

Mental Illness and the Law: A Guide for Legal Professionals



Virginia Department of Behavioral Health & Developmental Services
(DBHDS)

Module 3:

Explanation of Relevant Code Sections for Persons with Mental Illness



Mental Health Evaluations Options and Outcomes

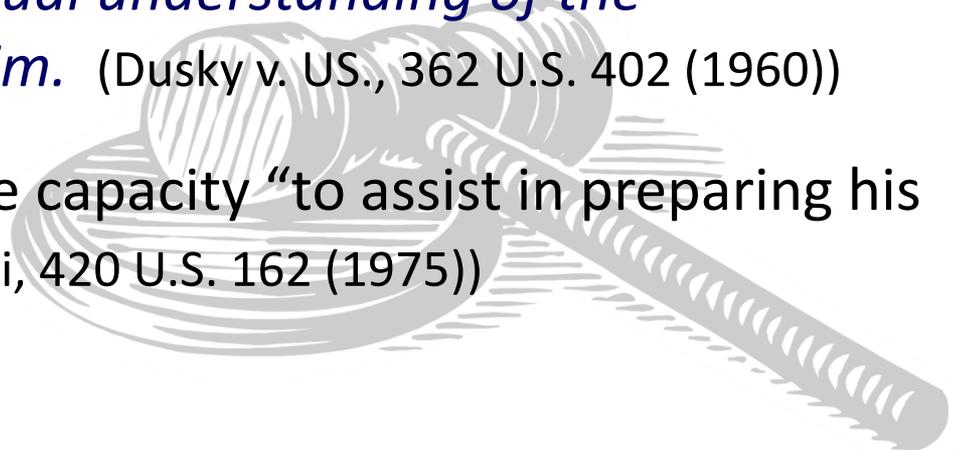


- Competency to Stand Trial (§19.2-169.1)
- Restoration of Competency to Stand Trial (§19.2-169.2)
- Disposition of the Unrestorably Incompetent to Stand Trial (§19.2-169.3)

Competency to Stand Trial

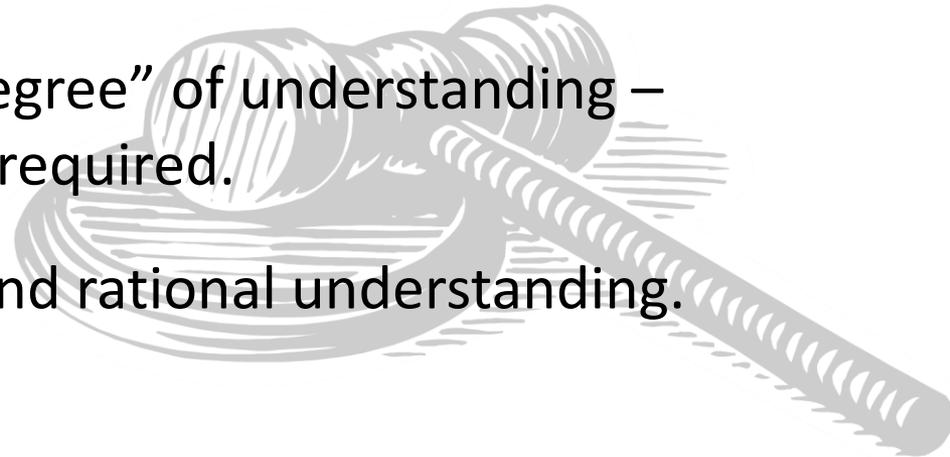
(Virginia Code §19.2-169.1)

- Due Process requires a defendant be competent to stand trial.
- Defendant must have:
 - sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.* (Dusky v. US., 362 U.S. 402 (1960))
- Defendant also must have capacity “to assist in preparing his defense.” (Drope v. Missouri, 420 U.S. 162 (1975))



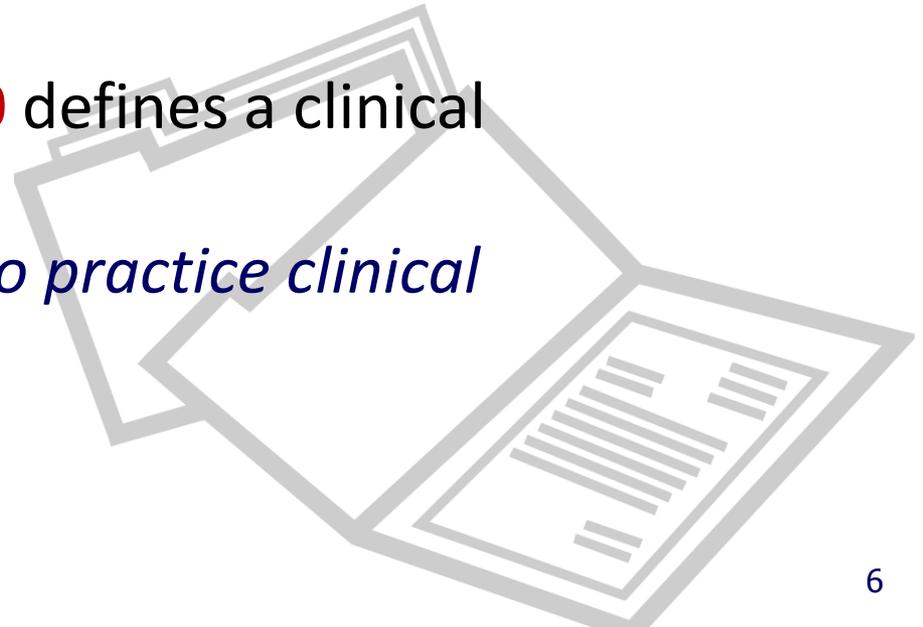
Competency to Stand Trial (cont.)

- Per §19.2-169.1 standard:
lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense.
- Test concerned with defendant's present ability – not necessarily symptoms, history of illness, etc.
- Test concerned with capacity, not willingness to participate.
- Test speaks of “reasonable degree” of understanding – complete understanding not required.
- Test addresses both factual and rational understanding.



Who is Qualified to Conduct Competency Evaluations?

- Per **§19.2-169.1** (A)
evaluation to be conducted by 1 psychiatrist or clinical psychologist who is qualified by training and experience in forensic evaluation.
- Virginia Code **§ 54.1-3600** defines a clinical psychologist as:
an individual licensed to practice clinical psychology.



Competency Evaluation - Training

The Commissioner of Behavioral Health & Developmental Services has designated the five-day long

Basic Forensic Evaluation: Principles and Practice

training offered by the Institute of Law, Psychiatry and Public Policy (ILPPP) at the University of Virginia as satisfying the minimum standard requirement required by this section of the Code.

A list of appropriately trained evaluators can be found at:

<http://ilppp.virginia.edu/>

You can also check with your local CSB about trained evaluators.

Location of Evaluation

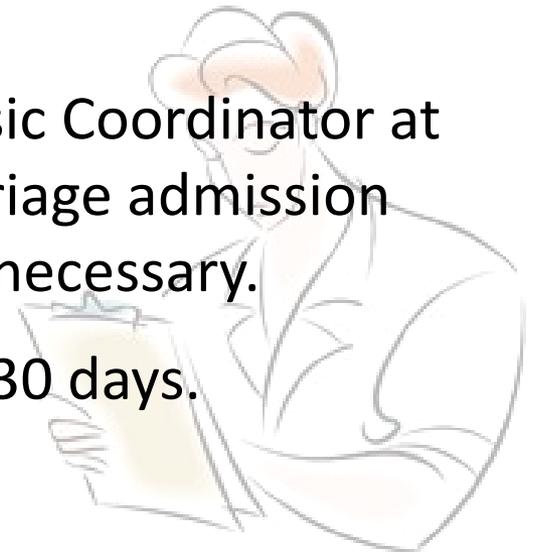
- Per §19.2-169.1(B):

the evaluation SHALL be performed on outpatient basis unless the court specifically finds outpatient services are unavailable or unless the results of outpatient evaluation indicate hospitalization of the defendant for evaluation of competency is necessary.



Location of Evaluation (cont.)

- If ordered for an **outpatient** evaluation.
 - ☞ make sure order and collateral are immediately sent to evaluator.
- If ordered for an **inpatient** evaluation.
 - ☞ send order and collateral to Forensic Coordinator at your local state hospital who will triage admission and make appropriate referrals as necessary.
 - ☞ Hospitalization should not exceed 30 days.



Attorneys Role in Competency Evaluation

- Provide collateral materials – Per **19.2-169.1** (c) **Commonwealth Attorney** to provide:

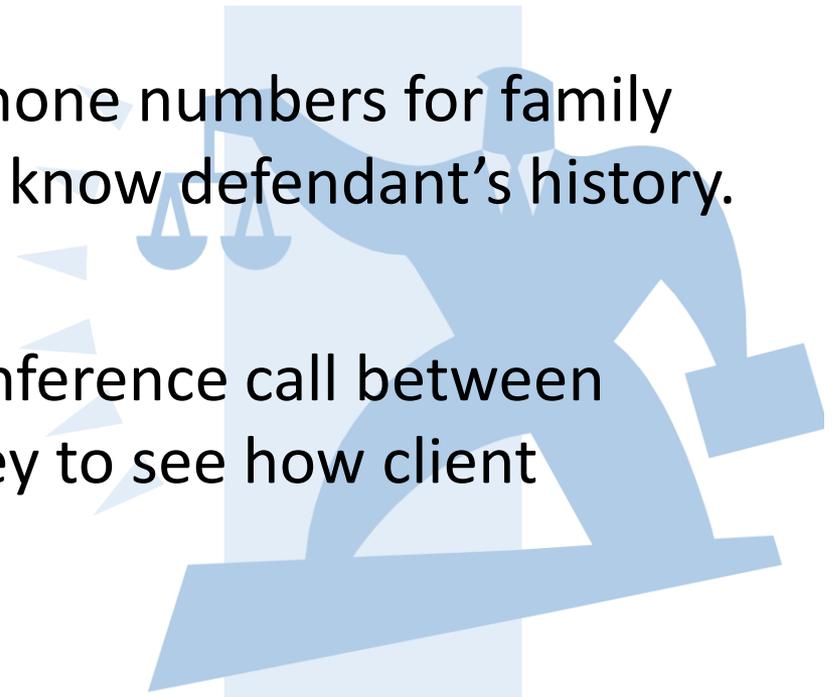
any information relevant to the evaluation, including but not limited to: warrant or indictment; names of attorney and judge; information about alleged crime; and summary of reason for evaluation.

Attorneys Role in Competency Evaluation (cont.)

- **Defense attorney** to provide:
 - any prior psychiatric records, and
 - any other relevant information.
- Often the **defense attorney** is the first person to notice a defendant's competency may be impaired:
 - a written explanation regarding the reason for the competency evaluation request is useful to the evaluator.

Attorneys Role in Competency Evaluation (cont.)

- Per code, the collateral should be provided within **96 hours** of issuance of the order.
- Evaluators may request phone numbers for family members and others who know defendant's history.
- Evaluators may ask for conference call between client and defense attorney to see how client interacts.



What to look for in Competency Evaluation report

- Clear explanation of defendant's specific deficits.
- Cited examples of specific deficits related to current case.
- A link between the deficits and some origin for those deficits.
- An explanation of what types of treatment are needed to address the deficits.
- If competent but has a mental illness – any recommendations to attorney or court regarding any special accommodations, precautions, etc.



What happens if defendant is adjudicated incompetent to stand trial?

- Per §19.2-169.2 (A)

the Court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of DBHDS...



Default is
Outpatient

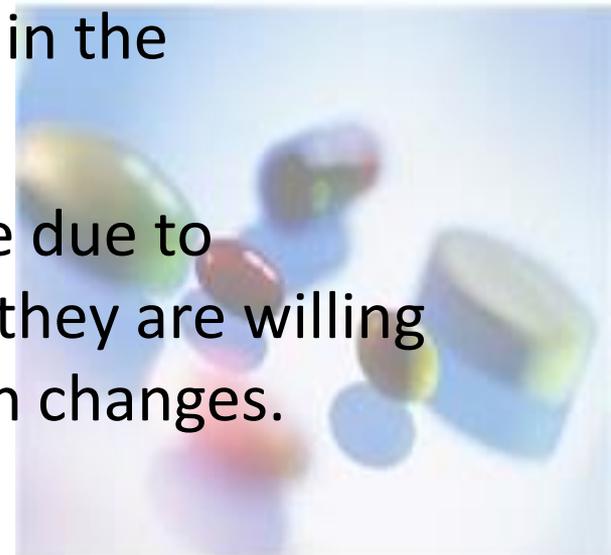
What happens if defendant is adjudicated incompetent to stand trial? (cont.)

- CSBs can provide outpatient restoration in their outpatient clinics, in the local jails or in defendants home if on bail.
- Who is your local CSB contact for outpatient restoration services?
- Some CSB have mental health staff who can provide restoration services in the jail.



What types of defendants do best on outpatient restoration?

- Defendants whose incompetency seems to be due to intellectual deficits rather than due to symptoms of mental illness.
- Those who are on bond and doing well in the community.
- Those who's incompetency seems to be due to symptoms of major mental illness BUT they are willing to comply with medications/medication changes.



Attorney's Role in Competency Restoration (§ 19.2 – 169.2)

- Provide collateral materials including any report prepared per §19.2-169.1 so restoration providers are aware of identified deficits.
- Provide restoration providers with any specific concerns you have about the defendant's competency – what you have experienced in your interactions with the defendant.



Attorney's Role in Competency Restoration (cont.)

- Provide any prior psychiatric records and any other relevant information.
- Evaluators may request phone numbers for family members and others who know defendant's history.
- Evaluators may ask for conference call between client and defense attorney to see how client interacts.



How long will restoration process last?

- If defendant is charged with misdemeanor Disorderly Conduct, Larceny or Trespassing restoration can only last 45 days per **§19.2-169.3**
- Otherwise – code allows up to 180 days to restore defendant's competency.



How long will restoration process last? (cont.)

- On average, most defendant's are restored between 2-3 months of initiating treatment.
- Relatively few defendant's are found unrestorable
- If not restored by expiration of order, judge may issue new order to extend restoration up to 180 more days.



What to look for in competency restoration report

- ✓ Clear explanation of what specific treatment(s) the defendant received.
- ✓ The defendant's response to treatment:
 - How did they change over time.?
 - Which symptoms got better, which symptoms remained, etc.?
- ✓ If *opined competent*
 - Specific examples of being able to rationally and factually understand court and assist attorney in own defense.



What to look for in competency restoration report (cont.)

- ✓ Any recommendations regarding accommodations needed or strategies to retain competency.

- ✓ If *opined incompetent* but *restorable*
 - Explanation of what deficits remain.
 - What treatment(s) are likely to address the remaining impediments.
 - Why providers feel person can be restored.



What to look for in competency restoration report (cont.)

✓ If *opined incompetent* and *unrestorable*

- Explanation of what deficits remain.
- Why further treatment won't result in any further improvement.
- Clear evidence multiple types of treatment were attempted.
(i.e. they just didn't try one treatment and give up – unless illness is type that is not very responsive to treatment – i.e. dementia, mental retardation, chronic severe schizophrenia).



What to look for in competency restoration report (cont.)

- ✓ While not explicit, it is implicit that another evaluation should be conducted by a qualified psychiatrist OR psychologist at the end of the restoration episode.



Unrestorably Incompetent Defendants

- Per **§19.2-169.3**

If the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future, it shall order that he be

(i) released,

*(ii) committed pursuant to **§37.2-814** (civil commitment),*

*(iii) certified pursuant to **§37.2-806** (certification to training center), or*

*(iv) if defendant charged with sexually violent offense order that he be reviewed for commitment pursuant to **§37.2-900**.*

Unrestorably Incompetent Defendants (cont.)

- If committed under **37.2-814**, this commitment order replaces the criminal restoration order and the defendant will be treated like other civilly committed individuals (i.e. he will be discharged when psychiatrically stable and a discharge plan is in place)– unless order directs otherwise.
- Per DOJ settlement, training centers are being closed so this section of Code will need to be revised as certification to training center will no longer be an option.

A word on Malingering as it relates to Competency to Stand Trial

- Malingering is the intentional feigning or exaggeration of symptoms, most often symptoms of mental illness and/or cognitive deficits, for some type of secondary gain.
- It is possible to have legitimate mental illness/cognitive deficits and still malingering.
- Malingering can be determined via observations, clinical interview and clinical judgment, or testing specific to malingering.

A word on Malingering as it relates to Competency to Stand Trial (cont.)

- A defendant may mangle for many reasons.
 - Sometimes it's a direct and manipulative attempt to thwart prosecution.
 - For others, it may be a desperate and not well thought out means to deal with anxiety and delay the distressing environment of the jail or court room.

A word on Malingering as it relates to Competency to Stand Trial (cont.)

- Malingering may be difficult to determine on an outpatient basis.
 - Inpatient competency evaluation and/or restoration to competency affords 24/7 observation of behaviors that may be consistent with domains relative to CST, or
 - highlight behaviors inconsistent with the defendant's self-report or presentation when with an evaluator.

A word on Malingering as it relates to Competency to Stand Trial (cont.)

- Although a defendant's behaviors during the trial process should be considered by an evaluator and by the court when determining competency, a defendant does not have the right to create his own incompetency through voluntary, willful, and deliberate acts.