SPEAKER NOTES

Competency and Mental States: The Law as It Applies to the Mentally Ill

Summarized by Thomas T. Thomas

Friends and family members of people with mental illness sometimes become involved with the criminal justice system. Knowing your legal rights and responsibilities, including the current law surrounding competency, can make the interaction easier. **Michael J. Markowitz, JD,** has extensive experience representing such persons. He is a certified specialist in criminal law and has served as a judge *pro tempore* in Contra Costa County, for both the Municipal Court and the Superior Court, Juvenile Division. He spoke and answered questions at our November 17 meeting.

MICHAEL J. MARKOWITZ, JD

"Let me begin with a disclaimer," Markowitz said. "I don't have anything to do with civil law. I don't arrange conservatorships, trusts, or property conveyance. I represent people accused of crimes—everything from driving under the influence to murder.

"A lot of my clients over the years have suffered from some form of mental defect, whether temporary or long term. How a person with mental illness is treated in the criminal justice system is always a matter of the degree or severity of his or her illness."

Markowitz' involvement usually begins with a phone call: someone saying that his or her son, wife, or brother has been arrested. And that's when the lawyer begins asking questions. "Most crimes," he said, "are of two types. They are either minor and silly, in which case you can sometimes use the illness as a defense. Or they are serious, often violent. And if that's out of character for the client, you can ask why and perhaps show that it may be due to mental illness."

A lawyer goes through three processes in deciding on a defense. First is the evaluation phase: he talks to the client, seeks clues as to his or her mental status both at the present time and at the time of the crime, and gathers information on the nature of the crime.

The second phase is a decision process. After finding out that the person suffers from depression, schizophrenia, or bipolar syndrome, the

lawyer must decide how the law applies to the condition and what to do with it.

The third phase is deciding to advise the client on how to plead.

But before getting to the third phase, the lawyer must decide about the client's competency. Based on the current mental state, is the person able to cope with the lawyer and the courtroom, put on a defense, and know what's going on? This has nothing to do with the mental state at the time of the crime, which affects the decision to plead.

If the attorney or the court raises doubt about the defendant's competency, one or more doctors is automatically assigned to evaluate the person. Of course, the lawyer wants to have his or her own doctor do an evaluation first, to know what the court's appointee will find and be ready to deal with it.

"This is where family members can really help, by giving the relative's history," Markowitz said. "Previous illnesses and injuries, drug or alcohol abuse, medical conditions, past experiences—these can only come from the client or from his or her family. If your relative has a mental illness, document the condition, keep a logbook, and make a written account of the illness."

He told the story of a young man accused of a terrible crime who did not think of himself as incompetent and fought his lawyer on everything. Everyone involved in the case—the lawyer, the court psychiatrist, and Markowitz himself—felt the client "just didn't get it." Then a neuropsychologist examined the young man and found that his frontal lobe was damaged and he could not tell right from wrong. However, he was sent to Napa State Hospital, where they coached him in court procedure and sent him back for trial because, as Markowitz said, that's their goal.

Now it is becoming more common to have another attorney, as well as the doctors, consult on competency. "A doctor can point to underlying mental defects, but the lawyer can determine whether the defendant, although he still may not *want* to communicate, is capable of talking with his lawyer and preparing a defense," Markowitz said.

Once a person is found to be incompetent, the legal process stops and does not resume until he or she either recovers or is found to be competent to stand trial. A defendant can only be held in the hospital under these conditions for the length of time that, if he or she had been convicted of the crime, would have constituted the prison sentence. However, the hospital personnel can extend the hold, usually at the point of release, if they affirm that the person is a danger to self or others. In some cases, this can amount to a life sentence in the hospital.

"The point to remember," he said, "is that the issue of competency is not up to the client but to the attorney and the court."

As to the defendant's state of mind at the time of the crime, his or her *mens rea*,[1] the law recognizes two kinds of criminal intent. General intent applies regardless of what the person believed or felt or wanted. For example, someone who has too many drinks and then drives a car has the general intent of the crime of driving under the influence—even if he or she did not plan to commit the crime.

Specific intent applies if the person clearly meant to take actions that led to the crime. For example, a person who breaks into a house in order to steal from it has the specific intent of burglary. In this case the mental state is important, because the person may not have been able to foresee or judge the results of the next step, which is actually committing the burglary.

If a defendant pleads not guilty by reason of insanity, the definition of "insanity" is legal, not medical. The legal definition is that the defendant is incapable of knowing and understanding the nature and quality of his or her acts and knowing right from wrong. Even though the client may be able to make these distinctions now and even help with his or her case, the person may still have been insane a year ago when the crime was committed.

"You rarely have a client who is both incompetent to stand trial now and insane at the time of the crime," Markowitz said.

To be found legally insane, the defendant must first be found guilty of, or plead guilty to, the crime. If the client does not plead guilty, then the court case goes into two phases: the finding of guilt and the determination of sanity. "But trial cases are the extreme," he said. "With the potential for an insanity plea, you usually try to resolve the case without going to trial."

However, only the client can enter a plea of not guilty by reason of insanity. If client won't do this—and a famous example is Ted Kozinski, the Unabomber—then the attorney or the court cannot force the issue. And 50 to 60 percent of people with schizophrenia, schizo-affective disorder, and similar diseases don't think they are sick.

"In that case," Markowitz said, "you have to ask them whether they want to spend the next ten years in the hospital or in prison."

Whether it's preferable to be tried by a jury or a judge is difficult to decide. Sometimes a judge can separate the mentally ill person from a heinous crime like child molestation, where a jury cannot. And juries in general do not want to believe in criminal insanity, perhaps because of an overuse of ADHD[2] defenses in juvenile cases or the "Twinkie defense" by Dan White in the murder of San Francisco Mayor George Moscone. On the other hand, there is no hung jury in a murder trial: guilty by a verdict of 11 to 1 is still not guilty.

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[1] The state of mind indicating culpability which is required by statute as an element of a crime.

[2] ADHD: attention deficit hyperactivity disorder.

And if the person is found guilty, Markowitz said, the criminal justice system is good at characterizing the defendant and treating him or her accordingly. A first offender, even convicted of murder, will generally go to a different prison than habitual, violent criminals.

Q. Is it better for a defendant to go to the hospital, where he or she might be held indefinitely as a danger, or to go to prison, where the term cannot extend beyond parole?

A. If the goal is to keep a dangerous person out of society, then it may be better to plead insanity under these conditions than to plead to a lesser charge and be released even earlier. On the other hand, being on probation or parole may be an incentive for the person to follow treatment and take medication.

Interestingly, the courts have found that a person in the hospital for legal insanity may be forced to take medication, if it's done humanely, but the defendant may not be forced to take medication during the trial, because the side effects may give the jury a false view of the person.

Q. If a defendant pleads not guilty by reason of insanity, does he still have to register as a sex offender?

A. Yes. Under California Penal Code Section 290, also known as Megan's Law, all sex offenders—and that's any crime, from indecent exposure to child molestation—must register. In the same way, a person who has pled insanity may not own a gun… which is probably a good thing.

Q. How do you feel about public defenders?

A. Some of the best lawyers I have known are public defenders. They are extremely dedicated, but most are overwhelmed by their case loads. They do not have the luxury that other lawyers do, to tell a client no, thank you. They're stuck with whatever case they're assigned. And most of them do a wonderful job.