

Recent Headlines

Mentally Ill in Jail Too Long, Lawsuit Charges (Austin American Statesman, 2/15/07)
... Officials Clash Over Mentally Ill in Florida Jails (New York Times, 11/15/06) ... *State Standoff on Mentally Ill* (Denver Post, 12/5/06) ... *Legal Limbo* (Seattle Stranger, 12/14/06)

Competency to stand trial is a constitutionally required mandate. It requires defendants to be able to understand their charges and to assist their attorney in preparation of their defense. When the issue of competency is raised by any of the parties involved, a competency examination can be ordered by the court. The requirements of competency proceedings have overburdened the mental health system recently in many states.

In practice, competency examinations, in most states require two licensed psychiatrists or psychologists. In many communities this is not an option because of funding issues or an insufficient pool of qualified professionals to perform these examinations. Also, competency examinations must frequently be performed in forensic psychiatric hospitals that are costly and often unavailable.

For individuals found Incompetent to Stand Trial (IST), restoration in almost all instances is provided in psychiatric hospitals that are often far removed from the county where the criminal charges are filed. As the headlines above illustrate, many states do not have sufficient inpatient bed capacity to meet the demand to complete competency evaluations or to immediately respond to a court commitment for competency restoration. Consequently, persons with mental illness remain in jail for weeks, and in some cases months, awaiting an inpatient bed, which may exacerbate overcrowding in many jails.

Aside from service system issues, there are consequences for the defendant. A finding of IST can start a chain of legal entanglements that result in: prolonged hospitalization or jail; institutionalization for even minor crimes; prolonged jail stays while awaiting scarce hospital bed placement; and delayed adjudication of criminal charges.

Competency proceedings can also compete with other due process rights:

- Right to a speedy trial can be jeopardized due to delays in adjudication while competency is being restored
- Rights to liberty and least restrictive alternatives are compromised when defendants are placed in a psychiatric hospital or retained in jail awaiting competency examination or when defendants undergo competency restoration in an inpatient setting when otherwise they could be safely treated in the community
- Right to treatment is compromised when defendants are detained in jail awaiting transfer to inpatient settings for competency restoration
- Right to refuse treatment is limited by *Sell v. US* which limits a defendant's right to refuse treatment and holds that defendants can be medicated over objection to restore competency
- Ironically right to counsel and to participate in one's own defense is also compromised since often inpatient restoration occurs in psychiatric hospitals distant from the court, impairing access to counsel

Some Quick Fixes

In many jurisdictions solutions for these competing issues have been found that are relatively easy and inexpensive to institute.

Competency Examination Stage

At the competency examination stage, the priority is promptly providing competency examinations to minimize any delay in the criminal proceedings, avoiding extended incarceration for persons awaiting examination, and avoiding unnecessary hospitalization for competency examinations.

- Virginia increased fees for community-based examinations to attract more qualified evaluators.
- Jurisdictions in Illinois, Washington State, and Massachusetts provide court-based examiners.

In Seattle Municipal Mental Health Court, initial competency assessments are made by a public defender, a defense social worker, and a court-employed mental health professional. These assessments, which precede the formal competency evaluation request, provide for a more accurate referral process.

- Virginia and Maryland allow the transfer of persons awaiting trial to an inpatient unit for stabilization prior to initiation of competency proceedings.
- The 8th Judicial Court in Clark County, Nevada, and Seattle Municipal Court have established competency courts. These courts provide consistency for ordering competency exams, improving coordination between the jail transport staff, hospitals, and court administrative staff.
- Jurisdictions in Ohio have specialized IST dockets.
- The attorneys in Seattle Municipal Mental Health Court routinely waive the requirement of two competency examiners. In 10 percent of cases the court stipulates use of a previous competency evaluation in lieu of seeking a new one. This occurs when the previous report is both recent and the court employed mental health professional concludes it is still accurate.
- Colorado and Washington provide competency examinations in jails, which reduces the demand for inpatient beds and eliminates transport delays. Seattle Municipal Mental Health Court conducts over 90 percent of its evaluations in jail. As a result, the state hospital, located 50 miles away, opened a satellite office blocks from the jail for its competency evaluation staff.
- Seattle Municipal Mental Health Court conducts community-based evaluations when the person is stable in the community and reliably attends court hearings.
- Jurisdictions in Texas improved their mental health services in jails, while judges extended the competency evaluation period to allow time for jail-based treatment/medication to help improve functioning and reduce findings of incompetency.
- Seattle Municipal Mental Health Court, upon receipt of the completed competency evaluation, advances the court hearing to the next business day. This saves money, reduces the person's stay in jail, and increases the likelihood of the evaluation's accuracy.

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Competency Restoration Stage

At the Competency Restoration stage, states tend to focus on insuring that: admissions are appropriate; level of care matches clinical need and not legal specification; utilization review of the restoration process insures prompt treatment and suitability for continued retention; opportunities for community- and jail-based competency restoration are expanded. It should be noted that strategies listed below may involve cost shifting from state to local funding or local to state funding. Fiscal incentives and disincentives are crucial when developing strategies to alleviate inpatient census problems due to IST issues.

- Arkansas and Maryland triage cases upon admission and promptly return competent cases to court.
- Illinois and Maryland have developed a utilization review process to insure consistent review of competency status to minimize length of stay.
- Texas utilization review includes assessing need for level of care with procedures to transfer to less restrictive levels of care while competency is being restored and allows for admission to a crisis stabilization unit for competency restoration.

Oklahoma and Virginia changed competency statutes to specify reasonable time limits for competency restoration based on seriousness of offense.

Virginia developed a competency restoration manual to train community-based and jail-based examiners.

- Virginia and Texas provide jail-based competency restoration treatment in some jurisdictions.
- Maryland improved information transfer from courts and jail to the hospital to insure that legal information and jail treatment information is available to hospital treatment staff to insure continuity of care.
- Jurisdictions in Nevada and Texas use video conferencing for "Sell" hearings (medication over objection) to expedite treatment process. Wisconsin uses video conferencing for status hearings during the restoration process. Seattle Municipal Mental Health Court uses telephonic conferencing for "Sell" hearings. It also sets a preliminary status hearing, which often obviates the need for the "Sell" hearing.
- Jurisdictions in Ohio, Texas, Georgia, and Virginia operate community restoration programs;

however, data suggests community restoration is underutilized.

Return to Court Stage

- Following restoration of competency, persons are generally returned to local jails to await their next court appearance. Lack of coordination among the courts, jail transport and treatment staff, prosecutors, and defense attorneys often results in unnecessary delays in criminal proceedings, lack of continuity of care, and ambivalence about how cases should be disposed of. At the return to court stage, states focus on prompt notification to the court and jail about release, improving transportation protocols to insure prompt response when a person is ready for release, and transition planning, which can provide the court with disposition and diversion options upon return to court.
- The 8th District Court in Clark County, Nevada and the Seattle Municipal Mental Health Court coordinate the transition process. Regular stakeholder meetings identify logistical and treatment issues that may interfere with prompt case disposition. Logistical issues include transportation delays, delays in receipt of psychiatric examinations, delays in scheduling cases for court appearance, interruption in clinical care due to inadequate jail formularies or lack of treatment information.
- Ohio, Illinois, Washington, and Wisconsin move cases up on the docket upon return from competency restoration.
- Colorado and Maryland develop release plans to provide for diversion alternatives upon return to court.
- The 8th District Court in Clark County, Nevada, Seattle Municipal Mental Health Court, and the state of Ohio all worked out transportation issues to insure defendants were promptly returned to jail and scheduled for court hearings.

A Program Example: Seattle Municipal Court's Mental Health Court Competency Docket

The Seattle Municipal Court established its Mental Health Court (MHC) in 1999 to handle misdemeanor case occurring within Seattle and processed by the Seattle Police Department. One unique aspect of Seattle's MHC is its access to specialized resources. The same judge, prosecutors, defense attorneys, and mental health professionals staff the court to provide consistency. This level of expertise enables the MHC team to problem-solve creatively and more effectively in cases involving people with mental illness, primarily those

who suffer from a major Axis I diagnosis. Seattle's MHC has functioned since its inception as both a competency and a therapeutic court.

Competency Docket

Seattle Municipal MHC hears all competency matters for two primary reasons: expertise working with persons with mental illness and expertise in the law. MHC public defenders spend a tremendous amount of time representing persons with mental illness outside the competency context. This provides them skills in working with this population that transfer well to competency cases. The judge, prosecutors, and public defenders have access to mental health professionals not available to mainstream courts.

Seattle Municipal MHC handled 170 competency cases in 1999. The MHC's expertise in accurately identifying cases where competency is an issue has grown substantially since then, averaging 450 competency cases per year since 2003. All felony and non-felony courts in the rest of western Washington state combined handle approximately the same number of competency cases. In 2006, 65 percent of cases in Seattle Municipal's MHC where competency was evaluated were dismissed on those grounds. By contrast, in 2005, in eastern Washington State, the issue was dispositive in only three percent of cases where competency was evaluated.

The prosecutors and defense attorneys in MHC work with the competency laws on a daily basis. This provides them the expertise to identify and resolve legal issues quickly and accurately. Moreover, Seattle Municipal MHC meets quarterly with all major stakeholders in the competency process, including the King County Jail, Western State Hospital, the Seattle Police Department's Crisis Intervention Team, and the County Designated mental health professionals. Further, the MHC conducts training sessions semi-annually with the Seattle Police Department on correctly identifying which individuals to refer to Seattle Municipal MHC. The overall result is a competency process that is both streamlined and provides increased attention to legal detail. Whereas competency cases averaged 20 days to complete in 2003, the average was 10 days in 2006.

Conclusion

Clearly, much can be done to streamline competency examinations and restorations without major statutory revisions that can take years. With strategic convening of local stakeholders, major change is possible through creative alterations of local procedures and improved communications. There are quick fixes that work. ■