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Individuals with Mental Disabilities in the Criminal Justice System

By Elizabeth Kelley

Because of the pandemic, the general public is more sensitive to mental health issues than ever before. But criminal justice professionals have long been aware that mental health issues play a role in virtually every stage of the criminal justice process, from arrest, through court proceedings, to disposition of a case. Furthermore, mental disabilities of one sort or another cut across every background, educational level, and nationality. Finally, mental health can be present regardless of the charges, whether it is a misdemeanor in rural Alaska or a sophisticated federal white-collar offense in New York. Some people were diagnosed at a young age. Some grew up before educators and mental health experts could identify and treat certain behaviors. Some, because of the stigma, have avoided diagnosis and treatment. This article is an attempt to assist attorneys in understanding the role mental health issues play during each phase of the criminal justice system and how to advocate what will best serve the client.

But first, a bit of clarification about terminology. Typically, I use the term “mental disability.” This refers to people with mental illness (such as bipolar disorder, major depression, and schizophrenia) as well

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as intellectual/developmental disabilities (such as autism spectrum disorder and fetal alcohol spectrum disorder). Moreover, many people with mental disabilities have co-occurring disorders, which is more than one diagnosis. For example, a person on the autism spectrum may also suffer from anxiety because of having been bullied and ostracized. Persons with bipolar disorder may also have a substance abuse disorder because they are using drugs to blunt their pain.

Competency

The threshold issue in every criminal case is competency to proceed. This is a standard established by the U.S. Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). This requires that the accused have (1) a rational as well as factual understanding of the proceedings and (2) sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding. Note that this standard measures the accused's level of functioning at the time of the legal proceedings and is an issue that counsel should continuously monitor.

Restoration

Depending on the jurisdiction, if an individual is found not competent to proceed, then the court orders that the individual, for a period of time, be restored to competency. The outcome of restoration is largely dependent on the nature of the disability. For example, defendants with dementia can never be restored; indeed, their cognitive ability will decline. On the other hand, someone with a mental illness, if given the proper medication in the proper dose and provided some structure, may very well be restored to competency.

Responsibility

Different jurisdictions have different options for people who did not understand what they were doing at the time of the alleged act. Those options might be defenses of insanity, guilty but mentally ill, or diminished capacity. Whereas competency measures the accused's state of mind at the time of the proceeding, arguments regarding responsibility go back in time to the act in question. Also, whereas competency is a relatively low standard to meet, the legal standard for insanity at the time of the act is a high standard. Four states—Idaho, Kansas, Montana, and Utah—do not have insanity statutes. However, the other jurisdictions that do, including the federal government, use one or a combination of the following standards: *McNaughten* (named after the 1843 case in the United Kingdom involving defendant Daniel McNaughten), Irresistible Impulse, Model Penal Code, and *Durham* (named after the case *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954)).

Ideally, a forensic evaluation is conducted as close as possible in time to the act in question—in other words, as soon as a client is arrested and before medication takes effect, rendering the client “normal.”

Because the standard for competency is so low and the standard for insanity is so high, most cases involving mental disabilities resolve in a plea, with the disability being used as mitigation. Additionally, there are a variety of diversionary options that might be available for people with mental disabilities, such as a drug court, behavioral health court, or veteran's court (for veterans with traumatic brain disorder or post-traumatic stress disorder). Depending on the nature of the offense and the strength of the expert evaluation (see below), the mental disability might be used to negotiate a more favorable plea.

The Expert

An evaluation by an independent forensic mental health expert is crucial. Even if the individual has been under the care of a treating psychiatrist or psychologist, an evaluation prepared by an independent expert is important for several reasons, not the least of which is avoiding any conflict of interest the treating professional might have. An independent expert should be just that—independent. Because of this, a court

should be able to trust the expert's evaluation and testimony. The attorney is encouraged to seek an expert as early as possible in the process.

The Evaluation

An evaluation should be not only thorough but also easy to read and well organized. In other words, if medical terms are used, they should be defined, and the evaluation should have topic headings, including an executive summary. It should be based on a comprehensive interview of the client, if not a series of interviews. The expert should conduct collateral interviews, that is, interviews with family, friends, co-workers, teachers, coaches, etc. The expert should also conduct a thorough document review, including a review of treatment records. Counsel should also provide the expert with all discovery in a case. The failure to do so may render an evaluation less than accurate and leave the expert open to being embarrassed at a hearing for not having addressed some significant aspect of the case. In other words, even if the information is potentially damaging, an expert who is informed of this can address it. Finally, depending on the mental disability, the expert may conduct a variety of tests and/or recommend another expert for additional testing.

How do you know if your client has a mental issue or needs a forensic evaluation?

For example, if a client's family contacts you and says their son has been diagnosed with attention-deficit/hyperactivity disorder and then autism spectrum disorder, the answer is easy. If your client is in the psychiatric wing of the jail, the answer is also easy. In these situations, some doctor has already given a diagnosis. Diagnoses may change over the years, but you are on notice that there is a mental health issue.

On the other hand, in the absence of a diagnosis, what should you look for? This concern is particularly valid because we are lawyers, not trained mental health experts. It is standard for many lawyers during their initial intake to ask questions such as "Have you ever had a head injury?" "What kinds of classes did you attend while in school, i.e., regular, special ed, AP?" "Are you on any medication?" But these kinds of questions don't necessarily alert an attorney that a mental issue might be relevant to the case and/or that an evaluation is in order.

When I first started representing people with mental disabilities, I didn't know the names of any kind of mental disability other than what we used to call "mental retardation" (now "intellectual disability"), and the only reason I knew that one was because there was a little girl in my elementary school who was mainstreamed into our classes. Instead, I relied on my instincts as to when behavior was more than unusual. For instance, when I visited a client at the jail and he told me to walk across the street to the bank and ask for the amount of his bond because his father was the king of Sheba, I knew there was an issue, even if I wasn't that familiar with delusions or schizophrenia. And at a federal arraignment, when the judge asked my client what his name was and he responded for what turned out to be 35 pages of a transcript, I knew I had an issue. Afterward, I called a forensic psychologist whom I trusted. I described the behavior and confirmed that an evaluation was appropriate. I learned that this was a classic example of pressured speech and that my client was likely in the midst of a manic episode. Ultimately, my client was diagnosed with bipolar disorder. (At first, in vain, I tried to silence my client, but the judge and I were so amazed at what we were witnessing that we just let him continue.)

In other words, trust your instincts. As lawyers, we generally are keen observers of human behavior and are relatively perceptive. Beyond that, as a trusted forensic psychiatrist told me, "It's not so much the label or diagnosis as the behavior."

Jail and Prison Conditions

If the client is awaiting disposition of the case and if pretrial release is possible, depending on the client's collection of issues, the attorney can make the argument that jail is not in the client's best interest and may, in fact, be harmful. For example, if clients have an intellectual disability or in any way appear vulnerable, they might be victimized by other inmates. They might be disruptive or simply unable to follow rules and thus be disciplined. The jail may not be able to provide the appropriate medications. Clients on the autism spectrum may have sensory issues, and the constant noise of other inmates, clanging of doors, bright lights, and bad smells of a jail could be torturous. Additionally, some people on the spectrum have real aversions to certain kinds of foods.

Should a non-custodial (non-prison) sentence be an option, counsel can use many of the above arguments to persuade a judge not to send someone to prison. A report or declaration from a prison consultant might be helpful for painting the daily reality for someone with a disability in prison.

Sentencing

In general, most cases in the criminal justice system are disposed of by a plea bargain, and, as such, most people must face sentencing, including people with mental disabilities. This is compounded by the fact that the standard for competency is so low and the standard for insanity is so high (see above). If the court has the discretion to impose a non-custodial sentence, it is vital that the attorney show that the client has a path forward—in other words, the attorney gives the court all the components to fashion a sentence that will keep the community safe and prevent the client from re-offending. Thus, the attorney must be prepared to outline where such clients will live, how they will spend each day, if they will work, and how they will get medication and treatment. The attorney should also work with the client to prepare for addressing the court at sentencing. The client should express genuine remorse. Family, friends, and other supporters are encouraged to be in the courtroom. If they submit letters to the court or are called to speak, the attorney should review the letters in advance and provide parameters for spoken remarks. Supporters should not deny or minimize the accused's actions. Moreover, the court should not perceive that supporters are using the client's mental disability as an excuse. Rather, all should reaffirm that they believe in this individual and will do whatever possible to support him or her going forward.

Dealing with the Client and the Client's Family

Representing people with mental disabilities is time intensive—if you are going to do so sensitively and thoroughly. Moreover, dealing with their families is often a particular challenge. On the one hand, the families know their loved ones best. They are an invaluable source of information regarding the client's childhood, history of treatment, what kinds of situations are triggers, and what medication is needed. On the other hand, by the time a family encounters you, that family may have dealt with schools, neighbors, and others who have mistreated and misunderstood their loved one. Now, despite their support and protection, their loved one is involved in the criminal justice system. They may well take their anger out on you. They may focus on issues other than the criminal case. It is all too easy to say, "Be patient" and "Draw boundaries," but do what you need to do to provide zealous advocacy. And only you know your limits.

Conclusion

In an ideal world, people with mental disabilities would not be penalized for manifesting the symptoms of their disabilities. And in that ideal world, we would be able to provide treatment instead of punishment. However, despite initiatives to divert people out of the criminal justice system, we are left with many individuals who pose a challenge to prosecutors, judges, probation officers, and correctional personnel. It is our task as their attorneys to advocate knowledgeably and passionately on their behalf.

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