THE PSYCHOLOGY OF LITIGATION

This is the first of a series by Diana McCoy, Ph.D., clinical and forensic psychologist, summarizing current research in forensic psychology that applies to criminal law.

COMPETENCY RESTORATION

"When the defendant was re-examined on missed items of the Competency to Stand Trial test 90 minutes later, he demonstrated good retention of missed items, which suggests that he had greatly benefited from the educational aspects of this evaluation. It will therefore be recommended that he is competent to stand trial."

Sound familiar? The frustration of being unable to effectively communicate with one's client sufficiently to mount a viable defense because of the certainty that he/she is incompetent to stand trial can only be exceeded by the frustration of the prosecutor's psychological/psychiatric expert(s) opining to the contrary. That is, although the defendant's competency, as in the case above, was initially questionable, thanks to "training" the defendant has now demonstrated sufficient information, not to mention cognitive capacity, to apply this newfound knowledge as well as show reasoning and judgment, short and long term memory, emotional stability, and attention and concentration in dealing with the rigors of a full blown trial – all of this based on parroting the right answers after a lapse of only 90 minutes!

Attorneys typically have doubts about their clients' competency to stand trial, usually because of mental retardation, neurological trauma, or mental illness, in 8 to 15% of all felony cases although they actually only raise the issue of competency less than half the time (Hoge, Bonnie, Poythress, Monahan, Eisenberg, & Feucht-Haviar, 1997). This is about 60,000 competency evaluations performed annually in the United States (Bonnie & Grisso, 2000). On the average, 30% of defendants referred for evaluation are deemed by the courts to be incompetent, with this statistic varying widely across jurisdictions (Melton, Petrila, Poythress, & Slobogin, 1997).

Although mental health examiners offer opinions about a particular defendant's competency, it is the courts, of course, who actually make the decision, with studies showing that the courts agree with the examiners' conclusions between 90% and 99.6% of the time (Cruise and Rogers, 1998; Zapf, Hubbard, Galloway, Cox, and Ronan, 2002). This suggests that the conclusions reached by examiners, including those based on competency restoration training (also known as "back end evaluations," to be distinguished from "front end evaluations") have considerable significance.

It often seems that the mere provision of information relevant to the legal system is seen as a cure-all to competency restoration, such as the example at the beginning of this column. In contrast, a state examiner with whom I spoke told me he tends to look more at the defendant's trust/mistrust of his attorney as a defining factor as opposed to actual knowledge and comprehension of the judicial system, with a training program, if indicated, tailored to the specific individual's needs. This clinician's predictions of

competency restoration are geared to such things as how long the person has been off his medication.

These wide differences in where evaluators place their emphasis in determining whether a defendant has been restored to competency or is restorable at all are likewise reflected in the literature of predicting competency restoration. While Golding (1992), for example, indicates that poor premorbid functioning, prior psychiatric history, and other clinical factors are the best predictors of response to treatment and hence competency restoration, Carbonell, Heilburn, and Friedman (1992) suggest that clinical variables are actually poor predictors. Such divergent conclusions have led some researchers to opine that evaluators are unable to predict with any degree of accuracy which defendants can and cannot regain competency (Roesch & Golding, 1980).

Interestingly, a recent study (Hubbard, Zapf, and Ronan, 2003) found few significant differences between defendants predicted restorable by mental health examiners and those not restorable, with those differences that did exist primarily related to non-clinical variables. For example, incompetent defendants with a criminal history were more likely to be predicted restorable, while those without a criminal history were more likely to be predicted as not restorable. Incompetent defendants charged with murder were more likely to be predicted as restorable, with the researchers questioning the likelihood of examiners being subjected to political pressure to have violent offenders prosecuted. Incompetent defendants able to understand the workings of the criminal justice system were significantly more likely to be predicted as restorable, as were younger defendants.

While there is this growing body of literature, with no clear consensus, as to which variables are predictive of competency restoration, there is very little research to date on the effectiveness of competency restoration training per se, including, as in the example above, of a defendant of questionable competence at the beginning of the evaluation who was then deemed competent by the end of the assessment a short while later. One of the few studies (Anderson & Hewitt, 2002) examining the effects of competency restoration training on mentally retarded defendants previously found not competent to stand trial in the "front end" evaluation found that only 1/3 of these defendants were found competent in the "back end" evaluation.

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So, can we actually assert that competency restoration training is effective? Can a person who is re-tested 90 minutes after having earlier failed to demonstrate competency now confidently be considered competent, having been given information about the legal process that theoretically she or he simply did not have before, presumably out of mere ignorance?

Maybe, but a finding in the admittedly minimal research that does exist is that this is far less than 100% of the time (Roesch & Golding, 1980; Anderson & Hewitt, 2002). Sometimes defendants legitimately do not know certain things about the judicial system, with their mental faculties such that having been provided this information through lecture, videotape, role playing, and so forth, they can now process it intelligibly and be reliably counted upon to remember it weeks and even months later, whenever their trial

takes place. That is, they are able to coherently testify on their own behalf, understand the prosecutor is not their friend, have some legitimate sense of whether witnesses are being truthful, and are sufficiently aware and intact that they can appropriately communicate this to their attorney.

However, Alabama psychologist Kathleen Ronan, a major researcher in the field of competency and competency restoration, in a personal communication told me that a movement is afoot within the field of psychology, at least partially in response to attorney input, to look at more than just the intellectual component of competency, i.e, the defendant's ability to parrot back the right answers. In addition to intellect, we are beginning to evaluate the client's *appreciation* of competency-related issues as well as his *reasoning processes* - the defendant's *functional* ability.

That is, training to restore someone to competency needs to be such that the individual can demonstrate the ability to know the germane issues involved in standing trial, be able to manipulate this information appropriately, apply that knowledge to the specifics of his case, and make rational and logical decisions regarding trial issues. Any evaluator of competency or competency restoration, stated Dr. Ronan, regardless of what side hires her, needs to be able to answer this question: "How do you know the defendant is not simply parroting back what you have told him rather than truly understands the legal issues and can apply them?" The mental health examiner's response should be, "Because I have done a <u>functional analysis</u> of his competency and I am basing my opinion on these specific procedures I utilized, which are…"

In addition, the fact that the defendant's short term memory lasted 90 minutes on any one particular day sufficient to parrot correct answers, aside from saying nothing about his ability to appreciate competency-related issues and demonstrate reasoning, is no assurance that that person can focus for hours at a time during a trial or will remember 90 minutes later what she heard someone attest to earlier. Simply eyeballing a person will not tell the attorney, a psychologist, or anyone else whether that individual is actually tracking the proceedings with any degree of lucidity or comprehension.

In the absence of psychological testing to determine intelligence and the all important memory abilities, without a thorough review of medical/psychiatric records to ascertain premorbid psychiatric history and such things as whether the person suffers from dementia and/or a major psychiatric disorder, and lacking interviews with friends and family members who can provide such essential information as the defendant's ability to track a conversation, pay attention to even a short television program, remember events from both long and short term memory, and so on, that expert's opinion of restoration to competency can legitimately be challenged.

In short, the downside is that to date there is scant knowledge that helps us determine the treatability of incompetent defendants such that we know who can be restored to competency, when, or by what means. On the positive side, however, psychologists are now reaching the conclusion that we have not been looking at competency and competency restoration the right way. We are in a state of transition, being in the process

of establishing a data base that will eventually be able to address competency in a more definitive, helpful way. We are developing new tests, such as the MacCAT-CA (MacArthur Competence Assessment Tool – Criminal Adjudication), which assesses not just intellectual knowledge of criminal proceedings but also appreciation and reasoning pertinent to competency to stand trial.

Now it will be up to the courts, in response to mental health examiners' newly expanded testimony (hopefully) on the factors legitimately constituting competency and what can and cannot be demonstrated by research, to re-define what constitutes an adequate competency assessment.

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Dr. McCoy specializes in death penalty mitigation. For further information, including a bibliography on mitigation and other articles written by Dr. McCoy, please visit her website, www.forensicpsychpages.com.