

Public Evaluations of Unrepresented Defendants

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Previous articles have addressed the ethical and legal issues involved when private psychiatrists perform forensic evaluations on criminal defendants before the defendants have access to counsel; but there have been few studies addressing evaluations requested through public facilities and by clinicians other than psychiatrists. The authors present the results of a detailed study of defendants admitted for evaluations of competency to proceed to a forensic inpatient unit in one state, as well as data from a national survey of state forensic facilities. The studies were designed to measure the incidence of unrepresented defendants in a population referred for competency evaluation, as well as to examine the reasons for such occurrences. The data reveal that court-ordered evaluations of unrepresented defendants are rare, but continue to exist.

Both organized psychiatry and psychology in the United States have made it explicit that forensic evaluation of an adult criminal defendant before that person has access to representation by counsel is unethical. As far back as 1981, the American

Psychiatric Association (APA) ethical guidelines¹ stated: "Ethical considerations in medical practice preclude the psychiatric evaluation of any adult charged with criminal acts prior to access to, or availability of, legal counsel. The only exception is the rendering of care to the person for the sole purpose of medical treatment." The ethical guidelines of the American Academy of Psychiatry and the Law (AAPL)² are essentially identical to those of its parent organization.

The American Psychological Association's recent forensic guidelines³ are quite similar: "A forensic psychologist may provide emergency mental health services to a pre-trial defendant prior to court order or the appointment of counsel where there are reasonable grounds to believe that such emergency services are needed for the protection and improve-

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ment of the defendant's mental health and where failure to provide such mental health services would constitute a serious substantial risk of imminent harm to the defendant or to others."

Even the American Bar Association's *Criminal Justice Mental Health Standards*⁴ prohibits a pretrial psychiatric examination of a defendant unless ordered by a court, approved by defense counsel, or necessary "solely for the purpose of determining whether emergency mental health treatment or habilitation is warranted."

The ethical guidelines of the National Association of Social Workers⁵ and the American Society of Clinical Forensic Social Workers do not yet address the issue of forensic evaluation before access to counsel, although social workers are increasingly involved in evaluations of competency to stand trial.⁶

Although no records of the deliberations of the Ethics Committees of the APA or the AAPL exist to provide insight into the basis for the prohibition, the major ethical arguments against forensic evaluation of criminal defendants prior to access to counsel are: (1) prior to access to defense counsel, district attorneys are responsible for requesting the great majority of competency evaluations, and they can be expected to choose evaluators known to be favorable to the prosecution; (2) although defendants may be familiar with the goals and methods of police interrogation to obtain evidence that a crime was committed by the defendant, few are aware of either the methods or the goals of a forensic mental health evaluation; and (3) this latter deficit cannot be cured by the usual method of providing suffi-

cient information to the defendant about the purposes of the examination, because of the more complex and subtle nature of the examination; because those defendants for whom prosecutors raise issues of competency or sanity are likely to have sufficient mental disorder to prevent them from understanding any *Miranda* warnings given, particularly immediately after arrest when the stress involved further diminishes their ability to comprehend warnings⁷; and because, despite comprehensive warnings, many mentally ill persons persist in believing that psychiatrists are there to help them, not to provide evidence in criminal prosecutions.⁸

The major argument in favor of immediate evaluation, made both by prosecutors and clinicians who continue to perform such examinations, is that it provides the best information concerning mental state (particularly mental state at the time of the alleged crime), and is thus more useful legally.⁷

The law has, however, generally not prohibited such evaluations.^{7, 9} The U.S. Supreme Court, in *Estelle v. Smith*,¹⁰ overturned a death sentence that was supported by testimony obtained through an examination of the defendant without the knowledge of his attorney and without adequate warning of the purpose of the evaluation. The Court commented on the potential deception (whether intended or not) involved in a pretrial psychiatric evaluation; but Smith had counsel, and if counsel had been notified, and adequate warnings had been given, it is unlikely that the Burger court (much less the Rehnquist court) would have reversed the sentence.

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Most state statutes do not directly address the issue of forensic evaluations before access to counsel, although many can be interpreted to do so. For example, the Wisconsin statutes require that a finding of probable cause that the defendant committed the crime charged be made by the court before an inpatient competency evaluation can be made.¹¹ Because the right to counsel attaches at least by arraignment, it appears clear that a finding of probable cause of guilt requires access to counsel.

Similarly, the Colorado statutes do not explicitly address the issue of forensic evaluation before access to counsel, but appear to follow the ABA's guidelines. They state that whenever the question of a defendant's incompetency to proceed is raised, the court shall make a preliminary finding whether or not the defendant is competent to proceed and shall inform the prosecuting and defense attorneys, again implying access to counsel at that stage of the proceedings.¹² Despite this implied prohibition, however, the Colorado Supreme Court ruled explicitly in 1960¹³ that, despite the fact that the examining psychiatrists did not inform the defendant of the purpose of their evaluation, "Examination of defendant by two psychiatrists prior to arraignment and before appointment of counsel and the admission of psychiatrists' testimony at trial did not violate defendant's privilege against self-incrimination nor deprive him of due process. . . ."

In a more recent decision however,¹⁴ the same court held that (1) defendants' Sixth Amendment rights to counsel attach as soon as adversarial proceedings are in-

stituted; (2) defendants have the right under Colorado law to refuse to cooperate with competency evaluation¹⁵; (3) "A defendant facing such an exam must make decisions with significant legal consequences and is in obvious need of counsel"¹⁶; and (4) competency evaluation is therefore a "critical stage" of the proceedings. Therefore, when the trial judge ordered a competency evaluation *sua sponte* before the defendant was represented by counsel, statements made during that examination were legally involuntary and could not be used to impeach his testimony at trial.

Despite ethical and some legal prohibitions against forensic evaluation of unrepresented defendants, a significant number of forensic clinicians continue to perform them. There have been two articles in the literature that discuss cases in which private forensic psychiatrists provide examinations before access to counsel,^{7, 9} but less is known about the frequency of such evaluations in the public sector. Miller and Kaplan¹⁷ studied a series of 100 consecutive defendants admitted for competency evaluation to a state forensic hospital in Wisconsin, and found that five of them had not been provided with counsel. Two of those had refused counsel and their wishes were respected by the judges, but were subsequently found to be incompetent to make that decision; probable cause of their guilt was nevertheless found, and they were committed for competency evaluation.

Unlike private clinicians, who are under no obligation to respond to requests from district attorneys for evaluations of unrepresented defendants, clinicians at

state facilities are salaried and have less freedom to reject evaluations which violate professional ethics. Because the majority of competency and sanity evaluations continue to be done in state forensic facilities,⁶ it is important to determine the incidence of requests for evaluation of unrepresented defendants. This study is designed begin such an examination.

Methods

This study has two parts. In the first part, questionnaires were sent to the forensic hospital directors in each state and the District of Columbia, as listed by the National Association of Forensic Program Directors. Respondents from state forensic facilities were asked to answer questions to determine the perceived incidence of requests for forensic evaluations of unrepresented defendants, and procedures (if any) that the facilities have developed to deal with the problem (if indeed they perceived it to be a problem.)

As it was felt to be likely that some of the facilities had not had sufficient experience with the problem to be specifically aware of its proportions, this part of the study was complemented by a more specific inquiry into the experience of one forensic facility, the Institute for Forensic Psychiatry of the Colorado Mental Health Institute at Pueblo. Until recently, the Institute was responsible for providing pretrial evaluations for competency in the great majority of cases in which the issues were raised. Recent policy changes have encouraged outpatient evaluations, but the majority of such evaluations in Colorado continue to be done in the Institute.

For this phase of the study, a consecu-

tive sample of defendants admitted for pretrial evaluation of competency to proceed were studied, to determine if they had had access to counsel prior to commitment. Each defendant was interviewed by a member of the research team, to obtain his/her perception of access to counsel. Defendants were informed of the purpose of the study and told that no identifying information concerning them would be released to anyone outside the research team. No patient refused to participate in the study, but several were too seriously mentally ill to be able to answer the questions reliably. Patients' responses were checked with information provided by the committing courts to determine if in fact the defendants had counsel appointed and, if so, whether any actual contact with the defendant had occurred before the commitment for evaluation. (The support staff for the Institute routinely request the names of both prosecutors and defense attorneys for each defendant committed.) Structured interview protocols were followed, in which defendants were asked if they had defense attorneys appointed to represent them and if they had had the opportunity to meet with them. They were also asked if they had indicated a desire to fire their attorneys or to represent themselves. In addition, the court records were reviewed, to determine if defense counsel had been appointed. In each case in which a defendant stated that no counsel had been appointed, or that he/she had expressed a desire to represent him/herself, or no counsel was listed by the court, contact was made with the District Attorney's (DA's) office to confirm the absence of counsel. The DA was also

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asked for information about why no counsel had been appointed.

Crimes charged were taken from the court orders and from police reports that were sent with defendants on admission. DSM-III-R diagnoses were obtained from the patients' discharge diagnoses.

A third planned part of the study, involving contacting defense attorneys for each study patient, had to be abandoned because of interpretations by a number of public defenders that answering any questions about their clients (even whether or not they had met with the clients before they were committed for evaluation) would violate attorney-client privilege. District attorneys were successfully contacted in each case in which defendants reported that no attorneys had been provided.

Results

National Survey After two mailings and subsequent telephone followups, responses were obtained from all 51 jurisdictions surveyed. Eight jurisdictions reported that they no longer accepted defendants in their inpatient facilities for pretrial evaluations, and another reported that the great majority of pretrial evaluations are now performed in the community. This represents an increase of seven such jurisdictions since our previous study.⁶ In most of those jurisdictions, the evaluations are done in a decentralized fashion by a number of community facilities, so that responses reflecting statewide practices were unobtainable. We did obtain a response to the survey from one such outpatient facility, a court clinic in a large metropolitan center with a suffi-

ciently large volume of admissions (considerably larger than the caseload of many centralized state forensic facilities), to see if there were any significant differences in their responses to the survey as compared with those from inpatient facilities. This left us with a study sample of 43 jurisdictions.

Twenty-one of the 43 facilities that perform pretrial evaluations reported that at least some defendants were committed before access to counsel. The range of incidence reported varied between 1 percent or less and 14 percent (Table 1). Although half of the facilities reporting that they did not admit unrepresented defendants failed to answer many of the other questions on the survey, nevertheless the responses to those questions demonstrated significant differences between facilities that did and did not report admitting unrepresented defendants (Table 2).

Facilities that reported admitting some unrepresented defendants were almost twice as likely to routinely contact defense attorneys for each incoming defendant, and 50 percent more likely to attempt to verify defendants' statements that they did not have lawyers assigned to defend them. The great majority of respondents from both types of facilities

Table 1
Incidence of Unrepresented Defendants

Percentage	Number of States
≤1	9
2	2
3	1
5	6
10	2
14	1

Table 2
National Survey

Questions	Do You Admit Unrepresented Defendants?	
	Yes	No
Do you routinely contact Defense attorneys?		
Yes	13	8
No	8	14
Do you check defendants' statements that they have no lawyers?		
Yes	15	6
No	5	5
Is it a problem for you to be asked to evaluate unrepresented defendants?		
Yes	16	9
No	4	1
What steps would you take with such defendants?		
Notify court	3	3
Refuse to evaluate	12	2
Other	4	2

reported that they would consider being asked to evaluate unrepresented defendants to be a problem; but over half of those who reported admitting no unrepresented defendants did not respond to the question. Finally, facilities that reported admitting unrepresented defendants stated that they would refuse to evaluate unrepresented defendants over twice as often (63% versus 29%) as those that reported admitting no such defendants.

In their initial written responses, several facilities reported that the number of defendants admitted without counsel was "none;" but in their comments, they said that the practice was "rare." When these respondents were contacted individually, each said that they had in fact admitted a

few unrepresented defendants. Inasmuch as not all respondents who reported admitting no unrepresented defendants were contacted individually, it is quite probable that the number of facilities reporting that unrepresented defendants are occasionally admitted is a conservative estimate. In addition, several facilities that reported admitting no unrepresented defendants stated in their comments that since such admissions were prohibited by state law, they therefore just didn't occur.

Although the missing data certainly affect the generalizability of the results of the national survey, they at least reveal a correlation between the *perception* that unrepresented defendants are not being admitted for evaluation and the lack of sufficient investigation to uncover the problem if it does in fact exist. One would expect that facilities that do not place significant emphasis on preventing the evaluation of unrepresented defendants do not make the effort to find out if such defendants are being admitted, or to take remedial action if they are. Such lack of knowledge was anticipated when the national survey was undertaken and was a major reason why the detailed Colorado survey was undertaken.

The Colorado Survey A consecutive series of 50 patients admitted for pretrial evaluation were interviewed at the Institute for Forensic Psychiatry shortly after admission. Because the likelihood of unrepresented defendants being referred for evaluation of criminal responsibility is extremely low, only those for whom competency to proceed was the sole legal question were included in the study.

Eight defendants reported that they had

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not had lawyers assigned to them before they were committed to the institute for evaluation. Because prearrest contact with lawyers is often realistically minimal for mentally disordered defendants, we contacted the lawyers listed on the referral forms from the institute when there were names on the forms. We were able to confirm that seven of the eight defendants were correct in stating that they had not been provided with counsel before being committed for evaluation, despite the state statutes and the state Supreme Court decision, both of which would appear to prohibit such practice.

We were able to discover the circumstances leading to the order for evaluation in each of the seven cases. The judge had raised the issue of competency *sua sponte* in six of the cases; in the remaining case, the DA raised the issue because of reports from the sheriff that the defendant had been suicidal in jail. In two cases, the competency evaluation was ordered at preliminary hearings before formal arraignment—one at a bond hearing and one at a prisoner advisal hearing. In two cases, the defendant reported that he had asked the judge to appoint counsel, but was refused. In two cases, public defenders were appointed after the defendants were admitted to the hospital for evaluation. One of the unrepresented defendants had expressed a desire to represent himself, but the request had not been sustained by the judge; this was the case in which the judge ordered the competency evaluation at the bond hearing.

The seven unrepresented defendants came from 5 of the 19 counties that sent defendants for evaluation during the study

period. One county, with three point nine percent of the state's population, sent three of the seven unrepresented defendants out of the total of five defendants that they sent. Two of the other counties were large (population more than 230,000) and two were quite small (less than 4,200).

As was the case with our previous study in Wisconsin, a majority of the represented defendants (25 out of 43) indicated that they were dissatisfied with their appointed counsel; but this percentage of dissatisfaction (58%) was considerably lower than the 90 percent found in Wisconsin. There were statistically significant differences between the crimes charged for represented and unrepresented defendants; represented defendants were more likely to have been charged with misdemeanors or property felonies ($t = 2.849, p = .01$; Table 3). Diagnoses also differed between the two groups; represented defendants were more likely to suffer either from organic disorders or to have no Axis I or II diagnosis at all ($t = 2.353, p = .03$; Table 4).

Discussion

The results of this survey make it clear that court commitments of unrepresented defendants are far from rare. Forty-nine per cent of respondents from facilities that perform pretrial evaluations reported that such admissions occurred in their facilities, and, as argued previously, this is almost certainly lower than the actual figure, for several reasons. Those facilities reporting no such admissions were much less likely to make routine contacts with defense attorneys and much less likely to

Table 3
Crimes Charged

Type of Crime	Represented Defendants	Unrepresented Defendants
Felonies		
Murder, attempted murder	6	1
Assault, sexual assault	13	4
Felony menacing	2	1
Theft, burglary	7	0
Arson	2	0
Misdemeanors		
Disorderly conduct	8	1
Resisting arrest		
Criminal mischief		
Loitering trespassing		
Fugitive	3	0
Bail jumping		
Probation violation		
Driving offenses	2	0

attempt to verify defendants' claims to be unrepresented, so that their chances of discovering that their patients are unrepresented are significantly lower than those facilities who do make such inquiries. In addition, of course, evaluations done without any contact with defense attorneys (who are most likely to have raised the issue of competency in the first place) lack important information that may be essential for an adequate evaluation of competency to proceed.

Several respondents stated that they

had concluded that unrepresented defendants could not be admitted to their facilities, because it was prohibited by law in their jurisdictions. But it is prohibited by law in Wisconsin¹¹ and in Colorado,¹³ and our studies in those states have clearly shown that the law is not always followed; assumptions based on the law as a guarantor of judicial behavior are often invalid.

Another reason for facilities to underestimate, or reject altogether, the possibility that unrepresented defendants are

Table 4
Primary Diagnoses

Primary Diagnoses	Represented Defendants	Unrepresented Defendants
Psychoses	17	3
Affective disorders	6	1
Personality disorders	7	2
Mental retardation	3	0
Organic mental disorder	3	0
Substance abuse	1	0
No diagnosis	6	1

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being admitted is that such admissions are in fact uncommon. Based on the numbers of admissions and the incidence of unrepresented defendants reported in our survey, there is a minimum of 200 such admissions each year nationally. When the great majority of defendants have representation, the incentive to look for those few who do not becomes lessened. If one large, university-affiliated evaluation center is omitted, facilities reporting admitting unrepresented defendants average admitting almost twice as many defendants for competency evaluation per year as those that do not (194 versus 102); the latter therefore have less chance to identify such defendants.

The case-specific data from Wisconsin and Colorado indicate that the basic scenario leading to evaluation orders on defendants before they have access to counsel is one in which defendants appear obviously mentally ill, either to judges at preliminary hearings or to jail staff before arraignment. In such cases, judges feel that they are faithful to the spirit of the law in ordering evaluations as expeditiously as possible, if necessary without waiting for the defendant to discuss the situation with counsel. But since few defendants will understand the purposes of such evaluations,⁷ it is crucial that they be advised by counsel before undergoing psychiatric examination, particularly in those states that permit defendants to refuse such examinations.

Although 200 unrepresented defendants a year (or even twice that) is a small number relative to the number of defendants evaluated nationally each year, the ethical problems posed remain signifi-

cant, especially since such admissions violate not only professional ethical standards, but the laws in some jurisdictions. Unlike private practitioners, who can refuse to perform such evaluations, clinicians at state facilities (both inpatient and outpatient) are placed in significant ethical dilemmas by such admissions.

It has been argued (H. Zonana, personal communication, 1993) that the ethical concerns associated with competency evaluations of unrepresented defendants are less significant than is the case with prearrest private evaluations for the prosecution, which may result in testimony on criminal responsibility or even guilt or innocence, because of both the nature of the legal questions investigated and the fact that some judicial involvement is required in order to commit a defendant to a public forensic facility. Although this argument certainly has some practical merit, the current ethical guidelines do not permit such evaluations, thus placing public psychiatrists and psychologists in ethical binds *per se*. In addition, we would argue that the protections invoked by a judicial order of commitment are more theoretical than practical; and that in many states information elicited as part of a competency evaluation may be used as rebuttal testimony on the issue of guilt or innocence if the defendant chooses to testify.

The problem is amenable to solution, but it requires the active cooperation of the judiciary, because judges are the only ones who can require defendants to participate in pretrial evaluations. When the results of our previous study in Wisconsin were reported to the state Jury Instruc-

tions Committee (responsible for providing trial judges with procedural rules to follow in situations such as ordering pre-trial psychiatric examinations), the committee responded by issuing specific prohibitions against the practice, which were effective in significantly reducing the incidence of the problem. Although only the judiciary has the authority to remedy the problem, it is unlikely to take action unless it is presented with evidence that such legal improprieties occur; and clinicians at the evaluating facilities are frequently the only ones in a position to obtain such evidence.

Even if the judiciary or the legislature do respond by barring orders for evaluation of unrepresented defendants, a significant number of judges continue to issue such orders.¹⁷ Psychiatrists in private practice can choose to follow the ethical guidelines by declining to perform evaluations until defendants have access to attorneys. For public psychiatrists, however, the problem is more complex. As our detailed data from Wisconsin and Colorado demonstrate (supported by the preliminary data from many other states), such defendants continue to be admitted to state forensic facilities for evaluation.

The first step that needs to be taken to eliminate this practice is to identify all such defendants. This process will often suggest solutions; for example, in Wisconsin, all such defendants came from one county. Data will be essential to convince hospital or state department administrators or the judiciary. Individual clinicians cannot usually refuse to evaluate unrepresented defendants admitted to their facilities; but they can band together

to lobby their administrations to support their positions. If sufficient numbers of clinicians petition for relief from having to violate their ethical codes by performing such evaluations, their chances of success increase significantly. Their approach, both within their systems and with the judiciary, should be largely an educational one, because few bureaucrats and even fewer judges will be aware of the ethical dilemmas involved. In addition, the defense bar (particularly the public defender system, if one exists) is a natural ally in this effort, because they will be very likely to side with the clinicians on this issue.

This approach works in practice: in Wisconsin, contact was made with the state Jury Instructions Committee, a prestigious group of attorneys, judges, and legal scholars, who responded to the information by talking to the chief judge in the one county that was sending unrepresented defendants for evaluation—and the practice stopped immediately.

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