

Defending an NGI Case

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NGI Basics

- 971.15 – Mental Responsibility of Defendant
 - (1) A person is not responsible for criminal conduct if at the time of such conduct....
 - The person lacked substantial capacity to either appreciate the wrongfulness of his or her conduct OR
 - The person lacked substantial capacity to conform his or her conduct to the requirements of the law

NGI Basics

- “Mental disease or defect”
 - Does not include repeated criminal acts or otherwise antisocial conduct
 - Can include a wide range of disorders, from more “traditional” mental illnesses (schizophrenia, bipolar disorder, etc.) to neurological conditions (FAE, ALS, epilepsy)
 - Important to choose the correct type of expert for your case (more on that later....)

NGI Basics

- NGI is an affirmative defense
- Trial is split into two stages
 - First phase is “guilt” phase, this looks like traditional trial with state having burden of proof BARD
 - Ask: Should this be stipulated?
 - Second phase is “responsibility” phase, defendant has burden of proof, burden is “reasonable certainty” by “greater weight of credible evidence”

Pre-trial Procedure: Raising NGI

- May be raised at any time, however....
 - Per Wis. Stats. 971.16(3), report of examining expert must be filed no less than 10 days prior to trial
 - Will need to outline brief factual basis at the time of entry of plea to establish factual basis
 - Do not need report with conclusion that defendant is NGI to raise NGI

Experts: Court Appointed & Privately Retained

- May retain your own expert at any time, conduct interviews, draft reports, file review, etc. without having raised NGI
- Court “may appoint” one or more experts....
 - If court appoints expert, expert directed to file report not less than 10 days before trial, with copies to DA, defense
 - Privately retained report also must be filed not less than 10 days prior to trial, or consistent with scheduling orders entered

Choosing Your Expert(s)

- Ask: What kind of expert do I need?
 - Research area of mental defect. Is it psychological? Neurological? A combination? Do you need more than one expert?
 - Make calls. Don't be shy.
 - Cold calls rarely get a response, particularly when the expert is outside of local geographic range. Leave messages. Follow up.
 - Use trusted experts as referral sources to experts in your area
 - MINDSET – www.mindsetconsultinggroup.com

Factors to Consider

- Look at qualifications
 - CV
 - Publications on relevant materials
 - Educational history
 - Years of experience
 - Practicing professional or “professional witness”?
 - Cost
 - Availability
 - Geography

Case Study: State v. Steele

- Experts ultimately retained:
 - Neuroradiologist
 - Reviewed MRIs to draw conclusions about medical diagnosis
 - Neuroscientist
 - Explained volume loss seen on MRI, what potential inferences could be drawn from volume loss, recommended additional testing
 - Neuropsychologist
 - Performed interview and file review, performed multiple psychological tests on defendant (objective scoring)
 - Drafted report with test results but no conclusion as to NGI status
 - Forensic psychiatrist
 - Consulting v. testifying
 - Testifying expert performing clinical interview, file review, drafted report with conclusion, testified

Case Study: State v. Steele – Did All Experts Testify?

- No. Why not?
 - Wis. Stats. 907.03
 - *State v. Weber*, 172 Wis. 2d 98
- Case in chief v. rebuttal

Preparing Your Expert to Testify

- Trust their expertise – allow direct examination to be about them
- TALK TO THEM. Repeatedly.
- Don't try to “out-expert” the expert
- Send draft material to them to review and give feedback on
- Put it in writing!
- Know the contents of your expert's report
- Anticipate state's arguments
- Ask questions to advance case theme

Developing a Case Theme

- Identify “facts beyond change”
- What is the best form of the argument, given the facts?
- Brainstorm – talk to yourself, your colleagues, your friends & family
- Identify what resonates with people

Case Themes: Poetry & Packing a Punch

- Pay attention to how your words sound: Alliteration, consonance, and rhythm.
- Memorable phrasing
- “Two minute drill”
- Say something true

Jury Selection

- Build a community
- Introduce bad facts along with case theme, determine if juror world experience allows for both to exist at once (“embrace the suck”)
- There are no “bad” answers
- *Never* rehabilitate a potential juror!!

Opening Statements

- Two minute drill, redux
- Reintroduce case theme
- Incorporate prior “conversation” (voir dire)
- Memorable descriptions

Treat opening as the most important part of your case

Witnesses

Ask...

- Does your witness advance your case theme?
- Do your questions advance your case theme?
- How can you best advance your case theme on cross examination?

Closings

- Keep track of prosecutor's questions and incorporate into argument
- Give the jury an opportunity to feel smart
- Reiterate theme
- Work it
- Power Points/Playing for the fumble
- NGI Extra: YOU GET REBUTTAL

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