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Jeannette Cox

University of Dayton, jcox01@udayton.edu

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Chapter 15

Legal Issues for Treatment Providers and Evaluators

Abstract:

This chapter briefly describes legal issues relevant to providing mental health treatment and assessment services to persons with intellectual disabilities. It describes civil rights law, the law of informed consent, substituted consent, guardianship, eligibility for disability benefits, and competency to stand trial. All of these areas of law recognize that a diagnosis of intellectual disability, standing alone, has little legal significance. Accordingly, the law requires mental health practitioners to make individualized determinations of how an individual's functional abilities interact with the demands of the relevant legal context. This context-dependent inquiry aims to maximize the individual's right to exercise the privileges and responsibilities of citizenship to the full extent of his or her abilities.

Key Words:

law, intellectual disability, mental retardation, developmental disability, civil rights, assessment, guardianship, informed consent, disability benefits, competency

Introduction

The law related to intellectual disability reflects ongoing debates about the appropriate balance between competing impulses to protect and to empower persons with intellectual disabilities. Historically, the law focused almost exclusively on sheltering persons with intellectual disabilities from abuse and poor decisions. Recent reforms led by the disability rights movement, however, have recognized that this protective impulse has too often resulted in the law treating adults with intellectual disabilities as perpetual children, a status that often results in disempowerment, isolation, and the underdevelopment of functional abilities. These reforms have also recognized that simple adjustments to standard operating procedures (often termed “reasonable accommodations” or “reasonable modifications”) frequently eliminate the need to exclude persons with intellectual disabilities from the privileges and responsibilities of citizenship.

In response to the disability rights movement, nearly all areas of the law now recognize that a diagnosis of intellectual disability, standing alone, has no legal significance. For example, an intellectual disability diagnosis does not automatically mean that a court may appoint a guardian to make financial decisions for the individual. Similarly, an intellectual disability diagnosis does not automatically mean that an individual accused of a crime is incompetent to stand trial. Instead, the law requires an individualized determination of how a specific individual’s functional abilities interact with the demands of the relevant activity, such as managing a particular set of assets or participating in a particular criminal trial. This detailed inquiry into an individual’s need for protective legal action aims to maximize the self-determination of persons with intellectual disabilities.

The law's individualized inquiry into the particular strengths and limitations of a person with intellectual disabilities is relevant to mental health practitioners in two ways. First, the need to make individualized determinations of a particular person's abilities will arise in a mental health treatment practice. A treating professional must comply with civil rights laws, which frequently require modifications to typical practices in order to ensure that persons with disabilities have equal access to the benefits available to persons without disabilities. A treatment provider must also comply with the law of informed consent, which requires an assessment of the patient's ability to understand and weigh the risks and benefits of a proposed treatment. Second, the need to make individualized determinations of a person's abilities may arise in a forensic mental health context. Persons with intellectual disabilities, as well as caregivers and courts, frequently request mental health professionals to assess an individual's functional abilities for a legal purpose.

In light of these two distinct points of contact with the law—as a treatment provider and as a forensic expert—this chapter proceeds in two parts. Part I describes legal issues relevant to providing mental health treatment to persons with intellectual disabilities. This discussion includes a brief survey of civil rights laws, the law of informed consent, and the law of guardianship and other forms of substituted consent. Part II, which focuses on forensic issues, surveys some of the legal contexts in which a psychiatrist or other mental health provider may be asked to provide information about an individual's functional abilities. Focusing on the legal issues a mental health practitioner is most likely to encounter, this part discusses applications for disability benefits, petitions for guardianship, and evaluations of competency to stand trial.

Please note that this chapter is for general information purposes only. It is not intended to be comprehensive and should not be considered legal advice for a specific case or set of facts.

Please contact an attorney in your area for more detailed information about how the specific provisions of your state’s law apply to your practice.

I. Law Related to the Mental Health Treatment of Persons with Intellectual Disabilities

a. The Right to Reasonable Modifications

Although good treatment practices will naturally reflect the nondiscrimination and empowerment goals embodied by civil rights laws, treatment providers should nonetheless be mindful of civil rights laws that prohibit disability-based discrimination. These statutes, most notably Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, prohibit “covered entities”—which include hospitals, professional offices of health care providers, and treatment centers—from denying an individual with a disability an equal opportunity to enjoy the services the covered entity provides. (29 U.S.C.S. 794, 2006; 42 U.S.C. S. 12101, 2006) In order to provide equal access to services, covered entities must make reasonable modifications to their architecture, policies, practices, and procedures. These reasonable modifications remove barriers that would otherwise prevent persons with disabilities from accessing the services enjoyed by persons without disabilities.

Reasonable modifications for a person with an intellectual disability may include adjusting the manner in which information is communicated. For example, a person with limited ability to digest written informed consent materials may require an oral explanation. Reasonable modifications may also include speaking at a slower pace and using simple and concrete terminology whenever possible. It may also include using visual materials—such as charts and

photographs—to aid communication. Another modification that may facilitate communication between the individual and the treatment provider is to permit an individual with an intellectual disability to involve a trusted friend or family member in his discussions with the treatment provider.

While a treatment provider's obligation to provide reasonable modifications is normally triggered by a request from the individual, the nature of intellectual disabilities may prevent some individuals from making a request for modifications. In that circumstance, the civil rights laws require a treatment provider to initiate a discussion about the need for reasonable modifications. Although the treatment provider may not force an individual to accept an unwanted modification, the treatment provider can offer options designed to enable the individual to benefit from the treatment provider's services. The law does not mandate, however, that a treatment provider implement the particular modification the individual prefers, so long as the offered modification offers enables the individual to enjoy the benefits provided to nondisabled persons and is "reasonable."

Although the civil rights statutes do not define "reasonable," judicial treatment of the term suggests that determinations about whether a particular modification is "reasonable" will involve weighing the individual's need for the modification against the cost to the treatment provider that would implement it. The treatment provider may avoid making reasonable modifications only if the treatment provider can demonstrate that they would impose an "undue burden" on the treatment provider or "fundamentally alter" the nature of the treatment provider's facilities or the goods and services provided.

b. Informed Consent and Substitute Decision-makers

While compliance with disability nondiscrimination laws should naturally accompany good treatment practices, compliance with informed consent law poses unique challenges. Before proceeding to treat an individual with an intellectual disability, a treatment provider must determine whether the individual's limited capacity to understand the risks and benefits of the treatment renders the individual unable to provide informed consent.

The law of informed consent requires health care providers to establish that the patient understands the risks, benefits, and possible side effects of a proposed treatment as well as reasonable alternatives. In addition to understanding the proposed treatment, the patient must also freely consent, without coercion or manipulation from the treatment provider or others. In the absence of a significant medical emergency, a health care provider who provides treatment without first obtaining informed consent will be liable to the patient for battery or medical negligence.

The law of informed consent does not require that the patient fully understand the technical aspects of the proposed treatment, such as how a particular medication affects brain chemistry. Many patients without intellectual disabilities lack sufficient education and training to understand the technical aspects of particular medical treatments and yet the law regards them as able to provide informed consent. The patient's understanding must simply be sufficient to enable the patient to make a reasoned choice about whether to accept or reject the proposed treatment.

A person's ability to give informed consent will often vary depending on the type of treatment proposed. While a person with significant intellectual disabilities may be able to consent to a routine examination, the same person may be unable to consent to the administration of a medication that entails significant risks. The degree of risk involved in a particular

treatment, as well as the number of treatment options and the complexity of the information about possible side effects, will affect whether an individual can give informed consent.

i. Assessing Capacity to Provide Informed Consent

To assess whether a patient has sufficient understanding to provide informed consent, the health care provider should ask the patient open-ended questions. The practitioner should avoid questions that elicit a “yes” response because a patient with intellectual disabilities may give yes as a default response in order to disguise a lack of understanding. In keeping with civil rights laws that require health care providers to modify procedures in order to ensure equal opportunities to persons with disabilities, the practitioner should modify written materials or orally translate them in order to effectively communicate their content to the patient. When a treatment provider has modified informed consent procedure as much as possible and is still uncertain about whether a patient may give informed consent, it may be appropriate to obtain an independent evaluation.

If the patient’s understanding is sufficient to enable informed consent for purposes of the treatment proposed, the health care provider must also carefully assess the voluntariness of the patient’s consent. Because persons with intellectual disabilities are vulnerable to coercion and manipulation from family members and other support persons, the health care provider should speak with the patient privately to determine whether her consent is, in fact, freely given. Also, to reduce the possibility that the patient will be unduly influenced by the health care provider’s views, the provider should encourage the patient to consult relatives, caregivers, and other members of his or her support network to help him to think through the decision.

ii. Obtaining Informed Consent via a Substitute Decision-Maker

When a patient is unable to provide informed consent to a particular medical procedure, the treatment provider cannot proceed without obtaining informed consent from a substitute decision-maker who provides informed consent on the patient's behalf. Even when a patient is unable to provide consent herself, the law protects the patient's right to bodily integrity by requiring that the treatment provider obtain consent from a substitute decision-maker who is obliged to make decisions based on the patient's best interests, which will involve honoring the patient's wishes whenever possible.

In some circumstances, the substitute decision-maker will be a guardian. Guardianship is a legal mechanism whereby a court determines that a person is unable to make certain decisions for herself and grants the legal authority to make such decisions to another person, called the guardian, who acts on the person's behalf. If an individual is subject to a guardianship order that has granted the guardian legal authority to provide informed consent, the health care provider must obtain the guardian's consent to treatment. Even when the medical practitioner believes the individual has the functional capacity to provide informed consent, the health care provider must obtain the guardian's consent because a court has extinguished the individual's legal authority to provide consent and transferred this right to the guardian.

Not all guardians have authority to provide informed consent, however, because modern guardianship statutes encourage courts to tailor a guardian's responsibilities to the individual's specific needs. For example, some individuals have a guardian only for the limited purpose of handling their financial affairs; the individual retains all other legal rights, such as the right to make medical treatment decisions. To determine whether the guardian has legal authority to provide consent to medical treatment, the treatment provider may ask the guardian to provide a

copy of the court's guardianship order which outlines the scope of the guardian's authority.

Guardianship law is discussed in more detail later in this chapter.

If a patient does not have a guardian, one option for obtaining substituted consent is for the patient's caregiver to file a petition for guardianship. However, because the appointment of a guardian can take a significant amount of time, it is often not an appealing vehicle for obtaining informed consent. Additionally, because a guardianship order extinguishes one or more of an individual's legal rights and is difficult to undo, most disability rights advocates urge caregivers to first explore less intrusive and permanent options for obtaining substituted consent.

The least intrusive method to obtain substituted consent is for the individual to voluntarily give someone legal authority to make health care decisions on her behalf by executing a "health care power of attorney." In some states, an individual may be able to execute a health care power of attorney even though she is unable to give informed consent to a particular medical procedure because a decision about whom the person trusts to make medical decisions is less intellectually difficult than a decision about whether the benefits of a medical procedure outweigh the risks. (Hurley & O'Sullivan 1999) In some states, a health care power of attorney may be oral rather than in writing.

For persons who do not have sufficient mental capacity to appoint a health care agent, most states have laws that allow relatives and close friends to provide informed consent to treatment for a person who is unable to understand the issues involved in a medical decision. These statutes normally list those persons—often called "surrogate decision-makers"—in order of priority, usually naming the patient's spouse first, then adult children, then parents or domestic partner, then siblings, and then close friends. The law requires a surrogate decision-maker to make treatment decisions based on his or her understanding of what the individual would want if

the individual was able to understand the applicable information. A surrogate decision-maker cannot provide informed consent if the patient resists treatment, however, because surrogacy statutes do not formally transfer a patient's right to make decisions to the surrogate.

In some states, obtaining substituted consent for certain types of treatments—such as the administration of psychotropic medication, electroconvulsive therapy, behavior modification programs involving aversive stimuli, or admission to a mental health care facility—may require additional measures, even if the patient does not object. Some states specifically prohibit surrogate decision-makers from authorizing these types of treatments. Some states also prohibit health care agents and guardians from doing so absent a specific grant of authority to consent to these particular types of treatment. (405 Ill. Comp. Stat. 5/2-107(a) 2008) Accordingly, these treatments may require an individual's physician or caregiver to obtain a special court order determining that the patient lacks capacity to make the decision and that the benefits of the treatment outweigh the harm. (Vars 2008)

In sum, providing mental health treatment to persons with intellectual disabilities requires compliance with disability discrimination laws and the law of informed consent. A treatment provider may not rely on an intellectual disability diagnosis alone, but must assess an individual's functional abilities in the context of the particular treatment the practitioner seeks to provide. The interaction between the individual's functional abilities and the treatment may require the provider to modify normal procedures in order to provide the individual access to the provider's services. Similarly, the interaction between the individual's functional abilities and the complexity of treatment decisions may require the provider to obtain the assent of a substituted decision-maker in order to comply with the law of informed consent.

II. Legal Questions Requiring Evaluation of Persons with Intellectual Disabilities

Legal issues related to intellectual disabilities also arise in a consultative forensic practice because the legal system frequently relies on mental health practitioners to assess persons' intellectual abilities. As the foregoing discussion indicates, one legal question that mental health practitioners frequently encounter is whether an individual's level of understanding is sufficient to satisfy the law of informed consent. While this question will arise in a mental health practitioner's own practice, it may also arise in a consultative role when other doctors require mental health practitioners' special expertise to help make judgments about informed consent.

This chapter surveys three other contexts in which a mental health practitioner may be asked to assess an individual's intellectual abilities for a legal purpose: eligibility for disability benefits, petitions for guardianship, and competency to stand trial. While these three questions are not the only legal questions that may require a mental health practitioner to assess a person's intellectual ability, they represent the breadth of legal questions for which a person's intellectual ability may be relevant.

Although, in the past, many areas of the law relied heavily on diagnosis of intellectual disability to determine whether an individual was eligible for special treatment under the law, today most legal questions require a deeper inquiry into the individual's functional abilities. Also in contrast to the past, when persons with intellectual disabilities were frequently deemed "disabled" or "incompetent" for all legal purposes, today each legal question involves a different standard for determining "disability" or "incompetency." Accordingly, many persons' intellectual limitations will be legally significant in some contexts but not others.

Before evaluating individuals for a legal purpose, treating practitioners should carefully consider whether conducting such an evaluation may prevent them from providing effective

treatment to the individual. While the law rarely prohibits mental health practitioners from evaluating persons that they simultaneously treat, ethical and pragmatic considerations frequently militate against performing this dual role. Some examinations, for example, may result in the examinee losing significant legal rights. If the examinee opposes guardianship, conducting an evaluation that results in a guardianship may generate conflict between the examiner and examinee that will irreparably damage the treatment relationship.

Conducting an evaluation may also damage a treatment relationship even when an evaluation results in the examinee obtaining a benefit she desires, such as Social Security Supplemental Income (SSI). Because most legal inquiries related to intellectual disability require proof of limited intellectual functioning, evaluators must collect detailed information about an individual's weaknesses and past failures. Conducting an evaluation and preparing a report that emphasizes a person's deficiencies can easily conflict with treatment goals of building the individual's sense of competence, control, and autonomy. The damage to the treatment relationship can be particularly great when a court or agency requires the evaluator to testify orally about the person's limitations. Reframing questions to focus on abilities rather than inabilities may be therapeutically beneficial to the individual, but may result in an inaccurate legal determination because court and agency adjudicators are more accustomed to a limitations-focused approach.

For all types of assessments, it is important to keep in mind that some persons with intellectual disabilities may attempt to minimize their limitations by adopting a compliant and cooperative attitude with authority figures. In order to counteract this tendency and accurately assess an individual's level of understanding, an evaluator should avoid questions that may elicit a simple "yes" response. Conversely, an evaluator should also keep in mind that some persons

with intellectual disabilities may have developed a “learned passivity” due to a submissive relationship with a caregiver or other perceived authority figure. Taking time to make an individual feel comfortable and empowered to speak for herself may help to more accurately reveal an individual’s true abilities.

a. Disability Benefits

One context in which a mental health practitioner may be asked to provide information about an individual’s functional limitations is for purposes of the individual’s eligibility for disability benefits. For example, the Social Security Administration has two programs that may be applicable.

The first program, Social Security Disability Insurance (SSDI), is available for persons who have a significant work history but now are unable to “engage in any substantial gainful activity by reason of [a] medically determinable physical or mental impairment.” (42 U.S.C. S. 423(d)(a)(A)(2000) For individuals over 55, the standard is whether the person is unable to perform past relevant work. Most persons with significant intellectual disabilities are eligible for little or no SSDI benefits because they do not have sufficient work history to be considered “insured” under this program. However, in certain circumstances, disabled individuals without sufficient work history may receive disability benefits based on the work history of a deceased spouse, deceased parent, or a living parent currently receiving social security benefits. (Social Security Administration. www.ssa.gov)

The Social Security Administration’s other disability benefits program, Supplemental Security Income (SSI), is more commonly applicable to persons with significant intellectual

disabilities. Unlike SSDI, receipt of SSI payments does not require that an individual have a significant work history. Instead, it requires that the individual have limited income and assets. The standard for adult “disability,” however, is the same for SSI and SSDI. An adult must be unable to “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.” A person under age 18 can receive SSI disability benefits if he or she meets the stricter disability standard of “marked and severe functional limitations” that “very seriously limits his or her activities.” Because the disability standard is stricter for persons under 18, some persons unable to qualify for SSI disability benefits as a child may qualify at age 18 when the broader disability definition applies.

A person automatically meets the Social Security Administration’s adult disability definition if the individual has an intellectual disability that manifested prior to age 22 and has either (1) a valid verbal, performance, or full-scale IQ of 59 or less or (2) severe mental limitations evidenced by inability to complete an IQ test and dependence upon others for personal needs such as toileting, eating, dressing, or bathing. The Social Security Administration assumes that persons falling into these categories are unable to engage in substantial gainful activity without any further assessment of their functional limitations.

Persons with less severe intellectual disabilities may also meet the Social Security Administration’s adult disability definition if their ability to work is significantly limited. For example, a person may meet this definition if they have an IQ of 60 through 70 and another impairment (physical or mental) “imposing an additional and significant work-related limitation of function.” Similarly, a person with an IQ of 60 through 70 may meet the disability definition if their IQ results in at least two of the following: (1) marked restriction of activities of daily living, (2) marked difficulties in maintaining social functioning, (3) marked difficulties in

maintaining concentration, persistence, or pace, or (4) repeated episodes of decompensation, each of extended duration.

b. Petitions for Guardianship

Another legal context in which a mental health practitioner may be asked to assess an individual's functional limitations is a petition for guardianship. Guardianship is a legal mechanism whereby a court determines that a person is unable to make certain decisions for himself and grants the legal authority to make such decisions to another person, called the guardian. Because the law presumes that persons who have reached 18 years of age are competent to make their own decisions unless they are proven incompetent, an individual's 18th birthday often provides the impetus for an individual's relatives or other interested persons to consider petitioning a court to establish a guardianship. (Millar 2003)

Historically, guardianship orders transferred *all* legal decision-making authority to the guardian. However, the disability rights movement critiqued this "plenary guardianship"—which resulted in a near-total loss of the legal rights that accompany adulthood—as unduly restrictive for many individuals who are able to handle some, but not all, of their personal affairs. In response to this critique, most states have revised their guardianship statutes to permit courts to tailor a guardian's authority to the needs of the individual. A guardianship order that permits an individual to retain decision-making authority over matters within his or her abilities is often termed a "limited guardianship."

Prior to the guardianship reform movement, an intellectual disability diagnosis was often sufficient to justify the appointment of a guardian. Today, however, most states now take a

functional approach that focuses less on diagnostic labels and more on the person's strengths and weaknesses related to the particular decision-making areas the proposed guardian seeks to control. Emphasizing that guardianship is appropriate only in extreme circumstances, the model guardianship statute suggests that guardianship is appropriate for an individual who "lacks the ability to meet essential requirements for health, safety, or self-care, even with appropriate technological assistance." (National Conference of Commissioners on Uniform State Laws, 1997)

The guardianship reform movement also strengthened the procedural safeguards designed to protect individuals from unnecessary loss of decision-making authority. Many states require the court that rules on a petition for guardianship to first hold a hearing. The individual has the right to speak at the hearing, and, in most states, has the right to an attorney or advocate to assist him in raising objections. The individual may object to the particular person proposed as guardian, the proposed scope of the guardian's authority, or to the need for a guardian altogether. Another reform recently incorporated into many state's guardianship laws is the involvement of a "neutral evaluator" who facilitates gathering information relevant to the court's decision. A mental health expert may serve as a "neutral evaluator." A mental health expert may also serve as a witness on behalf of a party to the guardianship proceeding (either for or against guardianship). (Perlin et al, 2008)

When conducting an examination for purposes of a guardianship proceeding, it is important to ensure that the examinee understands, to the greatest extent possible, that the evaluation may result in a significant loss of rights, such as the right to make autonomous health care choices, to make independent financial decisions, or to enter into a contract. The examiner should also explain that the examination results will be shared with the court and that the

examiner may testify at the guardianship hearing. (Drogin & Barrett 2010) While it is not strictly necessary that the examinee's level of understanding meet the legal requirements of "informed consent" (because the person's ability to provide such consent may be one focus of the examination), the APA Ethics Code nonetheless mandates that "psychologists inform persons with questionable capacity to consent . . . about the nature and purpose of the proposed assessment services, using language that is reasonably understandable to the person being assessed." (American Psychological Association 2002 amended 2010)

An examiner should tailor the assessment to the specific powers the guardian seeks to assume. For example, if the guardian seeks to control where the individual resides, the court will need information about the degree of assistance the individual needs with domestic tasks such as meal preparation and personal hygiene. The court will also require information about the individual's ability to appropriately respond to an emergency situation such as a fire in the home. In addition to interviewing the examinee and administering functional skills tests, it is also important to interview friends and relatives, particularly those who have been caretakers, in order to understand the individual's skill level. The examinee's medical history, educational records, and work history may also provide useful information.

If the guardian seeks to control the individual's finances, the court will need information about the individual's ability to manage his or her finances. This assessment will require an understanding of the individual's financial situation. If the individual has limited assets and no income aside from a monthly SSI check, it is probably unnecessary for a court to appoint a guardian to control the individual's finances. If the individual needs help managing her SSI funds, the individual's caregiver may petition the Social Security Administration to become the individual's representative payee. However, if the individual has a significant portfolio of

investments that are not already managed by a trustee or other fiduciary, an individual unable to adequately understand and manage her finances may need the appointment of a guardian for this purpose.

When discussing a proposed petition for guardianship with an individual's caregivers, an evaluator should keep in mind that the appointment of a guardian is a dramatic step that removes the autonomy the law confers on individuals when they reach adulthood. It may also profoundly influence an individual's sense of control and self-determination. Because of the risks that guardianship may unduly deny individuals with intellectual disabilities the opportunity to direct their own lives, many disability rights advocates urge caregivers to consider alternatives.

(Salzman 2010) One alternative is for family and friends to provide a supportive environment in which the individual can make her own decisions with assistance in identifying and weighing the options. (Millar 2007) Another alternative to guardianship is for the individual to authorize someone to make certain decisions on her behalf by executing a "power of attorney." Although this option requires the individual to understand the consequences of appointing someone to act as her agent, some persons unable to make complicated decisions about their medical treatment or finances may nonetheless be able to understand the consequences of appointing someone else to do so. (O'Sullivan 1999)

A mental health practitioner who evaluates an individual with a dual diagnosis of intellectual disability and mental health disorder should also keep in mind that persons who lose legal rights in a guardianship proceeding rarely regain them. (Stancliffe et al 2000) Accordingly, if it appears that some of the individual's current limitations are the result of a mental health condition which may significantly improve over time rather than the individual's more static underlying intellectual disability, it is important to provide the court this information. Sharing

this information with the court may lead the court to craft a temporary guardianship order that will prevent the individual from permanently losing her decision-making rights.

c. Competency to stand trial

The criminal justice system also frequently requests mental health practitioners to assess individuals' functional limitations. The most common legal question about a criminal defendant's mental capacity is whether an individual is competent to stand trial. This inquiry focuses on the defendant's mental abilities at the time of trial and plea bargaining.

Assessments of competency to stand trial reflect the legal principle that criminal defendants should have a fair opportunity to defend themselves from criminal charges. The adversarial nature of the criminal justice system assumes a fair contest between the prosecutor and the defendant. In order for this contest to be fair, criminal defendants must have sufficient mental acuity to understand the criminal adjudication process and to assist counsel in preparing their defense. In the words of the United States Supreme Court, "it is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events." Instead, the criminal defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," "a rational as well as factual understanding of the proceedings against him," and the capacity to "assist in his defense." (Dusky v. United States 1960; Drope v. Missouri 1975)

An intellectual disability diagnosis, by itself, does not automatically establish that an individual is incompetent to stand trial. The factual and legal complexity of the proceedings is relevant. Some cases may involve complicated choices about defense strategy while other cases

do not. Accordingly, an individual may be competent to stand trial for purposes of some criminal charges but not others. Conversely, the lack of an intellectual disability diagnosis does not automatically establish that an individual is legally competent to stand trial. The experience of a trauma or mental disturbance may lead a person formerly considered competent to be currently incompetent for purposes of standing trial. Similarly, mental illness or substance abuse may temporarily render an individual with an average or above-average IQ incompetent to stand trial.

Before conducting a competency evaluation, it is important to consult with the individual's criminal defense attorney. This consultation serves three purposes. First, it permits the examiner to confirm that the defendant has had an opportunity to consult with counsel prior to the evaluation. In the rare circumstance in which a court orders a competency evaluation before the defendant has obtained counsel, the evaluation should be postponed until the defendant has had the opportunity to discuss the evaluation request with his attorney. Second, consultation with defense counsel enables the examiner to obtain information about the complexity of the defendant's case and the types of defense strategy decisions the defendant will have to make. This information will help the examiner tailor the evaluation to elicit information relevant to whether the defendant is competent to understand the specifics of his case. Third, defense counsel may also help the examiner collect information relevant to the competency evaluation, such as mental health and educational records as well as contact information for relatives and other persons who may have pertinent information.

An evaluation of an individual's competency to stand trial should attempt to measure the following: (1) the person's ability to understand the criminal process, especially the roles of prosecutor, judge, jury, and defense counsel; (2) the person's ability to accurately perceive the likelihood he will be found guilty and the likely success of available defense strategies; and (3)

the person's ability to communicate with defense counsel about the facts of the case and legal strategy. (Scott 2010) In addition to a clinical interview, a forensic assessment tool designed specifically for persons with intellectual disabilities may be helpful. The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST*MR) is one available tool. (Zapf & Roesch 2009) Before commencing the examination, it is essential for the examiner to clearly communicate to the examinee that the purpose of the examination is not therapeutic but instead is to determine whether the examinee's current mental limitations prevent him from standing trial. Although it is not strictly necessary to obtain informed consent when a court has ordered the competency evaluation, good ethical practices demand that the examiner carefully explain the evaluation's purpose. Most crucially, the defendant should understand that the court will receive the evaluator's report.

In addition to evaluations related to an individual's competency to stand trial, the criminal justice system may also rely on mental health practitioners to assess an individual's mental functioning at the moment the crime occurred. The most familiar (although rarely applicable) criminal responsibility inquiry is the "insanity defense," which excuses an individual from criminal responsibility for actions she took when she was unable to understand what she was doing or that what she was doing was wrong. Intellectual disability alone is seldom used to establish an insanity defense because an intellectual disability severe enough to establish that a person was unable to understand the significance of his actions would also easily establish that the person is incompetent to stand trial. Because intellectual disabilities are usually fairly static, persons whose intellectual disabilities were severe enough to meet the standard for legal insanity at the time of the crime will often be incompetent to stand trial. However, an intellectual

disability not severe enough to prevent an individual from standing trial may, when combined with a psychotic episode at the time of the crime, establish an insanity defense.

Persons not able to establish an insanity defense may introduce evidence of intellectual disability and mental health disorders in an attempt to receive a lesser penalty. Many offenses carry different penalties depending on the perpetrator's state of mind, or *mens rea*, at the time of the offense. For example, evidence of an intellectual disability or mental health disorder may help a defendant establish that a crime was not premeditated but was instead an impulsive act.

In sum, conducting forensic evaluations of persons with intellectual disabilities usually requires an individualized inquiry into a person's functional abilities similar to the assessments required to comply with civil rights and informed consent laws. Each inquiry is unique, however, because the legal question—such as the individual's ability to understand the criminal defense strategy used in a particular trial—is often extremely context dependent. An evaluator must not only determine the individual's functional abilities, but must also consider how those functional abilities interact with the demands of the individual's current legal situation.

Conclusion

This chapter has surveyed the most common legal issues mental health practitioners encounter when working with persons with intellectual disabilities. Part I surveyed the law relevant to providing mental health treatment to persons with intellectual disabilities. In the course of this practice, a treatment provider must comply with civil rights laws as well as the law of informed consent. Part II briefly surveyed three legal questions for which mental health practitioners are frequently asked to provide information about an individual's intellectual

abilities: applications for disability benefits, petitions for guardianship, and assessments of criminal competency.

The concern overarching these disparate areas of the law is that rather than relying on an intellectual disability diagnosis, the law requires an individualized inquiry into each individual's unique needs and circumstances. The law may regard an individual to be "disabled" or "incompetent" for one purpose but not for others. Each legal inquiry requires an individualized determination of how the individual's mental abilities interact with the specific context. The complex and time-consuming task of determining how the individual's mental abilities interact with the specific context aims to maximize the individual's right to exercise the privileges and responsibilities of citizenship to the full extent of his or her abilities.

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