

Sell! Sell! Sell!

Understanding the nuances of pre-trial competency proceedings



Scope

Handling Competency from Start to Finish

- Raising Competency
- Establishing Client Goals
- Contested Hearings
- Location of Treatment
- Litigating Involuntary Medication Orders

Confronting Competency

Raising Competency

- Everyone required to raise competency if reason to doubt
- Obviously, defense counsel is in the best position to raise it
- Before an examination may be ordered, PC has to be found
 - This will be done based on the complaint, unless you submit an affidavit alleging aspects of the complaint are “materially false” Wis. Stat. 971.14(1r)(c)
- Judges may try to make you explain the reason, remind them you cannot raise competency strategically, *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986), and keep it very generic

Initial Examination

- Examiner usually appointed by Wisconsin Forensic Unit, but not required
- Whether this is inpatient or outpatient is determined by WFU/DHS
- However, people on bond only inpatient if they don't cooperate with outpatient
- Technically "outpatient" supposed to be in a jail/locked unit, but they will often meet at courthouses or by Zoom
- Inpatient timelines can be difficult to ascertain, push to get client moved

Using Forensic Measures with Speakers of Languages other than English

- Several measures directly address CST
 - Inventory of Legal Knowledge (Musick et al., 2010)
 - MacArthur Competence Assessment Tool – Criminal Adjudication (Poythress et al., 1999)
 - Evaluation of Competency to Stand Trial – Revised (Rogers et al., 2004)
 - Publishing website provides measures only in English
 - Limited research for other than English
 - Forensic measures reportedly still used, less often (Canales et al., 2017)

Getting to the Goal

What the Client Wants

- Once you get the report, as with everything—discuss it with the client
- Sometimes doctors will recommend OCRP, if so, you can explain to clients what that entails and get their thoughts on if they're okay with it
- Medication is often a big sticking point for clients
 - See if they care, I often frame as whether or not they want to decide

Contested Hearings

- Regardless of your thoughts, you argue for what the client wants
- Hearing should begin with the court asking your client's position
- If claiming competent, the State **should** be contesting (arguably nothing forcing it)--absent a good reason not to
- Currently, medication should never be ordered at the initial hearing
- If found incompetent and OCRP not in report, ask the court to order DHS evaluate client for participation

Incompetent, What's Next?

Competency Crisis

- Court orders exceed state resources
 - Growing waitlists
 - Delays result in withheld liberty and treatment
 - Multiple states in relevant lawsuits
 - “I firmly believe that delays associated with competency-related services represent a genuine moral crisis” (pp.2)

Gowensmith, 2019

Immediate Effect

- Once found incompetent, proceedings are suspended and client is committed to custody of DHS for up to 12 months
- There is nothing explaining what it means for proceedings to be suspended
 - Until someone tells me differently, I think it means Court has next to no authority and bond is no longer in place
- Unlike with 51s, there's no provision to challenge outpatient to inpatient
 - Possibly unconstitutional, but these are on a shorter timeline and cannot be extended

Outpatient Competency Restoration

OCRCP

- Requires clients to get set up with a treatment provider (psychiatrist) in the community and attend “sessions”
- Familial supports are huge, as is transportation
- You may have to act as a liaison between the client and OCRCP if issues arrive

Inpatient Competency Restoration

- Can **ONLY** be done in a DHS institution (Mendota), or the locked unit of a facility or jail that **has entered into a voluntary agreement** with DHS to provide treatment
- Clients should **never** be held in jail pending admission to Mendota without receiving treatment
 - Start by raising it with the court, if they don't do anything, contact appellate (Faun and I)
- The warrant procedure DHS uses is illegal and exceeds court's authority

Involuntary Medication Orders

Statutory Requirements

971.14(5)(am)

- Doctor must explain advantages and disadvantages of and alternatives to **particular** medication and treatment

Client must be either:

- incapable of expressing an understanding or,
- substantially incapable of applying an understanding in order to make informed choice

Virgil D. Factors

189 Wis. 2d 1, 15, 524 N.W.2d 894 (1994)

Factors courts should consider:

- Able to identify the type of recommended medication or treatment;
- Previously received the type of medication or treatment at issue;
- Able to describe what happened and if effects were beneficial or harmful;
- Able to identify the risks and benefits associated with the recommended medication or treatment; and
- Hold patently false beliefs about the recommended medication or treatment preventing an understanding of legitimate risks and benefits.

Melanie L. Explanation

2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607

The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court. ¶67

[I]t is the responsibility of medical experts who appear as witnesses for the county to explain how they probed the issue of whether the person can ‘apply’ his or her understanding to his or her own mental condition. . . . For both the patient and the medical professional, facts and reasoning are nearly as important as conclusions. ¶75

Enter *Sell*



Constitutional Requirements

Sell v. United States, 539 U.S. 166, 180-81 (2003).

- Before ordering involuntary medications, the court must find:
 - (1) the government has an important interest in proceeding to trial;
 - (2) involuntary medication will significantly further that interest;
 - (3) involuntary medication is necessary to further that interest; and
 - (4) involuntary medication is medically appropriate.

Important Government Interest

- Must be a **serious** crime and consider the individual facts of the case (*e.g.*: criminal history, possibility of commitment if not restored, actual allegations, etc)
- Federal courts have found that “serious” means a penalty of >10 years
- However, in Wisconsin, the legislature has given us [lists](#) of “serious” crimes

Significant Furthering of Interest

- Administration “substantially likely” to render client competent and “substantially unlikely” to have side effects that would interfere
- This requires an individualized treatment plan
 - Specific dosages (should be checking [FDA labels](#))
 - Be wary of medication plans with long lists of medications

Medication Necessary

- Any alternative, less intrusive, treatments or methods unlikely to achieve same result
 - Specifically, order from the backed by threat of contempt
- It is important to discuss with clients **why** they are/do not want to take medications
 - They might have a reasonable explanation (however this likely requires them to testify)

Medically Appropriate

- Medication must be in client's best interest in light of their condition
- Must do more than control symptoms and benefits outweigh harm
- Purpose is to prevent courts handing power over to doctors
- Lean on the medication labels published by the [FDA](#) and [DHS Informed Consent Forms](#) to get information on the medications that doctors may ignore
 - Doctors have recommended doses above what the label said was effective and/or safe

Individualized Treatment Plan

Must contain:

- Medication(s)
 - Should not be a long list; purpose is to have court approve
- Dosages
 - Amount AND Frequency
- Length of treatment
 - Should not be timed to the competency reports

MEDICATION TREATMENT TO BE PROVIDED

The following oral medications are proposed for treatment either in combination or in succession to restore the defendant's competency to stand trial: See additional materials (attached)

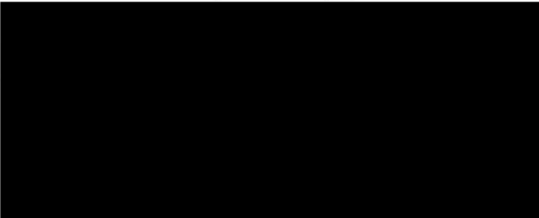
Name of Medication	Purpose	Dose Range
Olanzapine	Psychosis	5-40 mg
Aripiprazole	Psychosis	5-30 mg, long acting injection 300-400 mg
Risperidone	Psychosis	2-8 mg
Paliperidone	Psychosis	3-12 mg, long acting injection 156-234 mg
Haloperidol	Psychosis	5-20 mg
Quetiapine	Psychosis	50-800 mg
Clozapine	Psychosis	50-600 mg

The following medications are proposed to be given by injection if the defendant is unable or unwilling to take the proposed oral medication:

Name of Medication	Purpose	Dose Range
Haloperidol	Psychosis	5-10 mg
Lorazepam	Agitation	1-4 mg

Treatment will be provided by a physician. Additional medications to address side effects or allergic reactions will be provided when necessary. The defendant may consent to treatment with alternative medications in lieu of or in addition to involuntary medication when such treatment is medically appropriate. Medication(s) may also be given in an emergency situation in which the medication or treatment is necessary to prevent serious physical harm to the subject or to others.

The effects of treatment and progress towards competency restoration will be reported to the court as statutorily required at 3 months after commitment, 6 months after commitment, 9 months after commitment and within 30 days prior to the expiration of commitment. Progress reports will be provided earlier should treatment be successful prior to the statutorily required timeframe.



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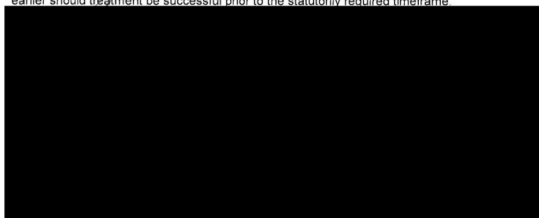
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Timing of Medication Order

- Medication should almost never be ordered when client found incompetent
 - Medication plans are developed by doctors at Mendota
- Statute allows State to later request an order
 - This will be done once the person is admitted to Mendota
 - Court must hold hearing within 10 days of request (can be postponed another 10 days)
- Doctors do try to get client to take voluntarily

Dangerousness?



Beware the Form

3. Involuntary administration of medication - Dangerousness

- The involuntary administration of medication(s) and treatment is needed because the
 - A. defendant poses a current risk of harm to self or others if not medicated or treated
 - B. administration of medication and treatment is in the defendant's medical interest, **AND**
 - C. defendant is not competent to refuse medication or treatment due to mental illness, developmental disability, alcoholism, or drug dependence because:
 - The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, **OR**

CR-206, 09/22 Order for Commitment for Treatment (Incompetency)

§971.14(5), Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

Page 1 of 3

- The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, and alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

[Mandatory Circuit Court Form CR-206, ¶3.B \(App.3-4\).](#)

Danger-based Medication

It is illegal. Use Chapter 51.

- Chapter 51 was largely rewritten to include numerous due process protections
 - The standards on the form unconstitutionally circumvent those
- The provision that exists now only allows it during the inpatient examination phase, not during the commitment
- 51.61(1)(g)1. exists for emergencies while in a facility

The Inevitable Appeal

Addressing the Court's Mistake

- If the court orders involuntary medications unlawfully, ask for a stay
- Stay Factors:
 - a strong showing that they are likely to succeed on the merits of his appeal;
 - a showing that unless the stay is granted they will suffer irreparable harm;
 - a showing that no substantial harm will come to other interested parties; and
 - a showing that a stay will do no harm to the public interest.
- Ask court to delay signing the order
- Contact appellate/Faun Moses/myself

Stay Procedure Beginning July 2024

- On January 25, 2024, SCOW approved a petition to create a rule re: how appeals in competency cases will be handled:
 - Trial counsel must file NOI w/ in **14 days** of order
 - Must also serve on DA and DHS
 - Please contact madisonappintake@opd.wi.gov (and cc: swankl@opd.wi.gov) **ASAP** and note it's URGENT
 - Medication orders automatically stayed for 14 days
 - Be sure to remind courts of this

Stolen Slides Courtesy of:

Competency to Stand Trial Evaluations Across Linguistic Discrepancies

Rebecca Weiss, Ph.D., Miriam Woodruff, M.A.