

COMPETENCY & NGI

Atty. Eric Heywood

WI SPD Criminal Law Basics

March 15, 2018



Competency vs. NGI

Competency

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

NGI

- **Legal standard:** “A person is not legally responsible for criminal conduct as a result of a 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.”
Wis. Stat. § 971.15(1).

Competency vs. NGI

Competency

- Client's understanding of proceedings now.



NGI

- Client's control of behavior then.



Competency vs. NGI

Competency

- **Ethical obligation:** must raise competency regardless of client's consent.

NGI

- **Strategic decision:** need client's consent to pursue NGI plea.



COMPETENCY

Competency Concerns

Ask questions to assess client's competency:

- Role of defense, prosecutor, and judge
- Current charges, penalties, and elements
- Prior criminal record, mental health treatment, and cognitive limitations
- Potential defenses and witnesses
- Trial procedure
 - Jury trial or Court trial
 - Desire to testify or remain silent

Discussing Competency with Client

- Client may feel offended
 - “Are you calling me stupid?”
- Potential response:
 - Legal process is complicated, it’s not fair for you to be convicted or punished if you don’t understand the legal process.
- Balance ethical duty to raise competency with advocate role to maintain client rapport.



Competency Case Law

- Defendant must be 1) rational, 2) have sufficient present ability to consult with counsel to a reasonable degree of rational confidence, and 3) have a rational and factual understanding of the proceeding.
 - ***Dusky v. United States***, 326 U.S. 408 (1960).
- Defense counsel has an ethical duty to raise competency whenever it becomes apparent ; strategic considerations do not alleviate counsel's duty to raise competency.
 - ***State v. Johnson***, 133 Wis. 2d 207 (1986).

Competency and Confidentiality

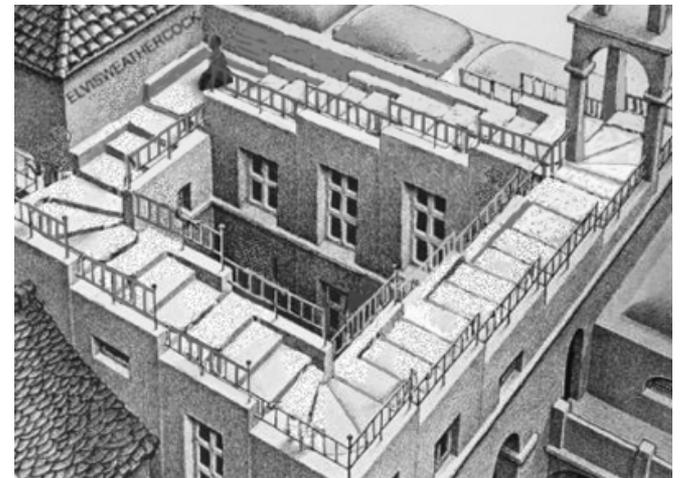
- Defense counsel is NOT ALLOWED TO REVEAL CLIENT CONFIDENCES in the context of a competency proceeding, unless the client gives permission.
 - ***State v. Meeks***, 2003 WI 104.
 - You should read this case yourself.
 - The Judge or prosecutor may ask for confidential information, you should be prepared to respond with a summary of the confidentiality privilege.

Competency at Revocation Hearings

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

Competency 6 Step Summary

1. Defense files competency motion, with specifics if client agrees.
2. Court finds probable cause and orders examination.
3. Evaluator files report with opinion regarding client's competency.
4. State or defense can challenge the evaluator's report.
5. Competency hearing.
6. Disposition.



Step 1: Competency Motion

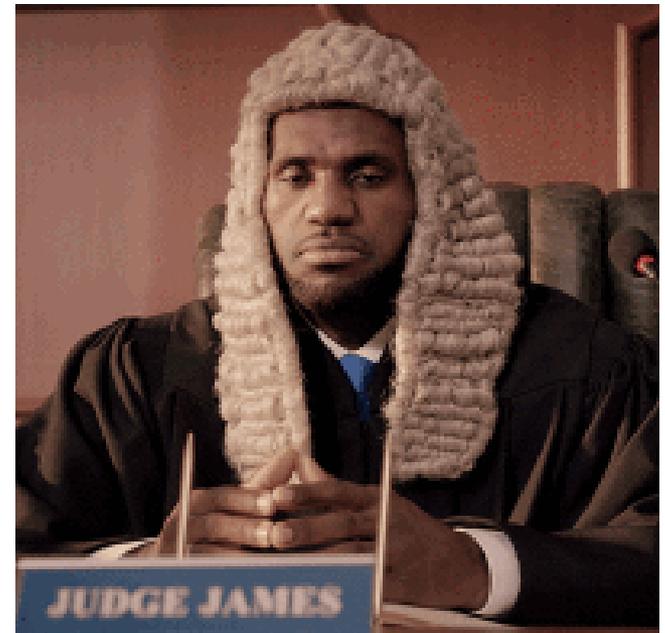
- Depending on jurisdiction, you may file a written motion or make an oral motion as to your concern about competency.
- Some jurisdictions may want you to prepare the proposed order for a competency evaluation (Form CR-205) in addition to a written motion.

Step 1: Sample Competency Motion

- Attorney Eric Heywood moves the Court for an order for an examination regarding the accused's competency to stand trial. Defense counsel brings this motion pursuant to Wis. Stat. §§ 971.13 and 971.14 on the grounds that the defense counsel has reason to doubt the accused's competency.
 - Only include specific facts if appropriate AND client consents to disclosure of confidential information, pursuant to WI SCR 20:1.6.

Step 2: PC and Exam

- The court will determine if there is probable cause for the offense.
 - Wis. Stat. § 971.14(1)(c).
- Court orders examination.
 - Wis. Stat. § 971.14(2).



Step 3: Evaluation

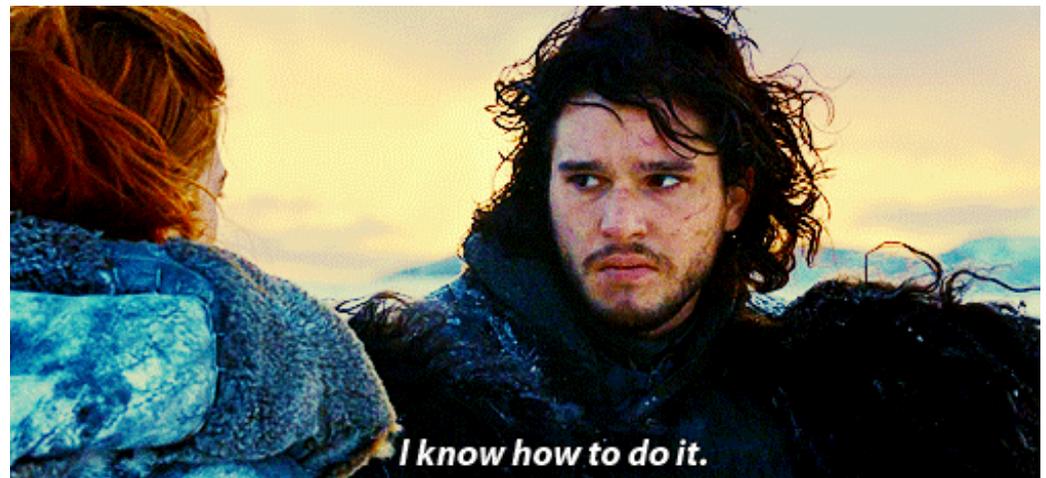
- If your client is released on bail, the evaluation must be outpatient unless failure to cooperate or inpatient observation is necessary for an adequate evaluation.
 - Wis. Stat. § 971.14(2)(b).
- Request jail credit for each day spent inpatient.
 - Wis. Stat. § 971.41(2)(a).
- Time limits for report:
 - 30 days for outpatient.
 - 15 days for inpatient.
 - Wis. Stat. § 971.41(2)(c).

Step 3: Evaluation Report

- Competent.
- Not competent, likely to regain competency.
- Not competent, likely to regain competency, but not competent to refuse medication.
- Not competent, not likely to regain competency.
- Unable to render an opinion.
 - Referral to inpatient facility: Mendota or Winnebago.

Step 4: Challenging Report

- Review report with client.
- At this point, even if you still doubt client's competency, you must go forward however the client wishes.
 - Adversarial role to advocate for client.
 - Not a Guardian ad Litem role to decide for client.
- State may also challenge the evaluator's report (in part or in whole).



Step 5: Competency Hearing

- If the defense asserts competency, the accused shall be found competent unless the state proves incompetency by **clear and convincing evidence**.
- If the defense asserts incompetency or stands mute, the accused shall be found incompetent unless the state proves competency by the **greater weight of credible evidence**.
 - Parties may stipulate to competency or incompetency.
 - Wis. Stat. § 971.14(4)(b).

Step 6: Disposition Options

- Competent.
 - Prosecution continues.
- Not competent, likely to regain.
 - Commitment of up to 12 months or statutory maximum, whichever is less.
 - If defendant regains competency, prosecution continues; possibility of re-commitment for cumulative 18 months.
 - Court can order medications if client not competent to refuse.
 - If defendant does not regain, defense should move for dismissal.
- Not competent, not likely to regain.
 - Can convert to Chapter 51 or 54/55.
 - Case is suspended.
 - Defense should move for a dismissal or administratively close.

COMPETENCY QUESTIONS?

Next up is NGI

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

- **Theory:** the sane person is held accountable for her actions; the insane person is not.
- **Reality:** if an NGI plea is accepted, your client's freedom could be more restricted by the terms of the NGI agreement when compared with what would happen if your client was simply found guilty.
 - Wis. Stat. § 971.15.



Strategic Decision

- The right to proceed or not with NGI belong to the defendant, not counsel.
 - *State v. Byrge*, 225 Wis. 2d 702 (Ct. App. 1999).
- If the defendant has entered a plea of not guilty by reason of mental disease or defect or if there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, an exam **can** be ordered.
 - Wis. Stat. § 971.16(2).

NGI 4 Step Summary

1. Determine if you believe NGI would be appropriate, discuss with client, and change plea if client elects.
2. Judge orders 1 - 3 court appointed examiners to examine the defendant; defense may request its own expert.
3. Bifurcated trial or bifurcated plea.
4. Disposition and commitment to the Department of Health Services.

Step 1: Starting the NGI Process

- Discuss with client the strategic advantages and disadvantages of an NGI plea.
- Wis. Stat. § 971.05(3) suggests that the NGI plea should be entered at arraignment, after filing of the information or complaint.
 - I usually need more time to consult with client.
- You can change a not guilty plea to not guilty & NGI, but must do so well in advance of trial.
 - ***State v. Kazee***, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995).
 - Make sure you join the NGI plea w/ a plea of not guilty!

Step 1: Sample NGI Plea Motion

- The defendant now moves the court to enter a plea of not guilty by reason or mental disease or defect, in addition to the previously entered not guilty plea, pursuant to Wis. Stat. § 971.15.
- The defendant makes this motion to change the plea pursuant to *State v. Kazee*, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995)(holding that a motion to change a plea must be timely so as to give the state suitable notice before trial).
- The defense requests an NGI evaluation, pursuant to Wis. Stat. § 971.16.

Step 2: Court Appointed Examination

- Court appoints typically one evaluator initially, but can use up to three evaluators.
 - Attorney can recommend an expert to the court.
- Psychologist vs. Psychiatrist.
- Consider retaining your own expert.
 - Evaluate if client may be malingering.



Step 3: Bifurcated Process

- After the report comes back, you will decide whether you would like to stipulate to one or both bifurcated phases or have a trial on all issues.
 - No less than 10 days before trial if court appointed.
 - No less than 15 days before trial if defense hired.
- State does not have to stipulate to NGI finding by expert and may request the trial portion.
 - ***State v. Murdock***, 2000 WI App 170.
- If you have a trial, the same jury will hear both phases.

Step 3: The Trial

- The defense has the burden to a reasonable certainty by the greater weight of the evidence, Wis. Stat. § 971.15(3).
 - 5/6 verdict is all that is needed.
 - 5th Amendment still applies—no self incrimination.
- If defense presents limited testimony in support of NGI, judge may issue a directed verdict.
 - ***State v. Leach***, 124 Wis. 2d 648 (1990).

Step 4: Disposition

- Client is committed to DHS.
- For Felonies: **not exceeding** the maximum confinement.
 - Wis. Stat. § 971.17(1)(b).
- For Misdemeanors: **not exceeding** 2/3 of the maximum sentence.
 - Wis. Stat. § 971.17(1)(d).
- Second evaluation may be completed with an opinion of dangerousness and medication.

Step 4: Dispositional Placement

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



Step 4: Conditional Release

- Client will have case manager through DHS (or contract agency), and potentially a probation agent as well from DOC for “safety monitoring.”
 - Medication monitoring.
 - Drug testing.
 - Driver’s License.
- Lose firearm rights if felony.
- Sex Offender Registry if applicable.

Revocation of Conditional Release

- Client may be taken into custody upon allegation that conditions have been violated.
- Department may submit a statement of probable cause and a petition to revoke an order for conditional release.
- Hearing within 30 days.
- State has the burden by clear and convincing evidence.

Petition for Conditional Release

- If inpatient, can petition for conditional release every 6 months.
- Court will appoint an attorney (if case is closed) and order an examination with hospital progress.
 - Make sure the doctor uses the right standard.
 - “that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released.” Wis. Stat. § 971.17(4)(d).
- If court determines inpatient no longer appropriate, then conditional release plan is developed within 60 days.
 - “The court shall grant the petition unless it finds by clear and convincing evidence...” Wis. Stat. § 971.17(4)(d).

End of Commitment

- Petition for termination may be filed by a person on conditional release every 6 months.
- Expiration of Commitment.
 - County could pursue Chapter 51.



Commitment and NGI advice

- If you have doubts about competency, raise it.
 - Don't worry if you are right or not.
 - Doctor's job to figure it out.
 - Protect incompetent client from conviction.
- Be mindful of NGI consequences.
- Provide as much collateral information about your client as possible to the doctors.
- Be aware of malingering clients.
- Keep safety in mind.
- Ask questions!

Resources

- Wis. Stat. §§ 971.13 – 17.
- Case law.
- WI Court forms CR 205-06, 280, 270-77.
- WI Judicial Benchbook Vol 1 CR 12, CR 34.
- WI Criminal Defense Manual Ch. 5, sec. XXII.
- Rules of Ethics SCR 20:1.6, 1.14.
- Prior presentations:
 - Atty. Lisa Procaccio
 - Atty. Kate Frigo
 - Atty. Guy Taylor

THE END

Questions?

heywoode@opd.wi.gov