BEYOND THE BENCH XXII

INCOMPETENT TO STAND TRIAL: NOW WHAT?

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MONDAY, DECEMBER 2, 2013, 1:45 – 3:15 P.M.

WORKSHOP OUTLINE

- COMPETENCY: AN OVERVIEW OF THE LAW
- ETHICAL DILEMMAS: CASE RESOLUTION VS. COMPETENCY LITIGATION
- DETERMINING LEAST RESTRICTIVE SETTING WHILE PROVIDING REMEDIATION SERVICES
- PROCEDURAL CHALLENGES: USE OF PROTOCOLS
- UNDERSTANDING REMEDIATION OPTIONS
- CASE RESOLUTION OPTIONS

VIGNETTES FOR DISCUSSION ON ETHICAL DILEMMAS: CASE RESOLUTION VS. COMPETENCY LITIGATION

What are the ethical dilemmas presented in each of the factual scenarios below?

- Vignette One: Mary
    - Mary was cited for marijuana on school grounds under H&S 11357(e). For first-time offenders, the Prosecutor's standard offer is completion of a drug-counseling class for dismissal of the petition. The Prosecutor conveyed this offer to Mary's Defense Attorney prior to her court appearance. When Mary appeared in court for arraignment, her mother stated, in open court, that she is a Regional Center consumer. When the court inquired regarding the reason she became a Regional Center consumer, her mother replied that Mary is intellectually disabled with an IQ of 63.
        - What are the ethical dilemmas that arise when deciding whether to allow Mary to informally resolve the case by completing a drug-counseling class?
        - Would the analysis change if the offered disposition was 654.2? 725?

- Vignette Two: Johnny
    - Johnny was detained on allegations of fondling his younger brothers through their pajamas while they slept in the same bed at night. He was charged with several counts of PC 288(a). After completing a Pre-Plea Report, the Probation Officer recommended suitable placement for disposition. Johnny's Defense Attorney had an extremely difficult time communicating with him. She appointed a confidential defense expert who opined that Johnny was incompetent to stand trial due to autism spectrum disorder, a developmental disability. Johnny is solely focused on his release from juvenile hall. The Defense Attorney knows that initiating competency proceedings will prolong the resolution of the case for several months. She is concerned that Johnny will likely remain in juvenile hall during competency proceedings.
        - What are the ethical dilemmas that arise when deciding whether to express a doubt concerning Johnny's competency or to allow him to make an admission in order to secure his release from juvenile hall?
        - Would the analysis change if Johnny was released during competency proceedings?

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WORKSHOP OUTLINE

- Competency: An Overview of the Law
- Ethical Dilemmas: Case Resolution vs. Competency Litigation
- Determining Least Restrictive Setting While Providing Remediation Services
- Procedural Challenges: Use of Protocols
- Understanding Remediation Options
- Case Resolution Options

COMPETENCY: AN OVERVIEW OF THE LAW

COMPETENCY: AN OVERVIEW OF THE LAW

- ***Dusky* v. *United States* (1960) 362 U.S. 402**
  - "[T]he test must be whether [the defendant] has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."
- ***In re Gault* (1967) 387 U.S. 1**
  - The notion that juveniles are entitled to due process in delinquency proceedings was born.

COMPETENCY: AN OVERVIEW OF THE LAW

- ***James H.* v. *Superior Court* (1978) 77 Cal.App.3d 169**
  - A minor has the right to a competency hearing in a delinquency proceeding.
- ***Timothy J.* v. *Superior Court* (2007) 150 Cal.App.4th 847**
  - Juvenile incompetence may be based on a finding of developmental immaturity alone.

COMPETENCY: AN OVERVIEW OF THE LAW

- ***Jackson* v. *Indiana* (1972) 406 U.S. 715;**
  ***In re Davis* (1973) 8 Cal.3d 798; and**
  ***In re Jesus G.* (2013) 218 Cal.App.4th 157**
  - An incompetent person may only remain detained if there is a substantial probability that he or she will attain competence in the foreseeable future.
  - Even then, continued detention must be justified by progress toward attaining competence.

COMPETENCY: AN OVERVIEW OF THE LAW

- **Welfare and Institutions Code section 709**
  - A doubt may be declared at any time.
  - Incompetence is based on the *Dusky* standard.
  - The court must appoint an expert.
  - The standard is preponderance of the evidence.
  - Codified *Jackson* v. *Indiana* and *In re Davis*.
  - Remediation and attainment services may be ordered.
  - Court may rule on certain motions.
  - Applies to 601s and 602s.

COMPETENCY: AN OVERVIEW OF THE LAW

- **California Rules of Court, Rule 5.645(d)**
  - If the court finds that there is substantial evidence that a child cannot meet the *Dusky* standard it must suspend proceedings and conduct a hearing regarding the child's competence to stand trial.
  - The court must appoint an expert to examine the minor.

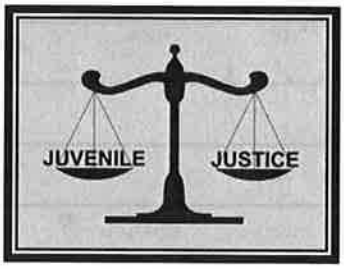
COMPETENCY: AN OVERVIEW OF THE LAW

- **California Rules of Court, Rule 5.645(d)**
  - To be appointed as an expert, an individual must:
    - Be a licensed psychiatrist or have received a doctoral degree in psychology.
    - Have professional experience addressing juvenile developmental issues, and social and cultural characteristics.
    - Have training and experience in forensic evaluation of juveniles.
    - Be familiar with juvenile competency standards.
    - Possess a comprehensive understanding of attainment of competency.

COMPETENCY: AN OVERVIEW OF THE LAW

- **Once a doubt is declared, it cannot be waived or withdrawn. It must be judicially resolved.**
  (In re Davis (1973) 8 Cal.3d 798)

ETHICAL DILEMMAS: CASE RESOLUTION VS. COMPETENCY LITIGATION



ETHICAL DILEMMAS: CASE RESOLUTION VS. COMPETENCY LITIGATION

- **Vignette One: Mary**
  - Mary was cited for marijuana on school grounds under H&S 11357(e). For first time offenders, the Prosecutor's standard offer is completion of a drug-counseling class for dismissal of the petition. This offer was conveyed to Mary's Defense Attorney prior to her court appearance. When Mary and her mother appeared in court for arraignment, her mother stated, in open court, that Mary is a Regional Center consumer. When the court inquired, the mother replied that Mary is intellectually disabled with an IQ of 63.

Ethical Dilemmas: Case Resolution vs. Competency Litigation

- **Vignette Two: Johnny**
  - Johnny was detained on allegations of fondling his brothers through their pajamas while they slept in the same bed at night. He was charged with several counts of PC 288(a). The Probation Officer recommended suitable placement as a disposition. A confidential defense expert opined that Johnny is incompetent to stand trial due to autism spectrum disorder. Johnny is solely focused on his release from juvenile hall.

Determining Least Restrictive Setting While Providing Remediation Services

Determining Least Restrictive Setting While Providing Remediation Services

- **What options are available?**
  - Release home
  - Release to family member or friend
  - Utilize resources through DCFS if the child is a dependent under WIC 300
  - Regional Center Placement
  - Therapeutic Group Home

PROCEDURAL CHALLENGES: USE OF PROTOCOLS

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Protocol for Competence
in California Juvenile Justice Proceedings

PROCEDURAL CHALLENGES: USE OF PROTOCOLS

- **Protocols emerged as a result of a lack of statutory guidance**
  - **Protocols establish procedural guidelines**
    - Attainment services that must be provided.
    - Timelines governing progress toward attainment.
    - Maximum time of confinement while attainment services are being provided.
  - **Protocols must be followed**
    - Local policies are fully enforceable as court rules. (*Wisniewski* v. *Clary* (1975) 46 Cal.App.3d 499.)

UNDERSTANDING REMEDIATION OPTIONS

Understanding Remediation Options

- **Two Basic Types of Remediation Services**
  - **Psychiatric Remediation**
    - Applicable to minors diagnosed with mental illness
    - Focuses on symptom reduction
    - May also require remedial competency education
  - **Remedial Competency Education**
    - Relatively new area for California
    - A lot of research has come from Virginia

Understanding Remediation Options

- **The Gold Standard: Restoring Youth (RY), formerly Virginia Juvenile Competency Program (VJCP)**
  - Began in 1999 in response to legislation
  - Thorough training for restoration counselors who are usually special education teachers
  - Multi-modality education
  - Small case load

Understanding Remediation Options

- **Warren et al. Study of the Effectiveness of RY:**
  - Data was collected on 563 youth aged 8 through 20 years who had been ordered into restoration services by Virginia juvenile courts over an 8-year span.
    - 56% of children with an intellectual disability were restored.
    - 84% of children with mental illness were restored.
    - 58% of children diagnosed with both were restored.
    - 91 % of children diagnosed with neither were restored.

Understanding Remediation Options

- **What Works?**
  - Programs specifically designed for juveniles that take into consideration developmental stage as well as cognitive ability
  - Multi-modality approach assures all learning styles are accommodated
  - Highly qualified restoration counselors
  - Individualized curricula

Understanding Remediation Options

- **Some Minors Will Not Attain Competence**
  - Intellectually disabled population is less likely to be restored.
  - Medication and treatment may not sufficiently reduce symptoms.
  - Developmentally immature minors may not be able to reach competence within the time frame allotted.

Case Resolution Options

CASE RESOLUTION OPTIONS

- **Prior to Competency Proceedings or Borderline Cases**
  - Informal Resolution
    - Regional Center diversion
    - 654.2
- **Minors found to be incompetent**
  - If the child cannot attain competency, the only option is to dismiss the case.

REFERENCES

Restoring Youth: A University-Practioner Model for Remediating Youth Adjudicated Incompetent to Stand Trial.

Kimberly A. Larson, Thomas Grisso, and National Youth Screening & Assessment Project. "Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers." *Models for Change* 2011.

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