(THE ARC)

(EXPLORING THE COMPETENCY DILEMMA FACING PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM)

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>> HELLO, HELLO, EVERYONE, WELCOME TO THE ARC NATIONAL CENTER ON CRIMINAL JUSTICE AND DISABILITY WEBINAR. MY NAME IS ASHLEY BROMPTON AND I'M THE CRIMINAL JUSTICE FELLOW AT NCCJD. BEFORE WE BEGIN OUR PRESENTATION, I WOULD LIKE TO COVER A FEW BASICS ESPECIALLY FOR THOSE OF YOU WHO ARE NEW TO WEBEX.

PARTICIPANTS ARE ON A LISTEN-ONLY MODE.

WE WOULD BE MORE THAN HAPPY TO HELP YOU.

AT THE END OF THE SESSION, THERE WILL BE TIME FOR QUESTIONS, THROUGHOUT THE PRESENTATION YOU CAN EITHER POST QUESTIONS IN THE Q&A SECTION OR CHAT BOX. YOU DON'T WANT YOUR NAME SHARED, TYPE PRIVATE BEFORE YOUR QUESTION.

YOU CAN E-MAIL QUESTION TO NCCJDINFO@THEARC.ORG.

IF WE DON'T HAVE TIME TO GET TO YOUR QUESTION, WE WILL FOLLOW UP AFTERWARD.

WE HAVE ONE FINAL REQUEST.

A SHORT SURVEY WILL POP UP AFTER YOU CLOSE WEBEX.

PLEASE TAKE FIVE MINUTES TO COMPLETE IT.

WILL ENSURE THAT YOU ARE SATISFIED WITH THIS AND FUTURE WEBINARS, THIS WEBINAR IS FUNDED BY THE UNITED STATES DEPARTMENT OF JUSTICE.

THANK YOU FOR YOUR PARTICIPATION.

THANK YOU FOR OUR PRESENTERS TO TAKING THE TIME TO BE HERE WITH US TODAY.

I WOULD LIKE TO NOW INTRODUCE YOU TO THE NEW INCOMING CRIMINAL JUSTICE FELLOW ARIEL SIMMS.

SHE COMPLETED DEGREE AT HARVARD LAW SCHOOL.

PRIOR TO LAW SCHOOL ARIEL SPENT TWO YEARS WORKING AS A MENTAL HEALTH COUNSELOR, AFTER THAT EXPERIENCE SHE DECIDED TO BECOME A DISABILITY AND HUMAN'S RIGHT ADVOCATE SPECIALLY ON BEHALF OF THOSE LIVING WITH MENTAL DISABILITIES, THROUGHOUT HER TIME IN LAW SCHOOL, ARIEL WORKED ON DISABILITY RIGHTS ISSUES BOTH IN THE UNITED STATES AND ABROAD INCLUDING HEALTHCARE POLICY, HUMAN RIGHTS AND CRIMINAL JUSTICE REFORM.

I'M NOT GOING TO TURN IT OVER TO ARIEL TO BEGIN THE PRESENTATION.

>> THANKS SO MUCH, ASHLEY, I WANT TO TAKE A COUPLE OF MINUTES TO DISCUSS TWO TERMS THAT ARE OFTEN CONFUSED, CAPACITY AND COMPETENCY.

CAPACITY IS A MUCH BROADER TERM AND GENERALLY DESCRIBES PEOPLE'S ABILITIES TO UNDERSTAND ACTIONS AT A PARTICULAR MOMENT IN TIME.

IT IS ALSO A VERY FLUID CONCEPT AND NOT ONLY VARIES FROM PERSON TO PERSON BUT ALSO DECISION TO DECISION.

FOR EXAMPLE, IT COULD BE SAID THAT SOMEONE HAS CAPACITY TO WORK BUT NOT TO MANAGE HIS OR HER FINANCIAL AFFAIRS.

ON THE OTHER HAND, COMPETENCY IS A PURELY LEGAL CONCEPT THAT ASKS THE QUESTION WHETHER SOMEONE HAS THE CAPACITY TO UNDERSTANDING AT VARIOUS POINTS IN THE LEGAL PROCESS.

FOR INSTANCE, THERE'S A GENERAL COMPETENCY TO STAND TRIAL WHICH BOB WILL BE SPEAKING ABOUT IN JUST A MOMENT, BUT ALSO COMPETENCY TO PLEA GUILTY OR WAIVE ONE'S MIRANDA RIGHTS, FOR THOSE WHO ARE VISUALLY YOU CAN SEE IN THE DIAGRAM THAT THAT IT'S ENCOMPASSED WITHIN THE BROADER CONCEPT OF CAPACITY AND WITH THAT BRIEF INTRODUCTION, I WOULD LIKE TO INTRODUCE OUR FIRST SPEAKER.

SO BOB IS AN ATTORNEY AT THE SENATE REPUBLIC PRESENTATION AND LAW FIRM IN MASSACHUSETTS AND WASHINGTON, D.C.

HE HAS REPRESENTED PEOPLE WITH DISABILITIES SINCE 1973 WHEN HE GRADUATED FROM BOSTON COLLEGE LAW SCHOOL.

HIS LITIGATED AND ARGUED APPEALS IN PRISON, GUARDIANSHIP, FAIR HOUSING, RIGHT TO TREATMENT AND RIGHT TO COMMUNITY SERVICES CASES.

BOB HAS SERVED ON THE FACULTY OF WESTERN NEW ENGLAND UNIVERSITY OF LAW SCHOOL AND SMITH COLLEGE LAW SCHOOL FOR SOCIAL WORK.

HE'S ALSO PUBLISHED A BOOK AND NUMEROUS ARTICLES AND BOOK CHAPTERS ABOUT DISABILITY WITH LAW.

WITH THAT, I'M GOING TO TURN IT OVER TO YOU, BOB, AND YOU CAN GO AHEAD AND TURN ON YOUR VIDEO AND UNMUTE YOURSELF AND TELL US A LITTLE BIT MORE.

>> THANK YOU VERY MUCH.

HERE WE GO.

I WANT TO TALK ABOUT SOME OF THE DISTINCTIONS AND DIFFERENCES IN THE WAY THAT COMPETENCY TO STAND TRIAL AND CONCEPTS AFFECT PEOPLE WITH MENTAL ILLNESS AND PEOPLE WITH DEVELOPMENTAL AND INTELLECTUAL DISABILITIES.

IN THE UNITED STATES, WE DO NOT PUT DEFENDANTS AT RISK OF THEIR LIFE OR LIBERTY IF THEY DON'T UNDERSTAND ESSENTIALLY WHAT'S HAPPENING TO THEM AND WHAT IS AT RISK FOR THEM IN THE COURSE OF THE CRIMINAL CASE IN A TRIAL.

THE CONSTITUTIONAL TEST DEVELOPED BY THE SUPREME COURT FOR COMPETENCE TO STAND TRIAL IS WHETHER HE HAS SUFFICIENT, PRESENT ABILITY TO CONSULT WITH A LAWYER, WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING AND A RATIONAL AND FACTUAL UNDERSTANDING OF THE PROCEEDINGS AND WHETHER THE DEFENDANT, WHETHER HE OR SHE CAN ASSIST HIS OR HER COUNSEL IN THE PREPARATION AND CARRYING OUT OF THE DEFENSE OF THE CHARGES.

NOT SURPRISINGLY, MOST DEFENDANTS WHO ARE FOUND NOT COMPETENT TO STAND TRIAL HAVE A MENTAL DISABILITY EITHER INTELLECTUAL DISABILITY OR MENTAL ILLNESS.

INCOMPETENT DEFENDANTS, THEY CAN'T BE TRIED, AT LEAST FOR AS LONG AS THEY REMAIN INCOMPETENT.

WHEN THEY BECOME COMPETENT, THEY CAN BE TRIED, SO THEY CAN BE TRIED LATER IF THEY BECOME COMPETENT, AND THAT REALIZATION OF COMPETENCY IS ACHIEVEMENT OF COMPETENCY OR RESTORATION OF COMPETENCY HAS TO HAPPEN IN WHAT THE SUPREME COURT CALLED A REASONABLE TIME.

THE DEFENDANT FOR A REASONABLE TIME MAY BE COMMITTED TO A FACILITY, OFTEN IS COMMITTED TO A FACILITY FOR THE PURPOSE OF RETAINING COMPETENCE.

IN SOME STATES, AN ORDER FOR AN INCOMPETENT DEFENDANT FOR RESTORATION, THE DEFENDANT ALSO HAS TO MEET THE STANDARDS FOR OUR CIVIL COMMITMENT THAT DEPENDING ON STATE LAW THOSE USUALLY STANDARDS THAT THE PERSON HAS A MENTAL ILL OR INTELLECTUAL DISABILITY OR IS DANGEROUS TO HIMSELF OR OTHERS IF NOT PLACED IN AN INSTITUTION.

THE FUNDAMENTAL ISSUE, A FUNDAMENTAL AND DIFFICULT ISSUE IS, AS I SAID, HOW LONG A PERSON CAN BE INVOLUNTARILY DETAINED FOR TREATMENT OR EDUCATION TO ACHIEVE COMPETENCE TO STAND TRIAL.

THE QUESTION WAS FIRST ADDRESSED COMPREHENSIVELY BY THE SUPREME COURT IN A 1972 CASE, IN THE CASE JACKSON VERSUS INDIANA.

MR. JACKSON WAS ILLITERATE, HE WAS DEAF AND UNABLE TO SPEAK.

EXPERTS EXAMINED HIM TOLD THE TRIAL JUDGE THAT THE CHANCE THAT IS MR. JACKSON WOULD EVER BE COMPETENT TO STAND TRIAL WERE VIRTUALLY NONEXISTENT.

NONETHELESS, THE TRIAL COURT COMMITTED HIM TO AN INSTITUTION UNTIL HE BECAME IN INDIANA STATUTE SANE ENOUGH TO BE TRIED.

THE NATURE AND DURATION OF MR. JACKSON'S COMMITMENT HAD TO BARE SOME RELATIONSHIP, UNREASONABLE RELATIONSHIP TO THE PURPOSE OF THE COMMITMENT.

IN OTHER WORDS, WHAT WAS HAPPENING DURING THE COMMITMENT HAD TO BARE SOME RELATIONSHIP TO WHAT THE PURPOSE OF THE COMMITMENT WAS AND THE SUPREME COURT SAID THAT SINCE MR. JACKSON COULD NOT BE -- COULD NOT BE BROUGHT TO COMPETENCY, THAT HE COULDN'T BE HELD ANY LONGER THAN WAS REASONABLY NECESSARY TO DETERMINE THAT THERE WAS SUBSTANTIAL POSSIBILITY OR A SUBSTANTIAL PROBABILITY THAT HE WILL OBTAIN COMPETENCY IN A FORESEEABLE FUTURE.

THE COURT HELD THAT IT'S PERMISSIBLE TO OBTAIN AN INDIVIDUAL TO FACILITY OR RESTORATION OF COMPETENCY BUT THE TERM OF THE CONFINEMENT HAD TO BE REASONABLE TO DETERMINE WHETHER THE PERSON COULD BE -- COULD RETAIN COMPETENCY IN THE FORESEEABLE FUTURE.

SINCE 1972, COURTS AND LEGISLATORS, LEGISLATURES HAVE STRUGGLED TO FIGURE OUT JUST WHAT REASONABLE MEANS AND REASONABLE TIME IS AND JUST WHAT THE FORESEEABLE FUTURE IS.

AS AN EXAMPLE IN MASSACHUSETTS, THE WAY THAT WE HAVE DEALT WITH IT HERE, AFTER AN INCOMPETENT TO STAND TRIAL DEFENDANT HAS BEEN INSTITUTIONALIZED FOR TWO-THIRDS OF THE MAXIMUM TERM THAT SHE COULD BE SENTENCED TO, IN OTHER WORDS, IF SHE WAS SENTENCED FOR THE MOST SERIOUS CRIME BECAME ELIGIBLE FOR PAROLE WHICH IS AFTER TWO-THIRDS OF THE SENTENCE.

THE CHARGES THEN IN MASSACHUSETTS HAVE TO BE DROPPED AND THE INDIVIDUAL HAS TO BE RELEASED OR CIVILLY COMMITTED IF THE INDIVIDUAL MEETS THE COMMITMENT STANDARDS.

NOW, HOW FREQUENTLY DOES ALL OF THIS HAPPEN?

IT'S VERY HARD AS IT OFTEN IS IN COURT IN THE UNITED STATES TO COME UP WITH RELIABLE STATISTICS, BUT ACCORDING TO THE LITERATURE THERE ARE PROBABLY ABOUT 12 DEFENDANTS A YEAR WHO ARE FOUND INCOMPETENT TO STAND TRIAL.

SOMEWHERE BETWEEN 6 AND 16% OF THE DEFENDANTS WHO ARE FOUNDED INCOMPETENT TO STAND TRIAL ARE PEOPLE WITH DISABILITIES.

THEY ARE REFERRED TO EVALUATION.

ABOUT 12.5% TO 36% ARE DETERMINED INCOMPETENT TO STAND TRIAL WHILE ABOUT 45-65% OF DEFENDANTS WITH MENTAL ILLNESS ARE DETERMINED TO BE INCOMPETENT.

A SUBSTANTIALLY HIGHER FIGURE.

AVAILABLE DATA FROM A REVIEW OF CASE LAW, ANECDOTAL REPORTS SEEMS LESS LIKELY THAT WILL BE FOUND INCOMPETENT TO STAND TRIAL AS COMPARED WITH MENTAL ILLNESS.

DEFENDANTS WITH INTELLECTUAL DISABILITIES ARE ALSO LESS LIKELY TO STAND TRIAL AT A LATTER DATE.

THAT SECOND IS -- SECOND FACT IS LESS SURPRISING TO ME THAN THE FIRST ONE.

BUT THERE MAY BE SOME REASONS FOR THIS AND POSSIBLE EXPLANATIONS, MAYBE, THAT DEFENDANTS WITH INTELLECTUAL DISABILITIES ARE LESS LIKELY TO HAVE BEEN COMPETENT IN THE PAST AS COMPARED WITH DEFENDANTS WITH MENTAL ILLNESS.

THE STRATEGIES TO OBTAIN COMPETENCY FOR DEFENDANTS WITH INTELLECTUAL DISABILITIES ARE PROBABLY OFTEN MORE COMPLEX THAN THE ONES TO RESTORE COMPETENCY FOR DEFENDANTS WITH MENTAL ILLNESS.

SOME DEFENDANTS, FOR EXAMPLE, WITH MENTAL ILLNESS, MEDICATION AND PSYCHOTHERAPY, THEY HELP WITH DEFENDANTS WITH INTELLECTUAL DISABILITIES ON THE OTHER HAND THE TREATMENT MAY HAVE TO INVOLVE EDUCATION, VOCATIONAL TRAINING AND THERAPY, SPEECH THERAPY AND SO ON.

BECAUSE OF THE RELATIVE COMPLEXITY OF THESE METHODS AND THE INTENSITY NECESSARY FOR THEM, FACILITIES THAT RECEIVE PEOPLE WHO ARE INCOMPETENT TO STAND TRIAL MAYBE LESS WELL EQUIPPED TO SERVE THEM.

WHERE DO PEOPLE GO WHEN THEY'RE FOUND INCOMPETENT TO STAND TRIAL?

STATE STATUTES AND PRACTICES SET UP THE TYPES OF FACILITIES TO WHICH ARE INCOMPETENT TO STAND TRIAL DEFENDANTS MAY BE SENT.

PERHAPS STATE PSYCHIATRIC HOSPITALS ARE THE MOST COMMON AND ARE USED EVEN INAPPROPRIATELY FOR DEFENDANTS WITH INTELLECTUAL DISABILITIES IN SOME STATES.

SOME STATES ARE CONSTRUCTED SPECIAL I/DD FACILITIES, DEFENDANTS WHO ARE NOT COMPETENT TO STAND TRIAL OR FOUND NOT GUILTY BY REASON OF INTELLECTUAL DISABILITY OR MENTAL DEFECT OR WHATEVER THE STANDARD IS.

THESE FACILITIES ARE USUALLY SECURE AND CAN LOOK AND OFTEN BE OPERATED AS IF THEY WERE PRISONS OR JAILS.

SOME INCOMPETENT TO STAND TRIAL DEFENDANTS MAYBE HELD FOR RESTORATION OR MORE COMMONLY FOR EXTENDED PERIODS WHILE THEY AWAIT A BED IN APPROPRIATE FACILITY.

YOU WILL HEAR MORE ABOUT THAT LATER.

MASSACHUSETTS UNLIKE PROBABLY ANY OTHER STATE PLACES SOME INCOMPETENT TO STAND TRIAL DEFENDANTS INCLUDING SOME WITH INTELLECTUAL DISABILITY LIKE THE BRIDGE WATER HOSPITAL.

MOST STATES ALLOW FOR BUT NOT OFTEN USE COMMUNITY-BASED PROGRAMS FOR RESTORATION.

THIS ALTERNATIVE IS THE LEAST RESTRICTIVE ALTERNATIVE AND RESPONDS TO WHAT IS A BED SHORTAGE CRISIS FOR INCOMPETENT TO STAND TRIAL DEFENDANTS, BUT BECAUSE THE INDIVIDUALS HAVE PENDING CRIMINAL CHARGES IT'S OFTEN DIFFICULT TO COMMUNITIES AND THEY SHOULD BE TREATED IN A COMMUNITY-BASED PROGRAM.

NOW ACHIEVING COMPETENCY.

THE LIKELIHOOD THAT AN INDIVIDUAL WITH INTELLECTUAL DISABILITY WILL ACHIEVE COMPETENCE IS LOW AND THE LENGTH OF TIME THAT THE PERSON WILL SPENT INSTITUTIONALIZED IS LONGER AS COMPARED TO INDIVIDUALS WHO ARE FOUND INCOMPETENT BECAUSE OF MENTAL ILLNESS, ONLY ABOUT ONE-THIRD TO ONE HALF OF DEFENDANTS WITH INTELLECTUAL DISABILITIES OR DETERMINED TO BE INDEPENDENT TO STAND TRIAL ARE COMPETENT TO STAND TRIAL.

DEFENDANTS WITH MENTAL ILLNESS AND INTELLECTUAL DISABILITIES, ALL OF THESE DEFENDANTS WITH MENTAL DISABILITIES SHARE COMMON ISSUES THAT ARE OF CONCERN AND THAT ARE SYSTEMATIC EXCEPT WITH THE MOST PERHAPS -- WITH THE MOST DISABLED DEFENDANTS, CLINICAL PREDICTIONS OF WHETHER A DEFENDANT WILL BECOME COMPETENT OR OFTEN NOT RELIABLE.

SOMETIMES LITTLE BETTER THAN A CLINICAL GUESS AND IT'S DEPENDENT ON LOTS OF PREDICTABLE FACTORS.

THAT'S DETERMINING WHAT THE FORESEEABLE FUTURE IS AND A REASONABLE TIME HAS PASSED.

ACCORDINGLY COURT'S DETERMINATION OF REASONABLE TIME MAY VARY CONSIDERABLY AND AS WILL DETERMINATIONS OF WHAT THE FORESEEABLE FUTURE IS.

TO THIS POINT, IT'S WORTH NOTING THAT IN 2004 AN ANALYSIS BY PROFESSOR MICHAEL SHOWED THAT ONE HALF OF THE STATES, 30-SOME YEARS AFTER THE JACKSON CASE, NEARLY HALF OF THE STATES HAVE NOT IMPLEMENTED, ENFORCED OR OPERATIONALIZED THE REQUIREMENTS OF JACKSON WHICH CALLS FAILURE THAT'S UNTHINKABLE AND AREA OF UNCONSTITUTIONAL LAW.

MAY ALSO IMPACT COURT DECISION-MAKING, CLINICIANS ARE LIKELY TO WEIGH THE SERIOUSNESS OF OFFENSE AND LIKELY PUNISHMENT EITHER CONSCIOUSLY OR UNCONSCIOUSLY IN MAKING DECISIONS ABOUT COMPETENCY.

THE SAME CONSIDERATIONS MAY ENTER AND PROBABLY DO ENTER INTO DECISIONS TO DISMISS CHARGES OR RELEASE PERSON FROM SECURE CONFINEMENT AND THESE THINGS MAYBE MUCH MORE DIFFICULT DEPENDING ON THE CHARGES AND THE AVAILABLE PROGRAMS INCLUDING PROGRAMS THAT THE COURT AND THE COMMUNITY WILL CONSIDER SECURE.

SO THE CONCLUSION FROM THIS IS, I THINK, THAT FOR BOTH DEFENDANTS WITH INTELLECTUAL DISABILITIES AND THOSE WITH MENTAL ILLNESS, THE CRIMINAL JUSTICE SYSTEM COMPETENCY PROCESSES ARE DESCRIBED -- DESIGNED FOR MORE WITH MENTAL ILLNESS BUT PROBLEM FOR BOTH.

THE SERIOUS SHORTCOMINGS ARE EXACERBATED FOR DEFENDANTS WITH INTELLECTUAL DISABILITY AND YOU'LL HEAR MORE ABOUT THAT AS THE WEBINAR GOES ON.

SO THANK YOU.

>> ALL RIGHT.

THANK YOU SO MUCH, BOB.

OUR NEXT PRESENTER IS CLAUDIA, CLAUDIA IS A SENIOR STAFF ATTORNEY WITH FOUNDATIONS DISABILITY RIGHTS PROGRAM.

SHE LITIGATES CASES THAT INCREASE CIVIL RIGHTS AND CIVIL LIBERTIES WITH PERSONS WITH DISABILITIES AND ACTIVELY INVOLVED IN LEGISLATIVE APPELLATE COURT.

A CASE THAT CLARIFIED THE SCOPE OF REASONABLE ACCOMMODATION FOR EMPLOYEES WITH DISABILITIES.

SHE'S HEADED 2000 AMENDMENTS TO EMPLOYMENT AND HOUSING ACT THAT CONFIRMED THE ACT FOR PERSONS WITH DISABILITY.

PRIOR TO JOINING, SHE WORKED AT LEGAL AID SOCIETY FOR 19 YEARS AND NATIONAL ABORTION AND REPRODUCTIVE ACTION LEAGUE FOR TWO YEARS.

SHE OBTAINED BA IN GOVERNMENT IN AFRICAN CITIES IN 1987 AND HER AT UNIVERSITY OF CALIFORNIA IN 1992.

SHE WAS A RECIPIENT OF THE WOMEN'S LAW PUBLIC LAW AND FELLOWSHIP.

WITH THAT, I WILL TURN IT OVER TO CLAUDIA CENTER.

>> THANK YOU.

>> ONE SECOND.

I HAVE TO GIVE PRIVILEGES HERE.

GIVE ME ONE SECOND.

APOLOGIZES TO EVERYONE.

I'M HAVING SLIGHT TECHNICAL DIFFICULTIES, JUST ONE MOMENT.

OKAY, CLAUDIA, GO AHEAD AND TURN ON YOUR VIDEO.

I'M GOING TO HAVE TO CHANGE YOUR SLIDES FOR YOU FOR THE MOMENT.

JUST LET ME KNOW WHEN YOU WANTING TO THE NEXT SLIDE.

>> OKAY.

AM I -- IS THAT GOOD?

>> YOU'RE GOOD, CLAUDIA.

YOU CAN GO AHEAD.

>> OKAY, SO I'M GOING TO TALK A LITTLE BIT TODAY ABOUT THE DIFFERENCE BETWEEN GUARDIANSHIP AND WHETHER A PERSON IS INCOMPETENT TO STAND TRIAL AND I'M ALSO GOING TO TALK ABOUT WHAT ATTORNEYS SHOULD THINK ABOUT WHEN THEY'RE REPRESENTING INDIVIDUAL WHO IS ARE UNDER GUARDIANSHIP OR CONSERVATORSHIP AND IT'S VERY COMMON.

YOU CAN GO AHEAD ON THE SLIDE.

YEAH.

SO GUARDIANSHIP AND WHETHER A PERSON IS INCOMPETENT TO STAND TRIAL ARE TWO DISTINCT ASSESSMENTS UNDER STATE LAW.

OFTEN THE LAWS THEMSELVES WILL USE SIMILAR WORDS SO IT SEEMS AS THOUGH THEY ARE ALMOST CONNECTED BUT THEY ARE TWO DISTINCT ASSESSMENTS THAT ARE MADE FOR DIFFERENT PURPOSES AND IN DIFFERENT CONTEXTS, SO GUARDIANSHIP OR CONSERVATORSHIP IS REALLY IF SOMEBODY IS UNABLE TO PROVIDE FOR THEIR BASIC DAILY NEEDS EVEN WITH SUPPORTS AND WHETHER SOMEONE IS COMPETENT TO STAND TRIAL IS WHETHER THEY ARE ABLE TO UNDERSTAND THE CRIMINAL PROCEEDINGS AGAINST THEM AND WHETHER THEY'RE ABLE TO ASSIST IN THEIR DEFENSE.

SO THE OUTCOME OF ONE ASSESSMENT DOES NOT DETERMINE THE OUTCOME OF THE OTHER ASSESSMENT.

SO YOU CAN GO FORWARD ON THIS SLIDE.

ONE MORE.

SO WHEN THINKING OF REPRESENTING SOMEONE UNDER GUARDIANSHIP AND CONSERVATORSHIP IT'S IMPORTANT TO HAVE BACKGROUND ON THE GUARDIANSHIP SYSTEM OR THE TYPICAL GUARDIANSHIP IN MOST STATES.

IF YOU LOOK AT THE LANGUAGE THAT DEFINE GUARDIANSHIP IT SEEMS AS THOUGH IT'S A VERY NARROW STANDARD, IT'S OFTEN DESCRIBED AS THE LEAST RESTRICTIVE ALTERNATIVE BUT JUDGES ARE SUPPOSE TODAY GRANT IT WITH CLEAR AND CONVINCING EVIDENCE.

THEY'RE SUPPOSED TO BE A HEARING, BUT IN PRACTICE, THERE MAY NOT BE THAT TYPE OF CLOSE SCRUTINY AND EVALUATION IN GRANTING A GUARDIANSHIP.

GUARDIANSHIP MIGHT BE GRANTED BECAUSE IT'S DEEMED TO BE IN THE INDIVIDUAL'S BEST INTEREST OR A PARENT MAY SEEK GUARDIANSHIP BECAUSE THEY NEED TO MANAGE THE FINANCES OF THE INDIVIDUAL BUT THEY'RE ACTUALLY ABLE TO DO EVERYTHING ELSE.

A SERVICE PROVIDER MAY REQUIRE GUARDIANSHIP LIKE A DOCTOR MAY SAY, OH, I NEED GUARDIANSHIP TO GET CONSENT TO THIS MEDICAL PROCEDURE OR SERVICE PROVIDER MAY SAY, YOU KNOW, WE WANT GUARDIANSHIP, YOU KNOW, AS PART OF OUR PROCESS FOR ADMINISTERING THE SERVICE.

SO THEY MAY -- MAY HAVE BEEN PUT IN PLACE MANY YEARS EARLIER WITHOUT A LOT OF SUBSTANTIVE REVIEW OVER THE YEARS.

SO I THINK THAT IT'S IMPORTANT FOR AN ATTORNEY TO BASICALLY NOT MAKE ANY ASSUMPTIONS BASED ON THE FACT THAT A GUARDIANSHIP IS IN PLACE.

IT DOESN'T MEAN THAT THE INDIVIDUAL CAN'T COMMUNICATE.

IT DOESN'T MEAN THAT THEY CAN'T HAVE AN ATTORNEY-CLIENT RELATIONSHIP.

IT'S SOMETHING THAT OBVIOUSLY YOU HAVE TO TAKE INTO CONSIDERATION BUT IT'S NOT DETERMINATIVE FACT ON HOW THAT RELATIONSHIP WILL PROCEED.

SO NEXT SLIDE.

SO RULE OF THUMB BASICALLY IS THAT YOU WANT TO PRESUME THAT THE INDIVIDUAL CAN BE A CLIENT JUST LIKE ANY OTHER CLIENT.

YOU MAY HAVE TO HAVE REASONABLE MODIFICATIONS THAT I'M GOING TO TALK ABOUT IN A MINUTE.

THERE MAY NEED TO BE DIFFERENT STRATEGIES FOR HOW THE ATTORNEY-CLIENT RELATIONSHIP WILL PROCEED, BUT YOUR BASIC RULE OF THUMB IS GOING TO PRESUME THAT THERE IS COMPETENCY TO -- TO HAVE THE RELATIONSHIP.

AND SO WE ARE LUCKY IN THAT THE ABA MODEL RULES, PROFESSIONAL RESPONSIBILITY REALLY GIVES GUIDANCE RULE 1.14 AND THE COMMENT TO THAT RULE ARE REALLY YOUR GO-TO SOURCES FOR ANY SITUATION WHERE YOU'RE NOT SURE HOW TO PROCEED.

NOW, THAT DOESN'T MEAN THAT, YOU KNOW, THERE AREN'T GOING TO BE HARD SITUATIONS OR IT'S NOT THAT THE RULE IS GOING TO ANSWER EVERY QUESTION, BUT I THINK IT'S -- IT'S A VERY HELPFUL GUIDANCE FOR ALL OF US WHO REPRESENT INDIVIDUALS WHO HAVE THIS LEGAL STATUS.

SO RULE 1.14 SAYS THAT AS FAR AS REASONABLY POSSIBLE THE ATTORNEY SHOULD MAINTAIN NORMAL -- A NORMAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT.

SO YOU WANT TO ASSUME THAT THE CLIENT WHEN PROPERLY ADVISED AND ASSISTED IS CAPABLE OF MAKING DECISIONS ABOUT IMPORTANT MATTERS JUST LIKE A CLIENT WITHOUT A DISABILITY.

YOU WANT TO GIVE THAT CLIENT ATTENTION AND RESPECT AND YOU WANT TO COMMUNICATE WITH THE CLIENT, NOT JUST, YOU KNOW, COMMUNICATE WITH THE GUARDIAN OR CONSERVATOR.

NEXT SLIDE.

SO IT'S IMPORTANT TO KNOW THAT STRICT CONFIDENTIALITY APPLIES WITH AN INDIVIDUAL WITH DIMINISHED CAPACITY, SO THAT'S RULE 1.6 IN THE MODEL RULES, BUT THERE IS SOME IMPORTANT INFORMATION IN THE COMMENTS TO RULE 1.14 ABOUT SITUATIONS WHERE A FAMILY MEMBER OR A SUPPORTER WHERE IT MIGHT BE APPROPRIATE TO HAVE THEM PRESENT DURING CERTAIN MEETINGS AND THAT WOULD BE IF THE INDIVIDUAL WITH THE DISABILITY WANTS THAT PERSON THERE AND IF THAT PERSON'S PRESENCE IS NECESSARY TO THE LEGAL REPRESENTATION.

NOW, THERE IS SOME TENSION WITH CASES IN SOME JURISDICTIONS THAT TALK ABOUT THIRD PARTIES BEING PRESENT AS -- AS EXTINGUISHING ATTORNEY-CLIENT PRIVILEGE, BUT IF YOU CAN SHOW, TRACK THE LANGUAGE TO THE COMMENTS TO THE RULE THAT THE PERSON WANTED THAT INDIVIDUAL THERE AND THAT THE SUPPORTER WAS NECESSARY TO THE COMMUNICATION OR THE REPRESENTATION, YOU KNOW, I THINK THAT'S -- THAT'S AN AREA WHERE YOU COULD MAKE A MODIFICATION IF IT'S DEEMED AS THOUGH IT WAS THE RIGHT THING TO DO.

THERE'S ALSO AN EXCEPTION SET UP IN THE RULE FOR WHEN THE ATTORNEY NEEDS TO MAKE SOME LIMITED DISCLOSURE FOR EMERGENCY SITUATIONS TO TAKE PROTECTIVE ACTION WHICH WE ARE NOT GOING TO GET INTO TOO MUCH HERE BUT I JUST WE WANTED TO MENTION THAT THERE IS THAT OTHER AREA.

NEXT SLIDE.

SO WITH ANY INDIVIDUAL WITH A DISABILITY THAT YOU'RE REPRESENTING PARTICULARLY INDIVIDUALS WITH PSYCHIATRIC DISABILITIES OR INTELLECTUAL DISABILITIES, YOU MAY WANT TO THINK ABOUT MODIFYING YOUR STRATEGIES TO ENHANCE THE REPRESENTATION AND TO MAKE SURE THE COMMUNICATION IS EFFECTIVE.

SO, YOU KNOW, THE BIGGEST ELEMENT UNDER THIS CATEGORY WOULD BE ACCESSIBLE COMMUNICATION AND LAWYERS TEND TO STRUGGLE WITH ACCESSIBLE COMMUNICATION AND, YOU KNOW, SO THE STRATEGIES THAT WE ADOPT TO COMMUNICATE WITH OUR CLIENTS CAN HELP WITH ANY CLIENT BECAUSE IT'S GOOD FOR ANY CLIENT.

SO USING SIMPLE ACCESSIBLE LANGUAGE, TRYING TO AVOID LEGALESE, USING SHORT DECLARATIVE SENTENCES, TRY TO DESCRIBE -- TAKE A LEGAL -- LEGALESE, TAKE THAT WORD AND TRY AND BREAK IT DOWN AND USE COMMON WORDS TO DESCRIBE WHAT IT MEANS.

WRITTEN MATERIALS LIKE RETAINER AGREEMENTS OR OTHER TYPES OF INFORMATIONAL HANDOUTS, YOU'LL WANT TO DEVELOP PLAIN LANGUAGE VERSIONS OF THESE WRITTEN MATERIALS AND SOME OF THE ORGANIZATIONS REPRESENTED IN TODAY'S WEBINAR HAVE EXAMPLES OF THESE KINDS OF MATERIALS.

IMPORTANT INFORMATION SHOULD BE REPEATED, MAYBE STATED IN DIFFERENT WORDS IF IT SEEMS AS THOUGH THERE MIGHT BE AN ISSUE WITH COMMUNICATION AND THERE COULD BE MULTIPLE FORMATS MIGHT BE APPROPRIATE FOR ACCESSIBLE.

SO MAYBE E-MAIL OR WRITING OR ORALLY, ET CETERA, NEXT SLIDE.

SO THIS GOES BACK TO WHAT I WAS TALKING WITH RULE 1.14, THE EXISTING SUPPORT NETWORKS CAN HELP WITH THE REPRESENTATION, YOU KNOW, IF YOU FOLLOW THE GUIDANCE OF 1.14 TO TRY AND SUPPORT THE INDIVIDUAL DURING THE ATTORNEY-CLIENT RELATIONSHIP, WHICH, YOU KNOW, IS STRESSFUL AND REQUIRES THE INDIVIDUAL TO THINK ABOUT DIFFICULT AND COMPLEX ISSUES AND MAKE DECISIONS.

AND FINALLY, JUST FLEXIBILITY AND TIME, ACCOMMODATING THE INDIVIDUAL'S NEEDS, THEIR ABILITIES, THEIR PREFERENCES, MAYBE MEET WITH THE INDIVIDUAL AT THEIR HOME OR IN A COMFORTABLE ENVIRONMENT, MAYBE HAVE SHORTER MEETINGS, MAYBE MEET MORE FREQUENTLY OR WHATEVER IT IS THAT SEEMS TO BE EFFECTIVE.

SO THAT'S ALL PRETTY MUCH COMMON SENSE BUT I THINK SOMETIMES IT'S GOOD TO LAY IT OUT AND THAT WAS MY COMMENTS.

>> THANK YOU SO MUCH, CLAUDIA, WE WERE STILL HAVING A FEW TECHNICAL DIFFICULTIES HERE BEHIND THE SCENES, WE ARE HOPING THAT WE HAVE THE SITUATION CORRECTED.

SO I WOULD NOW LIKE TO TURN THINGS OVER TO ROBERT, PROFESSOR OF LAW, ASSOCIATE DEAN FOR EDUCATION INCLUDING DIRECTOR OF THE CLINICAL PROGRAM AND DIRECTOR OF THE DISABILITY RIGHTS LAW CLINIC AT AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW WHERE HE HAS TAUGHT SINCE 1983.

PRIOR TO COMING TO WCL, HE WAS AN ATTORNEY FOR FIVE YEARS AT THE DEPARTMENT OF JUSTICE, SPECIAL LITIGATION SECTION.

LATER RENAMED WITH PEOPLE WITH INTELLECTUAL DISABILITY.

AMONG PUBLICATIONS, COEDITOR AND COAUTHOR, GUIDE TO CONSENT, AUTHOR OF GUARDIANSHIP AND ADULTS WITH DOWN SYNDROME.

COAUTHOR OF ADULTS AND CLIENTS AND AUTHOR OF IMPLEMENTING LEGAL CAPACITY OF THE UN CONVENTION.

THE DIFFICULT ROAD FROM GUARDIANSHIP TO SUPPORTED DECISION-MAKING, HE HAS DEGREE FROM CORNELL DEGREE AND JB FROM CORNELL LAW SCHOOL.

WITH THAT I WILL TURN IT OVER TO YOU, BOB.

>> THE ISSUES WE HAVE BEEN TALKING ABOUT.

SO FIRST WHAT IS SUPPORTED DECISION-MAKING, COULD BE DEFINED IN MANY DIFFERENT WAYS BUT ONE OF THE WAYS TO THINK ABOUT IT IT IS A LESS RESTRICTIVE ALTERNATIVE TO GUARDIANSHIP.

GUARDIANSHIP ITSELF HAS VARIOUS LEVELS OF RESTRICTIVENESS FROM LIMITED TO PRELIMINARY BUT SUPPORTIVE DECISION MAKING IS AN ALTERNATIVE.

MAIN CHARACTERISTIC IS THAT SOMEBODY WHO IS MAKING USE OF SUPPORTED DECISION-MAKING RETAINS HIS OR HER CAPACITY AND COMPETENCY BOTH IN TERMS OF WHICH WE TALKED ABOUT SO FAR.

SO IT IS A WAY TO ASSIST PEOPLE RATHER THAN SUPPLANT, AND THAT'S THE CRITICAL ELEMENT HERE.

I'M GOING TO BE TALKING NOT JUST ABOUT SUPPORTIVE DECISION MAKING SPORTS DEFENDANTS BUT ALSO WITNESSES AND VICTIM WHO IS ARE, OF COURSE, KIND OF WITNESS AND IN SO FAR AS PEOPLE ARE INCREASINGLY USING SUPPORTED DECISION-MAKING, IT'S IMPORTANT THAT THE CRIMINAL JUSTICE SYSTEM BE AWARE OF HOW THAT MIGHT BE USED IN PARTICULAR CONTEXT.

OKAY, SO WHAT IS THE DEFINITION OF SUPPORTED DECISION-MAKING THAT WE MIGHT USE?

I TOOK A STAB AT IT A FEW YEARS AGO AND I THINK THE DEFINITION HAS HELD UP PRETTY WELL.

SUPPORTED DECISION-MAKING CAN BE DEFINED AS A SERIES OF RELATIONSHIPS, PRACTICES, ARRANGEMENTS AND AGREEMENTS OF MORE OR LESS FORMALITY AND INTENSITY DESIGNED TO ASSIST AN INDIVIDUAL WITH A DISABILITY TO MAKE AND COMMUNICATE TO OTHERS DECISIONS ABOUT THE INDIVIDUAL'S LIFE.

WITH MORE TIME WE CAN GO INTO THE DIFFERENT ASPECTS OR ELEMENTS OF THAT DEFINITION BUT I THINK YOU GET THE IDEA, THE IDEA IS A WAY TO HELP PEOPLE ASSIST, SUPPORT THEM IN CONDUCTING THEIR LIVES.

OKAY.

SUPPORT FOR DECISION-MAKING PROCEEDS THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES WHICH CAME INTO EFFECT IN 2008 BUT GOOD A BOOST FROM THE CONVENTION IN PARTICULAR ARTICLE 12, EQUAL RECOGNITION BEFORE THE LAW.

EVERYBODY -- EVERY INDIVIDUAL HAS LEGAL CAPACITY AND CANNOT LOSE THAT CAPACITY.

WE HAVE BEEN TALKING HERE OF WHAT MIGHT BE CALLED MENTAL CAPACITY AND EVEN IF THE CASES THAT THERE'S QUESTIONING OF IT, PEOPLE ARE ABLE TO RETAIN AS MUCH CAPACITY AS THEY CAN AND CAN BE ASSISTED TO ACT EVEN IF THEY DO NEED ASSISTANCE.

GOT A BOOST FROM ARTICLE 12 BUT IT ACTUALLY IS SOMETHING THAT OWES ORIGINS TO WORKS IN CANADA, PARTICULARLY BRITISH COLOMBIA, BULGARIA, ISRAEL HAS A RECENT STATUTE, SOUTH AUSTRALIA, ONE OF THE STATES IN AUSTRALIA AND A NUMBER OF OTHER COUNTRIES, SWEDEN AND NORWAY BEING TWO OTHERS.

IN THE UNITED STATES IT IS A RELATIVELY NEW CONCEPT AND RELATIVELY UNDERDEVELOPED AS OF YET.

RIGHT NOW THERE'S ONE STATUTE THAT I'M AWARE OF IN TEXAS THAT'S A BROAD GENERAL STATUTE INCLUDING SUPPORTED DECISION-MAKING AS ALTERNATIVE GUARDIANSHIP.

THERE'S SOME STATUTES IN DC THAT HAVE USED IT THAT ARE PENDING OR PROPOSED STATUTES WHICH MAY ADOPT BUT NOT YET DONE SO.

IN THE COURTS THERE HAVE BEEN CASES BY PROBATE JUDGES OR SURROGATE JUDGES.

THE HATCH CASE IN VIRGINIA AND SEVERAL CASES IN NEW YORK.

AND JUDGES IN THESE CASES HAVE CONCLUDED ESSENTIALLY THAT THE PROPOSED -- IN THOSE CASES WHERE GUARDIANSHIP WAS PROPOSED DECISION-MAKING WAS LESS RESTRICTIVE ALTERNATIVE TO ALLOW THE PERP TO ACHIEVE HIS OR HER ENDS WITHOUT NEEDING TO LOSE HIS OR HER RIGHTS TO MAKE DECISIONS.

MOST OF THE TIME WHEN WE TALK ABOUT SUPPORTED DECISION MAKING, WE ARE TALKING IN A CIVIL CONTEXT.

SO IN GUARDIANSHIP WITH RESPECT TO GUARDIANSHIP, I SHOULD SAY AND AS A WAY TO PERMIT PEOPLE WITH DISABILITIES TO BE INVOLVED IN ALL THE KINDS OF DECISIONS IN DAILY LIVES THAT YOU MIGHT EXPECT PEOPLE TO HAVE.

THIS IS A DECISION ABOUT THEIR EDUCATION, ABOUT FINANCES, ABOUT THEIR RELATIONSHIPS, INTIMATE AND OTHERWISE, WHERE THEY WANT TO LIVE, ET CETERA.

BUT THERE'S REALLY NO REASON WHY NOT TO APPLY SUPPORTED DECISION-MAKING TO THE CRIMINAL JUSTICE SYSTEM.

SO LET'S LOOK A LITTLE MORE SPECIFICALLY ABOUT HOW THAT -- HOW SUPPORTING DECISION-MAKING MIGHT WORK IN THAT CONTEXT.

FIRST OF ALL, IMAGINE WE ARE DEALING WITH SOMEBODY WHO IS A VICTIM OF A CRIME.

A SUPPORTER OR SUPPORT NETWORK AND I WILL USE THE TWO TERMS INTERCHANGEABLY COULD ASSIST THE VICTIM WITH UNDERSTANDING THE NATURE OF THE CRIME THAT WAS COMMITTED AND BEING ABLE TO COMMUNICATE TO THE PROSECUTOR AND POLICE IMPORTANT INFORMATION ABOUT THE CRIME, COULD INCLUDE WHO THE PERPETRATOR WAS, THE CIRCUMSTANCES OF THE CRIME, ET CETERA, FOR AN INDIVIDUAL WITH DISABILITY WHO HAS DIFFICULTY COMMUNICATING HAVING SOMEBODY IN HIS OR HER NETWORK COULD BE A CRITICAL ROLE, CRITICAL THING TO HAVE AVAILABLE TO HIM OR HER.

THAT PERSON ALSO COULD BE PROVIDING EMOTIONAL SUPPORT TO THE VICTIM AS HE OR SHE RECOUNTS THE EXPERIENCE THAT THE PERSON HAS HAD WITH THE ALLEGED CRIME.

BUT AGAIN, AS WITH OTHER ASPECTS OF SUPPORT DECISION-MAKING, THE VICTIM RETAINS HIS OR HER AGENCY, RETAINS HIS OR HER ABILITY TO CHOOSE WHETHER TO BE ASSISTED AND SO IN WHICH WAYS.

INTERESTINGLY ENOUGH IN THE ARTICLE 16 OF THE CONVENTION OF RIGHTS OF PERSONS WITH DISABILITIES, PROVIDES THAT APPROPRIATE FORMS OF SUPPORT SHOULD BE AVAILABLE FOR PEOPLE WITH DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM, AND I SHOULD PERHAPS SAY FOR THOSE NOT UP ON THEIR INTERNATIONAL LAW, UNITED STATES HAS SIGNED THE CONVENTION RIGHTS WITH PERSONS WITH DISABILITIES BUT NOT RATIFIED IT.

THERE WAS TWO EFFORTS TO DO SO IN THE OBAMA ADMINISTRATION.

THEY WERE NOT SUCCESSFUL.

IT COULD BE BROUGHT UP AGAIN.

CERTAINLY NOT BEFORE THE NEXT CONGRESS.

RIGHT NOW FROM A U.S. STANDPOINT THE CONVENTION IS SOMETHING THAT IS OF INTEREST AND IT HAS BEEN CITED BY SOME LEGAL JURIES AND COMMENTATORS.

BUT WHAT ABOUT WEAKNESSES WHO MAYBE VICTIMS OR WITNESSES TO A CRIME?

AGAIN, A LOT OF THE SAME ISSUES WOULD APPLY.

AND IN ADDITION, WE THINK ABOUT PEOPLE WHO ARE TESTIFYING.

A SUPPORTER OR SUPPORT NETWORK COULD ASSIST THE PERSON IN INTERPRETING HIS OR HER TESTIMONY TO THE JUDGE OR THE JURY.

THIS MAY SEEM A LITTLE ODD TO YOU, THE FACT OF THE MATTER THAT SOMEBODY COMMUNICATES IN UNCONVENTIONAL WAYS, IT MAY NEED INTERPRETER OR SOMEBODY TO COMMUNICATE OR TO CONVEY THE CONTEXT OF WHAT HE ACTUALLY DID AND THAT ASSISTANCE COULD NOT ONLY BE IN TERMS OF WHAT THE WITNESS WISHES TO COMMUNICATE BUT UNDERSTANDING THE QUESTIONS THAT THE LAWYERS MAY POSE EITHER ON DIRECT OR CROSS-EXAMINATION.

IT IS IMPORTANT TO UNDERSTAND THAT IF THE INDIVIDUAL DOES NOT HAVE -- IS NOT COMPETENT, THAT IS CANNOT TESTIFY IN A COMPETENT WAY AND UNDERSTANDING THE MEANING OF HE OR SHE IS TESTIFYING TO AND UNDERSTANDING THE MEANING OF AN OATH, THEN HE OR SHE WILL NOT BE ABLE TO TESTIFY.

BUT IN MY VIEW AND THERE'S NO REAL COURT SUPPORT FOR THIS YET, BUT IN MY VIEW, SOMEBODY WHO WAS COMPETENT WITH THE ASSISTANCE OF HIS OR HER SUPPORT NETWORK OUGHT TO BE ABLE TO PARTICIPATE INCLUDING TO TESTIFY.

DEFENDANTS HAVE ALL THE SAME KIND OF COMMUNICATION ISSUES AND HAVE SOME ADDITIONAL CONCERNS AS WELL.

ONE, OF COURSE, IS THEY HAVE CONSTITUTIONAL RIGHTS TO CONFRONT ACCUSERS AND UNDERSTAND NATURE OF CHARGES AGAINST THEM, THE RIGHTS UNDERPIN PEOPLE NOT COMPETENT TO WITHSTAND TRIAL.

AS CLAUDIA SAID IN PROCEEDING PRESENTATION, THAT PERSON AS SUPPORTER WOULD NOT STAND IN THE PLACE OF THE INDIVIDUAL, WOULD NOT BE SOMEBODY THAT YOU WOULD COMMUNICATE WITH SOLELY AND NOT TALK TO THE DEFENDANT OR YOUR CLIENT, BUT RATHER COULD BE SOMEBODY THAT COULD ASSIST IN THAT.

IN FACT, WHEN WE THINK ABOUT SUPPORTIVE DECISION-MAKING IN THIS CONTEXT, IT LOOKS A LOT LIKE THE REQUEST FOR REASONABLE MODIFICATIONS OR ACCOMMODATIONS BUT WE WOULD ASK IN THE COURT SYSTEM.

IN EFFECT, THE SUPPORTER -- THE PERSON BEING SUPPORTED BRINGS THE NETWORK OR SUPPORTERS TO THE COURT PROCEEDING BUT THE COURT ITSELF -- THE COURT SYSTEM MAY NEED TO BE PROVIDING ACCOMMODATIONS TO ALLOW THAT PERSON TO PARTICIPATE AND UNDERSTAND.

AGAIN, SOMEWHAT OVERLAPPING WITH WHAT CLAUDIA TALKED ABOUT, USE OF PLAIN LANGUAGE AND THE POSSIBILITY OF PRESENTING A WITNESS WHO CAN EXPLAIN BEHAVIOR THAT MIGHT OTHERWISE BE DIFFICULT FOR THE TRIAL EFFECT TO UNDERSTAND FOR A DEFENDANT WITH INTELLECTUAL DISABILITY IN PARTICULAR.

NOT A LOT OF CASE LAW IN THIS AREA.

IT'S VERY MUCH ON THE CUTTING EDGE OF THE ISSUE OF SUPPORTED DECISION-MAKING, BUT THERE IS AN INTERESTING CASE RELATIVELY CIVIL CASE FROM ILLINOIS FROM CHICAGO, IT'S REED VERSUS STATE OF ILLINOIS.

SEVENTH CIRCUIT, 2015 DECISION AND IT'S WRITTEN BY JUDGE OF THAT COURT.

PRO SE CIVIL PLAINTIFF.

SHE BROUGHT A CASE OF -- PERSONAL INJURY CASE ON HER OWN AND ASKED THE COURT FOR VARIOUS ACCOMMODATIONS TO PERMIT HER TO TESTIFY.

THE COURT GAVE HER SOME ACCOMMODATIONS, SO, FOR EXAMPLE, SHE WAS ABLE TO HAVE SOMEBODY TAKE NOTES FOR HER, SIT WITH HER IN COUNSEL TABLE, SHE ALSO WAS GIVEN A PODIUM TO STAND UP WHICH OTHERS WOULD NOT HAVE BEEN PROVIDED AND GIVEN THE OPPORTUNITY TO HAVE OCCASIONAL RECESSES.

HOWEVER, SHE ASKED FOR ADDITIONAL HELP THAT SHE DID NOT GET, SHE ASKED FOR A MICROPHONE, SHE ASKED FOR AN INTERPRETER TO ARTICULATE THOUGHTS WHEN SHE COULD NOT EXPRESS THEM CLEARLY HERSELF AND ALSO WANTED A JURY INTRODUCTION EXPLAINING DISORDER.

THE LOWER COURT JUDGE WAS VERY UNSYMPATHETIC AND SAW HER AS DELAYING PROCEEDINGS, DESCRIBED HER CONDITION AS SIMPLY ONE OF STAMMERING, WHICH TENDING TO MINIMIZE IT AND SHE LOST HER CASE AT THE LOWER COURT LEVEL.

THE CASE WENT TO FEDERAL COURT AND ULTIMATELY TO THE COURT OF APPEALS AND THE COURT MAJORITY SAID, LOOK, THIS INDIVIDUAL SHOULD HAVE THE OPPORTUNITY TO ARGUE THAT THESE ACCOMMODATIONS WERE NEEDED IN ORDER FOR HER TESTIMONY TO BE EFFECTIVE.

THERE'S SOME TECHNICAL ASPECTS OF THE CASE BUT THAT WAS THE ESSENCE OF THE CONCLUSION AND IN EFFECT, ONE SHOULD VIEW WHAT SHE WAS ASKING FOR EITHER AS A REQUEST FOR REASONABLE ACCOMMODATION OR AS AN OPPORTUNITY TO ALLOW HER SUPPORTER IN THIS CASE HER INTERPRETER TO BE WITH HER AND PARTICIPATE IN THE PROCEEDINGS SO THAT SHE COULD, IN FACT, BRING THE CASE THAT SHE INTENDED TO BRING.

AND THAT REALLY IS ALL AT THE END OF MY PART.

I'M HAPPY TO ANSWER ANY QUESTIONS AT THE END.

SO THANK YOU FOR YOUR ATTENTION.

>> ALL RIGHT, THANK YOU SO MUCH, BOB.

JUST A QUICK NOTE FOR EVERYONE, WE ARE STILL HAVING TECHNICAL ISSUES ON NCCJD SO YOU'LL ONLY BE ABLE TO HEAR ME AND NOT SEE ME.

I APOLOGIZE FOR THAT.

I'M GOING TO NOW INTRODUCE OUR NEXT SPEAKERS.

NCCJD WAS THRILLED TO PARTNER WITH FOUR LAW STUDENTS AND WE ARE VERY EXCITED TO FEATURE THREE OF HARD-WORKING LAW STUDENTS ON OUR WEBINAR.

WE WANT TO GIVE THANKS TO STANFORD SCHOOL OF LAW FOR PROVIDING WITH SUCH GREAT TALENT.

ALSO A QUICK REMINDER TO EVERYONE, PLEASE BEGIN LISTING YOUR QUESTIONS FOR OUR SPEAKERS IN EITHER THE CHAT OR THE Q&A BOXES.

YOU CAN POST THEM NOW.

I WILL COLLECT THEM AND AFTER WE HEAR FROM THE LAW STUDENTS, WE WILL START OUR QUESTION AND ANSWER SESSION.

SO LET ME INTRODUCE YOU TO DREW, A SECOND-YEAR LAW SCHOOL AT STANFORD LAW SCHOOL, HE HAS PREVIOUSLY WORKED AS A DEFENSE INVESTIGATOR, PUBLIC DEFENDER SERVICE IN LOUISIANA CAPITAL ASSISTANCE CENTER AND HIGH SCHOOL TEACHER IN CHICAGO.

DREW HOPES TO WORK AS A PUBLIC DEFENDER AFTER GRADUATING FROM LAW SCHOOL AND HAS A PARTICULAR INTEREST IN HOW THE CRIMINAL SYSTEM UNDERSTANDS AND ACCOUNTS FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES.

HE DEVELOPED HIS PAPER AND COMPETENCY TO STAND TRIAL IN CAPITAL DEFINITIONS OF INTELLECTUAL DISABILITY UNDER THE SUPER VISION OF PROFESSOR JOAN PETER AT STANFORD.

SO DREW, GO AHEAD AND TURN ON VIDEO AND YOU CAN GET STARTED.

>> HI, EVERYONE.

HOPE YOU CAN HEAR ME.

AND THANK YOU SO MUCH FOR HAVING ME.

I'M REALLY LOOKING FORWARD TO PRESENTING.

I'M GOING TO JUMP RIGHT IN.

BASICALLY WHAT MY PAPER IS ABOUT AND HOW DEFINITIONS OF INTELLECTUAL DISABILITY THAT ARE USED IN THE DEATH PENALTY CONTEXT OR CAPITAL CONTEXT COULD MAYBE IMPORTED INTO COMPETENCY TO STAND TRIAL PROCEEDINGS.

JUST TO GIVE A BROAD OVERVIEW, THERE'S BEEN TWO MAIN CASE THAT IS DEAL WITH THE INTELLECTUAL DISABILITY AND DEATH PENALTY.

I WAS INVESTIGATOR AT LOUISIANA CENTER WHICH HANDLES CASES, THAT'S HOW I CAME EXPOSED TO THIS ISSUE BEFORE COMING TO LAW SCHOOL.

THE SUPREME COURT INITIALLY BACK IN 1989 SAID THAT STATES COULD EXECUTE INDIVIDUALS WITH INTELLECTUAL DISABILITIES UNDER THE CONSTITUTION AND SPECIFICALLY UNDER THE EIGHTH AMENDMENT AND THEY CAME BACK IN 2002 AND SAID IT WAS UNCONSTITUTIONAL AND THAT WAS MOSTLY TIED TO THE FACT THAT INDIVIDUALS WITH INTELLECTUAL DISABILITIES SEEM TO HAVE LESS CULPABILITY AND THEN AFTERWARDS UNDERSTANDING KIND OF THE RAMIFICATIONS OF A CRIME.

SO WHAT THE SUPREME COURT DID IN ATKINS, THEY LOOKED TO THE AMERICAN ASSOCIATION OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AS WELL AS THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN ORDER TO ACCOUNT FOR HOW ARE YOU GOING TO SET UP THE MEASUREMENT OF INTELLECTUAL DISABILITY AND THEY CAME UP WITH THREE PRONGS AND ARE FOLLOWING THE DSM-5.

SO THOSE THREE PRONGS WERE FIRST THE INTELLECTUAL FUNCTIONING PRONG WHICH SAID THAT YOU NEED TO DEMONSTRATE SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING AND THAT'S TYPICALLY MEASURED BY IQ TESTS, SO THE WAY SCALE AND THE STANFORD ARE SOME OF THE MOST COMMON THAT YOU TEND TO SEE IN COURTROOMS IN DEATH PENALTIES CASES FOR DETERMINING WHETHER OR NOT THE DEFENDANT HAS AN INTELLECTUAL DISABILITY.

THE SECOND PRONG IS THAT THE DEFENDANT NEEDS TO SHOW SIGNIFICANT LIMITATIONS IN ADAPTIVE BEHAVIOR AND ADAPTIVE BEHAVIOR TYPICALLY COVERS THREE DOMAINS, PRACTICAL, CONCEPTUAL AND SOCIAL AND YOU LOOK AT A VARIETY OF FACTORS.

THE SUPREME COURT ACTUALLY HASN'T BEEN NECESSARILY EXPLICIT ON WHAT THOSE FACTORS ARE AND THAT'S SOMETHING THAT I WILL ALSO TALK ABOUT AS THIS PRESENTATION MOVES FORWARD AND THE THIRD FACTOR IS THAT THE AGE OF ONSET HAS TO BE PRIOR TO THE AGE OF 18.

SO THE DEFENDANT HAS TO BE ABLE TO DEMONSTRATE THAT BEFORE THEY WERE 18 YEAR'S OLD THEY SHOWED SIGNS OF INTELLECTUAL FUNCTIONING AND ADOPTIVE BEHAVIOR DEFICITS.

THAT WAS IN 2014 AND ESSENTIALLY THE COURT SAID THE STATES CANNOT USE CUTOFF SCORES. THE DEFENDANT SCORED ABOVE IQ SCORE OF 70, THEY WERE AUTOMATICALLY DISQUALIFIED FROM BEING CONSIDERED TO AN INTELLECTUAL DISABILITY AND ELIGIBLE FOR THE DEATH PENALTY AND THE COURT BASICALLY LOOKED AT THAT AND SAID, IF YOU ACCOUNT FOR MEASUREMENT ON STANDARDIZED TEST WHICH BASICALLY SAY THAT A SCORE THAT YOU GET, IF I GOT A 75, MY SCORE COULD ACTUALLY BE ANYWHERE BETWEEN THE RANGE OF 70 TO 80 AND SO THEY SAID, YOU CAN'T HAVE A IQ SCORE GIVEN THAT FACT.

WHAT THE COURT ALSO DID IS THEY REINFORCED THE FACT THAT STATE STANDARDS NEED TO BE TIED DIRECTLY TO CLINICAL ASSESSMENTS, AND SO THEY SAID THAT THEY NEED TO BE LOOKED AT, DSM-5, AAIDD IN ORDER TO OUTLINE HOW A DEFENDANT CAN SHOW THAT THEY HAVE AN INTELLECTUAL DISABILITY AND THUS THAT A DEFENDANT CAN SHOW THAT THEY'RE NOT ELIGIBLE FOR THE DEATH PENALTY.

BEFORE I TALK ABOUT WHY THE DEFINITIONS SHOULD BE IMPORTED INTO THE COMPETENCY TO STAND TRIAL AREA, IT'S IMPORTANT TO HIGHLIGHTS A FEW PROBLEMS HERE.

FIRST IS THAT THERE'S OTHER FORMS ON IQ TESTS OTHER THAN THE STANDARD ERROR OF MEASUREMENT.

ONE OF THEM IS THE FLYNN EFFECT.

THERE'S A LOT OF LITERATURE OUT THERE IF YOU'RE INTERESTED, I'M HAPPY TO ANSWER QUESTIONS.

BUT THE BASIC UPSHOT OF IT IS EVERY YEAR OUR POPULATION GETS BETTER AT TAKING IQ TESTS.

IF YOU LOOK AT A TEST THAT WAS NORMED MAYBE 90 YEARS AGO, THAT NUMBER IS ACTUALLY THREE YEARS THE IQ SCORES GO UP ABOUT ONE FULL POINT.

SO IF I TOOK A TEST NINE YEARS AGO AND I SCORED A 67 ON THAT TEST, IF THAT WAS NORM FOR TODAY, MY SCORE WOULD BE A 64.

WHAT YOU SEE OVER TIME YOU SEE INFLATION IN PEOPLE'S SCORES ON IQ TESTS AND THAT'S IMPORTANT BECAUSE IF YOU'RE CONSIDERING WHETHER OR NOT A DEFENDANT SCORED OVER 75 AS NOT THE CUTOFF BUT AN IMPORTANT LINE TO DRAW UNDER THE STATUTES, THEN IT MATTERS WHAT YOU'RE SCORE IS AND MATTERS HOW HIGH OR LOW, THAT'S HOW YOU SEE THE DEBATES IN DEATH PENALTY AREA OF WHAT IS IQ SCORE.

WE DON'T HAVE A LOT OF GUIDANCE UNDER THE SECOND PRONG, ADAPTIVE BEHAVIOR.

THERE'S ACTUALLY A CASE IN FRONT OF SUPREME COURT RIGHT NOW CALL MOORE V. TEXAS.

IT'S CURRENTLY IN FRONT OF THE SUPREME COURT AND WILL BE DECIDED EARLY NEXT YEAR.

BASICALLY WHAT IS THAT IS CHALLENGING ARE FACTORS IN TEXAS, AND WE WILL TALK ABOUT IN A MOMENT AS WE TALK ABOUT USE OF EXPERTS IN THE CASES.

IN TERMS OF EXPERT TESTIMONY THROUGH HAT KINS AND HALL THE SUPREME COURT HASN'T GIVEN US ANY SPECIFIC CRITERIA FOR WHO CAN BE AN EXPERT TO TESTIFY AND WHETHER OR NOT THE DEFENDANT HAS INTELLECTUAL DISABILITY.

THAT'S PROBLEM IN A NUMBER OF WAYS.

ONE OF THESE ETHNICITY UPWARD ADJUSTMENTS WHICH ROBERT DETAILS IN HIS ARTICLE AND I'M HAPPY TO SEND OUT A LINK AND THAT BASICALLY TALKS ABOUT THAT SEVERAL EXPERTS ARE LOOKING -- RESEARCH THAT AFRICAN AMERICANS AND LATINO DEFENDANTS OR JUST INDIVIDUALS GENERALLY SCORE LOWER ON IQ TESTS AND WHEN THEY LOOK AT THEY ARE ACTUALLY INCREASING IQ SCORES WHEN THEY MEASURE THAT BECAUSE OF THE GENERAL TREND.

THAT'S AN ISSUE BECAUSE IF YOU'RE IN A STATE LIKE FLORIDA, IF YOU SCORE ABOVE 70, WE ARE GOING TO BE CONSIDER DEATH PENALTY ELIGIBLE.

THOSE TYPES OF DEFENDANTS WHO ARE AFRICAN AMERICAN OR LATINO OF SPECIFIC ETHNICITY ARE AT A HIGHER RISK OF BEING FOUND ELIGIBLE THAN OTHER TYPES OF DEFENDANTS.

THE OTHER ISSUE THAT WE ARE SEEING ARE EXPERTS IN TEXAS IN PARTICULAR AND THERE WAS AN EXPERT WHO KIND OF SHOWS THIS BROADER ETHNICITY ADJUSTMENT PROBLEM WHO WAS LOOKING AT THESE TYPES OF DEFENDANTS SPECIFICALLY FROM LOW-INCOME COMMUNITIES AND MOST OFTEN MINORITY DEFENDANTS AND HE WAS SAYING THEY'RE NOT EXPOSED TO THESE TYPES OF PRACTICAL SKILLS THAT WE LOOK FOR UNDER ADAPTIVE BEHAVIOR SPECIFICALLY TO SHOW WHETHER OR NOT SOMEONE HAS INTELLECTUAL DISABILITY, SO WE ARE LOOKING AT, YOU KNOW, CAN THEY TAKE CARE OF THEMSELVES, CAN THEY TOOK FOR THEMSELVES, THEY DON'T HAVE THE TYPE OF SKILLS FROM THE COMMUNITY SO I THINK THEY ARE ACTUALLY LESS LIKELY TO HAVE AN INTELLECTUAL DISABLE, IS JUST THEY DON'T HAVE THOSE SKILLS.

THE IMPORTANCE OF THAT IS JUST THAT THOSE TYPES OF EXPERTS HAVE BEEN CERTIFIED IN THE PAST.

DENKOWSKI WAS REJECTED FROM THE FORENSIC BOARD IN TEXAS BUT THEY HAVE BEEN ALLOWED TO TESTIFY IN THE PAST.

OVERALL WE JUST DON'T HAVE ENOUGH GUIDANCE.

THE LAST AREA OF BRISENO FACTORS WHICH THE TEXAS COURT OF APPEALS HAS CREATED AND LITERATURE BASICALLY SAY THAT IS THESE FACTORS WERE CREATED AND THEY DON'T FOLLOW SCIENTIFIC STANDARDS, THE EXACT LANGUAGE IS THAT IT'S SUBSTANTIVE IMPAIRMENTS IN A PERSON'S ABILITY TO MEET EXPECTED CULTURE AND AGE-APPROPRIATE STANDARDS WHICH DOESN'T MATCH UP TO THE APA OR THE AAIDD, AND IT'S VAGUE AND DIFFICULT FOR THEM, DEFENDANTS TO PROVE THAT THEY HAVE ADAPTIVE BEHAVIOR DEFICITS.

SO NOW THAT WE HAVE DETAILED SOME OF THE PROBLEMS WITH THE DEFINITIONS OF INTELLECTUAL DISABILITY IN THE DEATH PENALTY AREA, I'M ACTUALLY GOING TO TELL YOU WHY IT'S IMPORTANT THAT WE BRING IT INTO COMPETENCY TO STAND TRIAL.

SO AS MR. FLEISCHNER DETAILED EARLIER, SUFFICIENT ABILITY TO CONSULT WITH COUNSEL AND UNDERSTAND THE COURTROOM PROCEEDINGS AROUND YOU AND RIGHT NOW THE CURRENT DOCTRINE TO STAND TRIAL DOESN'T ACCOUNT FOR INTELLECTUAL DISABILITY SPECIFICALLY AND THERE'S ONE OTHER THING I WANT TO HIGHLIGHT, ANYONE IN THE COURTROOM WHETHER IT'S THE DEFENSE ATTORNEY OR THE JUDGE, SPECIFIC ACTORS, THE PROSECUTOR CAN ACTUALLY BRING UP AND CHALLENGE AND RAISE INTO DOUBT WHETHER OR NOT A DEFENDANT IS COMPETENT TO STAND TRIAL AND FOR INTELLECTUAL DISABILITY THERE'S ACTUALLY TWO MAIN ISSUES.

ONE IS THAT INDIVIDUALS WITH INTELLECTUAL DISABILITY FREQUENTLY EMPLOY MASKING TECHNIQUES WHICH MEANS THAT THEY LOOK LIKE MAYBE THEY UNDERSTAND SOMETHING OR ACT LIKE THEY UNDERSTAND SOMETHING BUT IN REALITY THEY ACTUALLY DON'T.

WHEN WE USE THESE TYPES OF IMPRESSIONISTIC STANDARDS OR RAISE THAT INTO QUESTION, IT'S IMPORTANT THAT WE ARE TRYING TO FLAG THIS AT AN EARLIER STAGE RATHER THAN LETTING IT SLIP THROUGH.

THE OTHER THING AND IT'S INADEQUATE RESTORATION.

INTELLECTUAL DISABILITY IS NOT A CURABLE RESTORABLE CONDITION IN THE WAY THAT MAYBE A MENTAL ILLNESS IS, SO WHEN YOU'RE TALKING ABOUT TRYING TO RESTORE BACK TO COMPETENCY, IT'S MUCH MORE DIFFICULT AND COMPLICATED THAN THERE'S ACTUALLY SOME STUDIES AND LITERATURE THAT SHOWS THAT GOES TO FIND DEFENDANTS COMPETENT TO STAND TRIAL EVEN WHEN THEY ARE INCOMPETENT BECAUSE THEY AREN'T SURE WHAT TO DO NEXT.

THE OTHER REASON OF COMPETENCY TO STAND TRIAL IS IMPORTANT BECAUSE THEY ALREADY INVOLVE INQUIRIES INTO COGNITIVE FUNCTIONING.

THEY WANT TO GET IN THE DEFENDANT'S HEAD AND HOW DOES THIS PERSON SPECIFICALLY WORK AND HOW ARE THEY ABLE TO COMMUNICATE BECAUSE OF THAT AND UNDERSTAND THE PROCEEDINGS AROUND THEM AND WE ALREADY HAVE THIS SET OF DEFINITIONS IN THE CAPITAL CONTEXT THAT ISN'T JUST KIND OF AT LOOSE TO STAND TRIAL AND SPECIFICALLY TIED TO SCIENCE FOR INTELLECTUAL DISABLE.

AND THE LAST THING IS THE EFFICIENCY STANDPOINT.

COMPETENCY TO STAND TRIAL IS A GATEWAY TO THE TRIAL AT LARGE AND IF WE ARE TRYING NOT TO WASTE RESOURCES IN SOME WAYS AND WE ARE TRYING TO MAKE SURE THAT WE ARE NOT PREJUDICING THESE TYPES OF INDIVIDUALS WHO HAVE INTELLECTUAL DISABILITIES TO A TRIAL THAT IS IN MANY WAYS UNCONSTITUTIONAL, WE WANT TO UNDERSTAND THIS AS EARLY AS POSSIBLE AND IN THE BEST WAY AS POSSIBLE.

SO A FEW DIFFERENT RECOMMENDATIONS TO KIND OF ROUND OUT MY PRESENTATION, ONE IS THAT WE NEED CLEAR DEFINITIONS OF METHODS AND PRACTICES FOR MEASURING INTELLECTUAL DISABILITY ESPECIALLY ADAPTIVE BEHAVIOR.

STANDARDIZED TESTING IS ONE POSSIBLE WAY OF DOING THAT.

WE HAVE SEEN THE PROBLEMS WITH THAT UNDER THE FIRST PRONG OF INTELLECTUAL FUNCTIONING IN THE CAPITAL CONTEXT AND WE HAVE SEEN THE ERRORS THAT I TALKED ABOUT EARLIER.

UNDERSTAND ADAPTIVE BEHAVIOR, THIS IS A CURRENT STANDARDIZED TEST.

BUT, AGAIN, RELYING SO MUCH ON STANDARDIZED TESTS MEANS THAT YOU EXPOSE YOURSELF TO ERROR AND YOU ALSO BECOME EVEN MORE RELIED ON EXPERTS WHICH CAN LEAD TO MORE PROBLEMS, SO MAYBE A SOLUTION THAT I SUGGEST IN MY PAPER WOULD BE TO FOR LEGISLATORS TO OUTLINE THESE ARE THE TYPES OF DOCUMENTS, THESE ARE THE TYPES OF TESTIMONY THAT WE REQUIRE IN LOOKING INTO COMPETENCY TO STAND TRIAL AND LOOKING AT INTELLECTUAL DISABILITY BEFORE WE MAKE THE FINAL DETERMINATION.

THE OTHER THING THE INCREASED ACCOUNTABILITY FOR EXPERTS WHETHER THAT'S LEGISLATURE AND COURTS DETERMINING, OVERALL WE ARE GOING TO REQUIRE THIS TYPE OF CRITERIA FROM OUR EXPERTS WHO ARE TESTIFYING ON INTELLECTUAL DISABILITIES IN COURTS.

THERE ARE A FEW DIFFERENT WAYS THAT CAN BE GONE ABOUT BUT IT IS IMPORTANT WHEN LOOKING AT ACROSS THE COUNTRY WHAT TYPES OF EXPERTS ARE TESTIFYING WHICH IS OFTEN FORENSIC EXPERTS THAT THIS IS AN AREA THAT NEEDS INCREASED FOCUS.

THE LAST THING IS REFORMING COMPETENCY TO ACCOUNT FOR INTELLECTUAL DISABILITY.

BUT THERE ARE A FEW DIFFERENT LITIGATION STRATEGIES THAT I WOULD SUGGEST.

THIS IS GOING TO GET IN THE WEEDS WITH THE LAW, BUT IF WE THINK ABOUT ATKINS AND HALL, THEY'RE TALKING ABOUT THE IDEA THAT THERE'S AN EVOLVING SET OF STANDARDS OF DECENCY IN OUR SOCIETY AND THAT'S HOW THEY ARE DECIDING THAT EVEN THOUGH BEFORE WE HAVE SAID INDIVIDUALS WITH INTELLECTUAL DISABILITIES COULD BE EXECUTED, NOW THEY CAN'T BE.

SO MAYBE THAT SAME TYPE OF LOGIC CAN BE APPLIED TO COMPETENCY TO STAND TRIAL EVEN THOUGH BEFORE WE DIDN'T ACCOUNT FOR THE COGNITIVE CONDITION, NOW WE ARE GOING TO BECAUSE WE RECOGNIZE THAT IT'S DIFFERENT THAN MENTAL ILLNESS AN IMPORTANT TO DISTINGUISH BETWEEN THE TWO.

THE OTHER THING IS JUST THE IDEA OF DUE PROCESS.

WE TALKED ABOUT HOW A DEFENDANT CANNOT BE TRIED WHILE INCOMPETENT TO STAND TRIAL SO IT'S IMPORTANT THEN THAT WE USE THE BEST MECHANISMS AND MEASUREMENTS POSSIBLE TO DETERMINE WHAT EXACTLY IS AN INDIVIDUAL'S LEVEL OF COGNITIVE FUNCTION AND HOW WE ARE ASSESSING THAT AND HOW THAT'S IMPACTING COMPETENCY.

AND THEN THE THIRD THING WOULD BE MAYBE UNDERSTANDING ATKINS IN A DIFFERENT WAY.

MAYBE ATKINS ISN'T JUST SAYING THAT WE ARE NOT GOING TO EXECUTE INDIVIDUALS INTELLECTUAL DISABILITIES, MAYBE IT SAYS THAT IN AREAS OF THE LAW WHERE WE NEED TO CLOSELY INTERROGATE PSYCHOLOGICAL AND COGNITIVE CONDITIONS AND UNDERSTAND WHAT IS GOING ON IN SOMEONE'S BRAIN.

JUDGES AND LAWYERS AREN'T SCIENTISTS AND WE NEED TO UNDERSTAND THAT IN THE BEST WAY POSSIBLE.

THESE ARE JUST A FEW DIFFERENT SUGGESTIONS.

I'M HAPPY TO TALK MORE ABOUT MY PAPER AND PRESENTATION IN THE QUESTIONS AND COMMENTS SECTION AND THANK YOU SO MUCH FOR HAVING ME.

>> ALL RIGHT.

THANK YOU SO MUCH, DREW.

A QUICK REMINDER TO ALL OF OUR LISTENERS, PLEASE SUBMIT YOUR QUESTIONS TO THE CHAT BOX AND Q&A AND WE WILL READ THOSE TO THE PANELISTS AT THE VERY END.

UP NEXT WE HAVE BROOKE BOUTWELL, CURRENTLY A SECOND YEAR LAW STUDENT, SHE GRADUATED FROM THE UNIVERSITY OF TULSA WITH A DEGREE IN ENGLISH LANGUAGE AND LITERATURE, HER PREVIOUS WORK INCLUDES VICTIM ADVOCACY THROUGH THE OKLAHOMA CITY POLICE DEPARTMENT AS WELL AS VOLUNTEER WORK WITH THE JUVENILE DIABETES RESEARCH FOUNDATION.

THE AMERICAN CANCER SOCIETY AND THE SUSAN G. KOMAN FOUNDATION.

SHE WORKED AS PART OF LEGAL INTERNSHIP DURING THE SUMMER OF 2016.

TO BROOK, GO AHEAD AND TURN ON YOUR VIDEO AND UNMUTE YOURSELF AND YOU CAN GET STARTED.

>> GOOD AFTERNOON.

OKAY, HI, EVERYONE.

AS MENTIONED, I FOCUS WHICH IS LITIGATION THAT'S SURROUNDING THE CONSTITUTIONAL VIOLATIONS OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM.

AS MENTIONED IN PRESENTATION, PEOPLE WHO ARE BEING INCOMPETENT TO STAND TRIAL ARE ISSUES OF COMPETENCY THAT ARE BEING RAISED ARE BEING SENT TO STATE HOSPITALS -- THOSE ARE MY SLIDES, ARE BEING SENT TO STATE HOSPITALS FOR TREATMENT AND BECAUSE OF THE HUGE INFLUX OF THE PEOPLE THAT ARE BEING AFFECTED BY THIS, A LOT OF THE PEOPLE, THERE'S NOT ENOUGH ROOM IN THE STATE HOSPITALS, NOT ENOUGH BEDS FOR TREATMENT FACILITIES, AND SO THESE PEOPLE ARE BEING SENT TO JAIL TO WAIT FOR EITHER COMPETENCY EVALUATIONS OR COMPETENCY TREATMENT AND THESE PEOPLE HAVE NEVER BEEN TRIED IN A COURT OF LAW, THEY HAVE NOT HELD GUILTY, BUT MANY PEOPLE ARE SPENDING WEEKS, MONTHS AND EVEN YEARS IN JAIL, AND AS I TALKED ON MY PAPER, SOME OF THE PEOPLE ARE SPENDING MORE TIME IN JAIL WAITING COMPETENCY HEARINGS THAN THE MAXIMUM SENTENCE THAT THEIR OFFENSE WOULD HAVE CARRIED.

SO THERE'S BEEN A HUGE ISSUE IN LITIGATION IN RECENT YEARS, I FOCUS MY PAPER ON FOUR SPECIFIC STATE CASES.

I FOCUS ON TWO CASES IN WASHINGTON AND PENNSYLVANIA WHERE THE CASE HAS BEEN TRIED AND LITIGATED AND SETTLED IN TWO VASTLY DIFFERENT WAYS, AND I FOCUS IN A CURRENT CASE IN NORTHERN CALIFORNIA THAT FOCUSES SPECIFICALLY ON PERSON WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, AND THEN LASTLY, I FOCUS ON AN ISSUE IN TEXAS WHERE SOME PENDING LITIGATION IS HAPPENING.

SO IN WASHINGTON THE DISABILITY RIGHT OF WASHINGTON FILED A CLASS ACTION LAWSUIT FOR PERSONS WITH INTELLECTUAL AND MENTAL ILLNESS.

THE POLICY IN THE STATE OF WASHINGTON ALREADY WAS THAT COMPETENCY WAIT TIME SHOULD NOT EXCEED 7 DAYS.

THIS WAS BEING VASTLY EXCEEDED.

IT RANGED ANYWHERE FROM OVER 14 DAYS TO OVER 56 AVERAGE DAYS THAT PEOPLE WERE SPENDING IN JAIL WAITING COMPETENCY HEARINGS.

IN THIS CASE, THE JUDGE FOUND FILED FOR DISABILITY RIGHT AND ISSUED PERMANENT INJUNCTION IN WASHINGTON AND THEY WERE FORCING THE SERVICES TO COMPLY WITH THE 7-DAY MINIMUM THAT THEY HAD SET.

THEY DID NOT GIVE ANY FUNDS OR ANY RESOURCES OR ANY SUGGESTIONS AS TO HOW THE DEPARTMENT SHOULD COMPLY WITH THE 7-DAY MINIMUM AND SIMPLY SAID THAT LACK OF FUNDS WAS NOT A DEFENSE FOR THIS CONSTITUTIONAL VIOLATION.

A YEAR LATER, THAT SAME JUDGE BEGAN TO HOLD THE STATE DEPARTMENT IN CONTEMPT BECAUSE THEY WERE FAILING TO COMPLY WITH THIS 7-DAY MINIMUM.

AT THE TIME THE JUDGE WAS HOLDING THEM IN CONTEMPT, ONLY 20% OF PEOPLE HAD -- HAD WAITED FOR THE 7-DAY MINIMUM IN THIS CASE.

SO THE JUDGE BEGAN TO ISSUE FINES OF 500 TO ONE THOUSAND DOLLARS FOR EACH PERSON THAT WAS WAITING FOR MORE THAN 7 DAYS.

ON APPEAL, THE 9TH CIRCUIT HELD THE 7-DAY MINIMUM NEEDED TO BE REVERSED AND NEEDED TO COMPLY FOR THE WAIT TIME.

IN A VERY DIFFERENT WAY, PENNSYLVANIA, ACLU OF PENNSYLVANIA FILED A SIMILAR CLASS ACTION LAWSUIT ON BEHALF MENTAL DISABILITIES AND WENT TO SETTLEMENT.

THE COURT APPROVED TO SETTLEMENT THAT DID NOT OFFER A SPECIFIC MINIMUM WAIT TIME BUT GAVE VERY SPECIFIC STRATEGIES AS TO HOW THE PENNSYLVANIA STATE DEPARTMENT WAS TO FIX THESE ISSUES.

SO AS YOU CAN SEE ON MY SLIDE, THEY HAD A SPECIFIC AMOUNT OF TREATMENT OPTIONS THAT NEEDED TO BE OPENED UP WITHIN A SPECIFIC AMOUNT OF DAYS.

THEY WENT ONTO LIST WHAT THOSE SPECIFIC TREATMENT OPTIONS COULD INCLUDE AND THE AMOUNT OF FUNDS THAT NEEDED TO BE ALLOCATED.

SO THOSE ARE TWO VERY DIFFERENT WAYS TO LOOK AT THE ISSUE AND SINCE THEY ARE SO RECENT, WE ARE STILL WAIT TO GO SEE HOW SUCCESSFUL THE PENNSYLVANIA SETTLEMENT WOULD BE.

A VERY RECENT CASE THAT'S BEEN FILED IN NORTHERN CALIFORNIA IS EXTREMELY RELEVANT TO THE ISSUE THAT WE ARE TALKING ABOUT TODAY.

THIS IS THE ONLY CLASS ACTION SO FAR THAT'S FOCUSED SPECIFICALLY ON PEOPLE WITH INTELLECTUAL AND THE DEVELOPMENTAL DISABILITIES AND THEIR FAMILIES.

PEOPLE WITH INTELLECTUAL AND MENTAL DISABILITIES FACE UNIQUE STRUGGLE IN THE JAIL POPULATION.

THERE ARE TWO VERY SPECIFIC INSTANCES THAT THIS CASE WENT INTO, ONE OF THE PLAINTIFFS IN THIS CASE WAS SENT TO WAIT IN JAIL FOR OVER EIGHT MONTHS.

HE WAS PUT IN A GENERAL POPULATION WHERE HE WAS SUBJECT TO ABUSE BY OTHER INMATES AND RAPE AND HE SUFFERED SOME VERY SERIOUS PSYCHOLOGICAL ISSUES BECAUSE OF THAT.

ANOTHER PLAINTIFF IN THIS CASE IN CONTRAST WAS PUT IN SOLITARY CONFINEMENT WHICH HAPPENS A LOT TO PEOPLE WITH I/DD IN THE CRIMINAL JUSTICE SYSTEM AND THIS PARTICULAR PLAINTIFF, BEGAN TO DETERIORATE AS MANY PEOPLE PUT IN CONFINEMENT DO AND ENDED UP COMMITTED SUICIDE AS A RESULT.

THE TWO PLAINTIFFS IN THE PAPER THEY LOOK AT SERIOUS ISSUES THAT ARE SPECIFIC TO PEOPLE WITH I/DD WHEN PLACED IN JAIL SENTENCES FOR EXTENDED PERIODS OF TIME.

THIS CASE IN NORTHERN CALIFORNIA HAS JUST BEEN FILED, SO FAR IT SURVIVED MOTIONS TO DISMISS AND EMERGED THAT HAVE BEEN PRESENTED BY THE STATE, SO WE WILL SEE WHAT HAPPENS IN THIS CASE FROM HERE ON OUT.

AND THEN THE LAST STATE THAT I LOOKED AT WAS TEXAS.

TEXAS WAS AN INTERESTING CASE.

IN 2007, DISABILITY RIGHTS OF TEXAS FILED A CLASS ACTION LAWSUIT AND THE JUDGE, THEY SAID THAT THEY NEED TODAY COMPLY WITH 21-DAY MINIMUM IN THIS CASE.

FOLLOWING THAT ORDER, TEXAS DID A REALLY GOOD JOB.

THEY ADDED BEDS TO THE CURRENT STATE HOSPITALS, THEY CONTRACTED OUT TO PRIVATE HOSPITALS AND OTHER FACILITIES AND THEY WERE ABLE TO GET THEIR WAIT TIME WITHIN THE 21-DAY MINIMUM.

THEY WERE COMPLYING.

UNFORTUNATELY IN 2014, AN APPELLATE COURT OVERRULED THE JUDGE'S DECISION IN THIS CASE DUE TO A LEGAL TECHNICALITY AND AFTER THAT, ALL OF THE GOOD WORK THAT TEXAS HAD DONE WENT OUT OF THE WINDOW.

THEY CURRENTLY THEIR COMPETENCY WAIT TIME IS AN AVERAGE OF 122 DAYS WHICH IS A HUGE ISSUE AND THE STATE DEPARTMENT HAS GOTTEN RECORD ACKNOWLEDGING WHAT A HUGE ISSUE IT IS AND HAS SAID THAT THEY ARE WORKING THEIR BEST TO TRY TO DEVELOP STRATEGIES TO GET THEIR COMPETENCY WITHIN A REASONABLE TIME, AND THEY'VE ALSO GONE ON RECORD SAYING THAT THEY'RE CURRENTLY JUST WAITING FOR ANOTHER CLASS-ACTION LAWSUIT TO OCCUR TO GET THEM WITHIN COMPETENCY WAIT TIME WHICH IS REASONABLE.

AND THAT IS ALL OF MY PRESENTATION.

>> ALL RIGHT.

THANK YOU, SO MUCH BROOKE.

APOLOGIES THAT WE LOST SOME OF THE VIDEO AT THE END.

AGAIN, TECHNICAL ISSUES THAT CAME UP.

NOW FOR OUR FINAL PRESENTER, HILLARY FRAME, SHE IS CURRENTLY A SECOND-YEAR LAW SCHOOL STUDENT, PROJECT COORDINATOR FOR EDUCATION PROGRAM AND PROVIDES CHILDREN IN THE FOSTER CARE WITH SURROGATE PARENTS.

PRIOR TO LAW SCHOOL, HILLARY WAS A CASE MANAGER FOR INDIVIDUALS WITH DISABILITIES WHO FACED HOMELESSNESS IN NEW ORLEANS.

SHE WORKED ON THIS PROJECT AS PART OF HER LEGAL INTERNSHIP STARTING THE SUMMER OF 2016.

SO, HILLARY, YOU CAN UNMUTE YOURSELF AND TURN ON YOUR VIDEO AND GET STARTED.

>> OKAY.

I THINK IT'S WORKING NOW.

OKAY.

SO, HI, MY NAME IS HILLARY FRAME AND I'M EXCITED TO BE HERE TODAY.

WE ARE GOING TO BE TALKING ABOUT COMPETENCY VERSUS THE INSANITY DEFENSE.

THAT'S COMPETENCY TO STAND TRIAL AS A LOT OF THE PRESENTERS HAVE BEEN TALKING ABOUT TODAY.

FIRST, WE WILL TALK ABOUT POP CULTURE AND COMPETENCY AND INSANITY.

ANYONE HERE WHO HAS PROBABLY WATCHED LAW AND ORDER AND CSI HAS CLAIMED INSANITY DEFENSE.

SOMETHING THAT'S THROWN AROUND IN POP CULTURE AND NOVELS AND THINGS LIKE THAT WITHOUT A LOT OF ACTUAL DISCUSSION OF WHAT IT IS AND WHAT IT MEANS TO CLAIM THAT DEFENSE AND KIND OF THE DIFFERENCE BETWEEN THAT AND COMPETENCY TO STAND TRIAL SO A LOT OF PEOPLE ARE REALLY UNAWARE OF THIS.

DUE TO THE FACT THAT THE INSANITY DEFENSE IS OFTEN DEPICTED AS THE KIND OF WAY TO GO, IF YOU WANT TO GET OUT -- NOT BE HELD RESPONSIBLE FOR SOMETHING, I THINK IT'S REALLY IMPORTANT THAT PEOPLE ACTUALLY UNDERSTAND WHAT IT MEANS BECAUSE I THINK THAT THE KIND OF INSENSITIVITY AROUND THE INSANITY DEFENSE REALLY SHOWS WHERE OUR CULTURE NEEDS TO SHIFT AROUND ISSUES WITH PEOPLE THAT HAVE INTELLECTUAL DEVELOPMENTAL DISABILITIES JUST SIMPLY BECAUSE IT'S CLEARLY AS DEPICTED NOT A RESPECTED THING TO DO IN A LEGAL SETTING WHEN IN ACTUALITY IS COMPLEX.

SO BASICALLY WHEN THE CONCERN ABOUT COMPETENCY, WHETHER IT'S RAISED BY AN ATTORNEY OR IT'S RAISED BY THE JUDGE OR SOMEONE ELSE INVOLVED IN THE CASE, THE CRIMINAL CASE IS PUT ON HOLD AND THEN THIS PERSON GOES INTO WAITING TO BE EVALUATED FOR COMPETENCY.

SO THAT'S KIND OF WHERE BROOKE'S PRESENTATION COMES WHEN PEOPLE ARE WAITING.

THE TIMELINE IS VERY STRUCTURED.

SO THE PERSON WILL WAIT FOR THEIR BED TO BASICALLY OPEN UP IN A PSYCHIATRIC HOSPITAL, SOMETIMES A FORENSIC HOSPITAL, IT JUST DEPENDS AND THEY WILL THEN GO AND BE TESTED OR EVALUATED FOR THEIR COMPETENCY.

THE TEST CAST-MR IS WHAT IS OFTEN USED TO REVIEW COMPETENCY TO STAND TRIAL, AND BASICALLY WHAT WILL HAPPEN IS THE PERSON MIGHT TAKE A TEST, THEY'LL BE EVALUATED BY A PSYCHIATRIST OR PSYCHOLOGIST WHO WILL TALK TO THEM, ASK THEM DIFFERENT QUESTIONS ABOUT WHAT THEY UNDERSTAND, IF THEY UNDERSTAND BASICALLY THEIR RIGHTS AS A DEFENDANT, THINGS LIKE THAT.

AND THEN THE PSYCHIATRIST, PSYCHOLOGIST WILL PUT TOGETHER A REPORT WHICH WILL GO BACK TO THE JUDGE.

THE JUDGE HAS THE FINAL SAY IN WHETHER THEY THINK THE DEFENDANT IS COMPETENT TO STAND TRIAL OR NOT DESPITE WHAT THAT REPORT MIGHT SAY, SO THAT REPORT MIGHT SAY WE WOULD RECOMMEND THIS PERSON BE FOUND INCOMPETENT TO STAND TRIAL OR THE OPPOSITE AND THE JUDGE, YOU KNOW, CAN SAY, I DISAGREE WITH THIS, AND THE TRIAL MIGHT PROCEED OR THE PERSON MIGHT BE FOUND INCOMPETENT TO STAND TRIAL.

IF THE PERSON THAT'S FOUND INCOMPETENT TO STAND TRIAL, THEY WILL GO FOR A RESTORATION OF COMPETENCY WHICH ALSO AS WAS COVERED EARLIER CAN TAKE PLACE IN VARIOUS LOCATIONS, OFTEN IN PSYCHIATRIC HOSPITAL AND THAT CAN TAKE QUITE A LONG TIME DEPENDING ON WHAT IS GOING ON AND IF SOMEONE IS FOUND TO NEVER BE RESTORED TO COMPETENCY, THEY CAN BE HELD FOR VARIOUS LENGTHS OF TIME.

HOW IT APPLIES TO PEOPLE WITH I/DD.

THE INSANITY DEFENSE IS DEFENSE.

THAT MEANS THAT AT THE TIME OF A CRIME THE PERSON COULD NOT BE HELD RESPONSIBLE FOR THEIR ACTIONS WHEREAS INCOMPETENCY TO STAND TRIAL HAS NOTHING TO DO WITH THE CRIME ITSELF, IT SIMPLY HAS TO DO WITH AT THE TIME OF THE TRIAL.

SO THE INSANITY DEFENSE CLAIMS THAT THE PERSON SHOULD NOT BE HELD RESPONSIBLE FOR A CRIME.

THERE ARE DIFFERENT STANDARDS FOR THIS DEFENSE THAT I'M GOING TO TALK HERE IN JUST A SECOND.

THERE ARE A FEW DIFFERENT ONES, BUT WE ARE GOING TO TALK ABOUT THE MAIN FOUR.

AND WHAT I REALLY WANT TO STRESS IS HOW RARE THE DEFENSE IS.

AS YOU CAN SEE IN THE QUOTE THAT I USED ON THE SLIDE, IT'S ONLY USED IN LESS THAN 1% OF CASES, AND WHEN IT IS USED, IT'S CLEARLY NOT THE MOST SUCCESSFUL DEFENSE IN THE WORLD.

64% FOUND GUILTY.

IT'S NOT A GET-OUT-OF-JAIL-FREE CARD BECAUSE IT'S VERY MUCH A SERIOUS THING THAT PEOPLE USE AND INVOLVES SOME SERIOUS ILLNESSES OR OTHER ISSUES GOING ON IN A PERSON'S LIFE, AND WE ARE GOING TO TALK ABOUT WHAT THAT MEANS HERE AFTER WE DISCUSS THESE STANDARDS.

SO THESE ARE THE FOUR MOST COMMON STANDARDS FOR INSANITY.

THEY CAN VARY BY STATE BUT YOU HAVE THE -- I'M PROBABLY GOING TO SAY WHICH BASICALLY STATES THAT A PERSON AT THE TIME OF THE CRIME DID NOT KNOW THE NATURE OF IT, THEY DIDN'T UNDERSTAND WHAT THEY WERE DOING WAS WRONG OR THEY DIDN'T UNDERSTAND THAT THEY WERE HURTING SOMEONE, SOMETHING LIKE THAT.

THE IRRESISTIBLE IMPULSE RULE IS THAT AT THE TIME OF A CRIME THE PERSON HAS IMPULSE TO ACT IN A WAY THAT THEY COULDN'T TELL THE DIFFERENCE BETWEEN RIGHT AND WRONG AND SO SHOULDN'T BE HELD RESPONSIBLE BECAUSE THEY WERE UNABLE TO STOP THEMSELVES.

THE RULE IS THAT BASICALLY SOMEBODY ISN'T RESPONSIBLE FOR A CRIME IF THE ACT IS A PRODUCT OF A MENTAL ILLNESS OR OTHER KIND OF DISABILITY THAT'S RELATED TO THE MIND AND FINALLY WE HAVE THE AMERICAN LAW INSTITUTE, PENAL CODE AND BASICALLY STATED THAT THEY DIDN'T UNDERSTAND THE SIGNIFICANCE OF WHAT THEY WERE ABLE OR CONFORM UNDER THE LAW.

YOU CAN TELL THERE ARE A LOT OF SIMILARITIES BETWEEN THE RULES, BUT THEY ALL DO KIND OF VARY A LITTLE BIT AND HAVE DIFFERENT IMPACTS BASED ON THEIR SETTLED DIFFERENCES.

KIND OF MOVING ONTO HOW THIS AFFECTS PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE FIRST THING I WANTED TO DISCUSS IS THAT IT TAKES LONGER TO RESTORE SOMEONE TO COMPETENCY THAT IF THEY HAVE DEVELOPMENTAL DISABILITY WHICH MAKES THIS MORE PROBLEMATIC IN THE SENSE THAT MOST PEOPLE DON'T NOW ABOUT RESTORATION TO COMPETENCY, AND YOU ADD ON THE FACT THAT IT'S GOING TO TAKE THEM LONGER TO RESTORE TO COMPETENCY IT KIND OF SNOWBALLS INTO A LARGER ISSUE.

ANOTHER KIND OF MISCONCEPTION THAT I WANT TO TALK ABOUT IS THAT A DIAGNOSIS OF INTELLECTUAL OR DEVELOPMENTAL DISABILITIES IS NOT QUALIFIED AS INSANE.

SO IT'S THE UPMOST IMPORTANCE THAT WE LOOK AT THE INDIVIDUAL PERSON AND NOT A STEREO TYPE SOMEBODY THAT'S HOLDING ABOUT A MENTAL ILLNESS OR SOMEONE WITH I/DD BECAUSE THESE ARE FULLY-FORMED INDIVIDUALS THAT HAVE DIFFERENT ABILITIES AND WAYS OF GOING ABOUT THEIR LIVES, AND JUST BECAUSE THEY HAVE ONE OF THE DIAGNOSES DOESN'T MEAN THAT THEY'RE AUTOMATICALLY GOING TO QUALIFY FOR SOMETHING FOR EITHER THE INSANITY DEFENSE OR INCOMPETENCY TO STAND TRIAL.

IT'S ALSO JUST FOR EVERYONE'S CLARIFICATION, IT'S FAR MORE COMMON TO RAISE INCOMPETENCY CONCERN THAN TO USE THE INSANITY DEFENSE.

PEOPLE THAT HAVE INTELLECTUAL OR DEVELOPMENTAL DISABILITIES, I BELIEVE, AS WE DISCUSSED EARLIER ARE ROUGHLY AROUND 10% OF THE YOUTH OF INCOMPETENCY TO STAND TRIAL AND IT'S FAR MORE COMMON TO GO THAT ROUTE IF SOMEONE IS CONCERNED ABOUT A PERSON UNDERSTANDING THE TRIAL OR SOMETHING TO THAT EFFECT.

THAT'S BASICALLY WHAT I HAVE FOR TODAY, BUT I JUST REALLY WANT TO STRESS THE FACT THAT YOU REALLY NEED TO BE LOOKING AT INDIVIDUALS AND INDICATIONS AROUND OUR CULTURE WITH THIS, IS THAT, YOU KNOW, WE DON'T REALLY TAKE THIS SERIOUSLY IN OUR MEDIA AND THINGS LIKE THAT, THE UPMOST IMPORTANCE THAT THEY BE A SHIFT WHERE IT'S CLEARLY SHOWN AS A VERY SERIOUS THING TO ENGAGE IN DEFENSE AND ALSO MORE AWARENESS OF THE INCOMPETENCY TO STAND TRIAL AND ALSO BECAUSE THIS IS SOMETHING THAT AFFECTS A LOT OF PEOPLE AND IT'S JUST NOT THAT WELL KNOWN, BUT THANK YOU SO MUCH FOR HAVING ME TODAY AND I'M HAPPY TO ANSWER ANY QUESTIONS.

>> ALL RIGHT, THANK YOU SO MUCH, HILLARY.

I'M GOING TO START READING QUESTIONS FROM THE Q&A AND CHAT BOXES IN JUST A MOMENT, BE READY WITH YOUR QUESTION IF YOU HAVEN'T ALREADY SENT IT TO US.

ALSO, IF YOUR QUESTION ISN’T ANSWERED DURING THIS WEBINAR OR IF YOU FIND YOU HAVE OTHER QUESTIONS LATER, YOU CAN ALWAYS SEND THOSE TO NCCJD@THEARC.ORG AND THAT ADDRESS IS ON THE SCREEN.

PLEASE DO TAKE A MOMENT TO FILL THAT OUT.

>> WE ARE NOT GOING TO USE VIDEO BUT UNMUTE YOURSELF IF YOU WOULD LIKE TO ANSWER A PARTICULAR QUESTION.

OKAY.

SO TURNING TO OUR FIRST QUESTION, WHAT IS THE DIFFERENCE BETWEEN GUARDIANSHIP AND POWER OF ATTORNEY?

PROBABLY ONE OF THE ATTORNEYS IF YOU COULD LET US KNOW THE DIFFERENCE BETWEEN GUARDIANSHIP AND POWER OF ATTORNEY.

HI, THIS IS CLAUDIA CENTER, I'M NOT AN EXPERT ON THIS BUT I CAN ANSWER THE QUESTION.

THE DIFFERENCE IS THAT GUARDIANSHIP IS A STATE WHERE USUALLY PROBATE COURT OF A PERSON'S WITH DISABILITY --

[INAUDIBLE]

POWER OF ATTORNEY IS A DOCUMENT THAT -- AN INDIVIDUAL WHO HAS CAPACITY TO ENTER CONTRACT ENTERS WITH ANOTHER PERSON AND THEN IN THE FUTURE IF THE PERSON BECOME -- I WANTED SOMEBODY TO BE ABLE TO HAND OUT FINANCIALS AND I USE THE OPPORTUNITY TO DO.

ANOTHER TYPE OF POWER OF ATTORNEY IS A COMMON ONE FOR HEALTH CARE.

SOMEONE CALLED HEALTH CARE ADVANCE DIRECTED AND THAT USUALLY IS ONE THAT COMES UP TO EFFECT ON A PERSON'S INCAPACITY AND IS IN MOST STATES AS A SEPARATE KIND OF A DOCUMENT THAT GIVES AN AGENT THE AUTHORITY TO MAKE HEALTH CARE DECISIONS.

THESE ARE VERY NICE ALTERNATIVES TO GUARDIANSHIP.

ALL RIGHT, THANK YOU, CLAUDIA.

OUR NEXT QUESTION, I'M SORRY, CAN A GUARDIAN FOR LEGAL PROCEEDINGS WHERE A DEFENDANT HAS BEEN DETERMINED INCOMPETENT BE A TIME LIMITED GUARDIANSHIP?

CAN A GUARDIANSHIP WHERE A LEGAL PROCEEDING HAS BEEN INCOMPETENT CAN HAVE LIMITED GUARDIANSHIP?

>> IF I UNDERSTAND YOUR QUESTION, WHAT YOU MAY BE ASKING ABOUT IS GUARDIAN AD LITEM.

MAKE THE DEFENDANT COMPETENT BECAUSE YOU APPOINTED A GUARDIAN AD LITEM TO BECOME COMPETENT FOR HIM.

THERE ARE CERTAIN ASPECTS WHERE YOU CAN'T BASICALLY DELEGATE THAT, AND SO THAT WOULD BE I THINK THE ISSUE HERE.

>> YEAH, THIS IS BOB, REALLY INTERESTING CASE IN MASSACHUSETTS IN WHICH INTELLECTUAL DISABILITY WAS CHARGED WITH A -- CHARGED WITH A VERY SERIOUS CRIME AND HAD A GUARDIAN AD LITEM AND THE DEFENSE AND THE GUARDIAN AD LITEM HAD AGREED TO IT.

REALLY REMARKABLE PLEA BARGAIN IN THE CASE WHICH WOULD HAVE PREVENTED INSTITUTIONALIZATION OF THE PERSON FOR RESTORATION, AND THE JUDGE REFUSED TO ACCEPT THE GUARDIAN, ACCEPTANCE OF THE PLEA AND THE STATE PEOPLE COURT CONSISTENT WITH WHAT BOB JUST SAID THAT THAT'S NOT SOMETHING GUARDIANS CAN DO.

>> THANK YOU, OUR NEXT QUESTION, COULD ONE OF THE PANEL MEMBERS DISCUSS THE DISTINCTION BETWEEN RESTORATION VERSUS ATTAINMENT OF COMPETENCY FOR INDIVIDUALS WITH INTELLECTUAL OR DEVELOPMENTAL DISABILITY?

SO RESTORATION VERSUS ATTAINMENT OF COMPETENCY FOR PEOPLE WITH I/DD.

THE RESTORATION WOULD BE TO BE ABLE TO RECEIVE -- ONCE AGAIN TO BE ABLE TO EXERCISE THE DECISION-MAKING RIGHTS, BUT I THINK IT'S IMPORTANT TO UNDERSTAND THAT NO MATTER WHAT CONDITION A PERSON IS DEEMED TO HAVE, WHETHER IT'S I/DD OR SOMETHING ELSE, YOU HAVE CAPACITY AND YOU ARE COMPETENT UNTIL YOU'RE DETERMINED OTHERWISE.

I THINK SEVERAL OF US HAVE BEEN SAYING ON THE CALL TODAY THAT EVEN IF YOU THINK IT'S REALLY CLEAR THAT SOMEONE DOESN'T HAVE IT COMPETENCY OR CAPACITY, MANY -- MANY DETERMINATIONS IN COURT PROCEEDINGS ARE VERY EXPLICIT IN SAYING THESE ARE NOT MEANT TO BE GENERAL DETERMINATIONS OF LACK OF COMPETENCY, SO RESTORATION ONLY COMES INTO PLAY ONCE.

THERE'S BEEN A COURT PROCEEDING TO TAKE CAPACITY AWAY OR TO SAY THAT YOU DON'T HAVE IT BUT THE NATURE, IF YOU WILL, OTHERWISE, YOU HAVE CAPACITY AND YOU ARE COMPETENT.

THANK YOU.

OUR NEXT QUESTION ACTUALLY CAME FROM MULTIPLE MEMBERS OF OUR AUDIENCE, WHY IS THE CUTOFF AGE 18 FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES INSTEAD OF 22?

>> I CAN START ANSWERING THIS QUESTION.

I'M SURE ONE OF THE ATTORNEYS CAN EXPLAIN MORE, BUT MY UNDERSTANDING, I DON'T KNOW WHY NECESSARILY THE BEST WAY TO GO ABOUT IT, I KNOW THAT BASICALLY UP UNTIL RECENTLY, I BELIEVE, I/DD HAS CHANGED IT TO 22 TO 22, AMONG THE LITERATURE THAT THERE IS A CALL FOR THE LEGAL STANDARD TO BE CHANGED TO 22 AS WELL, AND ONE OF THE MAIN REASONS FOR THAT IS BECAUSE PRIOR TO THE AGE OF 18 SPECIALLY IN THE LOW-INCOME COMMUNITIES, THERE'S A CONCERN THAT INDIVIDUALS MAY NOT COME INTO CONTACT WITH THE TYPES OF STRUCTURES OR RESOURCE THAT IS WOULD MAYBE HAVE THE TYPES OF RECORDS THAT WOULD SHOW THAT THEY HAVE AN INTELLECTUAL DISABILITY WHEREAS 22 IS BELIEVED MORE ACCURATE TIME SCALE TO HAVE.

GENERALLY THE TIMELINE ISSUES, IT'S BEEN PRETTY ESTABLISHED, 18 FOR A LONG TIME.

IT'S RECENTLY MOVED TO 22.

ANOTHER THING TO GO WITH THAT QUESTION IS THE SUPREME COURT HAS SAID THAT THE AGE MAJORITY IN THE UNITED STATES IS 18, STATES CAN ALWAYS BE MORE PROTECTIVE AND INCREASE THAT AGE.

IF ANYONE WE WANTED TO COMMENT ON THAT, PLEASE FEEL FREE TO DO SO.

>> THIS IS BOB, I THINK HE TALKED ABOUT THIS IN HIS PRESENTATION.

THE COMMENT IS RIGHT.

IT IS OFTEN -- IF YOU READ THE CASES ON COMPETENCY TO STAND TRIAL WITH PEOPLE WITH INTELLECTUAL DISABILITIES IT'S SOMETIMES REMARKABLE HOW COURTS COME TO THE CONCLUSION THAT -- THAT THE PERSON REALLY UNDERSTANDS WHAT'S GOING ON, AND SOME OF THAT MAYBE BECAUSE OF THE MASKING AND THE OTHER THINGS THAT THE OTHER PRESENTERS HAVE TALKED ABOUT BUT THERE ARE AN INCREASING NUMBER OF CASES SMALL BUT INCREASING ABOUT ACCOMMODATIONS TO, YOU KNOW, TO WITNESSES AND VICTIMS TO ALLOW THEM TO TESTIFY.

I KEEP COMING BACK TO MASSACHUSETTS, THERE'S A VERY GOOD MASSACHUSETTS CASE WITHIN THE LAST COUPLE OF YEARS, A WOMAN WHO WAS SEXUALLY ABUSED IN A NURSING HOME.

SHE COULDN'T FORM WORDS.

THE JUDGE -- SHE WAS ABLE TO BE ABLE TO COMMUNICATE ENOUGH WITH THE NURSING HOME STAFF AND WITH THE POLICE TO EXPLAIN THAT SHE WAS -- AND THE PROSECUTOR FOR THAT MATTER TO EXPLAIN THAT SHE WAS -- THAT SHE HAD BEEN SEXUALLY ABUSED, AND THE MASSACHUSETTS STATE PEOPLE COURT USING A STATE LAW STATE, ANTIDISCRIMINATION LAW FOUND THAT SHE SHOULD HAVE BEEN ACCOMMODATED AND SHE WAS PROVIDED WITH AN INTERPRETER AND TESTIFIED ABOUT THE ASSAULT.

SO I THINK THAT THIS MAY -- IT MAYBE SOME INCREASING MOVE ON THE RIGHT DIRECTION BUT I AGREE OVERALL.

>> THIS IS BOB, AND I WOULD JUST ADD TO THAT, PART OF THE QUESTION IS WHO IS MAKING THE JUDGMENT, SO WHEN IT COMES TO WITNESSES OR VICTIMS IT'S OFTEN A JUDGMENT BY A PROSECUTOR WHO MADE BELIEVE THAT THE CASE IS HARD TO PROVE IF THE TESTIMONY OF THE VICTIM IS CRITICAL TO -- TO IT, AND THAT CAN BE A PROBLEM WITH THE PROSECUTOR'S UNDERSTANDING OF DISABILITY AND HOW THOSE STEPS THAT MIGHT BE TAKEN TO ENHANCE THE CREDIBILITY OF THE PERSON WITH THE DISABILITY INCLUDING ACTIVATING WHATEVER SUPPORTS THE PERSON MIGHT HAVE.

WAS TAKEN ADVANTAGE OF AND THAT CAN LEAD TO ATTENTION IN THE PERSON'S OWN SENSE OF IDENTITY AND WHERE, FOR EXAMPLE, EVEN IF THEY HAD CAPACITY, IF THEY DIDN'T EXERCISE IT IN THIS CASE, THEY SHOULDN'T, YOU KNOW, THEY WERE VICTIMIZED BY THE DEFENDANT.

THERE'S WAYS WHERE IT'S DIFFICULT FOR THE DEFENDANTS, NOT THE LEAST OF EVERYTHING THAT'S BEEN TALKED ABOUT, DEFENDANTS WITH INTELLECTUAL DISABILITIES TO GIVE STATEMENTS AND EVEN CONFESSIONS THAT ARE NOT REALLY NECESSARILY ACCURATE BUT WHICH THEY BELIEVE THEY SHOULD BE GIVEN AND DESIRED FOR THE PERSON SEEKING THEM.

I HOPE THIS WILL BE PART OF THE WAY TOWARD ADDRESSING THOSE.

>> ALL RIGHT.

THANK YOU FOR THOSE, FOR THAT DISCUSSION.

OUR NEXT QUESTION THERE IS A TOOL USED TO LOOK AT RELIABILITY OF WITNESSES THAT HAVE BEEN USED WITH PEOPLE WITH I/DD DESPITE NOT HAVING THEM TESTED WITH THEM, IS THERE ANY WORK ON CREATING TOOL OR COMPETENCY FOR PEOPLE WITH I/DD?

QUESTION OF COMPETENCY FOR PEOPLE WITH I/DD.

OKAY, I'M HEARING NO RESPONDERS TO THAT QUESTION.

>> I CAN SAY ONE MORE TEAM.

I KNOW THAT -- AND I THINK IT WAS REFERENCED IN ONE OF THE OTHER PRESENTATIONS, BUT THE CAST-MR, ONE OF THE ISSUES THAT'S BEEN TALKED ABOUT IN WEBINAR IS THE NEED FOR MENTAL ILLNESS AND INTELLECTUAL DISABILITY IN THE COMPETENCY REALM, AND IT'S ONE TEST THAT EXPERTS USED THAT’S SPECIFICALLY DESIGNED TO ASSESS COMPETENCY WITH INDIVIDUALS WITH INTELLECTUAL DISABILITY.

THAT BEING SAID, I THINK THAT THERE'S DEFINITELY LEGITIMATE CRITICISMS TO BE HAD OF THAT SPECIALLY WHEN YOU'RE CONSIDERING HOW IS RESTORATION ACT WITH INTELLECTUAL DISABILITY AND CAN'T SOMEONE WITH INTELLECTUAL DISABILITY BE RESTORED TO COMPETENCY AND SO, YOU KNOW, THAT IS WHO WAS AFFECTED BY THAT CONSIDERATION TOO.

THAT'S ONE THING THAT GETS USED.

THERE'S OTHER TESTS THAT I HAVE SEEN THAT ARE GETTING AS SPECIFICALLY, DO YOU UNDERSTAND WHAT ARE THE DIFFERENT ROLES IN THE COURTROOM, DO YOU KNOW WHAT THE PROSECUTOR DOES, DO YOU KNOW WHAT THE JUDGE DOES AND DO YOU KNOW WHAT THE ATTORNEY IS GOING TO DO?

IT CAN REALLY BE LIKE A LIST OF FACTORS.

>> THIS IS BOB, AND I WOULD ADD TO THAT IT ACTUALLY IS A VERY HUGE GAP, THERE HAVE BEEN EFFORTS TO TRY TO ADAPT SOME OF THE TESTS WITH PEOPLE WITH MENTAL ILLNESS OR SOCIAL DISABILITY.

REQUIREMENT OF APPRECIATION THAT A PERSON REALLY APPRECIATES THE NATURE OF THE CHOICE THAT HE OR SHE IS ASKED TO MAKE.

DEPENDING ON WHETHER YOU'RE TALKING ABOUT ELIGIBILITY OR COMPETENCY TO STAND TRIAL, WHEN THEY MOVE IN DIRECTIONS ABOUT THAT BUT UNDERSTANDING -- INTERPRETATION OR INCLUSION OF INTERPRETATION OR APPRECIATION CAN BE VERY -- CREATE A LOT OF CONFLICT BECAUSE THAT'S A VERY SOCIAL CONTEXT, TOTALLY MISSES AND DOESN'T TEST THE, FOR LACK OF A BETTER WORD, THE COMPETENCY OF THE LAWYER.

ONE OF THE KEY FACTORS IN THIS CONSIDERATION IS WHETHER THE PERSON CAN COMMUNICATE WITH THEIR ATTORNEY AND DEFENSE.

IT SEEMS TO ME THAT A SUBSTANTIAL LIMITATION ON THAT IS WHETHER THE ATTORNEY IS ABLE TO COMMUNICATE WITH THE PERSON WHO HAS A DISABILITY USING THE KINDS OF TOOLS THAT CLAUDIA TALKED ABOUT, THE KINDS OF APPROACHES THAT CLAUDIA TALKED ABOUT AND SOMETIMES IN COURT, I HAVE SEEN JUDGES OR ACTUALLY BEEN ASKED BY JUDGES, CAN YOU TALK TO YOUR CLIENT, DO YOU THINK YOU CAN GET -- YOU AND YOUR CLIENT CAN WORK OUT A DEFENSE.

THE JUDGE GIVES A LOT OF WEIGHT TO THAT.

THAT'S NOT PART OF THE TESTING.

THE CLINICAL PROFESSIONALS ARE DOING IN THE FACILITIES.

I THINK IT MISSES A HUGE PART OF WHAT COMPETENCY TO STAND TRIAL IS ABOUT.

TOO MANY LAWYERS ARE TOO -- UNFORTUNATELY TO HAVE THEIR CLIENTS FOUND INCOMPETENT TO STAND TRIAL THINKING THAT'S BETTER THAN A SENTENCE WHEN, IN FACT, AS BEEN POINTED OUT EARLIER, A PERSON SPENDS MORE TIME IN A FACILITY THAN THEY WOULD EVER SPEND IN A PRISON OR JAIL AND NEVER SPEND ANY TIME OR PRISON OR JAIL IF THEY WOULD GO TO TRIAL.

>> VERY GOOD POINTS.

KIND OF A RELATED QUESTION BUT ON THE FLIP SIDE, WHAT IS THE EXPERIENCE REGARDING PROGRAMS OR CURRICULUM FOR PERSONS WITH I/DD TO RESTORE COMPETENCY?

>> THIS IS A GREAT QUESTION BECAUSE REALLY THERE'S A LOT OF MYSTERY AROUND THE CONCEPT AND ONE OF THE THINGS, I THINK, THAT PEOPLE INCREASINGLY ARE FOCUSING ON IS MAKING THIS PART OF THE ISSUE OF TRANSITION TO THOSE STUDENTS WHO ARE RECEIVING SPECIAL EDUCATION AND MAKING A TRANSITION OUT OF K-12 AND INTO POSTSCHOOL EDUCATION OR WORK THAT FOR MANY PEOPLE WITH I/DD, THE PROBLEM IS THEY HAVE HAD A LOT OF PRACTICE IN MAKING MISTAKES AND LEARNING FROM THEM AND, THEREFORE, HAVING OPPORTUNITIES TO EXPRESS CAPACITY.

SO EVEN THOUGH INTELLECTUAL DISABILITY ITSELF IS NOT A CONDITION IN WHICH YOU CAN RECOVER, YOU CERTAINLY CAN LEARN ADDITIONAL SKILLS AND BE TRAINED IN IT, THAT REQUIRES A MUCH EARLIER FOCUS THAN TRADITIONALLY GIVEN AND ALSO FOCUS ON SELF-DETERMINATION AND WAYS TO BUILD UP PEOPLE'S UNDERSTANDING OF THE WORLD AROUND THEM, BUT I WOULD ADD TO THAT, REITERATE, IF WE THINK ABOUT HOW TYPICAL PEOPLE LEARN, THEY LEARN BECAUSE OF INFORMATION THEY RECEIVE, BUT EXPERIENCE AND FEEDBACK, WE HAVE TO PROVIDE OPPORTUNITIES FOR PEOPLE TO HAVE OPPORTUNITIES.

I DON'T HAVE ANY INDEPENDENT WAY TO ASSESS THIS BUT SEVERAL PEOPLE WHO WRITE ABOUT RESTORATION FOR PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITY TO A METHOD THAT'S USED IN HOSPITAL IN RHODE ISLAND THAT'S GENERALLY KNOWN AS THE SLATER METHOD, THAT'S APPARENTLY A FAIRLY COMPREHENSIVE PROGRAM THAT'S USED IN RHODE ISLAND, AND IT IS MENTIONED IN A NUMBER OF TIMES IN VERY SUPPORTIVE TERMS IN THE LITERATURE.

I DON'T KNOW -- I HAVE NO INDEPENDENT WAY TO JUDGE THAT EXCEPT SOME EXPERTS SEEM TO LIKE IT.

>> OKAY, THANK YOU.

WE WILL GO TO THE NEXT QUESTION.

COULD THE PANELISTS ADDRESS THE ISSUE OF HOW A DETERMINATION OF COMPETENCY RELATES TO THE RIGHT OF LEGAL CAPACITY OR RIGHT OF PERSON'S RIGHT TO BE RECOGNIZED, COMPETENCY VERSUS CAPACITY, VERSUS A RIGHT TO BE RECOGNIZED BEFORE THE LAW?

>> I WILL TAKE A STAB AT IT.

CAPACITY IS THE BROADER CONTENT AND COMPETENCY IS A VERY SPECIFIC ON-OFF SWITCH TO WHETHER YOU CAN GO FORWARD IN THE CONTEXT WE HAVE BEEN LOOKING AT, WHETHER YOU CAN GO FORWARD WITH COURT PROCEEDINGS, THE ISSUE OF CAPACITY IS YOUR QUESTION IS ALLUDING TO REQUIRES US TO MAKE A DISTINCT BETWEEN LEGAL CAPACITY AND MENTAL CAPACITY. LEGAL CAPACITY IS JUST SOMETHING YOU INHERENTLY HAVE OF HUMAN BEINGS AND CAN'T LOSE IT, IT'S ARTICLE 12 OF CRPD, IT RECOGNIZES AND SAYS, FOR EXAMPLE, THAT YOU ALWAYS NEED TO BE IN A SITUATION WHERE DIRECTLY OR INDIRECTLY YOU CAN BRING TO THE ATTENTION OF AUTHORITIES ONE OR THE OTHER THAT THERE'S A LEGAL MATTER THAT YOU HAVE AN INTEREST IN AND IN SOME COUNTRIES HAVING YOUR LEGAL CAPACITY TAKEN AWAY MEANS THAT YOU CAN'T EVEN, FOR EXAMPLE, CHALLENGE WHAT YOUR GUARDIAN IS DOING BECAUSE YOU'RE THOUGHT NOT TO BE A PERSON FOR THE LAW.

THAT'S A PROBLEM.

WE DO KNOW THAT PEOPLE HAVE CONDITIONS AND SOME OF WHICH WE HAVE BEEN TALKING ABOUT TODAY, AND THERE ARE ADDITIONAL ONES LIKE DEMENTIA WHERE THE PERSON'S ACTUAL MENTAL CAPACITY AT THE TIME WE ARE MEASURING IT IS IN QUESTION, AND THEY ARE GOING TO ACTUALLY -- THEY MAY BE ABLE TO BE SUPPORTED IN THEIR EXPRESSION OF LEGAL CAPACITY BY SOMEBODY OR SOME PEOPLE WHO FORM A NETWORK WITH THEM AND CAN SPEAK FOR THEM IF NECESSARY OR PERMIT THEM TO SPEAK FOR THEMSELVES WITH ASSISTANCE AND THE GOAL IN ALL OF THOSE CASES IS TO TRY TO IDENTIFY THE UNDERLYING WILL AND PREFERENCE OF THE INDIVIDUAL, IF THAT CAN BE DOPE, THEN THAT PERSON HAS LEGAL CAPACITY EVEN IF IT'S EXPRESSED IN AN USUAL OR INDIRECT KINDS OF WAYS.

WHETHER THAT WOULD BE APPLICABLE TO SOMEBODY WHO IS IN A COMA AND IS NOT ABLE TO CURRENTLY GUIDE HIS OR HER NETWORK, IT'S SOMETHING THAT IS FOR DEBATE AND ALSO THINK OF A PERSON SURROUNDED BY HIS OR HER NETWORKS.

EVEN IF WE DON'T GET TO THOSE KINDS OF CASES, WE START WITH THE PRESUMPTION BUT NOT ONLY PRESUMPTION BUT UNCHALLENGEABLE SUBJECTS THAT EVERYBODY HAS CAPACITY AND MENTAL CAPACITY IS GOING TO DEPEND ON SOME OF THE THINGS WE HAVE TALKED ABOUT TODAY.

>> ALL RIGHT, THANK YOU SO MUCH.

OUR NEXT QUESTION, WHO IS RESPONSIBLE FOR COVERING THE COSTS OF THE RESTORATION TESTING WHEN THAT ISSUE IS BROUGHT UP?

WHO GETS THE COST OF COMPETENCY TESTING?

>> I CAN ANSWER THIS QUESTION.

GENERALLY IT DEPENDS IF IT'S AN INDIGENT DEFENDANT, USUALLY THE STATE WILL PAY.

THERE'S USUALLY -- OFTENTIMES IT'S PART OF THE COST THAT GOES TO THE STATE.

IT'S NOT GENERALLY LIKE THE PRISON SYSTEM, FOR INSTANCE, WHERE INMATES ARE CHARGED FOR THEIR RESIDENTS.

IT DEPENDS ON WHICH JURISDICTION YOU'RE IN.

>> THANK YOU, ASHLEY.

OKAY.

OUR NEXT QUESTION -- WHAT DOES IT MEAN WHEN AN INDIVIDUAL WITH I/DD COMPETENCY AND INCOMPETENCY TO STAND TRIAL FOR CHARGES AND HOW OFTEN CAN THIS BE EVALUATED, SO GOING BACK AND FORTH TO STANDING TRIAL AND HOW IS THIS EVALUATED?

>> I THINK THE ANSWER TO THAT IS THAT WHERE AN INDIVIDUAL'S CAPACITY THE QUESTION -- THE TIMING IS THAT THE EVENTS, WHETHER THE TRIAL OR WHETHER THE PERSON HAS CAPACITY AT THE TIME OF TRIAL, TO SIT IN THE TRIAL OR PARTICIPATE IN THE TRIAL OR SETTLEMENT DISCUSSIONS ARE -- TRYING TO FIND A WAY TO PLEAD OUT THE CASE WHEN THOSE PLEA AGREEMENTS ARE ENTERED.

COMPETENCY TO STAND TRIAL IS A QUESTION THAT CAN BE RAISED AT ANY TIME BY ANY OF THE PARTIES TO THE CASE BY -- BY THE JUDGE OR THE PROSECUTOR OR BY THE DEFENSE.

AT ANY TIME ANY OF THE PARTICIPANTS IN THE CASE THINK THAT THE PERSON DOES NOT HAVE CAPACITY OR DOES NOT -- IS NOT COMPETENT TO STAND TRIAL, THAT ISSUE CAN BE RAISED, AND SO -- AND IT HAS TO BE EVALUATED AT THE TIME.

SO IT'S NOT UNCOMMON TO HAVE SOMEONE FROM COMPETENT TO STAND TRIAL AT THE BEGINNING OF A CASE AND AT SOME POINT IN THE CASE HAVE THAT QUESTION RAISED EVEN DURING TRIAL BASED ON THE PERSON'S BEHAVIOR DURING THE TRIAL AND HAVE IT -- HAVE THINGS STOPPED AGAIN, A PAUSE IN THE TRIAL TO HAVE THAT.

THAT'S MORE COMMON, I THINK, WITH PEOPLE WITH MENTAL ILLNESS, BUT CERTAINLY COULD HAPPEN WITH ANY ONE, WITH PEOPLE THAT ARE INTERESTING, CONSTITUTIONAL QUESTIONS BEYOND WHAT WE CAN TALK ABOUT HERE IS WHETHER THE STATE CAN FORCE A DEFENDANT TO BECOME COMPETENT BY FORCING THEM TO TAKE MEDICATION THAT THEY DON'T WANT TO TAKE OR WHETHER A PERSON CAN BE FORCED TO APPEAR BEFORE A JURY IN AN INDEPENDENT AN INCOMPETENT STATE BUT THOSE ARE TOUGH QUESTIONS, THEY GO BEYOND WHAT WE ARE TALKING ABOUT HERE.

BUT THE QUESTION IS A GOOD ONE.

>> OKAY.

HEARING NO OTHER PANELISTS ON THAT ONE, OUR NEXT QUESTION INTELLECTUAL DEVELOPMENTAL DISABILITY WITNESSES, CLASSIFICATIONS ARE SUPPORTED DECISION-MAKING METHODS AND GUARDIAN APPOINTMENTS THE BEST CHOICES FOR A COMBINATION AND ARE THESE THE ONLY METHODS?

>> THIS IS BOB, IT'S CERTAINLY NOT THE ONLY METHOD.

AS I TRIED TO CONVEY IN MY PORTION OF THE PRESENTATION, THERE'S A WAY IN WHICH REASONABLE ACCOMMODATIONS LOOKS AN AWFUL LOT LIKE SUPPORTIVE DECISIONS.

IT HAS TO BE HOW THE PERSON COMES TO THE PROCEEDING IN QUESTION AND IF SOMEBODY IS IN A SUPPORTIVE DECISION-MAKING, A DOCUMENT WHICH REFLECTS THAT THE PERSON USES, AND YOU ARE COMING IN CONTACT WITH THAT PERSON AS AN ATTORNEY FOR THE PERSON, AS A PROSECUTOR USING THE PERSON AS A WITNESS, THAT WOULD BE A GROUP OF PEOPLE WITH WHOM YOU WILL NEED TO KNOW HOW TO INTERACT AND CLAUDIA'S PRESENTATION ADDRESSES SOME OF THOSE ISSUES.

LAWYERS AND OTHERS TO WANT TO WORK THROUGH THE SURROGATE AND GUARDIAN AND NOT THE INDIVIDUAL.

I THINK THE PUSH IN SUPPORTING DECISION-MAKING AND RULE 1.14 IS, IN FACT, TO SAY, LOOK, YOU STILL HAVE TO USE THE INDIVIDUAL AS THE PRIMARY PERSON WITH WHOM YOU INTERACT IN THE SAME WAY THAT WE WOULD SAY THAT A PERSON WITH DISABILITY HAD AN AIDE, WE WOULDN'T BE DOING THE WORK THROUGH AIDE, WE WOULD BE DOING WORK THROUGH THE INDIVIDUAL ITSELF.

SO I DO THINK SUPPORTIVE DECISION-MAKING, SOME OF THE RISKS WITH GUARDIANSHIP COULD APPLY TO SUPPORTIVE DECISION-MAKING, WHAT I THINK IT DOES DO PROVIDES CONTEXT FOR PEOPLE THAT KNOWS THE INDIVIDUAL WELL AND, THEREFORE, MAY HAVE A BETTER OPPORTUNITY TO REALLY HELP THAT PERSON EXPRESS HIS OR HER WILL OF PREFERENCES.

>> ALL RIGHT, THANK YOU.

OUR NEXT QUESTION, IS IT A CONFLICT OF INTEREST FOR AN INDIVIDUAL WITH I/DD TO BE RESTORED TO COMPETENCY IN A FACILITY OPERATED BY THE STATE?

>> WELL, I DON'T THINK SO.

THE SUPREME COURT HAS SAID THAT THE STATE HAS STRONG INTERESTS IN BRINGING PEOPLE TO TRIAL IN A SPEEDY WAY.

SO THERE IS A STATE INTEREST IN THAT.

AND THE INDIVIDUAL HAS AN INTEREST IN HAVING A SPEEDY TRIAL AND HAVING THE CRIMINAL CHARGES DETERMINED.

SO THOSE INTERESTS ARE USUALLY CURRENT, AND I THINK I WOULD IMAGINE A CONFLICT, DEFENDANT TALKING ABOUT THE ALLEGED CRIME WITH PEOPLE WHO DON'T CARRY A PRIVILEGE AND THOSE SORTS OF THINGS, BUT I DON'T THINK INHERENTLY --

>> ANY OTHER PANELISTS WANT TO COMMENT ON THAT?

>> I WOULD JUST ADD THAT I THINK -- I AGREE WITH BOB.

THE SITUATION WHICH I THINK IS A CLEAR CONFLICT AND HAS NOT BEEN RESOLVED, ALTHOUGH BOB ALLUDED TO EARLIER, IF YOU HAVE A DEFENDANT ON DEATH ROW WITH MENTAL ILLNESS, HE SHOULDN'T BE THERE, THE PERSON HAS MENTAL ILLNESS AND NOT COMPETENT AT THE MOMENT, HE CANNOT BE EXECUTED UNDER THE CASE LAW BUT THERE'S AN OPEN QUESTION OF WHETHER HE COULD BE FORCIBLY MEDICATED TO BE COMPETENT AND ELIGIBLE FOR EXECUTION.

IT'S HARD TO SEE IN THAT INSTANCE IN THE DEFENDANT'S INTEREST TO BECOME COMPETENT AND OBVIOUSLY IN THE STATE'S INTEREST TO MAKE HIM SO.

BUT SO FAR AT LEAST NO DEFINITIVE RULE IN SUPREME COURT ABOUT THAT.

>> OKAY.

THANK YOU.

OUR NEXT QUESTION HOW DOES RESTORATION OF COMPETENT TO STAND TRIAL ASSIST THE INDIVIDUAL WITH OBTAINING SERVICES AND SUPPORTS THEY MAY NEED?

CAN AND HOW DOES RESTORATION OF COMPETENCE HELP THE INDIVIDUAL OBTAIN SERVICES AND SUPPORT?

>> WELL, IT'S REALLY KIND OF APPLES AND ORANGES BECAUSE THE NEED FOR AN ELIGIBILITY FOR SUPPORT IS REALLY INDEPENDENT OF DETERMINATION OF COMPETENCY.

I GUESS YOU CAN SAY THE WAY IN WHICH IT WOULD BE TRUE, THE DEFENDANT CAN BE TRIED OR ENTER A PLEA AND AS A RESULT OF THAT BE ELIGIBLE TO RECEIVE CERTAIN SERVICES THROUGH THE CRIMINAL JUSTICE SYSTEM, BUT MY CONCERN WITH THOSE KINDS OF ARRANGEMENTS IS THAT OFTEN THAT LEADS TO KIND OF ONGOING INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM THAT MAY NOT BE IN THE DEFENDANT'S INTEREST ACTUALLY.

AND I AGREE WITH BOB WHEN HE SAID EARLIER, YOU REALLY HAVE TO BE CRITICAL, LAWYERS THAT WANT TO DO ANYTHING TO AVOID THE CRIMINAL JUSTICE SYSTEM WITHOUT REALLY LOOKING INTO WHAT THE ALTERNATIVE IS.

ANOTHER THING THAT YOU FIND OUT IS LAWYERS THAT REDUCE THE AMOUNT OF INCARCERATION JAIL TIME, WHICH IS CERTAINLY OFTEN A GOAL, AGREE TO A SERIES OF CONNECTIONS AND -- AND REQUIREMENTS THAT THE PERSON FULFILLS AS A MATTER OF PROBATION WHICH CAN -- CAN SET UP THE DEFENDANT FOR FAILURE AND THE LIKE.

SO MY VIEW IS TO BE CAREFUL ABOUT THE USE OF CRIMINAL JUSTICE SYSTEM TO GET SUPPORTS BUT TO SEPARATE OUT THOSE TWO GOALS, SETTING SUPPORT IS ONE THING, BEING COMPETENT TO STAND TRIAL IS ANOTHER.

>> THANK YOU, IT LOOKS LIKE WE HAVE TIME FOR MAYBE ONE MORE QUESTION FROM OUR PANELISTS, SO WE WILL END ON THIS QUESTION, AND IF WE DID NOT GET TO YOUR QUESTION DURING YOUR WEBINAR TODAY, YOU CAN STILL SEND YOUR QUESTION.

THAT'S THE ADDRESS THERE IN THE Q&A CHAT BOX.

SO IF WE DID NOT GET TO YOUR QUESTION, YOU CAN ALWAYS FOLLOW UP WITH US AND WE WILL ANSWER IT.

OUR LAST QUESTION FOR THE PANELISTS IS WHEN A DEFENDANT IS UNDER GUARDIANSHIP, WHAT IMPACT DOES IT HAVE ON THE COURT'S DETERMINATION OF COMPETENCY?

DO THEY EVEN TAKE THOSE INTO CONSIDERATION?

>> I THINK THE ANSWER IS YES, THEY TAKE IT INTO CONSIDERATION, BUT IT'S NOT DETERMINATIVE BECAUSE AS SEVERAL OF THE SPEAKERS JUST SAID, CLAUDIA SAID IT AND OTHERS THAT -- THAT THE DETERMINATION OF GUARDIANSHIP CONSIDERATION OF INCAPACITY FOR GUARDIANSHIP IS REALLY A DIFFERENT DETERMINATION THAN A COMPETENT TO STAND TRIAL PERSON.

>> ANY FINAL THOUGHTS FROM OUR PANELISTS?

OKAY.

HEARING NONE, IF YOU ARE FURTHER INTERESTED IN THE TOPIC OF COMPETENCY, NCCJD WILL BE RELEASING A WHITE PAPER ON THE TOPIC THAT OUR PANELISTS HAVE BEEN AUTHORS OF.

BEFORE THE END OF THIS YEAR, HOPEFULLY SOMETIME SOON, SO DEFINITELY I WILL KEEP AN EYE OUT FOR THAT.

REMEMBER, YOU CAN ALSO SEND ANY QUESTIONS OR FOLLOW-UPS THAT YOU HAVE.

BUT OTHER THAN THAT, WE JUST WANT TO SAY THANK YOU ONCE AGAIN TO ALL OF OUR PANELISTS AND A BIG THANK YOU FOR AUDIENCE MEMBERS WHO ARE HERE WITH US TODAY.

SO THANK YOU SO MUCH.

ALL RIGHT, GOOD-BYE, EVERYBODY.