

2.2 Investigating Capacity to Proceed

A. Duty to Investigate

Counsel has a duty to make a “reasonable investigation” into a defendant’s capacity to proceed. *See Becton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990) (counsel must make reasonable investigation into defendant’s capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding).

B. Significant Behaviors

Counsel should note unusual behaviors that may be signs of incapacity to proceed (delusions, memory problems, puzzling medical complaints, peculiar speech patterns, difficulties in maintaining attention, etc.). For a comprehensive discussion of mental disorders, see *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-5* (5th ed. 2013). Counsel should assess the behavior or symptoms in terms of the statutory test for competency. *See supra* § 2.1B, Test of Capacity.

C. Sources of Information

It is impossible to generalize about the types of clients who may be incapable of standing trial. They may be charged with misdemeanors or serious offenses. Although more likely to be in jail, they may be able to navigate the requirements of pretrial release. To understand a client’s condition or assess the evidence related to capacity to proceed, counsel may need to consider several sources of information.

Client interview. A face-to-face meeting—at which counsel can observe the client’s speech, thinking, appearance, mannerisms, and other behavior—provides the best opportunity to assess the client’s condition and its potential effect on capacity to proceed.

Medical history. Counsel should obtain the client’s medical history, including any history of mental health treatment, and have the client sign several original release forms for medical and other records. (If you know the hospital or other facility that has the client’s records, obtain the form release used by the facility to avoid potential objections by the facility that the form does not comply with HIPAA or other laws.) Because clients may not want to admit to mental health problems or may not be used to thinking in those terms, counsel may need to find alternative ways to phrase such questions.

Because of his or her mental state, a client may be unwilling or incapable of executing a release of information. In these circumstances, counsel should consider applying to the court *ex parte* for release of medical and other confidential records concerning the client. *See* MAITRI “MIKE” KLINKOSUM, *NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL* 430–31 (2d ed. 2012) [hereinafter *KLINKOSUM*]; *see also infra* “Ex parte application” in § 4.6A, Evidence in Possession of Third Parties.

Witnesses. The defendant's family and friends may have helpful information about the defendant's condition. Jailers, law-enforcement officers, and court personnel also may have had an opportunity to observe the defendant. *See, e.g., State v. Silvers*, 323 N.C. 646 (1989) (conviction vacated and case remanded for failure to allow defendant to present testimony of jail personnel who had observed him).

Commitment proceedings. The client may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). Or, counsel may make a motion to the court in which the current criminal case is pending to compel production. *See generally infra* § 4.6A, Evidence in Possession of Third Parties. For medical records not in the court file, submit a release to the appropriate hospital or other facility. *See* G.S. 122C-53(i) (on client's request, facility "shall" disclose to client's attorney information relating to client).

Other records. Several other types of records may contain relevant information, including school, work, military, and juvenile records. In addition to these records, counsel should check the affidavit of indigency to see whether the client is receiving supplemental security income (SSI), which may be for a mental disability. To obtain SSI records, start with the local social security office where the client lives.