

2.4 Obtaining an Expert Evaluation

A. Procedures to Obtain Expert Evaluation

There are three ways that counsel may obtain expert assistance to evaluate capacity.

Ex parte motion. The defendant may obtain the assistance of a mental health expert by filing an ex parte motion with the court or, in capital cases, with the Office of Indigent Defense Services (IDS). *See infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases. The motion does not ask the court to determine the defendant's capacity. Rather, it seeks funds for counsel to hire an expert of counsel's choosing to provide assistance on all applicable mental health issues. Once the expert has evaluated the defendant, counsel will be in a better position to determine whether there are grounds for questioning capacity to proceed.

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is ex parte, it does not reveal to the prosecution that counsel has a question about the defendant's mental condition. Also, if counsel decides not to raise lack of capacity or call the expert as a witness, the prosecution generally does not have a right to discovery of the results of the expert's work. *See infra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests.

If the defendant's expert determines that the client is incapable of proceeding, counsel then may raise the question of capacity with the court. Counsel should consider drafting a motion to raise the issue rather than using the AOC form request and order, which by its terms seeks a local or state capacity examination. *See infra* § 2.5, Examination by State Facility or Local Examiner. The judge and prosecutor may be willing to accept that the defendant is incapable of proceeding without a further examination. *See* KLINKOSUM at 443–44 (discussing advantages to this approach).

Motion requesting court to appoint a particular expert. Theoretically, counsel could file a motion questioning the defendant's capacity to proceed and asking the court to appoint a particular expert to examine the defendant. *See* G.S. 15A-1002(b)(1) (court may appoint one or more impartial medical experts) [to be recodified as G.S. 15A-1002(b)(1a)]. Typically, however, the court refers the defendant to state or local mental health facilities for evaluations of capacity to proceed.

Motion for examination by local examiner or state facility. Counsel may begin the assessment of capacity to proceed by obtaining an examination of the defendant at a state or local mental health facility rather than moving for funds for an expert. *See infra* § 2.5, Examination by State Facility or Local Examiner. In noncapital cases in which a judge is unwilling to authorize funds for an expert, examination by a local examiner or state facility may be the only means of obtaining an expert evaluation.

B. Choosing Which Motion to Make

In appropriate cases, counsel should consider obtaining an evaluation of the defendant by moving *ex parte* for funds for an expert rather than moving initially for an examination at a state or local mental health facility. In determining whether to seek funds for the defendant's own expert, counsel should consider factors such as the seriousness of the charges, the presence of mental health defenses and other mental health issues, the importance of keeping the defendant's statements confidential, the likelihood that the case will go to trial, and the opportunity to obtain an examiner who employs tools and techniques specifically tailored to the defendant's condition and who can conduct a comprehensive evaluation. *See also* KLINKOSUM at 441 (recommending that defense counsel seriously consider obtaining the services of a private mental health expert first; “[w]hile both types of evaluations (private vs. state) have attendant risks and benefits, in the author’s experience, the risks involved in state-conducted mental health evaluations outweigh the benefits”).