



# Quick Fixes for Effectively Dealing With Persons Found Incompetent to Stand Trial

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This document was originally developed in November 2007. It has been rebranded and updated for distribution to the field. This document should be viewed as a reference resource. For more information, please contact [pra@prainc.com](mailto:pra@prainc.com).

## Overview

Competence to stand trial is a constitutionally required mandate. It requires defendants to be able to understand their charges and to assist their attorney in preparation of their defense. When the issue of competence is raised by any of the parties involved, a competence examination can be ordered by the court. The requirements of competence proceedings have overburdened the mental health system recently in many states.

In most states, competence evaluations require assessments by psychiatrists or psychologists. In many communities this is not an option because of funding issues or an insufficient pool of qualified professionals to perform these examinations. Court-ordered competence examinations may be delayed due to high demand and limited resources, in terms of both staff availability and funding. Some examinations may be limited to taking place in jail or even state hospitals.

For individuals found incompetent to stand trial (IST), restoration in almost all instances is provided in psychiatric hospitals that are often far removed from the county where the criminal charges are filed. Many states do not have sufficient inpatient bed capacity to meet the demand to complete competence evaluations or to immediately respond to a court commitment for competence restoration. Consequently, persons with mental illness remain in jail for weeks, and in some cases months, awaiting an inpatient bed, which may exacerbate overcrowding in many jails.

Aside from service-system issues, which exacerbate strains on jails to provide sufficient mental health services and strain the capacity of state psychiatric beds that might not be needed

for this purpose, there are consequences for the defendant. A finding of IST can start a chain of legal entanglements that result in prolonged hospitalization or jail, institutionalization for even minor crimes, prolonged jail stays while awaiting hospital bed placement, and delayed adjudication of criminal charges.

Competence proceedings can also compete with other due-process rights:


- Right to a speedy trial can be jeopardized due to delays in adjudication while competence is being restored
- Rights to liberty and least-restrictive alternatives are compromised when defendants are placed in a psychiatric hospital or retained in jail awaiting a competence examination or when defendants undergo competence restoration in an inpatient setting when they otherwise could be safely treated in the community
- Right to treatment is compromised when defendants are detained in jail awaiting transfer to inpatient settings for competence restoration
- Ironically, right to counsel and to participate in one's own defense is also compromised, since inpatient restoration often occurs in psychiatric hospitals distant from the court, impairing access to counsel

## Some Quick Fixes

In many jurisdictions, solutions for these competing issues have been found that are relatively easy and inexpensive to institute.

### Competence-Examination Stage

At the competence-examination stage, the priority is promptly providing competence




examinations to minimize any delay in the criminal proceedings, avoiding both extended incarceration for persons awaiting examination and unnecessary hospitalization.

- Some states have increased fees for community-based examinations to attract more qualified evaluators.
- Some jurisdictions also provide court-based examiners.
- In the Seattle Municipal Mental Health Court (Washington), initial screening assessments are made by a public defender, a defense social worker, and a court-employed mental health professional. These assessments, which precede the formal competence evaluation request, provide for a more accurate referral process.
- States may allow the transfer of persons awaiting trial to an inpatient unit for stabilization prior to initiation of competence proceedings.
- Some jurisdictions have established competence courts. These courts provide consistency for ordering competence exams and improving coordination between the jail transport staff, hospitals, and court administrative staff.
- Other jurisdictions without formal competence courts may have specialized dockets for IST, such as in Maryland and Georgia.
- The attorneys in the Seattle Municipal Mental Health Court routinely waive the requirement of two competence examiners. In 10 percent of cases, the court stipulates use of a previous competence evaluation in lieu of seeking a new one. This occurs when the previous report is both recent and deemed still accurate by the court-employed mental health professional.

- Colorado and Washington provide competence examinations in jails, which reduces the demand for inpatient beds and eliminates transport delays. The Seattle Municipal Mental Health Court conducts over 90 percent of its evaluations in jail. As a result, the state hospital, located 50 miles away, opened a satellite office blocks from the jail for its competence evaluation staff.
- Many courts within Seattle, Washington, conduct community-based evaluations when the person is stable in the community and reliably attends court hearings.
- In Michigan, a centralized evaluation center and its satellite sites can provide community-based competence evaluations.
- In Texas, the length of time a person spends in jail from booking to competence evaluation counts toward the time limit for restoration services or their sentence, if deemed competent.
- The Seattle Municipal Mental Health Court, upon receipt of the completed competence evaluation, advances the court hearing to the next business day. This saves money, reduces the person's stay in jail, and increases the likelihood of the evaluation's accuracy.
- Washington has piloted competence evaluations through video-conference in multiple county jails.
- Michigan has shifted in the face of the COVID-19 pandemic to provide video evaluations and has partnered with the state court and local jails to facilitate these services.

### **Competence-Restoration Stage**

At the competence-restoration stage, states tend to focus on ensuring that admissions are appropriate, the level of care matches clinical need and not legal specification, the review of the restoration process ensures prompt treatment and suitability for continued retention, and that




opportunities for community- and jail-based competence restoration are expanded. It should be noted that strategies listed below may involve cost-shifting from state to local funding or local to state funding. Fiscal incentives and disincentives are crucial when developing strategies to alleviate inpatient census problems due to IST issues.

- In some states, including Florida, competence restoration is limited to individuals charged with felonies.
- In Massachusetts, there is no mandate for restoration. Persons found incompetent to stand trial who need hospitalization can be committed for treatment using standard commitment language that encompasses the least restrictive alternative considerations.
- Some jurisdictions triage cases upon admission and promptly return competent defendants to court.
- Additional jurisdictions have developed a utilization review process to ensure consistent review of competence status to minimize length of stay.
- In Pierce County, Washington, the prosecution, defense, pretrial services, or family members can ask on a case-by-case basis to revisit an individual's competence while he/she is awaiting restoration.
- Texas's utilization review includes assessing level of care/security need with procedures to transfer to less-restrictive levels of care while competence is being restored. If a hospitalized individual has not yet been restored to competence, but has become medically/psychologically stable, often due to appropriate medication, the hospital can discharge to an outpatient competence program, freeing up inpatient space and transferring to a less-restrictive level of care.

- States may change competence statutes to specify reasonable time-limits for competence restoration based on the seriousness of offense, to be consistent with *Jackson v. Indiana* (1972).
- Virginia developed a competence restoration manual to train community-based and jail-based examiners.
- Many states, including Arizona, California, Colorado, Florida, Georgia, Louisiana, Tennessee, Texas, and Virginia, provide jail-based competence restoration treatment in some jurisdictions.
- Arapahoe County, Colorado, created the RISE Program for jail-based competence restoration, which includes trauma-informed peer support and reentry services.
- Texas uses video-conferencing for "Sell" hearings (medication over objection) to expedite the treatment process.
- Most states allow for outpatient competence restoration, but this option continues to be underutilized in many areas.
- Forensic navigators (or boundary spanners) can act as behavioral health court liaisons who help judges locate appropriate community restoration treatment resources and help people navigate return to the community upon release from state hospitals and jails.
- Technology, including video-conferencing, is being used to provide competence restoration services in some rural areas.

### **Return-to-Court Stage**

Following restoration of competence, people are generally returned to local jails to await their next court appearance. Lack of coordination among the courts, jail transport staff, treatment staff, prosecutors, and defense attorneys often results in



unnecessary delays in criminal proceedings, lack of continuity of care, and ambivalence about how cases should be disposed. At the return-to-court stage, states focus on prompt notification to the court and jail about release, improving transportation protocols to ensure prompt response when a person is ready for release, and transition planning, which can provide the court with disposition and diversion options upon return to court.

- The 8th District Court in Clark County, Nevada, and the Seattle Municipal Mental Health Court coordinate the transition process. Regular stakeholder meetings identify logistical and treatment issues that may interfere with prompt case disposition. Logistical issues include transportation delays, delays in receipt of psychiatric examinations, delays in scheduling cases for court appearance, interruption in clinical care due to inadequate jail formularies, or lack of treatment information.
- Some states, including Indiana and Illinois, give the hospitals authority to transfer defendants whose competence has been

restored back to court. In many jurisdictions, this discretion lies with the judge.

- In some states, cases are moved up on the docket upon return from competence restoration. This prevents defendants whose competence has been restored from waiting in jail for lengthy amounts of time.
- Some jurisdictions create statewide task forces to evaluate and study community competence evaluation and restoration programs and develop recommendations.

## Conclusion

Clearly, much can be done to streamline the competence process without major statutory revisions that can take years. With strategic convening of local and state stakeholders, major change is possible through creative revisions of policies and procedures, and through improved communications. There are quick fixes that work.

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