

REPRESENTING CLIENTS WITH MENTAL ILLNESS

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AGENDA

Why is it important to know if your client has a mental illness?

How do you know?

Effective Communication

Client expressing suicidal ideation– can you reveal a confidential communication?

Competency

Litigating Delays

MENTAL ILLNESS

Mental illnesses are medical conditions that disrupt a person's thinking, feeling, mood, daily functioning and ability to relate to others.

Serious Mental Illness is defined as a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.

WHY IS IT IMPORTANT?

LOTS OF OUR CLIENTS LIVE WITH MENTAL ILLNESS

“In 44 states, a jail or prison holds more mentally ill individuals than the largest remaining state psychiatric hospital; in every county in the United States with both a county jail and a county psychiatric facility, more seriously mentally ill individuals are incarcerated than hospitalized. A 2004 – 2005 survey found there were ‘more than three times more seriously mentally ill persons in jails and prisons than in hospitals.’”

Torrey, E.F., Zdanowicz, M.T., Kennard, A.D., Lamb, H.R., Eslinger, D.F., Biasotti, M.I., Fuller, D.A. (2014). The treatment of persons with mental illness in prisons and jails: A state survey. Arlington, VA: Treatment Advocacy Center.

Torrey, E.F., Kennard, A.D., Eslinger, D.F., Lamb, H.R., Pavle, J. (2010). More mentally ill persons are in jails and prisons than hospitals: A survey of the states. Arlington, VA: Treatment Advocacy Center.

WHY IS IT IMPORTANT?

LOTS OF OUR CLIENTS LIVE WITH MENTAL ILLNESS

In Washington State, 58% of adult Medicaid enrollees booked into jails in 2013 had a mental health treatment need, 61% had a substance-use disorder treatment need, and 41% experienced co-occurring treatment needs.

Henzel, P.D., Mayfield, J., Soriano A., & Felver, B.E.M. (2016). Behavioral health needs of jail inmates in Washington State [PDF file]. Retrieved from <https://www.dshs.wa.gov/ffa/rda/research-reports/behavioral-health-needs-jail-inmates-Washington-state>

**WHY IS IT
IMPORTANT?**

Defenses

WHY IS IT IMPORTANT?

**It happened, I
did it, but it
wasn't a crime.**

WPIC 18.20 Diminished Capacity—Defense

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the [capacity] [ability] to form (fill in requisite mental state).

It happened, I did it, it was the crime charged, but I'm not responsible.

WHY IS IT IMPORTANT?

WPIC 20.01 Insanity at Time of Offense—Definition

In addition to the plea of not guilty, the defendant has entered a plea of insanity existing at the time of the act charged.

Insanity existing at the time of the commission of the act charged is a defense.

For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.

**WHY IS IT
IMPORTANT?**

Competency

**WHY IS IT
IMPORTANT?**

Mitigation



WHY IS IT IMPORTANT?

**Eligibility for
treatment
courts/diversion &
sentencing
options**

- **Where is your client housed at the jail?**
- **Collateral contacts (with client's permission)**
- **Medications**
- **Diagnoses – what have other people told client?**
- **Look at history of other cases**

HOW DO YOU KNOW?

WHAT IF YOUR CLIENT DOESN'T WANT TO TALK ABOUT IT?

**EFFECTIVELY
COMMUNICATING
WITH CLIENTS
WITH MENTAL
ILLNESS**

**Learn about your
client's mental illness.**

**Spend time with your
client**

Listen

Be flexible

LANGUAGE MATTERS



**MENTAL ILLNESS DOES NOT DISCRIMINATE,
BUT SOMETIMES PEOPLE DO.**

COMMUNICATING WITH CLIENTS WITH ACUTE MENTAL HEALTH SYMPTOMS

Clients with mental illness may have anosognosia (the inability to perceive their mental illness) and/or delusions (fixed beliefs that do not change in response to evidence to the contrary). Anosognosia and delusions can be part of a client's mental illness – arguing about what is real is not productive.

Even if you disagree with your client's interpretations of reality, try to understand their experiences, point of view, hopes, fears, and beliefs about their self and their situation. Goal is to understand client's reality from their point of view even if they are out of touch with reality.

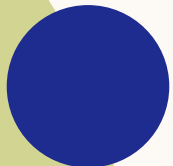
<https://namimainlinepa.org/communicating-with-a-loved-one-who-has-a-mental-illness/>

RCP 1.4 – COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0A(e), is required by these Rules;**
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;**
- (3) keep the client reasonably informed about the status of the matter;**
- (4) promptly comply with reasonable requests for information; and**
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



RPC 1.14 – CLIENT WITH DIMINISHED CAPACITY

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

CLIENTS WITH SUICIDAL IDEATION

In 2020, suicide was among the top 9 leading causes of death for people ages 10 – 64. Suicide was the second leading cause of death for people ages 10 – 14 and 25 – 34.

<https://www.cdc.gov/suicide/facts/index.html>

Suicidal ideation refers to thinking about, considering, or planning suicide.

<https://www.nimh.nih.gov/health/statistics/suicide>

CAN YOU REVEAL A CONFIDENTIAL DISCLOSURE?

RPC 1.6(b)(1) – Confidentiality of Information: A lawyer to the extent the lawyer reasonably believes necessary: Shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm.

Comment 6: “...Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”

CAN YOU REVEAL A CONFIDENTIAL DISCLOSURE?

WSBA *Advisory Opinion* 1011 (1986):

“...when a lawyer is faced with the situation of a client who threatens to commit suicide, and the lawyer reasonably believes that the client might attempt to carry out that threat, the lawyer, pursuant to RPC 1.13 (now RPC 1.14), may take protective action on the theory that the client is, at least temporarily, under a disability. Such protective action might include a call to the public emergency services to get immediate intervention and could allow the lawyer to provide whatever information necessary to protect the client.”

COMPETENCY

The constitutional standard for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (quoting Solicitor General Rankin for the U.S.).

The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he can assist in his defense. *State v. Hahn*, 106 Wn.2d 885, 894 (1986); *State v. Ortiz*, 104 Wn.2d 479, 482 (1985).

COMPETENCY

In order to provide effective assistance, defense counsel must raise competency with the Court when competency concerns are present. *In re Fleming*, 142 Wn.2d 853 (2001).

Defense Counsel cannot waive the issue of competency. *State v. Colville*, 88 Wn.2d 43, 47(1977).



**Competency issues are not
always obvious and do not
always look the same.**

The following competency-related deficits are noted:

- Delusional ideation, which would impair her ability to appreciate her pending legal matter in a reality-based manner; to consider alternate viewpoints; and to interpret the motivations of others (including his attorney) correctly.
- Mildly perseverative thought processes (regarding the exculpatory evidence), which would interfere with her ability to participate meaningfully in the planning of a defense strategy.
- Impaired insight, which would inhibit her ability to recognize the role of psychiatric symptoms in her interactions with others (including her attorney and other courtroom participants).

- Confused, disorganized thinking will impair his ability to rationally discuss with his attorney details of the instant offense, plea options, and other defense considerations
- Impaired concentration will interfere with his ability to focus on relevant conversation with his attorney in discussing the alleged offenses, plea options and other defense considerations. It will also interfere with his ability to focus in court hearings to consider how the information relates to the adjudication of his charges
- Poor judgment, as a result of these psychiatric symptoms, increases his risk of legal-related decisions that are impulsive and ill-conceived
- These symptoms would negatively impact his ability to testify coherently and rationally should such be the direction of his case.

- *Religious preoccupation, guardedness, and possibly delusional thought content*, which may impair the defendant's ability to rationally discuss the alleged offenses, plea options, and other defense considerations, to process information in a goal-directed manner, and to make reasoned decisions about her case. Her fixation on her religious beliefs also increases the likelihood she would have difficulty communicating effectively with defense counsel and would provide irrelevant or nonsensical responses when speaking with defense counsel or testifying. In addition, her guardedness is likely to impair her ability to appropriately interact with courtroom participants, including defense counsel.
- *Possible auditory hallucinations*, which may impede the defendant's ability to attend to, and concentrate on, courtroom proceedings and discussions with defense counsel. Internal preoccupation may also increase the likelihood she would respond to internal stimuli during court proceedings and exhibit inappropriate courtroom behavior.
- *Grossly impaired insight*, which would likely prevent the defendant from recognizing the role of mental illness on her thought processes and behaviors and would likely lead to

- Likely paranoid delusions, which suggest detachment with reality, will likely lead her to misinterpret the motivations of others
- Volatility, which may increase her chances of behavioral outbursts in court
- Depressed mood, which reduced her motivation to defend herself
- Avolition (lack of motivation), which will interfere with her motivation to achieve an outcome in her legal case that would be in her best interest

COMPETENCY – THE EVALUATION

- **Have the Court order an evaluation in your case, even if an evaluation is already ordered somewhere else**
- **Attend the evaluation**
- **Take notes**
- **Ask questions**



**STRATEGIES FOR
TALKING TO
CLIENTS ABOUT
RAISING
COMPETENCY**

COMPETENCY RESTORATION - **MISDEMEANORS**

Chapter 10.77 does not permit the court to automatically order restoration for a misdemeanor offense, even if the charge is a “serious offense” as defined in RCW 10.77.092.

COMPETENCY RESTORATION - **MISDEMEANORS**

Misdemeanor that is a “serious offense” under RCW 10:077.092 → RCW 10.77.088 (1)(a):

(a) Shall dismiss the proceedings without prejudice and detain the defendant for sufficient time to allow the designated crisis responder to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW, unless the prosecutor objects to the dismissal and provides notice of a motion for an order for competency restoration treatment, in which case the court shall schedule a hearing within seven days.

The Court can only order restoration for a serious offense if the Prosecutor establishes a compelling state interest in pursuing competency restoration treatment. See RCW 10.77.088(1)(b) & (2)

COMPETENCY RESTORATION - **MISDEMEANORS**

Misdemeanor that is a not “serious offense” under RCW 10:077.020 → RCW 10.77.088(6):

(6) If the defendant is charged with a nonfelony crime that is not a serious offense as defined in RCW 10.77.092 and found by the court to be not competent, the court may stay or dismiss proceedings and detain the defendant for sufficient time to allow the designated crisis responder to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW. The court must give notice to all parties at least 24 hours before the dismissal of any proceeding under this subsection, and provide an opportunity for a hearing on whether to dismiss the proceedings.

**NOTICE AND EXPLANATION OF IN-JAIL
EVALUATION DELAY PURSUANT TO RCW
10.77.068(5)**

Based upon the information available at this time and the recent average wait time for this legal authority, the current wait time for admission to a Department facility for this patient will be approximately 11 month(s) from the court order signed date. This estimate is intended to be a good faith, reasonable estimate based on the information available at the time this notice was created. However, estimated admissions dates are regularly subject to adjustment for a variety of reasons, including facility holds due to COVID-19, unexpected changes to patient admissions and discharges, and a variety of other factors. Estimates given prior to this date may have differed from the admissions estimate contained in this notice, and future estimates could differ from this one. If the defendant is referred to a restoration program other than a state hospital, such as a residential treatment facility, this estimate will also change after acceptance to that program.

**DELAYS – WHAT
CAN YOU DO?**

LITIGATE



DELAYS – WHAT CAN YOU DO?

1. **Motion to Dismiss - *State v. Hand*, 192 Wn.2d 289, 429 P.3d 502 (2018)**
2. **Make Motion for Order Directing DSHS to Show Cause**
3. **Make Motion to hold DSHS in Contempt
State v. Luvert, 20 Wash.App.2d 133 (2021)**

DELAYS – HELPFUL RESOURCES

WDA Resources:

1. **Streamlined Advisory for Fighting In Custody Competency Delays**
 1. Available at: <https://defensenet.org/resources/streamlined-advisory-for-fighting-in-custody-competency-delays/>
2. **Defense Motion to Dismiss without Prejudice for Violation of Substantive Due process after Failure to Timely Admit to Competency Restoration Services**
 1. Available at: <https://defensenet.org/resources/motion-to-dm-w-o-due-to-competency-delay-3-2019/>
3. **Motion and Order for DSHS to Appear and Show Cause**
 1. Available at: <https://defensenet.org/resources/competency-delay-order-for-dshs-to-appear-and-show-cause/>
4. **Motion to Dismiss 8.3(b), or Release, or Compensatory Sanctions – State v. Luvert**
 1. Available at: <https://defensenet.org/resources/motion-to-dm-8-3b-release-and-for-compensatory-sanctions-delay-in-competency-transport-1-2022/>

DELAYS – HELPFUL RESOURCES

Trueblood DSHS Monthly Progress Report for Court Monitor

- Available at: <https://www.dshs.wa.gov/bha/court-monitor-reports>

Disability Rights Washington – AB v. DSHS (Trueblood): Reforming Washington’s Forensic Mental Health System

- Available at: <https://www.disabilityrightswa.org/cases/trueblood/>
- Includes:
 - History & Background information
 - Case Documents
 - Press

THANK YOU

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