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Litigating Competence—Five Central Questions

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1. What general issues should a competency evaluation address?

- 1.1. In general an examination of competence should make reference to:
 - 1.1.1. The test for competency;
 - 1.1.2. The condition or conditions causing incompetence (if any);
 - 1.1.3. Treatment alternatives to restore defendant to competence, if applicable;
 - 1.1.4. Treatment availability in least restrictive alternatives, if applicable;
and
 - 1.1.5. The diagnosis of mental disease, defect or condition (if any) bearing on the issue of whether the defendant had the mental state required for the offense charged.

2. What specific psycho-legal skills should be addressed in a competency evaluation?

- 2.1. An examination of competence often makes an assessment of the following psycho-legal skills:
 - 2.1.1. Whether the Defendant has an appreciation of the charges;
 - 2.1.2. Whether the Defendant has an appreciation of the range and nature of possible penalties;
 - 2.1.3. Whether the Defendant has an understanding of the adversary nature of the legal process;
 - 2.1.4. Whether the Defendant has the capacity to disclose to his attorney pertinent facts surrounding the alleged offenses;
 - 2.1.5. Whether the Defendant has the ability to relate to his attorney;
 - 2.1.6. Whether the Defendant has an ability to assist his attorney in planning his defense;
 - 2.1.7. Whether the Defendant has the capacity to realistically challenge prosecution witnesses;
 - 2.1.8. Whether the Defendant has the ability to manifest appropriate courtroom behavior.

- 2.1.9. Whether the Defendant has the capacity to testify relevantly;
- 2.1.10. Whether the Defendant has motivation to help himself in the legal process;
- 2.1.11. Whether the defendant can comprehend, and rationally choose to waive Miranda rights;
- 2.1.12. Whether the defendant can rationally assess the waivers of constitutional rights required in a plea agreement and/or colloquy;
- 2.1.13. Whether the Defendant is presently competent due to ingestion of alcohol or drugs or both to meaningfully participate in his own defense.

3. How should a competency evaluation be conducted?

- 3.1. In general a competency evaluation should assess:
 - 3.1.1. Neurological/neuropsychological intactness of brain function.
 - 3.1.2. Basic IQ level and level of academic skills.
 - 3.1.3. Rationality of thought processes.
 - 3.1.4. Ability to communicate.
 - 3.1.5. Personality and mental illness factors relevant to state of mind at time of offense.
 - 3.1.6. Malingering and deceptiveness.
- 3.2. While it is possible to evaluate these factors primarily through interview methods there are reliability and validity issues in this approach...
 - 3.2.1. General reliability questions for psychiatric diagnosis.
 - 3.2.2. Inability to judge IQ from only interviews.
 - 3.2.3. Inability to judge brain injury from interview methods.
 - 3.2.4. Use of objective norms rather than personal standards.
 - 3.2.5. Questions of historical bias and unconscious responsiveness to political pressure...
 - 3.2.5.1. The Portland Press Herald articles;
 - 3.2.5.2. The USA Today statistics on mentally ill persons in the criminal justice system.

- 3.3. See previously distributed list of formal, normed tests sometimes used in evaluating competence in a more objective manner.

4. What materials should an evaluator review?

4.1. The obvious:

- 4.1.1. Charging documents and affidavits.
- 4.1.2. Witness statements.
- 4.1.3. Defendant's statements.
- 4.1.4. Prior criminal record.

4.2. Not so obvious:

- 4.2.1. Any audiovisual materials available—holding cell tapes; police interrogation tapes, booking tapes.
- 4.2.2. Mental health records.
- 4.2.3. School records especially if an IEP existed.
- 4.2.4. Community contacts.

5. How do I challenge an evaluation I disagree with?

5.1. Daubert challenges.

- 5.1.1. Challenges based on lack of normed measurement.

5.2. Challenges based on limited level of inquiry of initial evaluator.

- 5.2.1. Challenges based on ignoring of historical material.

5.3. Challenges based on vacillations in mental state.

5.4. Challenges based on lack of understanding of meaning of IQ measurements.

- 5.4.1. Challenges based on failure to understand national guidelines.
- 5.4.2. Such as AAMR mental retardation guidelines. Did they get adaptive behavior scale findings?

5.5. Challenges based on special expertise in a particular disorder or class of disorders.

- 5.6. Challenges based on evaluator's history of findings favoring one side of an issue.

For further information on understanding implications of IQ measurements see my paper on "Unpacking IQ."