

I Know You Are But What Am I:

Nuts and Bolts of Competency & NGI



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What Is Competency?

- “No person who lacks substantial mental capacity to understand the proceeding or assist in his or own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.”
 - Wis. Stat. Sec. 971.13(1)

What Is Competency?

- Attorneys MUST raise competency if there is any reason to doubt a client's ability to assist in his or her own defense or understand the proceedings
- Can raise competency at any point
- Can raise competency multiple times

What Is Competency?

- Competency is NOT legal responsibility for conduct due to a mental disease or defect

What Is Competency?

- Ask yourself:
 - Can the client assist you?
 - Can the client understand you?

What Is Competency?

- When in doubt, shout it out!

Case Law

- *Dusky v. United States*, 326 U.S. 408 (1960)
 - Rational

Case Law

- *State v. Johnson*, 133 Wis. 2d 207 (1986)
 - Ethical Duty

Case Law

- *State v. Meeks*, 263 Wis. 2d 794 (2003)
 - Confidentiality

Case Law

- Competency does not apply to civil cases
- However, *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502 (1997)
 - Duty to raise competency does apply to revocation hearings



GOING CRAZY?

Then we need to do it the right way.

Raising Competency

- Step One:
 - Competency motion in front of the court
- Step Two:
 - Court finds PC to believe competency is an issue and orders exam
- Step Three:
 - Evaluator files report with his / her opinion regarding client's competency
- Step Four:
 - Either state or defense can challenge the evaluator's opinion
- Step Five:
 - Hearing
- Step Six:
 - Disposition

Raising Competency: Step One

- Exact way to raise depends on jurisdiction
- Some jurisdictions ask that you prepare the proposed order for a competency evaluation (CR-205) in addition to a written motion
- At this point, the case is suspended

Raising Competency: Step Two

- So long as you raise it as an issue, judges will typically find that there is probable cause to believe competency is at issue
- Evaluation is ordered

Raising Competency: Step Three

- Doctor Files (Timely) Report
 - 30 days for outpatient
 - 15 days for inpatient
 - Wis. Stat. Sec. 971.41(2)(c)
- Possible Opinions:
 - Competent
 - Not competent, likely to regain
 - aka: “lacks sufficient capacity...”
 - Not competent, unlikely to regain
 - Not competent, not competent to refuse medication
 - Unable to render an opinion, referral to inpatient facility (Mendota or Winnebago)

Raising Competency: Step Four

- Review report with client
- At this point, even if you still doubt client's competency, you must go forward however the client wishes
- State may also challenge the doctor's report (in part or in whole)

ABOUTSEVEN

I feel like I'm taking crazy pills!

Raising Competency: Step Five

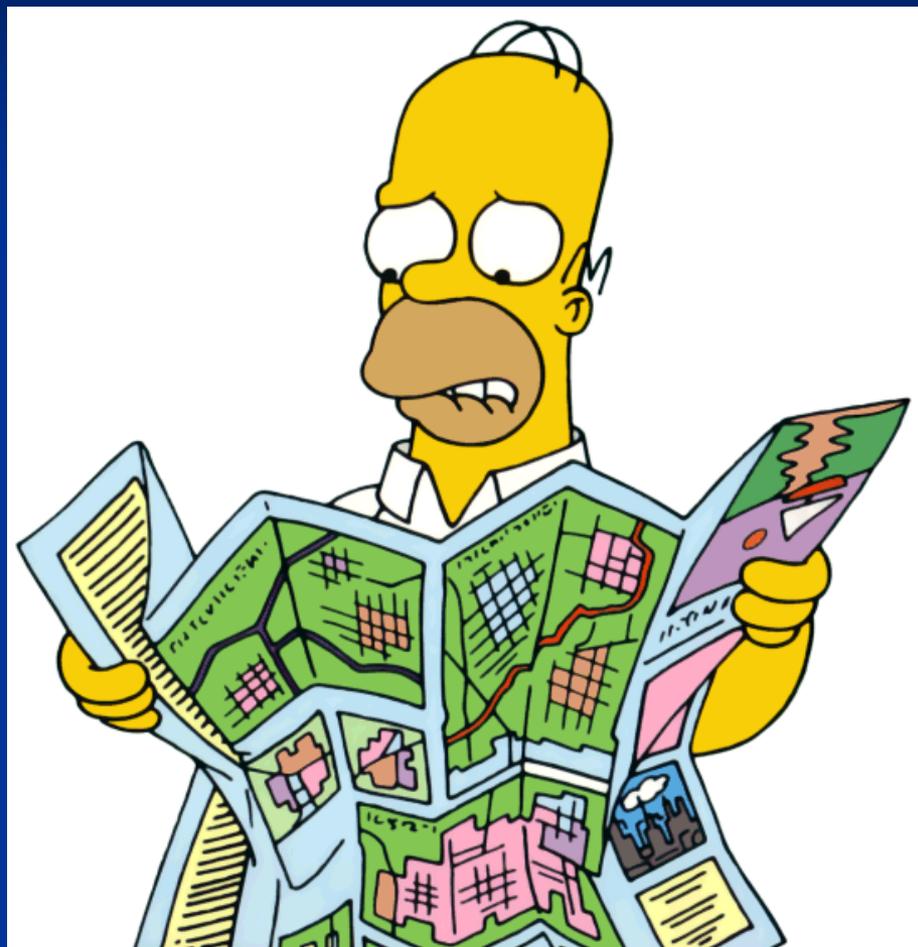
- If a defendant asserts that he is competent, the defendant shall be found competent unless the state proves incompetency by clear and convincing evidence
- If a defendant asserts incompetency or stands mute, the defendant shall be found incompetent unless the state proves competency by the greater weight of credible evidence
 - Wis. Stat. 971.14(4)(b)

Raising Competency: Step Six

- Disposition Options:
 - Client is competent
 - Client is not competent, likely to regain
 - Client is not competent, likely to regain, not competent to refuse medications
 - Client is not competent, not likely to regain

Regaining Competency

- 12 months or statutory maximum amount of time, whichever is less, to regain his competency
- Or, a cumulative of 18 months
- If client does not regain competency, defense should move for a dismissal or administratively close



Competency Raised

Not Competent

Competent
(Reinstates Case)

Not Likely To Regain:
(Conversion to 51 / 54/ 55 & Administratively Close)

Likely to Regain

Commitment

If 12 months straight go by = not likely to regain

Regains Competency

Reinstates Case

Client Loses Competency

Competency Raised again – now has total of 18 months cumulative to regain

Not Guilty By Reason of Mental Disease or Defect (NGI)

- A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.
 - Does not include repeated criminal or otherwise antisocial conduct.
 - NGI is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.
 - Wis. Stat. Sec. 971.15

Not Guilty By Reason of Mental Disease or Defect (NGI)

- *State v. Byrge*, 225 Wis. 2d 702 (Ct. App. 1999)
 - The right to assert a NGI defense belongs to the client, not the attorney

Asserting NGI: Four Steps

■ Step One

- Determine if you believe NGI would be appropriate, discuss with client, & change plea if client elects

■ Step Two

- Judge orders 1 – 3 court appointed examinations, defense may also elect to have its own expert

■ Step Three

- Bifurcated trial or bifurcated plea

■ Step Four

- Third phase of trial & disposition

Asserting NGI: Step One

- Wis. Stat. Sec. 971.05(3) suggests the NGI plea should be entered at arraignment, after filing of the information or complaint
 - But ain't nobody got time for that
- *State v. Kazez*, 192 Wis. 2d 213, 531 N.W. 2d 332 (Ct. App. 1995)
- Changing plea – join NGI with NG plea

Asserting NGI: Step Two

- Court appoints typically one evaluation to begin, but can use up to three evaluations
 - Attorney can recommend an expert to court
- Psychologist vs. Psychiatrist
- Report either supports or does not support NGI

Asserting NGI: Step Three

- Report comes back to judge, prosecutor, and defense
 - No less than 10 days before trial if court appointed
 - No less than 15 days before trial if defense hired
- *State v. Murdock*, 2000 WI App 170
 - State does not have to stipulate to report
- If you have a jury trial, same jury will hear both phases

Asserting NGI: Step Three

- The Second Phase of Trial: Accountability Phase
 - Defense has the burden to a reasonable certainty by the greater weight of the evidence
 - Wis. Stat. Sec. 971.15(3)
 - 5/6 verdict is all that is needed
 - 5th Amendment still applies
 - If defense presents limited testimony in support of NGI, judge may issue a directed verdict
 - *State v. Leach*, 124 Wis. 2d 648 (1990)

Asserting NGI: Step Four

- Dispositional Phase: NGI Commitment
 - Second evaluation is completed with an opinion of dangerousness and medication
 - Client is committed to the Department of Health and Social Services
 - For Felonies: a specified period not to exceed the maximum sentence
 - For Misdemeanors: 2/3 of the maximum sentence



Asserting NGI: Step Four

- If your client is *currently* dangerous by clear and convincing evidence, then inpatient mental health facility
- If not dangerous, conditional release to DHS
- If the court lacks information to make a determination, can order DHS to conduct a predispositional investigation

NGI Commitments

- Conditional Release:
 - Client will have case manager through DHS (or contract agency), and potentially a probation agent as well from DOC for “safety monitoring”
 - Lose firearm rights
 - Sex Offender Registry rules apply

NGI Commitments

- Revocation of Conditional Release
 - Hearing is within 30 days
 - State has the burden by clear and convincing evidence

NGI Commitments

- If inpatient – can petition for conditional release every 6 months
- If on conditional release, can petition for termination from CR every 6 months
- Court will appoint an attorney (if case is closed) and an exam with hospital progress
- If court determines inpatient no longer appropriate, then CR plan is developed within 60 days

NGI Commitments

- Terminate by:
 - Expiration of the commitment
 - County could pursue Chapter 51
 - Petition for termination

Advice From Doctors

- Gather and provide as much collateral information about your client as possible
- “Don’t worry if you’re right or not, it’s our job to figure that out, but if there are any doubts about competency PLEASE raise it! The worst thing is a client who isn’t competent and goes forward with legal proceedings.”

Practice Tips

- When in doubt, shout it out
- Keep safety in mind
- Be aware of the malingering client
- When in doubt, shout it out