The National Judicial College and the Mental Competency Best Practices Model

By Judge William F. Dressel (Ret.) and Daphne A. Burns

The National Judicial College (NJC) has devised and published a best practices model for handling mental competency issues that arise in state criminal justice and related mental health systems. In this article, the president of The National Judicial College, Judge William F. Dressel (Ret.), and the attorney for the project, Daphne A. Burns, discuss mental competency cases, the best practices model, and related issues.

Dressel: The idea for this project arose from discussions with judges and other justice system professionals from across the country as to challenging issues they were encountering. They expressed concern over the increasing number of people with mental illness coming into the criminal justice system and the impact of competency issues on the individuals, cases, and the justice system. A major challenge is to differentiate between mental illness and the issue of competency.

So, Daphne, what approach does the model suggest as to this particular issue?

Burns: One of the best practices is for a court to adopt collaborative practices similar to those utilized in problem-solving courts—especially for cases involving misdemeanors or nonserious felonies. Such teams of professionals become more adept at distinguishing between individuals who have a mental illness and need treatment to stabilize their condition and those who need to be assessed for competency issues.

For a court or jurisdiction that has not adopted a problem-solving model, how do you suggest they implement this practice?

Dressel: It's a good question because 90-some percent of individuals with mental health and/or substance use issues never go through a mental health court, drug court, veterans' court, or other problem-solving court. No matter what problem-solving issue arises, the question becomes, what is the appropriate protocol? If you have enough cases involving a particular issue, consider creating a separate docket; or, if the need arises, create a competency court for these individuals.

Does the model suggest protocols for competency cases?

Burns: Yes. The model sets forth protocols that are important for the various hearings along the competency hearings continuum, including the best practice of conducting an initial hearing to determine whether to order a competency assessment. Although U.S. Supreme Court case law requires an evaluation if there is a bona fide doubt as to the defendant's competency, such a hearing protects the defendant's due process rights and gives the court the opportunity to make observations and findings on the record. If there is an immunity agreement or statute in place, it gives the court the opportunity to conduct a colloquy with the defendant to support the court's findings. The colloquy may also help to differentiate between mental health and/or competency issues.

As a former judge for over 20 years, how do you recommend judges work with counsel who may not be familiar with competency or mental health issues?

Dressel: First, the judge can take a leadership role in assuring that everyone understands the best practices for mental competency cases within both the criminal justice and mental health systems. Studies show that in 80 percent of cases referred for a competency assessment, the
The need for continuity in treatment is critical, and the model has several best practices in that regard.

What best practices did you find in regard to treatment options?

Burns: One of the more challenging aspects of the model was arriving at best practices to treat an individual who needs to be detained. There are competing considerations. Mental health professionals generally oppose treating individuals in a jail setting. However, the number of hospital beds for treating individuals for competency restoration is limited, causing significant delays. In California, for instance, detainees were waiting weeks or months to be transferred to one of four state hospitals for treatment. As a result, the state revised its laws to allow pre-trial detainees to be treated in jail in order to expedite their treatment. In the Mental Competency—Best Practices Model, there are three levels of recommendations depending on the circumstances of the case.

To address the concerns of the mental health professionals and others in treating pre-trial detainees in a jail setting, other best practices are explored. For instance, the model recommends that individuals be treated and detained in a mental health pod rather than in the general jail population. It recommends that jails employ mental health nurse practitioners to treat and monitor these individuals. Often, the kindness and approach of the treating practitioner can go a long way in keeping a person on prescribed medications. The model also recommends that jurisdictions hire a psychiatrist(s) to support the mental health nurse practitioners and provide oversight for the jurisdiction. The need for continuity in treatment is critical, and the model has several best practices in that regard.

One of the areas in which you have placed particular emphasis at the NJC is in case management, including writing the pamphlet *Fair, Timely, Economical Justice: Achieving Justice Through Effective Caseflow Management*. Based on that work and your years on the bench, what would you say are the best case management tools and practices that judges can bring to bear on these cases?

Burns: The key is to have a good case management system in place. Obviously, if the jurisdiction has a mental health court or the equivalent in place, the judge has more flexibility as to when to conduct hearings. For a judge in a general jurisdiction, the judge handles a variety of matters, he or she can still create the time to hear these matters, so it's not only a case management system, but also a good calendaring system that makes a difference.

For instance, even with increased filings, only 1 percent of criminal cases, and less than 1 percent of civil cases, go to trial so scheduling is important. Equally important, in multi-judge courts, is for judges to share responsibility. For instance, there are many courts where, if a judge's docket opens up, the judge will immediately communicate with the other judges to find out if they have something they need handled. Using that collaborative model, no judge ever leaves the courthouse before seeing if a colleague needs something done. Whether it is a multi-court jurisdiction or not, judges need to have the flexibility to handle matters that require immediate attention.

Basically, it boils down to good case management and calendaring approaches, along with a circuit or district that collaborates as a team. It is especially important when you are dealing with competency cases to avoid delay and backlog in the process.

What did you learn from the panel about the judges' role in managing these cases?

Burns: Two of our panel members served as the prosecutor and defense attorney in the Seattle Competency Court—one of whom, Michael J. Finkle, is now a King County Superior Court judge in the Seattle area. They worked on a collaborative team, and they emphasized, repeatedly, that the single most important action a judge can take in managing cases involving competency is to advance the date for hearings at every stage of the process. The Seattle Competency Court handles misdemeanors and nonserious felonies, but the practice holds true for any case. As soon as the competency assessment is complete and the report is filed, it is a best practice for the court to set the hearing; if the individual begins to decompensate or stops taking his or her medications, it is a best practice for the court to address that matter promptly.

The importance of this singular practice was confirmed by other experts across the spectrum. For instance, I visited a model mental health pod, or unit, in a county jail, and the captain remarked that the biggest frustration they face is keeping detainees competent while they are awaiting their hearing. In that jurisdiction, detainees are returned to the general jail population once they are restored; and the judges in the jurisdiction do not advance the date for the competency hearing once an individual is restored to competency. A state forensics director likewise remarked...
that they face tremendous backlogs at the state mental health hospitals because defendants wait substantial periods of time for a hearing or trial once they have been restored.

This has two deleterious effects. First, it creates backlogs and may waste valuable resources. Second, it creates a hardship for the individual—who is innocent until proven guilty—and may cause the individual to decompensate such that he or she must cycle back through the competency restoration process before proceeding. The model sets forth time frames for advancing dates for the various hearings and other practices along the continuum.

Another best practice is for judges to stay on top of these cases, which includes being informed of an individual's compliance with the prescribed treatment plan. For a judge who has not presided over a mental health court or docket or other problem-solving court, what advice would you give him or her for conducting a show-cause hearing to encourage an individual to comply with a prescribed treatment plan?

Dressel: Well, first of all, the judge should rely on, and use, the mental health professionals that are available. They are the judge's first line of success, if you will, to get folks to comply with the treatment plan. When they are unable to convince the person to follow the prescribed treatment plan, I would advise a judge to set a hearing and, first of all, make a clear record as to the purpose for the hearing. That includes conducting a colloquy to make sure the defendant understands the issues—how the failure to comply with the treatment plan impacts him or her and the case going forward. Obviously, the judge has the challenge of having before him or her a person who has a mental illness, may not be in contact with reality, or is really not competent, so the judge should use all the resources available to him or her. For instance, the judge can encourage defense counsel to develop the relationship and talk with his or her client. Most importantly, the judge can encourage the individual to comply.

Practice shows that the majority of individuals will agree to comply and their cases will move forward. For those who remain noncompliant because, for instance, they have an aversion to taking medications based on beliefs or due to side effects, the judge will want to discuss the ramifications of the individual's decision, including the possibility, where applicable and appropriate, of setting a forced medications hearing. The decision to forcibly medicate is one of the more difficult decisions a judge has to make, but it is appropriate in cases that meet the high standard that applies.

What best practices do you recommend to improve the overall handling of these cases?

Burns: All of the professionals involved in devising the best practices were clear on the need for specialized and cross-discipline education in this area, including basic education for the judges and attorneys on the distinction between mental illness and competency; competency and the various defenses of not guilty by reason of insanity; and the difference in how a case is handled when competency is raised. To that end, the model emphasizes the need for specialized education for all the professionals involved in the case along the entire spectrum from pre-arrest to release; the model also recommends that the professionals regularly provide cross-discipline education to one another. If all the players understand how the individual and case are managed by others along the continuum, this increases the likelihood that the case will be handled more smoothly. Perhaps even slight revisions by one stakeholder involved in the case can positively impact another aspect of the case in a major way. We saw that, as mentioned above, by judges advancing dates for hearings.

Dressel: Absolutely. And cross-discipline education is critical so that everyone is on the same page. It's been done in the area of handling capital cases; if you can do it at that level, you can do it here. You're not trying to convince someone to step back and not do their job; rather, what you are trying to do is empower them as judges, prosecutors, and defense counsel to really be able to do their jobs better.

From a prosecution standpoint, these cases present the issues of who needs to be prosecuted criminally; which case needs to be addressed in a different manner because of the mental health issue and potential competency issue he or she presents—depending, of course, on the charges; which case needs to be addressed in both respects? The same issues apply to defense counsel. When you are representing the client, you are trying to come up with the best result; you also want to make sure your client understands the options. Cross-discipline education is important so that the court and attorneys separate the various issues that need to be addressed so that they don't overlap, especially differentiating between the defense of not guilty by reason of insanity and competency to proceed.

Another issue I want to repeat and emphasize is that too often people will equate mental illness with a risk of causing harm to the community. That is an unfortunate leap that should not readily be made. Just because a person has a mental illness does not mean that he or she may present a risk of committing future crimes.

The toughest situation the judge has to deal with—which may lead to a separate proceeding—is if you have someone who is mentally ill and a risk to him- or herself. I have seen many times where criminal matters are put on hold because they are not the driving force in coming up with what is the appropriate resolution to allow matters to proceed in another arena. So, I think in the mental health arena, what I would say is really important and a good practice is for the judge to understand the type of issue he or she is dealing with, and deal with it in that arena—whether it is a person who is a danger to himself or herself and needs to be addressed in a civil commitment hearing or treatment component; or when there exists a mental health or substance abuse component. As a judge, you have to decide how to address or handle the case depending upon what the issues present.

Burns: So, the same issues for setting bond apply whether this person has a mental health issue or not; and what is interwoven throughout these cases and
Along these lines, an aspect that we intend to address further is the mental health screening component. Some jurisdictions, such as Houston (Harris County) and Lubbock, Texas, conduct an initial and, where appropriate, substantive mental health screening and have a system in place that enables them to provide judges with the mental health history of individuals charged with crimes at the initial hearing. We address this briefly on the Web site and intend to develop more resources to assist jurisdictions in this aspect of managing these cases.

Finally, another feature of our Web site for this project at www.mentalcompetency.org is our Technical Assistance page, where someone can request further resources, research, information, or any other type of support in this area. We hope judges from across the country will utilize the Web site and contact us with any questions or issues that arise and refer other stakeholders in their jurisdictions to the resource as well. They can subscribe to a blog for highlights of cases, opinions, issues, and other research; and we will present a series of webcasts on the Mental Competency—Best Practices Model in 2012.

Endnotes
1. The project was funded by a grant from the Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. The Mental Competency—Best Practices Model was published in January 2012 at http://www.mentalfimency.org and includes a wealth of supporting information and resources, including videos of various competency hearings. The National Judicial College (NJC) will present a series of webcasts in 2012 on implementing best practices; the NJC is also available to provide technical assistance, including research on questions or issues that arise in handling competency issues and cases.