The Judge's View of Competency Evaluations

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In his textbook on management Drucker[1] makes the point that it is one of the primary responsibilities of a manager to ascertain what the customers want; it is not always easy, however, for him to be sure what the customer wants, because he usually has more than one customer, each with varying needs. In an analogous way, it is a well-established principle of consultation-liaison psychiatry that the consultant needs to know the particular attitudes, needs, and expectations of his consultees (including having an awareness of unstated questions and conflicts), rather than to view his function as merely that of examining and reporting on a patient in isolation from the hospital milieu.[2]

The liaison psychiatrist has the advantage of working in a relatively stable environment with a limited number of consultees, whom he can have some chance of getting to know well over an extended period of time. The forensic psychiatrist, however, especially in the setting of a large urban court clinic, faces a more formidable problem. Even if the psychiatrist envisions his role as that of a consultant to the court (offering advice on relatively limited issues, such as competency to stand trial), he must nevertheless attempt to be responsive to a large number of judges, with varying legal philosophies and knowledgeability about psychiatry, none of whom he is likely to know well. Thus, he is left with a considerable area of ambiguity in addressing the question as to what the judge really wants to know in ordering a competency evaluation on a particular defendant.

It does not, of course, resolve the issue simply to note that the Supreme Court gave its answer to this question in the *Dusky* decision. There the court spelled out in relatively specific terms the requirement that a competent defendant should have, "the ability to consult with his lawyer with a reasonable degree of rational understanding," which included his having "a rational as well as factual understanding of the proceedings against him."[3] Having this criteria for deciding the issue does not prevent the trial court judge, who is under pressure to decide and dispose of difficult and puzzling cases, from using the competency examination to develop information about other issues or even to circumvent the ultimate issues of guilt or punishment.

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There is considerable testimony in the literature to the effect that courts use the competency examination for a variety of purposes and that judges and psychiatrists often operate in isolation from each other, the judges not being clear or precise about what they expect from psychiatrists and the psychiatrists in turn not providing what the judges are looking for. In 1965 Robey[4] noted a "consistent failure by the courts to inform the examining psychiatrist what questions it wished answered"; he found that judges vary among themselves as to the degree of mental capacity they require of an individual standing trial and that psychiatrists tended to send the judges narrowly focused reports, which might give a diagnosis but make no mention of the criteria for competency.[4] Balcanoff and McGarry[5] reported that in a series of 30 cases in Boston, they also found it difficult to discover the reasons for many court-ordered examinations. Hess and Thomas[6] reported that competency examination was used for different purposes by different courts and that the concepts of competency and responsibility were used interchangeably by both psychiatrists and judges. More than 10 years later, in 1974, the Group for the Advancement of Psychiatry report reiterated these very same problems.[7] At about the same time, Cooke *et al.*[8] had analyzed 326 cases in Michigan and concluded that, in many instances, competency was raised as an issue simply to promote other strategies: to produce a delay, to provide a humanitarian alternative to severe punishment, to lay the groundwork for an insanity defense, or to dispose of cases without having to go through a civil commitment.

Geller and Lister[9] analyzed the records of 87 pretrial commitments and found "little relationship between the questions posed by the court and the replies made by psychiatrists"—in spite of a specific request to comment on competency, 65 percent of the reports failed to do so. Petrila *et al.*[10] recently documented the other side of the problem in a study of 252 cases in Missouri, where 53 percent of the time the judges ordered nothing more specific than a "psychiatric examination." Although some judges made more specific requests, there was little effort to tailor the order to the specific individual and to define the issue at hand.[10]

We are aware of only one study in which judges were asked directly what should be covered in a psychiatric examination for competence. In this instance, Pfeiffer et al.[11] sent letters with a series of questions to 24 federal judges. Although they received only seven replies, their findings did suggest the same lack of uniformity in the judges' expectations as noted above. These seven judges gave varying and contradictory answers to questions about whether they were interested in a diagnosis, an opinion about sanity, an opinion about dangerousness, or simply an assessment of the defendant's understanding of court procedure. Interestingly, the *only* question that all

of the judges *did* agree on was that all seven wanted to know if the defendant needed treatment or was dangerous![11]

We began this investigation of what judges look for in a competency examination report because we wanted to know how well we were serving the needs of the courts with which we work. The setting for this work was the Forensic Psychiatry Clinic for the Criminal and Supreme Courts in Manhattan. (In New York, the Supreme Court is not an appeals court but rather the trial court for felony cases.) During 1983 the clinic submitted competency reports on a total of 813 defendants. In addition, the clinic also serves to examine defendants prior to sentencing and to advise the courts as to whatever treatment is indicated. These two functions are kept separate because the two types of examination are defined under separate sections of the criminal procedure law. The clinic operates on an "outpatient" basis, making an effort to provide the court with recommendations on as many cases as possible without hospital referral.

Between the judges and the clinic psychiatrists, there has been little utilization of formal liaison channels in the past. A judge who has questions about a particular psychiatric report may inquire about it through the clinic administrator, but there is rarely any direct consultation with the psychiatrist, except for occasional courtroom appearances. The psychiatrists in turn are rarely provided with any information at all about what led up to the order for the examination, e.g., whether the defendant appeared to be incoherent or caused a disturbance in court or whether his history of mental illness or the bizarre nature of the offense was the basis for referral. Operating with this lack of background, the clinic policy is to address the order for competency examination narrowly, providing information about the defendant's history and mental status and an opinion about his competence according to the Dusky criteria. The judges in turn provide very little feedback as to how well satisfied or informed they are after reading the reports they receive. The following case report illustrates some of the problems in communication between the judge and the psychiatrist in this setting.

Case Report

A 36-year-old man was arrested and charged with manslaughter in the stabbing of a drinking companion. He was first sent for a competency evaluation approximately one year after his arrest. During the psychiatric interview, he gave a history of hospitalization on three occasions in state hospitals, where he was treated with antipsychotic medication. He was vague about the reasons for these admissions, saying only that he had "bad

nerves," but he specifically denied ever being suicidal or hearing "voices." He had no complaints and was taking no psychotropic medication while in custody.

On examination the defendant was alert, relaxed, calm, cooperative, and cheerful with the examiner. He was fully oriented and gave relevant and coherent answers to all questions, with no hint of thought disorder. He knew the name of the deceased victim, the place and time of his arrest, and could correctly identify and explain the functions of the defense attorney, district attorney, judge, and jury. He could state the charge against him correctly, understood the plea bargain that the prosecutor had offered, and he knew that he risked serving a longer sentence if he stood trial and was found guilty. He also appeared to recognize that the police had a videotaped confession that he had given. He stated that he wanted to reject the plea offer and go to trial, even though he could "get the maximum," because he wanted his case "out in the open ... to bring out all the facts" about his arrest. He declined to discuss these "facts" further with the psychiatrist but stated that he got along well with his attorney, trusted him, and would discuss everything with him.

Because the psychiatrist suspected a possible delusional reason for his wanting to go to trial, he ordered a battery of psychologic tests of the defendant. The psychologist concluded the man was not currently psychotic but noted that he did appear to have a tenuous hold on reality and could easily decompensate under stress. The psychiatrist concluded that there was no very compelling reason to doubt this man's ability to cooperate with his attorney and accordingly found him to be fit to proceed.

The judge, seeing the defendant three weeks later, was clearly unhappy with the psychiatric report. She returned the defendant to the clinic for reexamination, providing the following note for clarification (and, interestingly enough, calling attention to the crucial distinction from the Dusky case): "This defendant obviously is aware of what a court is, what a judge is, etc. But he has strange delusions: his statement was videotaped, and he says the person on the tape is a dummy made by the police and even his ID photo is not him. Can he consult adequately with his attorney?"

The defendant was reexamined the following week and this time questioned directly about the videotape. His mental status was the same as before except that he now became more irritable when pressed about the videotape and about why he wanted to go to trial. He confirmed the belief that the man on the tape was not himself and that the picture on his ID card was not him either. He then revealed a long series of delusional ideas and indicated that he was practically indifferent to the outcome of his case: "People have been doing things to me," he said, "and it's gone too far. These things have gone on for twenty years. I don't care how much I get

punished .... It's not my problem anymore. I don't care if I get a fair shake." He now stated that he wanted to go to trial to prove that the charge against him was "fictitious," that the autopsy on the victim was "faked" (since "someone could play dead and let them take pictures of him"), and that there had always been a plan by a "syndicate" to "get" him. After this examination, the psychiatrist concluded that the defendant was indeed psychotic and did clearly lack the capacity for a rational appreciation of the evidence against him.

Methodology

Our aim in beginning this investigation was to find out more precisely what information the judges find useful in competency reports, so that we might provide information most consistent with their needs. A brief questionnaire was sent to each of the 52 judges sitting on the Supreme Court, along with a request for a meeting in person to discuss the issues addressed in the questionnaire (Table 1). The judges were asked multiple choice questions about their reasons for ordering competency examinations, about the information they wanted in a psychiatric report, and several questions about the adequacy of the reports they receive. Our expectations were that (1) judges would cite a variety of reasons for ordering the examination; (2) judges would show little interest in psychiatric diagnosis; and (3) a significant number of the judges would be mainly interested in having a conclusion from the psychiatrist about the defendant's fitness to proceed and therefore

Table 1. Judges' Priorities in Ordering Competency Examinations

	Priority		
	First	Second	Third
1. The most likely reasons for ordering a competency examination:			
A. Defendant has a history of psychiatric illness	4	3	5
B. The notoriety of the case	0	0	0
C. Defendant's behavior in court	8	4	4
D. Defense attorney requests examination	8	6	2
E. The nature of the offense (bizarre crime, sexual offense, etc.)	0	3	3
F. Other: ______	0	0	0
2. The questions you most often want answered in the psychiatric report of a competency examination:			
A. Is the defendant mentally ill?	2	3	3
B. Does the defendant need treatment?	0	0	1
C. Does the defendant understand the charges and court procedure?	17	1	0
D. Is the defendant dangerous?	0	0	1
E. Can the defendant control himself in the courtroom?	0	0	4
F. Can the defendant cooperate with his attorney?	2	10	3
G. Why did the defendant commit the act he is charged with?	0	1	0

* Judges were asked to list their first, second, and third priorities for the questions asked.
Note: Columns do not add up to 18 because several judges gave more than one first choice.

not be interested in extensive history or description of the defendant's mental status.

We received responses, either written, oral, or both, from 22 judges. Of this total, 16 were interviewed, while 6 returned the questionnaire but declined to be interviewed. A total of 18 questionnaires were returned. (There were 4 judges who were interviewed but never returned the form.)

Results

The judges cited two primary reasons, which were of virtually equal importance, for ordering the examination: (1) a request by the defense attorney and (2) the judge's own observation of the defendant's demeanor and behavior in the courtroom. Of 18 judges who returned the questionnaire, 8 cited the attorney's request as the most likely reason and 6 others offered it as a secondary reason. Eight judges cited the defendant's behavior as the primary reason, with four others rating it secondary. Four judges considered a history of mental illness to be the most likely reason for the examination None of the judges considered the notoriety of the case to be a factor.

When asked what questions they most wanted answered by the psychiatrist's report, the judges uniformly gave the legally "correct" responses, i.e., adhering to a strict definition of the issue of competence. Seventeen judges chose as the primary question, "Does the defendant understand the charges and court procedure?" The only other question cited as a first priority (each by two judges) were: "Is the defendant mentally ill?" or "Can the defendant cooperate with his attorney?" Ten judges cited the defendant's ability to cooperate as the second most important question. Only one judge cited dangerousness as a priority, one judge cited need for treatment, and one judge wanted to know "why the defendant committed the act he is charged with."

Contrary to our expectations, the majority of the judges expressed a desire for more complete information, with 13 stating that they considered all parts of the psychiatric report (i.e., the history, mental status, diagnosis, and opinion about competence) to be significant. Only two judges stated that they would base their findings on the psychiatrist's diagnosis and recommendations alone and two others would depend on the psychiatrist's conclusion about competence alone. A somewhat contradictory pattern appeared, however, in answer to the question, "Do you often adopt the psychiatrist's conclusion as the the defendant's fitness regardless of the information contained in the narrative part of the psychiatric report?" Nine of 17 judges who answered this question indicated that they *did* simply adopt the psychiatrist's conclusion. One judge offered an explanation: that the body of the report often does not provide enough of a basis for any

contrary conclusion, so that the judge, short of calling a hearing and questioning the psychiatrist, has no choice but to adopt the conclusion that is offered. When judges elaborated on this issue in the interviews, there appeared to be a consensus in favor of having as much information as possible. While two judges did maintain that the competency examination was often no more than a formality which was necessary for the disposition of the case and, therefore, that they were really only interested in the conclusion, most of the others appeared to want more information than they now get. These judges, far from finding the material burdensome, felt that more background information would only help them in their decisions.

The judges expressed substantial satisfaction with the advice they currently receive: only three judges found that the conclusions of the reports were incongruous "fairly often" with their own observations of the defendant in the courtroom. There was a trend in the direction of the judges' feeling that the clinic too often found a defendant competent who should have been found incompetent. Six judges committed themselves to this view. While two judges stated that it was *not* true that the clinic found too many defendants competent and two other judges went so far as to say that they "never" disagreed with the clinic's opinions, there was not a single judge who felt that too many defendants were found incompetent. This trend suggests that the judges in this sample are more impressed with the seriousness of the mental disorders they see in people coming before them than they are with the danger of malingering.

Discussion

There are two significant methodological problems involved in this type of investigation. The first is sample bias, which results from the fact that it is quite likely that the judges who responded to this inquiry were those who were most interested in and most positively disposed toward psychiatry to begin with. This was certainly our impression, for we were met with very few instances of even the least hostility. One judge did return the questionnaire with an angry letter, informing us that some of the questions were insulting. Another judge appeared to be making an effort to remain civil during the interview and expressed great frustration with how little psychiatrists seemed to be able to do for disturbed defendants. Another judge made it clear, in a respectful way, that he saw little need for psychiatric opinion in the courtroom, since many instances of disturbed behavior could be dealt with by contempt proceedings. One or two judges seemed to be speaking to us mainly out of politeness. All of the others, however, appeared to be both eager and interested in giving their impressions and in particular, finding out how the clinic could provide more services to them. Most of

the judges were quite sympathetic toward psychiatrists. One remarked that judges and psychiatrists have the same problems, i.e., having to make difficult decisions and being vilified in the press for them. Several judges tempered the complaints they did have (such as feeling that too many defendants were found competent) by saying that they understood why the psychiatrist had to give the opinion that he gave under the circumstances, by recognizing that no one can really predict future behavior, or by noting that the psychiatrist has "an impossible job."

The other methodological problem resulted from the relatively nonstructured nature of the interviews. The judges generally had fewer concerns and were less interested in talking about competency examinations, which they considered a more straightforward problem compared with the presentencing evaluations. Most of the judges shifted the focus of the interview into the latter area and especially into questions about the services available for treatment and rehabilitation. Some judges had clearly unrealistic expectations. Several voiced surprise at learning how limited the treatment resources are for either incarcerated criminals or those on probation. Others were eager to ask clinical questions about such subjects as the effectiveness of antipsychotic medication or treatment for alcoholism. A number of judges clearly made the assumption that prognosis for treatment is related to prognosis for recidivism, and they did not like to hear that this assumption is highly questionable. One judge was particularly distressed at being told that psychiatrists have no demonstrably effective treatment for many of the defendants examined. He made the statement almost pleadingly that he "had to believe" that psychotherapy could help the many disturbed people who passed through his courtroom.

Conclusions

This investigation presents a more complex picture of the relationship of the judge and the psychiatrist compared with that presented heretofore in the literature. It does not confirm the conclusion that there is any great uncertainty or ambiguity in the minds of judges about what they are asking for in ordering competency examinations. This group of judges was very clear about maintaining the distinction between competency and presentencing evaluations. They did not expect a competency examination to tell them anything about dangerousness or the defendant's need for treatment, and they were equally clear in their expectations about what information they would get in a report (even if they often would like the information in greater detail). At the same time, it is also clear that competence to stand trial is in itself a less problematic issue to most of the judges and that they are much more concerned with gaining psychiatric

assistance in making decisions about sentencing and disposition, with a view to obtaining treatment for the disturbed defendant. There also appears to be considerable room for improvement in the liaison between the clinic psychiatrist and the judge. Problems with liaison do not appear to result principally from any hostility on the part of judges toward psychiatry. The judges in this group were clearly eager for psychiatric input and wanted more extensive information about defendants than they are used to getting from the court clinic. They were also generally open to more direct and frequent communication with the clinic psychiatrists about individual cases. Such communication might be facilitated by a few simple, concrete measures: the psychiatrist's task would be made easier if the court provided, along with the order for examination, a brief statement of the reason for requesting the examination or raising the question of competence. (It would clearly be of value to know, e.g., if the defendant was agitated in court or if the defense attorney had difficulty with his client.) On the other side, the psychiatrist might provide a more pertinent report if he made a practice of telephoning the judge for clarification of the situation when the circumstances and reason for the examination are obscure. Through such measures the court's specific needs for information could be more fully met.

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