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The Challenges of and Ethical Responsibilities of Representing Clients with Diminished Mental Capabilities

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THE CHALLENGES AND ETHICAL RESPONSIBILITIES OF REPRESENTING CLIENTS WITH DIMINISHED MENTAL CAPACITIES

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INTRODUCTION

How well a lawyer and client relate to each other in the context of legal representation depends on many factors including the complexities of the case, the chemistry between them, the client's ability to communicate and the lawyer's ability to listen to the client and accurately discern his/her objectives before developing and articulating a strategy for helping him/her achieve them. (*See* NY Rules of Professional Conduct [RPC] 1.2 [ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER], and RPC 1.4 [COMMUNICATION]).

As stated in RPC 1.2(a), "... a lawyer shall abide by the client's decision concerning the objectives of the representation," and, as required by Rule 1.4, "shall consult with the client as to the means by which they are to be pursed. A lawyer shall abide by a client's decision whether to settle a matter...(and)...in a criminal case, ...shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive (a) jury trial and whether (or not) the client will testify."

RPC 1.4 (5)(b) states that a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The commentary to this rule states that the client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued TO THE EXTENT THAT THE CLIENT IS WILLING AND ABLE TO DO SO."

This is akin to the rule of INFORMED CONSENT (RPC 1.0[j]), which represents an "agreement by the (client) to a proposed course of action (e.g. proceeding to trial), after the lawyer has communicated information adequate for the person to make an INFORMED DECISION, and after the lawyer has adequately explained...the material risks (e.g. significant jail time if convicted), of the proposed course of conduct and reasonably available alternatives" (e.g. guilty plea to a lesser crime with a lesser or no-jail sentence commitment or motion to suppress evidence or to dismiss the accusatory instrument, if warranted).

The conventional lawyer-client relationship is premised on the assumption that the client, if properly advised and assisted by counsel as required by the rules, is capable of making informed and reasonable decisions about important matters such as whether to enter a guilty plea or go forward with a trial (and if so, whether with a jury or judge sitting as finder-of-fact). (*See* Comment 1 to RPC 1.14 [CLIENT WITH DIMINISHED CAPACITY].

The situation may not be so straightforward, however, especially where there is some indication (whether obvious or subtle), that the client may be suffering from some condition or malady that

makes it very difficult, if not entirely possible, for him/her to comprehend the legal issues and available options, communicate his/her objectives clearly or make reasoned decisions with respect to the resolution of the matter in question.

As if representing a seemingly "normal" client weren't often difficult enough, protecting the rights and advancing the interests of someone who is mentally impaired can present the lawyer with special challenges that require acute observational and listening skills (to identify the client's condition, if not obvious or already known to counsel), patience, creativity and resourcefulness, as well as an assessment of whether the client is actually able to make informed judgments about important matters if properly advised.

In some cases, it may well be necessary for counsel to consult with the client's family (or guardian) or, if accessible, obtain records of treatment for any type of psychiatric, medical or other disorder, to get an accurate read on the client's condition. It may also be helpful to have a qualified social worker interview the client (or at least sit in an observe), to help counsel determine the extent of the client's limitations and devise a strategy for meaningful and productive communication. (**NOTE:** ACP has highly-trained Licensed Master Social Workers on staff who can assist counsel in such cases).

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

STRIVE FOR NORMALCY:

(a). When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of young age, mental impairment or for some other reason, the lawyer SHALL, as far as reasonably possible, MAINTAIN A CONVENTIONAL RELATIONSHIP WITH THE CLIENT.

Toward this end, counsel should be mindful that while some clients may be virtually incapable of making informed decisions (in which case, criminal defense counsel will likely be seeking a competency examination under CPL 730 [see 4/13/20 monograph: WHEN A CLIENT IS UNFIT TO BE TRIED]), others may only require greater patience and indulgence on the part of counsel. As Comment 2 notes, "the fact that a client suffers a disability DOES NOT DIMINISH the lawyer's obligation to treat the client attentively and with respect."

When enlisting the participation and assistance of the client's family, counsel should be mindful of the attorney-client privilege/rule of confidential information (RPC 1.6*), and while it extends to those who are present to assist the client during the representation, if counsel concludes that their presence could result in the unauthorized disclosure of confidential communications, then they should be excluded from such conversations (or at least strongly admonished, before allowed to participate, against speaking to anyone else about what was discussed between lawyer and client).

*RULE 1.6(a) prohibits a lawyer from KNOWINGLY REVEALING confidential information, or USING such information to the disadvantage of the client (or for the advantage of the lawyer or a third person), UNLESS:

1. the client gives INFORMED CONSENT (assuming he/she is capable of doing so); and

2. the disclosure is IMPLIEDLY AUTHORIZED to ADVANCE THE BEST INTERESTS OF THE CLIENT and is either REASONABLE under the circumstances or CUSTOMARY in the professional community. (see sub.[b] for other exceptions to non-disclosure]).

For purposes of the RPC, CONFIDENTIAL INFORMATION consists of information gained during or relating to the representation of a client, WHATEVER ITS SOURCE, that is:

a. PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE;
b. LIKELY TO BE EMBARRASSING OR DETRIMENTAL TO THE CLIENT IF DISCLOSED; OR
c. INFORMATION THAT THE CLIENT HAS REQUESTED TO BE KEPT CONFIDENTIAL.

PROTECTIVE ACTION: RULE 1.14

(b). When the lawyer reasonably believes that the client: has DIMINISHED CAPACITY, is AT RISK OF SUBSTANTIAL PHYSICAL, FINANCIAL OR OTHER HARM UNLESS ACTION IS TAKEN AND CANNOT ADEQUATELY ACT IN HIS/HER OWN INTEREST, the lawyer MAY TAKE
REASONABLY NECESSARY PROTECTIVE ACTION, INCLUDING CONSULTING WITH INDIVIDUALS/ENTITIES THAT HAVE THE ABILITY TO TAKE ACTION TO PROTECT THE CLIENT, AND, IN APPROPRIATE CASES, SEEKING THE APPOINTMENT OF A CONSERVATOR OR GUARDIAN.

Such protective measures, as noted in Comment 5, may include: consulting with the client's family members, using a "reconsideration" period to permit clarification or improvement of circumstances, using voluntary "surrogate decision-making tools" such as durable powers of attorney, consulting with support groups, professional services, adult protective agencies or other individuals/entities that have the ability to assist and protect the client.

In taking protective action, the lawyer should be guided by the wishes and values of the client (if determined), the client's best interests and a desire to "minimize intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections." (Comment 5).

In determining the EXTENT OF THE CLIENT'S DIMINISHED CAPACITY, Comment 6 advises lawyers to consider and balance:

1. the client's ability to articulate his/her reasons for a desired decision;
2. the variability of the client's state-of-mind (consistent or all over the place) and ability to appreciate the consequences of a decision;
3. the substantive fairness of a decision, and
4. the consistency of a decision vis-a-vis the client's long-term values and commitments.

In appropriate situations, the lawyer may consult with an appropriate diagnostician (e.g. doctor, psychiatrist, psychologist, qualified counsellor), to obtain guidance and insight into the client's needs and decision-making abilities.

RULE 1.14 CONT'D

(c). As noted above, information relating to the representation of a client with diminished capacity is protected by the Rule of Confidential Information. (ROC 1.6 supra). However, when counsel deems it necessary to take PROTECTIVE ACTION on behalf of the client, counsel is IMPLIEDLY AUTHORIZED to REVEAL INFORMATION ABOUT THE CLIENT, BUT ONLY TO THE EXTENT REASONABLE NECESSARY TO PROTECT THE CLIENT'S INTERESTS.

Counsel should be mindful, however, that while it may be necessary, in certain circumstances, to disclose confidential information, and, in some cases, to seek (or better yet, have someone else seek), the appointment of a guardian or conservator, (with or without the client's cooperation), such action could lead to the client's involuntary commitment or give rise to other adverse consequences, such as a break-down in the lawyer-client relationship. (See Comment 8 to RPC 1.14).

Whenever possible, counsel should first pursue the LEAST RESTRICTIVE protective actions necessary to protect the client's interests. And, in cases of emergency involving a client with seriously diminished capacity (e.g. threat of immediate harm to the client's health, safety or financial interests, and there is no other available representative to assist the client), the lawyer may take action on the client's behalf despite the inability to establish a true lawyer-client relationship, but such action should be limited to maintaining the status quo or otherwise preventing imminent and irreparable harm. (ABA RPC 1.14, Comment 9).

COUNSEL AND THE CRIMINAL CLIENT WITH DIMINISHED CAPACITY:

In the criminal context, defense attorneys representing clients who have a mental illness, developmental disability, neurological disorder or other brain damage may deem it necessary to seek a forensic examination under CPL 730, knowing that while a defendant cannot be tried or allowed to enter a guilty plea unless deemed fit to proceed, (Cooper v Oklahoma 517 US 348 [1996]), the consequence of a finding of incapacity may, in the case of a felony at least, be extended deprivation of liberty (up to two-thirds of the maximum potential sentence under the highest count of an indictment), in a psychiatric institution as opposed to a state correctional facility, followed by an additional stay in civil confinement under Article 9 of the Mental Hygiene Law (MHL). (See generally People v Schaffer 86 NY2d 460 [1995], People v Lewis 95 NY2d 539 [2000]).

Counsel must also decide, in appropriate cases, (assuming the defendant is found competent to proceed), whether to interpose the affirmative defense of NOT RESPONSIBLE by reason of mental disease or defect: (PL 40.15: due to mental disease or defect, the defendant lacked substantial capacity to know or appreciate the nature and consequences of his conduct or that it was wrong), recognizing that if successful, (however unlikely), the defendant would then be subject, pursuant to CPL 330.20, to confinement (if found to be dangerously mentally ill), in a secure psychiatric facility for a period of time that could well exceed any period of incarceration if found guilty.

Whether or not the defendant would be eligible for: eventual transfer to a non-secure facility, furlough, release under conditions, unsupervised release, or discharge would require periodic court hearings (where the DA has the right to challenge any proposed change in status), and a court determination that such disposition was supported by a preponderance of the evidence.

THREE NOTORIOUS CASES FROM THE 1980'S:

JOHN HINCKLEY:

In the early 1980's John Hinckley was found NOT RESPONSIBLE for the attempted murder of President Ronald Reagan and the shooting of Press Secretary James Brady (and two law enforcement officers). He reportedly shot Reagan to attract the attention of actress, Jodie Foster with whom he was said to be obsessed. He was confined to a psychiatric hospital, and several years later, in 1999, he was granted supervised visits with his parents.

In 2005, his psychotic disorder was deemed by all examining experts to be in full remission and he was granted expanded conditions of release. In 2009, he was allowed more frequent visits with his mother and was granted permission to obtain a driver's license (provided he carried a cell phone with GPS tracker). Further maternal visits were granted in 2013 (30 years after his not-responsible verdict).

In 2014, James Brady died but Hinckley was not prosecuted for his death because of the not responsible finding (based on Hinkley's mental condition at the time of the crime) and was otherwise protected from prosecution by DC law in effect at the time of the shooting.

In July 2016, a federal judge released Hinckley on conditions, finding that he was no longer a threat to himself or others. Two years later, he was allowed to move out of his mother's Virginia house and live on his own upon approval by his doctors. In October 2020, he was allowed to display his music, writings and artwork under his own name.

MARK DAVID CHAPMAN:

In contrast to Hinckley who successfully interposed an insanity defense (resulting in the Insanity Defense Reform Act of 1984), Mark Chapman, contrary to the advice of his attorneys who were in the midst of preparing a NOT RESPONSIBLE (affirmative) defense, (having been found competent to proceed), pled guilty to the 1980 murder of John Lennon in exchange for a sentence commitment of 20 years-to-life in prison (as opposed to a maximum possible sentence of 25 years-to-life).

He first became eligible for parole release in 2000 and has since been denied parole 11 times. He is currently incarcerated at Wende State Correctional Facility in Alden NY and is scheduled to appear before the Parole Board again in August 2022. At his last board appearance, after saying he shot Lennon out of jealousy and a desire for glory, he was asked whether it was infamy that he sought, to which he reportedly replied, "infamy brings glory." That remark apparently foreclosed any possibility of release, however remote it was in any event. Aaron, Katersky, *Mark David Chapman, man who killed John Lennon, said in parole hearing he wanted 'glory'*, ABC News, 9/21/20 (https://abcnews.go.com/Entertainment/mark-david-chapman-man-killed-john-lennon-parole/story?id=73149086).

Lennon's widow, Yoko Ono has vigorously opposed Chapman's release at every turn, expressing fear for herself and her son's safety, as well as possible retribution against Chapman by Beatles' fans if he is ever back out on the streets. It would seem that Chapman's chance of release will remain dim for at least as long as Ono, now 88, remains alive to contest it.

JOSEPH CHRISTOPHER, THE .22 CALIBER KILLER:

In 1980, Joseph Christopher was convicted after a bench trial in connection with the fatal shooting of three African American cab drivers in the city of Buffalo. The Fourth Department (101 AD2d 504) affirmed the convictions finding that the trial court did not err in refusing to allow the defense (over the defendant's objection), to call their own expert at the second hearing to determine his capacity to stand trial.

The Court of Appeals reversed, holding that nothing in CPL 730.30 or 730.60(2) allows a court to refuse to hear expert testimony (other than from those who examined the defendant at the psychiatric institution where the defendant was confined after the initial finding of incompetency).

PROCEDURAL HISTORY:

1. The defendant was deemed to be unfit to proceed by two psychiatric examiners after which a hearing was held pursuant to CPL 730.30(4).
2. The court found the defendant to be incapacitated (i.e., lacking, as a result of mental disease or defect, capacity to understand the proceedings against him or assist in his own defense: CPL 730.10[1]).
3. Two months later, in February 1982, the superintendent of the psychiatric facility certified that the defendant was NO LONGER INCAPACITATED.
4. Over the defendant's objection ("I'll make my own decisions," he told the court), defense counsel asked the court to appoint a psychiatrist (pursuant to County Law 722-a) to testify at and help counsel prepare for the hearing.
5. The court denied counsel's request, reasoning that defense counsel was seeking to repeat the hearing that was already conducted, and should not be permitted to call any expert whose opinion did not form a basis for the superintendent's report.
6. The court permitted the hearing to go forward (without the defense expert), and found the defendant to be competent to proceed.
7. The case proceeded to trial and the defendant was found guilty.
8. The Appellate Division affirmed, holding it was not a violation of due process for the court to place a limit on expert witnesses under CPL 730.60(2). In the AD's view, the statute only requires a limited initial hearing followed, if warranted, by a subsequent hearing where other doctors who examined the defendant per court order would testify and be cross examined. The court also took into consideration the testimony of the experts who testified at the first hearing.
9. The COURT OF APPEALS found that the AD misconstrued CPL 730.60(2) to deny the defendant the right to present evidence of his own unless the court, (unpersuaded after the first hearing that the defendant is not incapacitated), orders additional examinations by experts designated by the Director.

In the Court's view, "to say that the defendant is ensured a right to a hearing to contest a psychiatric determination but may not present psychiatric testimony is a contradiction in terms" (65 NY2d at 424). (See also People v Gonzalez 132 Misc 2d 1004 [Sup Ct Richmond County 1986]).

Moreover, that the defendant objected to his counsel's strategy was deemed to be of no moment since a defendant whose capacity to stand trial is in serious question cannot be deemed able to knowingly and intelligently waive a hearing to determine his competency.

The court was also unmoved by the trial court's reliance, in part, on the expert testimony from the first hearing since the issue at the second hearing was the defendant's competency then and there and not before.

MENTAL DISEASE OR DEFECT;

Although CPL 730.10 (1) ties the lack of capacity directly to a MENTAL DISEASE OR DEFECT, the statue does not define those terms. The CJI jury charge on Lack of Criminal Responsibility By Reason of Mental Disease or Defect is similarly devoid of any definitional guidance with respect to the meaning of those terms.

Nevertheless, mental disease or defect is generally considered to include diagnoses of mental illness (hence, the need for expert testimony), serious developmental disabilities, serious intellectual deficiencies or cognitive deficits. (*See* Katherine Bajuk, *Regarding Mental and Cognitive Issues, Criminal Justice System Must Catch* Up, NEW YORK LAW JOURNAL, 2/1/2017. Ms. Bajuk is a Senior Trial Attorney and Mental Health Specialist for the New York County Defender Services).

In the context of competency to stand trial, mental disease or defect would include major mental illnesses (e.g., schizophrenia), intellectual/developmental disabilities or serious cognitive limitations which adversely affect a defendant's ability to understand the proceedings or assist in his/her own defense. (*See* Sheila E. Shea, *Defense Practice Tips: Representing Clients With Mental Disabilities*, PUBLIC DEFENSE BACKUP CENTER REPORT, Jan-April 2013, pp. 8-16.

Mental Hygiene Law (MHL) 1.03 (20) defines a mental illness as a mental disease or condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that the person requires care, treatment, or rehabilitation.

Schizophrenia and other psychiatric disorders qualify as mental illnesses under the law which also includes neurological disorders and conditions that adversely affect an individual's brain functioning. (People v Phillips 16 NY3d 510 [2011]).

In some cases, an individual's competency can be affected by certain developmental disabilities including mental retardation (a term that is now considered by many in the Mental Health field and elsewhere to be pejorative, if not offensive), cerebral palsy, epilepsy, neurological impairment, autism and familial dysautoma (a genetic disorder affecting the development and survival of certain nerve cells in the autonomic nervous system [ANS] which control functions like breathing, digestion, and regulation of blood pressure and body temperature.

Developmental disabilities also include any other condition closely related to mental retardation that seriously impairs general intellectual functioning or adaptive behavior. To be considered a developmental disability, the person's condition must have originated before the person turned age 22, continue indefinitely and constitute a substantial impediment to the person's ability to function in society.

NEUROLOGICAL DEFECTS AND FITNESS FOR TRIAL:

The case of *People v Phillips, supra* at p. 7, graphically illustrates the extent to which experts can disagree and courts sometimes struggle over whether a person with severe brain damage (in that case, Transcortical Motor Aphasia [TMA] caused by multiple strokes) which dramatically affects his ability to understand concepts and express language, can be found capable of truly understanding the proceedings against him and assisting in his own defense.

The majority of the Court of Appeals upheld the Appellate Division's affirmance of the trial court's finding of competence (after a hearing conducted by the trial court over six months), finding that the lower court's determination was supported by legally sufficient evidence. The dissenting justice found that the lower court erred as a matter of law insofar as it discounted the only competent evidence of the defendant's competency (or absence thereof), consisting of testimony from two neurological experts both of whom concluded (based on neurological testing), that the defendant, who suffered permanent and irreversible brain damage, was incapable of understanding the proceedings or assisting in his defense.

CASE FACTS:

On September 22, 2004, the defendant, who had a history of marital domestic violence, attacked his wife in the lobby of her apartment in violation of an order of protection and stabbed her numerous times in the chest, abdomen arms and legs, nearly killing her. He was charged with Attempted Murder, Assault, multiple counts of Criminal Contempt, Menacing and Criminal Possession of a Weapon.

The defendant underwent competency examinations by two doctors each of whom concluded that he was unfit to proceed because his cognitive and speech limitations caused by multiple stroke-induced brain damage (described as extensive and irremediable), precluded him from effectively assisting in his defense.

One of the doctors (Lopez-Leon) stated that the defendant's concrete reasoning, speech impediments (due to TMA) and other signs of dementia impaired his ability to understand and rationally utilize information pertaining to his case. Nor was he, in this examiner's estimation, able to retain or repeat information relevant to legal strategies or appreciate their consequences.

The other doctor (Kim), determined that the defendant would have significant trouble using information from his lawyer to rationally discuss options pertaining to his case. He could not answer questions (other than in monosyllables), without extensive effort.

Consequently, the trial court found the defendant not competent to proceed and remanded him to the custody of the Commissioner of Mental Health at the Kirby Forensic Psychiatric Center

(KFPC). After only five months, the defendant's treatment team concluded that the defendant was now fit to proceed, but the facility's forensic committee, based on neurological examinations, determined otherwise.

Upon the director's fitness finding, the defendant was returned to DOCCS custody and the court undertook what would turn out to be a protracted hearing with contradictory conclusions offered by multiple experts with respect to the defendant's fitness to proceed to trial.

Testifying in favor of fitness were the KFPC director, Dr. Hicks (a licensed physician/board certified, forensic psychiatrist with some training in Neurology) and a psychologist (Dr. Scherer) who observed the defendant a couple times a week in group sessions designed to educate confined patients on the workings of the criminal justice system with an eye towards restoring them to fitness.

According to Dr. Hicks, while the defendant spoke in a halting, truncated manner, he did show an understanding of the charges against him (stabbing his wife) for which he could spend a long time in prison. The defendant also gave answers to rephrased versions of the same question which were "not inconsistent."

Dr. Scherer described the defendant anecdotally as manifesting speech difficulties but otherwise appearing alert, attentive and appropriately responsive to humor.

The defendant testified at the hearing, and when asked about the purpose of a trial and the significance of legal pleadings, he said, "I know what you're saying but it's hard."

The defense also called two expert witnesses, a Dr. Capruso (a licensed psychologist, board certified in Neuropsychology) and Dr. Henry, the Director of Neurology at Bellevue Hospital, both of whom subjected the defendant to neurological testing. Capruso testified that the defendant spoke in a halting, stammering manner, and while he appeared to understand simple concepts, he struggled to comprehend more complex concepts (e.g. he understood "yellow" and "box" but not "'yellow box.").

Contrary to Dr. Hicks, Dr. Henry testified that the defendant gave inconsistent answers to different versions of the same question, indicating difficulty understanding concepts. (e.g., when asked if he had asthma, he answered both "yes" and "no").

The trial court concluded, based in large measure on Dr. Scherer's testimony and upon its own observations of the defendant who appeared to respond appropriately and engage with counsel during the proceedings, that the defendant, (notwithstanding the opinions of the two neurologists whose methodology the court found to be more hypothetical than practical), that the defendant appreciated the respective roles of the court, counsel and prosecution and had sufficient ability to understand the proceedings and assist in his defense.

It should be noted that defense counsel, based on several months of interaction with the defendant, advised the court that, in her opinion, the defendant was incapable of assisting her with the defense. While acknowledging that defense counsel's input, not unlike the court's own observations, was a relevant factor in determining competency, it was not determinative and overall, in the court's estimation, the defendant had the mental wherewithal to proceed to trial.

The court made extraordinary accommodations at trial for the defendant's limitations including: adjourning proceedings early every day to give defense counsel time to explain what had transpired to him, permitting leading questions of witnesses to elicit short, seemingly comprehensible answers and ordering daily transcripts of court proceedings.

After the defendant was found guilty, the court took the unusual step (over objection by both sides), to review the trial transcript to ensure that the defendant had not been deprived of due process in the manner in which the trial was conducted. (People v Francabandera 33 NY2d 429 [1974]). The court concluded that there was no denial of due process.

The Appellate Division affirmed, finding no basis to overturn the trial court's finding of fitness based on what it described as a thorough competency hearing and a reasonable resolution of conflicting expert testimony which was entitled to great deference on appeal.

MAJORITY RULES;

The majority of the Court of Appeals framed the issue before it as whether the lower court properly found, as a matter of law, that the defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and possessed a rational and factual understanding of the proceedings against him. (citing Dusky v US 362 US 402 [1960]). (See also CPL 730.10[1]).

The Court observed that a finding of trial competency, while largely based on expert medical testimony, is ultimately a legal determination consigned to the sound discretion of the trial court. (People v Mendez 1 NY3d 15 [2003]). The Court also noted that the trial court's findings, based on its in-person assessment of the competing expert opinions, counsel's conclusions about her client and the court's own observations (People v Tortorici 92 NY2d 757 [1992]), were entitled to great weight, and the Court's review was limited to determining whether the lower court's finding were supported by legally sufficient evidence. (People v Pena 33 AD3d 374 [1st dep't 2006]).

The majority concluded that the trial court did not err in crediting the testimony of the People's witnesses (in particular, that of Dr. Scherer who had the most frequent contact with the defendant), over the defense experts whose testing, in the trial court's view, focused more on abstractions than on the real-world questions of whether the defendant understood the purposes of and players in a trial, and had sufficient ability to understand the charges and assist in his own defense.

The trial court also credited Dr. Hick's testimony with respect to the defendant's apparent ability to give consistent answers to the same questions repeated differently, and remarked that the defendant, over the course of several court appearances, seemed to react appropriately to testimony and communicated with the court in a manner that evinced an understanding of the nature and significance of the proceedings. Accordingly, in view of the extensive record before it, the majority found no abuse of discretion in the court's competency finding nor any basis to disturb the judgment of conviction.

THE DISSENT:

In what he described as a "'most unusual case," the dissenting justice (Lippman, CJ), faulted the majority for upholding a competency determination that was largely based, in the dissenter's

view, on anecdotal testimony from a non-examining witness (Scherer) who was in no position to assess the nature or severity of the defendant's profound NEUROLOGICAL deficits, much less reliably interpret the significance of his short and simplistic utterances in the context of group meetings with up to 20 other psychiatric patients.

The dissenter wondered how a defendant who had been diagnosed with permanent and irreversible brain damage (a lesion/hole in the left temporal lobe) that, in the opinion of two examining doctors, rendered him incompetent, could ever be restored to mental fitness, let alone in five months time.

The defendant was described as manifesting dysarthic (slurred) speech, poor concentration and impaired short term memory, and psychological testing at Bellevue revealed significant cognitive disabilities consistent with his neurological deficits. He reportedly scored in the "impaired" range in standard neurological testing and had great difficulty with abstract reasoning.

Though he showed some "superficial familiarity" with the respective roles of the trial participants, his incapacity for abstract thinking, even on a most basic level, in the view of the defense experts, rendered him incapable of assisting his attorney in any meaningful way.

According to Dr. Capruso, neuropsychological tests revealed that, in terms of comprehension and language ability, the defendant was operating at the level of a six-year-old. He was also described as being demonstrably unable to comprehend or reliably respond to simple inquiries or statements. In Capruso's opinion, while the defendant appeared to have a rudimentary understanding of what happens at a trial, his ability to establish a working relationship with an attorney was severely impaired as was his ability to heed the advice of counsel or properly weigh the risks and benefits of alternative courses of action. (see definition of INFORMED CONSENT, RPC 1.0[j] supra]).

Even Dr. Hicks who deemed the defendant to be fit for trial, acknowledged the permanence of the defendant's condition, that his Aphasia posed an obvious challenge to lawyer-client communication, and conceded that his opinion was based on an assumption of an ensuing guilty plea without consideration of the possibility of the defendant's testifying at a trial which would be a significant challenge in light of his inability to answer open-ended questions.

The Bellevue Director of Neurology (Dr. Henry) testified that while the defendant could follow simple directions, he could not execute simple, multi-step commends and, like Dr. Hicks, agreed that he could not answer open-ended questions. (Hence, the trial court's willingness to permit leading questions.)

> As for Dr. Scherer's observations, Dr. Henry noted that those untrained in Neurology or Speech Pathology may read too much into a neurologically damaged person's simplistic answers or demeanor to infer comprehension (rather than picking up cues and parroting behavior), when the reality is much more complex and difficult to discern without neurological testing. In her view, the defendant was not capable of informed consent, and he lacked the capacity to absorb, retrieve and communicate information so as to participate in his own defense in any productive way.
>
> While the majority faulted the dissenter for overstepping the Court's review powers by assessing the weight of competing expert testimony (a task reserved for the trial court), the dissenter took the view that there was no battle of experts to resolve since the only

ones actually qualified to opine on the effect of the defendant's neurological condition on his mental capacity were those properly trained in Neurology. In the dissenter's estimation, the trial court erroneously put too much emphasis on the periodic observations of a group therapist and unjustifiably dismissed the opinions of those who had the ability to opine on the defendant's condition and its impact upon his ability to understand the proceedings and assist in his own defense.

The dissenter also found that the trial court's extra efforts to accommodate the defendant's limitations at trial reflected its own ambivalence over the defendant's competence, and its post-verdict review of the trial, (which, under People v Francabandera *supra*, is meant for defendant's who can't recall the crime due to amnesia), did not apply to the threshold issue of competency which must be determined BEFORE the trial, not after.

As the dissenter observed, citing Dusky v US *supra*, "it is fundamentally incompatible with due process to try an incompetent defendant...(and) if a defendant is to be tried, he must have the basic capacity to exercise those rights upon which the fairness of a trial (depends) including the right to effective representation, to confront and cross examine witnesses and to elicit testimony or refrain from doing so without penalty. Minimally, a defendant must be able to understand the proceedings against him and possess sufficient present abilities to consult with his lawyer with a reasonable degree of rational understanding."

In the dissenter's view, the trial court erred as a matter of law in discounting the only relevant and competent evidence of the defendant's unfitness for trial and consequently, the People failed to establish by a preponderance of the evidence that he was competent to go forward with trial. (citing People v Mendez supra, 1 NY3d 15 [2003]).

As the dissenter observed, "while the threshold for fitness is not high, and borderline intellectual functioning is ordinarily not preclusive of a fitness finding, the deficits disclosed by the defendant's testing were PROFOUND in numerous categories, placing him in the lowest percentiles, and, when coupled with his expressive disability, raised a profound question whether he could, in fact, comprehend the proceedings and assist in his own defense...(And), since there was no competent, countervailing proof that the defendant's neurologic injury was not so severe as to cast his fitness in doubt, it is plain that the People did NOT meet their burden to demonstrate (the defendant's) fitness by a preponderance of the evidence."

FINAL OBSERVATION:

If nothing else, Phillips makes it abundantly clear that the bar for fitness under CPL 730 is not particularly high. If a defendant with severe neurological brain damage which dramatically impedes his/her ability to comprehend and communicate with counsel can be found competent to stand trial, one has to wonder how debilitated one must actually be to be in order to be deemed mentally incapable of participating in a trial in any meaningful way.

If the medical/psychiatric experts can't seem to agree, and the courts wrestle with such determinations, it is reasonable to conclude that prosecutors and defense attorneys may also experience great difficulty determining whether a defendant is truly fit to be tried.

That is why counsel must always be on the look-out for signs of mental illness, cognitive disability and/or diminished mental capacity so as to distinguish between a person who may be a step or two slow in thinking or communicating and someone who is suffering from a serious mental condition. Counsel should also look for signs of trauma in the client's life that could explain his/her affect, demeanor or responsiveness, and, perhaps more importantly, provide the foundation for a psychiatric defense or mitigation of sentence in the event of a conviction.

And, when in doubt, counsel should not hesitate enlist the services of those qualified to identify and explain certain disabilities and conditions that may not be apparent to the untrained observer. That will not only help counsel better understand and communicate with the client,but advocate more effectively and authoritatively on his/her behalf. The Rules of Professional Conduct and basic notions of good lawyering would seem to require nothing less.