activities of daily living, including eating, transfer/mobility, toileting, dressing;
  - Instrumental activities of daily living – meal preparation, housekeeping, transportation, taking medication, money management, telephone use;
  - Occupational skills;
  - Maintains safe environments.[223]

Finally, the AAMR lists five assumptions that it finds essential to the application of its definition:

1) Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture. This means that the standards against which the individual's functioning must be measured are typical community-based environments, not environments that are isolated or segregated by ability. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work, and interact. The concept of age peers should also include people of the same cultural or linguistic background.

2) Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors. This means that, in order for assessment to be meaningful, it must take into account the individual's diversity and unique response factors. The individual's culture or ethnicity, including language spoken at home, nonverbal communications, and customs that might influence assessment results, must be considered in making a valid assessment.

3) Within an individual, limitations often coexist with strengths. Like all people, individuals with mental retardation often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

4) An important purpose of describing limitations is to develop a profile of needed supports. This means that merely analyzing someone's limitations is not enough, and that specifying limitations should be a team's first step in developing a description of the supports the individual needs in order to improve functioning. Labeling someone with the term mental retardation should lead to a benefit such as a profile of needed supports.

5) With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve. A lack of improvement in functioning can serve as a basis for reevaluating the profile of needed supports. In rare circumstances, however, even appropriate supports may merely maintain functioning or stop or limit regression. The important point is that the old stereotype that persons with mental retardation never improve is incorrect. Improvement in functioning should be expected from appropriate supports, except in rare cases.[224]

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[223] *Id.* at 42.

[224] *Id.* at 8.

CONSIDERING THE TWO DEFINITIONS

There are some subtle differences in the two definitions of mental retardation outlined above:

- The DSM-IV-TR requires "significantly sub-average IQ" and "concurrent deficits" in adaptive behavior, while the AAMR requires "significant limitations" in IQ and adaptive skills. In practice, this may be a distinction without a difference.

- The DSM-IV-TR requires deficits in two of the 11 adaptive skill areas, while the AAMR requires deficits in only one adaptive skill domain.

- The APA still uses the "mild, moderate, severe, profound" classifications, which the AAMR has abandoned.

- The AAMR includes the five assumptions that it considers "essential" to the application of its definition.

In practice, using either of these two definitions may produce the same results. However, it is important to understand the distinctions between the two and to acknowledge that different experts may use different definitions. Be sure to ask your evaluator which definition he/she uses so that you will have a clear understanding of the paradigm that is being applied to your client. There is, on some level, a difference in perspective between the two definitions. The APA's DSM-IV-TR attempts to provide diagnostic criteria to improve the reliability of diagnostic judgments of "mental disorders" so that clinicians can diagnose, communicate about, study, and treat people with these disorders.[225] The AAMR definition is that of a professional group whose principal focus is advancing a "fuller understanding of the condition of mental retardation" and creating a "support paradigm" which will allow individuals with mental retardation to lead fuller, more inclusive lives.

Some defense counsel also report having found the DSM-IV-TR definition easier to use when trying to persuade a jury that a client has mental retardation. These attorneys note that the DSM-IV-TR formulation only requires that you prove deficits in two areas of adaptive behavior. The AAMR definition is not as clear in its requirement of "substantial limitations" in adaptive behavior. It may be easier for a jury to identify limitations in adaptive behavior under the DSM-IV-TR definition. The jury may be convinced that the evidence is even stronger if you can show deficits in more than two areas. However, the same practitioners also note that the AAMR is clearer in its discussion of the SEM, and in showing that IQ scores above 70 do not necessarily foreclose a diagnosis of mental retardation.

DIAGNOSIS OF MENTAL RETARDATION

The three criteria used in determining whether someone has mental retardation were discussed in Section 1. However, you should be familiar with the different diagnostic instruments, the methods of evaluation, and the problems associated with each.

IQ Tests

Testing Expert

Assessing intellectual functioning requires specialized professional training.[226] Clinical psychologists, neuropsychologists, and certified diagnosticians are best trained to carry out IQ tests. IQ tests are not usually carried out by psychiatrists, since they rarely have training in this area.[227] Finding an expert who has a great deal of experience administering IQ tests is very important, since there can be errors in both administering and grading a test that can affect your client's score.

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[225] American Psychiatric Association, *supra* note 219.

[226] *Id.* at 51.

[227] Burr et al., *supra* note 8, at 27.

You may find it beneficial to use different experts for IQ testing and testing other aspects of mental retardation, such as adaptive behavior. While a psychologist may be able to administer an IQ test, he/she may not have experience and expertise in working with individuals with mental retardation.[228] As discussed in Section 10, your mitigation expert should be someone who has a wealth of experience in working with individuals who have mental retardation.

Some Tests are Better than Others

Some tests are considered inadequate for purposes of ruling out a diagnosis of mental retardation.[229] These tests are:

- Kaufman Brief Intelligence Test
- Revised Beta
- Lorge-Thorndike Intelligence Test
- Peabody Picture Vocabulary Test
- Any group-administered test[230]

It is not uncommon for a prosecution expert to use one of these tests, then argue that its result shows that your client does not have mental retardation. It is very important for you to investigate the prosecution expert carefully, along with the test he/she administered to your client. Some recommendations are:

- Attend the evaluation, if possible.
- Review all data.
- Determine whether the expert relies on old tests that may not be accurate.
- Do not assume every test is scored correctly.
- Always review the expert's prior testimony/hearings transcripts.
- Determine whether the expert relies too heavily on IQ test scores, ignoring adaptive behavior deficits.
- Determine whether the prosecutor's expert intends to rely on the Minnesota Multiphasic Personality Inventory (MMPI), which is inappropriate for use with persons with mental retardation.[231]

The tests that are most reliable are the **Wechsler** scales and the **Stanford-Binet.**[232] There is a series of Wechsler tests, developed for different developmental phases. For adults, the Wechsler test is the Wechsler Adult Intelligence Scale – III (WAIS-III). This test and the Stanford-Binet V are considered to be "the most reputable and reliable test instruments available."[233] Others include the Kaufman Adolescent and Adult Intelligence Test (KAIT) in the list of reliable tests.[234] A clinician should determine which test is most appropriate based on the personal characteristics of the client being tested.[235]

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228 *Id.*

229 William J. Edwards, Working with Clients with Special Needs (Intellectual Disabilities) and Other Developmental Disabilities 3.

230 *Id.*

231 *Id.* at 7. For more on the inappropriate use of the MMPI to identify malingering in defendants with mental retardation, *see* Denis William Keyes, *Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation*, 42 Mental Retardation 151–53 (2004). For a motion to preclude use of the MMPI by the prosecution, see appendix included on the CD.

232 *Id.* at 59.

233 Burr et al., *supra* note 8, at 28.

234 Edwards et al., *supra* note 80, at 80.

235 AAMR, *supra* note 7, at 58.

Testing conditions should also be considered. Obtaining an accurate score on an IQ test requires that it be administered by a trained administrator under the proper conditions.[236]

When you are evaluating old test scores, you may want to keep the following questions in mind:

- What was the context for the testing? School, prison, jail, military?
- What was the environment like?
- Was it part of school placement or evaluation?
- What were the motives/biases of the evaluators in that context?
- How old was the test when it was given?
- What was the SEM for the test?
- What was the educational background of the evaluator?
- Was the evaluator qualified to administer the test?
- Has your client ever taken the same examination/test before?
- Did the administration of the test comport with the minimum requirements for an appropriate assessment of general intellectual functioning?
- If you have never heard of the test that was administered, get a copy of *Borrows Mental Measurement Yearbook*. It covers every test ever written.[237]

Should I Have My Client Tested?

This is always an important question to ask when you begin your assessment. If there are reliable "old" test scores that place your client within the range that would make him/her eligible for a diagnosis of mental retardation, you may not want to have him/her retested. There is always the danger that your client could score higher on a subsequent test.[238]

This is particularly true if your client has been tested recently – some evaluators say there is a risk that a person may score higher on a subsequent test if he/she was just tested. This is known as the **"practice effect."**[239] **If your client is retested, using the same IQ test, shortly after the initial test, the second score should be read taking the "practice effect" into account.**[240] The practice effect can occur across different editions of IQ tests, and may last for as long as six months after a test has been given. If your client has been tested within the last six months, discuss the "practice effect" thoroughly with your experts before you have your client tested again.

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236 BURR ET AL., *supra* note 8, at n. 20.

237 EDWARDS, *supra* note 229, at 4.

238 *See id.* at 35 (discussing divergent scores).

239 *Id.* at 34.

240 *Id.*

Scores

IQ tests provide a rough numerical assessment of present level of intellectual functioning compared to others.[241] The criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations.[242] The SEM is generally estimated to be three to five points for well-standardized measures of general intellectual functioning.[243] An IQ score is therefore best seen as bounded by a range of approximately three to four points above and below the obtained score. This means that an IQ of 70 is not accurately understood as a precise score, but would instead be considered a range of confidence with parameters of at least one SEM (scores of about 66 to 74; 66 percent probability), or two SEM's (scores of 62 to 78; 95 percent probability).[244]

When an IQ test is given, the test administrator should be sensitive to the array of factors that could influence or invalidate the evaluation, including the defendant's history as it affects his/her current physical and psychological state, attitude toward the test, and hidden motivations.[245] For example, a defendant could be experiencing culture shock if he/she is in prison for the first time, or could be going through detoxification if he/she has problems with substance or alcohol addiction.[246]

The "**Flynn effect**" should also be taken into account when determining scores. James Flynn, a professor in New Zealand, was the first to document massive IQ gains in populations over time. His research shows that during the last century, scores on standardized measurements of intelligence have been rising steadily in the U.S. and throughout the world. The "Flynn effect" is described and explained in the sample affidavit included in Appendix A of the CD in this handbook. Essentially, his research indicates that test scores must be adjusted according to the gain in IQ since the test was last "normed." The "**practice effect**," discussed above, should also be considered.

There is no fixed "cutoff" score for an assessment of mental retardation.[247] This is a particularly important point given that scores will vary depending upon the test that is used.[248] For example, a score of 70 on a Wechsler scale will identify 2.29% of the population as potentially having mental retardation, whereas a Stanford-Binet-IV score of 70 identifies slightly more than 3% of the population as eligible for a determination of mental retardation.[249] In the United States, the difference between these two would be a little more than 2 million people.[250]

Adaptive Behavior

Both the DSM-IV-TR and the AAMR recognize that, in addition to limitations in intelligence, a person with mental retardation experiences limitations in adaptive behavior. The AAMR defines "significant limitations" as performance that is at least two standard deviations below the mean of either (a) one of the following three types of behavior: conceptual, social, or practical; or (b) an overall score on a standardized measure of conceptual, social, and practical skills.[251]

The AAMR lists several assumptions about adaptive behavior that it deems relevant to diagnosis. Some of these assumptions are:

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241 Human Rights Watch, *supra* note 14, at 1.

242 AAMR, *supra* note 7, at 14.

243 *Id.* at 57.

244 *Id.*

245 Hall, *supra* note 23, at 174.

246 *Id.*

247 *Id.* at 58.

248 *Id.*

249 *Id.*

250 *Id.*

251 AAMR, *supra* note 7, at 76.

- Adaptive behavior is a multi-domain construct.

- No existing measure of adaptive behavior completely measures all adaptive behavior domains.

- For a person with mental retardation, adaptive behavior limitations are generalized across domains of conceptual, social, and practical skills.

- Some adaptive behaviors are particularly difficult to measure using a rating scale or are not contained on existing standardized instruments.

- Low intellectual abilities may be responsible for both problems in acquiring adaptive behavior skills (acquisition deficit) and/or with the appropriate use of skills that have been learned (performance deficit).

- Assessment that provides information about typical behavior for the individual requires information that goes beyond what can be observed in a formal testing situation.

- Just as standardized measures of intelligence do not fully reflect what is considered "intellectual capacity," it is unlikely that a single standardized measure of adaptive behavior can adequately represent an individual's ability to adapt to the everyday demands of living independently.

- Problem behavior that is "maladaptive" is not a characteristic or dimension of adaptive behavior, as conceptualized in the 2002 definition of mental retardation. However, problem behavior may influence the acquisition and performance of adaptive behavior.

- Adaptive behavior must be examined in the context of the developmental periods of infancy and early childhood, childhood and early adolescence, late adolescence, and adulthood.

- Adaptive behavior scores must be examined in the context of the individual's own culture which may influence opportunities, motivation, and performance of adaptive skills.[252]

Some Instruments are Better than Others

It is important to understand the major purpose that underlies the use of adaptive behavior measures. These instruments were primarily intended to determine skill levels for purposes of program placement. They were not intended to be used in criminal cases. As a result, the use of these measures in criminal cases warrants caution and requires the acquisition of other sources of adaptive behavior information (interviews, records review).

Some adaptive behavior instruments, such as the Street Skills Survival Questionnaire (SSSQ), are inadequate for purposes of ruling out a diagnosis of mental retardation. While an instrument like the SSSQ has features that are attractive (e.g., performance indicator of adaptive skills), this type of scale is not a comprehensive measure of adaptive skills.

As previously stated, it is very important for you to investigate the prosecution expert carefully, along with the adaptive behavior measure he/she administered on your client. Some recommendations might be:

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[252] *Id.* at 74-75.

- Review all data.
- Do not assume every adaptive behavior measure is scored correctly.
- Always review the expert's prior testimony/hearings transcripts.
- Make sure that individuals (lay witnesses) who respond to the adaptive behavior instrument are credible.
- Make sure that at least one of the lay witnesses is from your client's same cultural/ethnic background.

Testing conditions should also be considered. Obtaining an accurate score on a measure of adaptive behavior requires that it be administered by a person with experience in conducting this type of assessment.

The scores obtained from formal measures of adaptive behavior typically include standard scores (mean = 100; standard deviation = 15), scaled scores (mean = 10; standard deviation = 3), and percentile ranks.

When you are evaluating old adaptive behavior scores, you may want to keep the following questions in mind:

- How was the measure administered?
- Was it administered to a knowledgeable informant? Self-report?
- What was the context for obtaining responses? Pre-age 18? At time of crime? Other?
- Was it part of school placement or evaluation?
- What were the motives/biases of the evaluators in that context?
- How old was the instrument when it was given?
- Which norms were used? Some instruments have norms for individuals who are normal and norms for individuals with mental retardation.
- What was the SEM for the test?
- Was the evaluator qualified to administer the instrument?

If you have never heard of the test that was administered, get a copy of *Borrows Mental Measurement Yearbook*, which includes a definitive listing.[253]

Standardized Instruments for Measuring Adaptive Behavior

There are several established standardized instruments used to measure adaptive behavior. They include the **Adaptive Behavior Assessment System-II**, the **Vineland Adaptive Behavior Scales**, the **Scales of Independent Behavior – Revised**, the **AAMR Adaptive Behavior Scales**, and the **Comprehensive Test of Adaptive Behavior – Revised**.[254] Each of these instruments measures some adaptive behavior in all three domains.[255] However, certain skills that are particularly

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253 EDWARDS, *supra* note 229, at 4.

254 *Id.* at 88-91.

255 BURR ET AL., *supra* note 8, at 29.

indicative of mental retardation are not covered by any of these measurement instruments.[256] This makes it particularly important to include a comprehensive life history as part of the assessment of adaptive behavior.[257] (See Section 4 for a discussion of the type of information that should be reviewed as a part of this process.)

Issues in Assessing Adaptive Behavior

- Adaptive behavior information should be obtained from multiple sources. This includes formal standardized assessments as well as information obtained from interviews and reviewing records. One test score is not sufficient. You need information about adaptive behavior from multiple sources.

- In assessing adaptive behavior, the AAMR clearly indicates that you must take the context in which the person was evaluated into account. For example, a person may function well, and therefore assess better, when he/she is living in a more structured environment. If your client scored well on a measure of adaptive behavior in the past, but does not score well now, you should determine whether he/she was living in a more structured, "atypical" environment at the time of the first test.[258]

- Prison is a highly structured environment. Certain aspects of your client's adaptive behavior will appear better while he/she is in prison because of this structure. Prison is not a good indicator of what your client's adaptive behavior skills are in a "real world" setting, as many adaptive skills areas are not used nor can they be assessed.

- Most instruments do not measure certain traits that are directly related to mental retardation, like gullibility and naïveté, as discussed above.

- If the client was not tested prior to age 18, your mitigation specialist will have to recreate an adaptive behavior history using records and personal interviews – often referred to as "retrospective assessment." Questionnaires developed for this purpose are included in Appendix A of the CD in this handbook.

- Lay witnesses (family members, friends, employers, teachers) providing information on adaptive behavior must be credible and ultimately willing to sign an affidavit and/or testify.

- Lay witnesses providing information on adaptive behavior should have the following qualifications: (a) frequent contact with the individual; (b) contacts of long duration; (c) opportunities to observe the variety of adaptive skills; and (d) recent contact.[259] Note: The last criterion is not possible in cases where your client has been incarcerated for a significant period of time. As a result, if no other adaptive behavior data exist prior to age 18, the use of retrospective assessment may be the only option.

- At least one of the lay witnesses providing information on adaptive behavior should be of the same cultural/ethnic group as your client.

- The scores on a standardized measure of adaptive behavior are invalid if an excessive amount of guessing (as indicated in the administration manual) on levels of adaptive functioning occurs.

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256 *Id*; Greenspan & Switzky, *supra* note 203, at 8-9; AAMR, *supra* note 7, at 74, 84.

257 AAMR, *supra* note 7, at 74, 84.

258 Burr et al., *supra* note 8, at 37.

259 Patti L. Harrison & Thomas Oakland, Adaptive Behavior Assessment System Manual 15 (2d ed. 2003).

Onset Before Age 18

As discussed above, the age of onset may be one of the more difficult aspects of determining mental retardation if you represent a client over the age of 18 who has never been assessed. The best way to find evidence of onset before age 18 is to comb through the records discussed in Section 4, and to interview people using background questions like those included in Appendix A on the CD. A mitigation specialist who can help you compile this information will be an invaluable resource.

RESOURCES FOR HELP

Local Chapters of The Arc

The Arc of McLennan County (Waco)
(254) 756-7491

The Arc of Spring Branch Memorial (Houston)
(713) 460-4274

The Arc of Midland
(915) 498-8590

The Arc of Texas (Austin)
(512) 454-6694

The Arc of San Angelo
(325) 657-0308

The Arc of Hunt County(Greenville)
(903) 455-4285

The Arc of Brown County (Brownwood)
(915) 646-6045 Ext. 292

The Arc of Gregg County (Longview)
(903) 753-0723

The Arc of Tyler/Smith County (Tyler)
(903) 597-0995

The Arc of Milam (Rockdale)
(512) 446-2190

The Arc of Harrison County (Marshall)
(903) 938-7571

The Arc of Denton County (Denton)
(972) 436-8471

The Arc of Fort Bend (Missouri City)
(281) 499-2234

The Arc of Bryan-College Station
(979) 774-5149

The Arc of Scurry County (Snyder)
(325) 573-5374

The Arc of Bell County (Temple)
(254) 947-5110

Howard County Arc (Big Spring)
(432) 264-0674

The Arc of Matagorda County (Bay City)
(979) 245-6318

The Arc of Calhoun County (Port Lavaca)
(512) 552-9403

The Arc of the Gulf Coast (Alvin)
(281) 388-1161

The Arc of Ector County (Odessa)
(432) 362-2702

The Arc of Potter and Randall Counties (Amarillo)
(806) 372-5699

The Arc of Northeast Tarrant County (Fort Worth)
(817) 834-7700

The Arc of Wharton
(979) 282-9200

The Arc of Greater Tarrant County, Inc. (Fort Worth)
(817) 877-1474

The Arc of Panola County (Carthage)
(903) 694-9575

The Arc of El Campo
(979) 543-5823

The Arc of Cypress Creek (Spring)
(281) 376-7072

The Arc of Gillespie County (Frederisksburg)
(830) 997-7163

The Arc of Greater Houston
(713) 957-1600

The Arc of Texoma (Sherman)
(903) 813-3560

The Arc of Ellis County (Waxahachie)
idheine@swbell.net (no phone number listed)

The Arc of Texas in El Paso
(915) 887-3442

The Arc of San Antonio
(210) 490-4300

The Arc of Wichita County
(940) 692-2303

The Arc of Dallas
(214) 634-9810

Advocacy, Inc. Offices

Main Office (Austin)
(512) 454-4816

East Texas Regional Office (Houston)
(713) 974-7691

Beaumont Satellite Office
(409) 832-4872

Nacogdoches Satellite Office
(936) 560-1455

El Paso Regional Office
(915)542-0585

North Texas Regional Office (Dallas)
(214) 630-0916

Wichita Falls Satellite Office
(940) 761-1199

Longview Satellite Office
(903) 758-7815

Fort Worth Satellite Office
(817) 336-0075

South Texas Regional Office (San Antonio)
(210) 737-0499

Corpus Christi Satellite Office
(361) 883-3623

Laredo Satellite Office
(956) 722-7581

McAllen Satellite Office
(956) 630-3013

West Texas Regional Office (Lubbock)
(806) 765-7794

Local MHMR Centers

Access (Jacksonville)
(903)586-5507

Andrews Center (Tyler)
(903) 597-1351

Austin-Travis County MHMR Center
(512) 447-4141

Betty Hardwick Center (Abilene)
(325) 690-5100

Bluebonnet Trails Community MHMR Center (Round Rock)
(512) 255-1720

Border Region MHMR Center (Laredo)
(956) 794-3000

Burke Center (Lufkin)
(936) 639-1141

Camino Real Community MHMR Center (Lytle)
(210) 357-0300

Center for Health Care Services (San Antonio)
(210) 223-7233 or 1-800-316-9241

Center for Life Resources (Brownwood)
(325) 646-9574

Central Counties Center for MHMR Services (Temple)
(254) 298-7000

Central Plains MHMR Center (Plainview)
(806) 293-2636

Coastal Plains Community MHMR Center (Portland)
(361)-777-3991

Dallas MetroCare Services
(214) 743-1200

Denton County MHMR Center (Denton)
(940) 381-5000

El Paso Community MHMR Center
(915) 887-3410

Gulf Bend MHMR Center (Victoria)
(361) 575-0611

Gulf Coast Center (Galveston)
(281) 331-4502

Heart of Texas Region MHMR Center (Waco)
(254) 776-1101

Helen Farabee Regional MHMR Centers (Wichita Falls)
(940) 397-3143

Hill Country Community MHMR Center (Kerrville)
(830) 792-3300

Johnson-Ellis-Navarro MHMR Services (Cleburne)
(817) 558-1121

Lakes Regional MHMR Center (Terrell)
(972) 524-4159

Lifepath Systems (McKinney)
(972) 562-0190

Lubbock Regional MHMR Center
(806) 766-0310

MHMR Center of Nueces County (Corpus Christi)
(361) 886-6900

MHMR of Tarrant County (Fort Worth)
(817) 569-4300

MHMR Services for the Concho Valley (San Angelo)
(915) 658-7750

MHMR Services of Texoma (Sherman)
(903) 957-4700

MHMRA of Brazos Valley (Bryan)
(979) 822-6467

MHMRA of Harris County (Houston)
(713) 970-7000

Northeast Texas MHMR Center (Texarkana)
(903) 831-3646

Pecan Valley MHMR Region (Stephenville)
(254) 965-7806

Permian Basin Community Centers for MHMR (Midland)
(432) 570-3300

Sabine Valley Center (Longview)
(903) 758-2471

Spindletop MHMR Services (Beaumont)
(409) 784-5400

Texana MHMR Center (Rosenberg)
(281) 342-9387

Texas Panhandle MHMR (Amarillo)
(281) 342-9387

Tri-County MHMR Services (Conroe)
(936) 756-8331

Tropical Texas Center for MHMR (Edinburg)
(956) 383-0121

West Texas Centers for MHMR (Big Spring)
(432) 263-0007

Other

Back to Life
1300 Bluff Drive
Round Rock, Texas 78681
(512)255-1465
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Notes