

LITIGATING COMPETENCY OF THE MENTALLY RETARDED

I. Meaning of Mental Retardation

- A. Mental retardation is a “defect” within meaning of sec. 971.13, stats. Recognize there are other developmental or cognitive disabilities besides mental retardation which may constitute defects as well, such as autism, downs syndrome, and chemical injuries.
- B. DSM-IV R category
 1. Characterized by significantly sub-average intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 and concurrent deficits or impairments in adaptive functioning. [DSM pages appended below]
 2. Degrees of Severity
 - a. Mild - IQ Level 50-55 to 70
Moderate - IQ Level 35-40 to 50-55
Severe - IQ Level 20-25 to 35-40
Profound IQ Level below 20 or 25
 - b. Degree of error + or - 5
 - c. Mild retardation represents at most an intelligence below 97% of population. The term “mild” is problematic because it still reflects significantly sub-average intellectual functioning. You must therefore counter the usual connotation of “mild.”
 3. IQ tests measure intellectual functioning. The usual test is the Wechsler Adult Intelligence Scale (WAIS).
 4. Adaptive functioning refers to what people do to take care of themselves and to relate to others in daily living rather than abstract potential implied by intelligence, i.e., IQ deficits must have a practical impact on one’s life and this is measured by assessing how one functions in practical affairs. Adaptive functioning in the subjective factor is assaying competence.
 5. The DSM factor of early or prior onset may be relevant if malingering becomes an issue. On the other hand, problems simply may not have been diagnosed previously.
 6. There are special instruments to assess the competency of mentally retarded persons, e.g., the Competency Assessment To Stand Trial - Mental Retardation (CAST-MR); MacArthur Competence Assessment Adjudication (Mac CAT-CA).

7. Typicalities

- a. Difficulty in doing complex planning, e.g. premeditation
 - b. Characterized by “concrete thinking”. Concrete thinking is the inability to think abstractly, metaphorically, or hypothetically. Ideas and words are usually limited to a single meaning. Figures of speech are taken literally and nuances of language are missed and not used.
 - c. Suggestibility
 - d. Limited communication skills including lack of complexity of language. Affects both expression and reception.
 - e. Susceptible to intimidation
 - f. Responsive to authority and reluctant to resist.
 - g. Memory impairments
 - h. Impulsivity
 - i. Denial of disability; try to mask due to stigma
 - j. Lack of knowledge of basic facts
 - k. May appear devious or obstinate
- B. Mental retardation is a “defect” within the meaning of sec. 971.15, Stats. Recognize there are other development or cognitive disabilities besides mental retardation, which may constitute defects as well, such as autism, down syndrome, and physical or chemical injuries to the brain.

II. Assessing Clients For Retardation or Cognitive Deficits

A. Indicators

1. Payee/caretaker
 2. SSI, SSDI
 3. Special Ed, Learning disabled, “slow” or M.R. classes
 4. Job history or lack of
 5. No driver’s license
 6. No bank account
 7. Latency – long pauses between question or response
 8. Slow bodily movement
 9. Speech patterns
 - a. Limited and simple vocabulary
 - b. Simple sentence structures and length
 10. Little factual recall
 11. Inability to contextualize
 12. Inability to rationalize
 13. Inability to understand legal concepts
 14. Requires constant simplification or explanation
- B. Also obtain school and SSI or other assistance records.

III. Effects in Criminal Case

- A. May be last to leave scene
- B. Cannot give adequate account or may seem non-responsive or evasive
- C. Suggestible in interrogation, investigation, and cross-examination.
- D. Can't understand, much less apply rights
- E. Can't fully explain relevant facts or put in relevant context
- F. May agree or accede for appearance sake
- G. Cannot make decisions committed to defendant
- H. Cannot function in adversarial situation
- I. Need for frequent explanation and re-explanation
- J. Cannot comprehend testimony
- K. Cannot put testimonial facts together or into conceptual framework
- L. Cannot concentrate for extended periods
- M. Will not challenge or question

IV. Components of Competency

- A. Three competencies: to confess, to stand trial, to plead for competency to stand trial. (Also revocation, State ex rel. Vanderbeke v. Endicott, 210 Wis. 2d 502, 563 N.W. 2d 883 (1997); appeal State v. Debra A.E., 188 Wis. 2d 111, 523 N.W. 2d 727 (1994).
- B. Dusky/Drope tests
 - 1. Basic "understand and assist" standard
 - 2. "Whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - whether he has a rational as well as factual understanding of the procedures against him." Dusky v. United States, 362 U.S. 402 (1969); See also, Drope v. Missouri, 420 U.S. 162 (1975).
- C. McGarry instrument, forensic assessment instrument frequently used by examiners at least in modified form and providing guide to areas of inquiry.
 - 1. appraisal of available legal defenses
 - 2. unmanageable behavior
 - 3. quality of relating to attorney
 - 4. planning of strategy including plea
 - 5. appraisal of participant roles
 - 6. understanding of court procedure
 - 7. appreciation of charges
 - 8. appreciation of penalties
 - 9. appraisal of likely outcome

10. capacity to disclose facts
11. capacity to realistically challenge witnesses
12. capacity to testify relevantly
13. self-defeating/self-serving motivation

D. Courts and frequently examiners rely on overly simplistic formulae: does the defendant

1. Understand the charges
2. Know the players
3. Understand plea options

(The state institutions run “competency classes” geared primarily to getting the rudiment of the case and courtroom understood. They cannot teach higher levels of thinking.)

E. Other aspects of competency to stand trial and effects of incompetency that should be litigated:

1. Competency to stand trial

a. Decisional competency

(1) In State v. Garfoot, 207 Wis. 2d 214, 558 N.W.2d 214 (1997), Chief Justice Abrahamson in concurrence observed: “Many questions remain unanswered: What decision-making abilities are encompassed by the Dusky formulation? To what extent do the Dusky tests include an accused’s appreciation of the trial’s significance and his or her own situation as a defendant in a criminal prosecution? What is the relation between the Dusky tests and legal rules relating to decision-making by criminal defendants?”

(2) Cooper v. Oklahoma, 517 U.S. 348 (1996) held that competency includes the ability to make decisions committed to the defendant by law and assist in others. These clearly include whether to plead, whether to testify, and whether to try the case to judge or jury; but they also must be consulted on decisions such as on jury strike, less included. cf. Godinez v. Moran, 509 U.S. 354 (1993)

(3) State v. Debra A. E., 188 Wis. 2d 111, 523 N.W.2d 727 (1974) held that decision-making ability may be necessary for competency in post-conviction stages, so why is it not equally applicable as a fundamental criterion at the trial level?

- b. Ability to testify in an adversarial circumstance (beyond ability to decide whether to testify)
 - (1) A right to testify has been established in law. See, State v. Burroughs, State v. Boykins. The issue then arises whether an individual is capable of testifying or the right is meaningless.
 - (2) A mentally retarded individual may have problems with other than simple questions, may need questions frequently rephrased and may be overly susceptible to leading questions. See arguable applicability of federal ADA, below.

2. Competency to Confess

- a. Three components to a lawful waiver of the Fifth Amendment right to silence and the Sixth Amendment right to counsel:
 - (1) Knowing
 - (2) Intelligent
 - (3) Voluntary
- b. There is a distinction between knowing, intelligent, and voluntary statements, State v. Lee, 175 Wis. 2d 348, 499 N.W.2d 250 (Ct. App. 1993).
- c. Involuntariness must be result of intentional police conduct, Connelly v. Colorado, 479 U.S. 157 (1986). State v. Clappes, 136 Wis. 2d 222, 401 N.W.2d 759 (1987). But ordinarily acceptable police procedures may be unacceptable as to the mentally disturbed. Police coercion and the suspect's personal characteristics are interdependent; the more vulnerable the more easily coerced by subtle means. cf. State v. Xiong, 178 Wis. 2d 525, 504 N.W.2d 428 (Ct. App. 1993).
- d. Lack of knowledge and intelligence may be function of cognitive disabilities such as mental retardation and are of concern irrespective of police coercion. State v. Lee, supra.
- e. Whether the police were concerned by indicia of mental health problems matters for suppression. A failure to inquire or an insensitivity to impairment maybe held against them. See, State v. Hoppe, 2001 WL 722875 (N.B.: unpublished)

- f. Distinction between parroting and comprehending in 5th and 6th Amendment rights and waiver.
 - g. Distinction between understanding and applying rights.
3. Competency to plead is a separate competency more clearly requiring decisional abilities, in that the decision to plead requires a knowing and intelligent waiver. Cf. Godinez v. Moran, 509 U.S. 354 (1993).
 4. “Competency is a contextualized concept.” The meaning of competency changes according the task required. Debra A.E., supra, 188 Wis. 2d 124-126. “A determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation.” ABA Criminal Justice Health Standards sec. 7-4.1 commentary at 175 (1986); Id. at 125, fn. 7.

V. Hearing Tactics

- A. Use of professional definitions from DSM and other authoritative sources
- B. Use of instrument guidelines to test the reliability of expert’s opinion; pay particular attention to subjective criteria.
- C. Establish typicalities through expert and lay testimony
- D. Challenge subjectivity of assessing adaptive functioning
- E. Utilize lay witnesses to testify to levels of adaptive functioning in opposition to expert opinions frequently based on the client's self-reporting.
- F. Distinguish daily adaptive functioning from that in novel or stress-ridden contexts. This is a distinction recognized by DSM.
- G. Challenge state’s access to defense examiner’s notes relating to substantive facts of defense. (5th Amendment issues)
- H. Consider protective order respecting state examiner’s inquiry into defendant’s version of events (5th Amendment);
- I. Determine to what extent examiner actually tested comprehension and ability to apply information beyond more assertions of understanding.
- J. There are two aspects of competency ordinarily not reached effectively in a competency evaluation:

- (1) “functional competency”, that is the ability to deal with the specifics of the particular case and with that regard competency may depend on the factual complexities and nuances;
 - (2) “ecological competency” the ability of the defendant to function in an actual courtroom situation, whether in response to stress, to duration, to testimonial particularities and complexities, etc.
- K. Examiners, particularly at some state institutions, have little understanding of legal procedure and specific competencies involved yet are opining on competency to participate in courtroom proceedings. Challenge them on their understanding of specific procedures and defendant’s capacities therewith.
- L. Training courses at state institutions are rudimentary; obtain their training and testing protocols.
- M. Problem of misdiagnosis of malingering. There is literature suggesting that a mentally retarded individual lacks the sophistication to malingering. DSM treats malingering at V.62(2).
- N. Specific instruments to test competency to confess
- O. Problem of defendant’s inability to testify (actual, tactical, strategic)
- P. May be necessary to make an on-going record of defendants incompetency: notes, affidavits, witnesses to interviews, particularly if court has found competent and it arises as the more complex stages of hearing and trial are reached.

VI. Other Issues

- A. Title II of the Americans with Disabilities Act (ADA), 42U.S.C. § 12131, prohibits state and local governments from discriminating against people on the basis of physical or mental disabilities with regard to services, programs or activities. Its regulations require courts to take affirmative measures to avoid discrimination, making “reasonable modifications in policies, practices and procedures,” though not such as to fundamentally alter the nature of the activity or proceeding. Motions may, therefore, lie under the ADA to require the courts to make reasonable accommodations and objections, even mistrial motions can be based on such failures.
- B. Validity and effect polygraph of mentally retarded
- C. Right of state’s expert to explore competency to confess by interview (5th Amendment)

- D. Access to examiner's notes with 5th Amendment implications
- E. Whether competency finding warrants interlocutory review.
- F. It is arguable under sec. 880.15, Stats., a temporary guardian may be appointed to look out for the defendant's interests if attorney and defendant are in dispute under sec. 971.14(4), Stats, or if decisional capacities are in question for appeal. cf., State v. Debra A.E., supra, 188 Wis. 2d at 135. Whether this applies at the trial level is untested and more questionable.