

Competency and deaf defendants: A collaborative approach

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Introduction

Deaf clients involved in the criminal justice system pose unique challenges to due process, a fact of which attorneys are increasingly aware. In particular, attorneys are increasingly aware of the potential that their deaf clients may not meet the standards for competency to stand trial established in *Dusky v. U.S.* and subsequent court decisions. The *Dusky* decision established the requirement that persons are able to understand the factual and rational nature of the proceedings against them and have sufficient ability to consult with their attorney. Subsequent court decisions have further refined and defined the construct of competency, beyond that contained in *Dusky*.

The variability of functioning levels, education, and language of deaf persons increases the likelihood that they will be unable to meet the competency criteria laid out in *Dusky* and subsequent court decisions. Unfortunately, despite a clear need for assessment and restoration to competency, there are few clinicians competent to provide these services. This suggests the need for collaboration between evaluators with the specialized skills of forensic assessment and evaluators with the specialized skills of deaf assessment.



Deafness, deprivation, & trial competence

There are a number of ways deafness can impact trial competence as laid out in the *Dusky* decision:

- Ability to communicate with their attorney "with a reasonable degree of rational understanding."
- Ability to have "a rational as well as factual understanding of the proceedings against him."

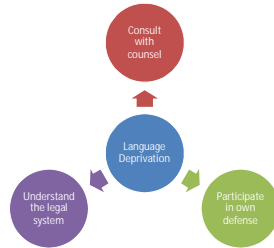


Figure 2. The impact of language deprivation on competence

The concept of "linguistic incompetence" can be applied to some deaf individuals in the legal system. While not having mental retardation, cognitive disability, or mental illness, they can be simply incapable of dealing in abstractions or understanding what their attorneys are trying to accomplish (LaVigne & Vernon, 2003).

Jackson v. Indiana (1972)

- Dealt with a "mentally defective deaf mute" who could not "read write or otherwise communicate."
- Had been found incompetent in part on his "almost nonexistent communication skill."
- Became the model case for violation of due process and indefinite commitment.

People v. Lang (1967)

- Deaf, illiterate man who could not sign and was "unable to communicate with anyone in any language system" was charged with 2 murders.
- Ultimately, courts determined that the only appropriate finding was that he was incompetent.
- Lang was civilly committed for a long-term course of treatment to teach him language.

Figure 3. Case law demonstrating linguistic incompetence

There are several steps that can be taken to mitigate the effects of deafness on trial competence:

- Use of SCL interpreters whenever possible
- Videotape the evaluation to have a record
- Utilize an expert in deafness (e.g. psychologist, speech and language therapist, etc.)
- Use a Certified Deaf Interpreter (CDI) if needed
- Provide a separate interpreter for the defense table at trial/hearings

Restoration

The restoration interventions will vary given the unique needs of each defendant. Some will need simple education, some will also need mental health interventions. Both of these are dependent upon the language skills of the individual. Creativity becomes paramount, with the ultimate goal of "treatment that fits" (LaVigne & Vernon, 2003).

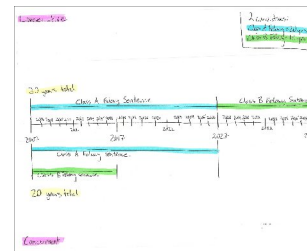


Figure 4. An example of a way to explain consecutive sentences as opposed to concurrent.

There may be cases where the defendant needs to know the actual words in English. In that case, a glossary of the words with the signs/definitions can be a helpful supplement to the teaching component. This task can be simplified by only including those terms the defendant does not already know.

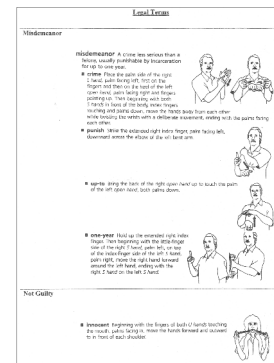


Figure 5. An example from a sign glossary.

Trial competence

There are three main components to trial competence in Oregon, which has adopted *Dusky*. All three are assessed in terms of functional ability.

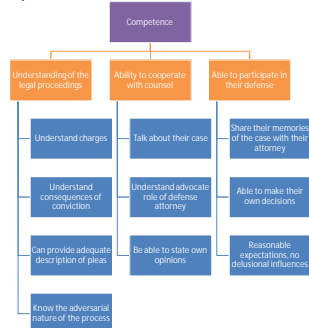


Figure 1. Components of competence in Oregon, with examples of functional abilities

Team assessment

By the use of team assessment, the strengths of both a forensic psychologist and a deafness expert can be obtained to provide the court with the best information. If only one deafness expert is available, they should do their assessment prior to restoration efforts.

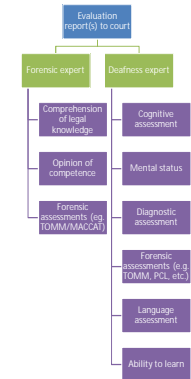


Figure 6. Responsibilities of each evaluator

Literature cited

- Jackson v. Indiana*, 406 U.S. 715 (1972). Retrieved May 25, 2009 from <http://supreme.justia.com/us/406/715/case.html>
- LaVigne, M. & Vernon, M. (2003). An interpreter isn't enough: Deafness, language, and due process. *Wisconsin Law Review*, 843, 870-71.
- Dusky v. U.S.*, 362 U.S. 402 (1960). Retrieved May 25, 2009 from <http://supreme.justia.com/us/362/402/case.html>

For further information

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