



Victims, Witnesses, and Defendants with Mental Illness or Intellectual and Developmental Disabilities

A Guide for Prosecutors

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Victims, Witnesses, and Defendants with Mental Illness or Intellectual and Developmental Disabilities

A Guide for Prosecutors

INTRODUCTION

People with intellectual and developmental disabilities (I/DD) or mental illness are overrepresented in the criminal justice system, as victims, witnesses, suspects, and defendants. The purpose of this guide is to increase understanding and generate discussion about these conditions or disabilities and their potential impact on resolving cases. This guide provides prosecutors with a synopsis of useful information that can provide strategies that will assist them in their work with those who have I/DD or mental illness.

The goal of this paper is to introduce a series of complex issues and concepts; it is not intended to be a comprehensive, in-depth review of the many practical, medical, and legal issues that are associated with the intersection of the criminal justice system and those with mental illness or I/DD.

The paper proceeds in three parts. Part 1 offers an overview of I/DD and mental illness and the legal obligations involved when interacting with people with I/DD or mental illness. Part 2 gives practical approaches for prosecutors to more effectively work with these populations, as victims, witnesses, or defendants. Part 3 gives examples of programs that prosecutors have either created or participated in that address the involvement of persons with I/DD or mental illness in the criminal justice system. Additional resources that offer further information about these topics are provided at the end of the paper.

PART 1- OVERVIEW OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AND MENTAL ILLNESS



What is Disability?

“Disability” can be defined in various ways. According to the Americans with Disabilities Act ([ADA](#)), [disability](#) is a “physical or mental impairment that substantially limits one or more major life activities.”¹ This definition of disability focuses on an actual or perceived impairment and assumes that an impairment is what keeps an individual from fully participating in society.

However, people with disabilities do not necessarily define themselves by a medical diagnosis or impairment. In contrast to the more functional definition of disability, international [human rights law](#) defines disability as “long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.”² Unlike the ADA’s definition, this one emphasizes the impact of barriers on an individual’s ability to fully participate in society as part of the [“social model” of disability](#).³

Developmental and mental health disabilities are two categories of disabilities. There are many other types of disabilities, such as physical disabilities, sensory disabilities, and age-related disabilities. Individuals with one type of disability frequently also have others. Regardless of the particular diagnoses or labels, every individual’s experience with disability is unique.

In some ways, mental health and developmental disabilities may manifest similarly in interactions with justice professionals, and there can be significant overlap between these disability communities. However, these disabilities will often require different services and supports, so it is important for justice professionals to have a better understanding of both types of disabilities.

1 Americans with Disabilities Act, §12102 (1990).

2 United Nations Convention on the Rights of Persons with Disabilities, Article 1 (2008). The United States has signed, but not yet ratified, the Convention, which has been ratified by 177 other countries to date.

3 “The Social Model vs The Medical Model of Disability,” Disability Nottinghamshire (2019). Retrieved from <http://www.disabilitynottinghamshire.org.uk/about/social-model-vs-medical-model-of-disability/>.

What are Developmental Disabilities?

Developmental disabilities are life-long disabilities that start before age 22, during a person's developmental period, and must substantially affect at least three of the following areas: the ability to care for oneself, learn, communicate, move, live independently, work, or make decisions.⁴ Some examples of developmental disabilities include intellectual disability, Down syndrome, autism, cerebral palsy, and Fetal Alcohol Spectrum Disorder.⁵ These disabilities can be difficult for justice professionals to identify, as individuals with these disabilities might not have any obvious physical traits or outward characteristics. This is one of the reasons these disabilities often go unrecognized in the criminal justice system.



Types of Developmental Disabilities

There are many types of developmental disabilities, but the most common include:

Intellectual Disability

Intellectual disability is characterized by limitations in intellectual functioning and adaptive behaviors, including practical, social, and cognitive skills. The onset of these limitations must be before the age of 18, even if a person is not identified as having this disability until later in life.

⁴ American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definitions, Classification, and Systems of Supports* (11th ed.) (2010).

⁵ Id.

Autism Spectrum Disorder

Autism is a pattern of neurodiversity that can be characterized by difficulties with social interaction, processing sensory information, and communication. Some people with autism engage in repetitive, self-stimulation behaviors, such as hand-flapping, which are more colloquially known as “stimming.”

Fetal Alcohol Spectrum Disorder (FASD)

FASD is a developmental disability that is caused by the consumption of alcohol during a pregnancy. FASD can lead to challenges with impulsivity, judgment, and decision-making, though many with FASD have high expressive language skills.⁶

People with developmental disabilities may have more than one type of disability, including multiple developmental disabilities, or co-occurring physical or mental health disabilities. When a person has both a developmental and mental health disability, this is sometimes referred to as “dual diagnosis,” though in many fields, dual diagnosis refers to someone with a mental health disability and co-occurring substance use.

What is Mental Illness?

Mental illnesses are medical conditions that can disrupt a person’s thinking, feeling, mood, daily functioning, and ability to relate to others. They include many different conditions that can vary in degree of severity ranging from mild to moderate to severe.⁷

Neither the person or the person’s family is to blame for the mental illness and mental illness does not develop because of a person’s character or intelligence. Mental illness can affect anyone regardless of their gender, geography, income, social status, race/ethnicity, religion/spirituality, sexual orientation, background, or other aspects of cultural identity. While it also can occur at any age, three-fourths of all mental illness begins by age 24.

⁶ Id.

⁷ National Institute of Mental Health (2019). “Mental Illness”. Retrieved from: <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml>

Mental illness is common. In a given year:

- 18.9 percent of U.S. adults experience some form of mental illness⁸
- 4.5 percent have a serious mental illness⁹
- Among the 46.6 million adults with any mental illness, 19.8 million (42.6 percent) received mental health services in the last year.¹⁰

Types of Mental Illnesses

There are many types of mental illnesses, but the most common include:

Major depressive disorder

A mood disorder that causes persistent feelings of sadness and loss of interest. It affects how you feel, think, and behave and can lead to a variety of emotional and physical problems.

Bipolar disorder

Bipolar disorder is a disorder that causes extreme shifts in mood, energy, and activity levels. It includes both manic and depressive symptoms which may last days to months.

Schizophrenia

The most common of all psychotic disorders that typically emerges in early adulthood and affects about 1 percent of people worldwide. Symptoms include delusions and hallucinations, disoriented thinking, which can include a rapid switching from one topic to another, and unpredictable agitation.

Anxiety disorders

We all experience anxiety at some point in our lives, but for those who develop an anxiety disorder, the symptoms can be overwhelming and develop physically. Anxiety disorders develop as a result of genetics or life events. For example, Post

⁸ Substance Abuse and Mental Health Services Administration. (2018). Key substance use and mental health indicators in the United States: Results from the 2017 National Survey on Drug Use and Health (HHS Publication No. SMA 18-5068, NSDUH Series H-53). Rockville, MD: Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration. Retrieved from <https://www.samhsa.gov/data/>

⁹ Id. SAMHSA (2018).

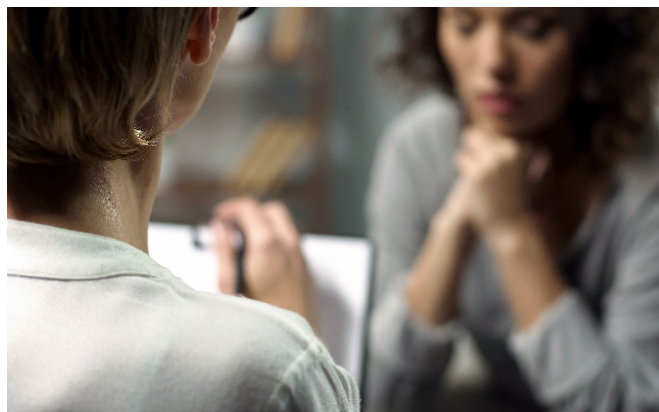
¹⁰ Id. SAMHSA (2018).

Traumatic Stress Disorder (PTSD – a type of anxiety disorder) often develops in veterans who have served in war zones.

Regardless of the diagnosis, symptoms can be similar and can overlap. The following are some examples of symptoms:

- Feeling sad or down
- Confused thinking or reduced ability to concentrate
- Excessive fears or worries, or extreme feelings of guilt
- Extreme mood changes of highs and lows
- Withdrawal from friends and activities
- Significant tiredness, low energy, or problems sleeping
- Detachment from reality (delusions, paranoia, or hallucinations)
- Inability to cope with daily problems or stress
- Trouble understanding and relating to situations and to people
- Major changes in eating habits
- Excessive anger, hostility
- Suicidal thinking.

It's important to be aware that the presence of one or more of these symptoms is not evidence that a mental illness is present. They may be a typical reaction to stress, or they may be the result of an underlying medical condition. In fact, one of the most important parts of an initial psychiatric evaluation is a physical work-up to rule out underlying physical illnesses. This is especially true when symptoms develop rapidly. If someone is exhibiting symptoms, they should seek the assistance of their doctor or a mental health professional.



Co-Occurring Conditions

Often mental illness is not the only thing going on in a person's life. Other conditions may also be present that further complicate the difficulties created by mental illness. This is referred to as co-occurring, co-morbid conditions, or dual diagnosis which means that there is more than one condition causing the difficulties. It is estimated that 3.4 percent of adults have co-occurring mental health and substance use disorder.¹¹

Substance use is the most common co-occurring condition. Even if a person does not have a formal diagnosis of substance use disorder, alcohol and other drugs are frequently involved in times of mental health crises. Many also use drugs and alcohol to self-medicate when their treatment plan is not effective. In addition to complicating the symptoms of mental health conditions, alcohol and other drugs can also interfere with medications that may be used to treat the conditions.

Diagnosis and Recovery

Diagnoses are based on clinical observations, self-reported information, and reports from those close to the person about someone's behavior or thinking. Symptoms vary from one person to another, and each person responds differently. However, working towards identifying an accurate diagnosis can mean a greater chance for someone to identify a treatment and recovery plan that works for them. Defining symptoms for each mental illness are detailed in the Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5).

For many people, recovery is a mix of services and supports that manage the symptoms of their mental illness. This can include medication, therapy, and psychosocial services (i.e., psychiatric rehabilitation), housing, employment or education, and peer supports. This combination of services and supports will vary from person to person. Even people with the same diagnosis will have different experiences, needs, goals, and objectives; there is no "one size fits all" approach.

¹¹ Id. SAMHSA (2018).

There are generally four categories of medication used to treat mental illness, and each come with side effects that can be a barrier to people engaging in medication as part of their recovery.

Antipsychotics

A category of medication used to treat symptoms of psychosis, such as delusions and hallucinations. They play a vital role in treating schizophrenia and schizoaffective disorder but can also treat certain types of bi-polar disorder and treatment-resistant depression. Side effects often include weight gain, which can lead to health complications, such as metabolic syndrome or a condition known as: tardive dyskinesia; where an individual can experience random, uncontrollable muscle movements or tics.

Antidepressants

Generally used to treat depression. Side effects can include nausea, reduction in sexual desire, weight gain, dry mouth, vomiting, insomnia, drowsiness, agitation, or restlessness.

Anti-anxiety medication

Used to reduce the emotional and physical symptoms associated with anxiety. Side effects can include low blood pressure, decreased sex drive, nausea, lack of coordination, depression, unusual emotional dysfunction, including anger and violence, memory loss, and difficulty thinking.

Mood stabilizers

These medications commonly treat mood swings associated with bipolar disorder, including manic or hypomanic episodes and depression. Side effects can include excessive thirst, frequent urination, tremor of the hands, nausea and vomiting, slurred speech, blackouts, change in vision, seizures, hallucinations, loss of coordination, and irregular or pounding heartbeat.

While innovations in the range of treatment and recovery services have increased, the reality is that many people with mental illness struggle to get connected to treatment providers and supportive services.

Every community in the United States experiences a mental health provider shortage.¹² Approximately 12.2 percent (over 5.3 million) of adults with mental illness are uninsured,¹³ and 44.6 percent of adults with mental illness report that they were not able to receive the treatment they needed because of costs.¹⁴

Access and Functional Needs

Instead of relying on diagnostic labels, it is often more helpful to think about disability from a standpoint of access and functional needs, an approach that is common in the fields of emergency and disaster response.¹⁵ Instead of focusing on someone's diagnosis, or more commonly, a list of diagnoses, the idea is to focus instead on what someone may need to have access or fully participate. For example, if a person is struggling to read a form, it would be helpful to know what the person might need to make that form accessible, such as larger print or to have the form read/explained aloud. In this situation, a diagnosis would not necessarily provide the most helpful information.

Legal Rights of Those with I/DD or Mental Illness

In the United States, the rights of persons with disabilities are protected by a [variety of statutes](#), at both the state and federal levels, including the Rehabilitation Act of 1973 and the Americans with Disabilities Act (“ADA”) of 1990. Together with state law, these statutes protect the civil rights of persons with disabilities and outlaw discrimination in many forms by many types of actors.

Under [Title II of the ADA](#), many criminal justice actors, including prosecutors, cannot discriminate in the provision of services or access to programs on the basis of disability.¹⁶ This general obligation not to discriminate translates into

12 Mental Health America (2018) The State of Mental Health in America. <https://www.mentalhealthamerica.net/issues/state-mental-health-america-2018>

13 Id. SAMHSA (2018).

14 Id. SAMHSA (2018).

15 See, e.g., Federal Emergency Management Agency's (FEMA) Functional Needs Support Services Guidance, <https://www.phe.gov/Preparedness/planning/abc/Pages/functional-needs.aspx>.

16 Title II, Americans with Disabilities Act (1990).

two, affirmative obligations for prosecutor offices: (1) providing access and (2) ensuring effective communication.

Individuals with disabilities have the right to access prosecutorial services and activities on the same basis as those without disabilities. On the access front, this may mean that a prosecutor has to modify an existing program, policy, or procedure to ensure full participation by someone with a disability. An example could be modifying standard provisions of a plea agreement, such as deleting a requirement to pursue education for someone with intellectual disability. On the communication front, this may mean providing auxiliary aids and services, such as live captioning, interpreters, assistive listening devices, or a notetaker. An example could be contracting with an agency to provide real-time captioning services during interviews or court proceedings for someone with an auditory processing disability.



These rights do not create a special advantage for persons with disabilities; instead, they help level the playing field to allow a person with disabilities to access a complex and difficult and, at times, inaccessible system for many people. One additional requirement of the Americans with Disabilities Act is that any public entity with 50 or more

employees must have a designated “ADA Coordinator,” someone who is familiar with the various requirements of disability rights laws and can help their agency stay in compliance.¹⁷ Many prosecutor offices have fewer than 50 employees; in that case, an ADA Coordinator would most likely be found within the larger court system or a different state or local government agency. If there is not an ADA Coordinator in their own office, prosecutors can look for one in the courts

¹⁷ Department of Justice, Nondiscrimination on the Basis of State and Local Government Services Regulations, 28 C.F.R. pt. 35, § 35.107(a) (2005).

in their jurisdiction – this information can often be found online or through the Court Clerk’s Office. Building a relationship with the ADA Coordinator helps to ensure compliance, and maintains a process that is informed and current. A pre-existing relationship will prove to be quite fruitful once a matter does arise involving a person with a disability.

Prosecutors also have resources in the community that may be helpful in preparing for and providing reasonable accommodations and supports to individuals with disabilities, including state and local disability organizations, such as [chapters of The Arc](#). In every U.S. state and territory, there is also a designated [Protection and Advocacy](#) (“P&A”) agency, an organization that is federally funded to provide advocacy services to individuals with all types of disabilities. P&As can also be a resource for prosecutors on disability compliance, training, and technical assistance.

PART 2 – PROSECUTOR APPROACHES FOR WORKING WITH PEOPLE WITH I/DD OR MENTAL ILLNESS



Introduction

It may not be commonplace for prosecutor training to include information about how to work with those who have mental illness or I/DD. However, meeting compliance laws and improving case outcomes, has put an emphasis on the need for such training. Even when prosecutors have encountered the issue, it may only be in the context of attempting to defeat a defense claim that the defendant is not responsible for the crime due to I/DD or mental illness. This paper does not address how to defeat such defenses, but instead, it provides general guidance to prosecutors who will interact with victims, witnesses, or defendants with I/DD and/or mental illness. The first section addresses issues related to working with victims and witnesses with I/DD or mental illness. The second section provides special considerations that arise when a defendant has I/DD or mental illness.

Victims and Witnesses with I/DD or Mental Illness

Interviewing and working with victims and witnesses with I/DD and mental illness can pose various challenges for a prosecutor – some pertain to the prosecutor’s own perceptions and others involve making necessary accommodations for the person.

Misconceptions and Discomfort

It is not uncommon for people to have a level of discomfort regarding interactions or behaviors that are not well understood. So, prosecutors, as many others, may have pre-existing misconceptions about people with I/DD and mental illness, or they may be uncomfortable when speaking with a person with I/DD or mental illness. Prosecutors may worry that a case may be weak or unprovable if it is based on the testimony of a victim or witness who has I/DD or mental illness. However, with a better understanding of I/DD and mental illness and some enhanced tools for interviewing these victims and witnesses, a viable criminal case can be built. As previously noted, the American Disabilities Act requires that victims and witnesses with I/DD or mental illness are entitled to equal access to justice, the same access as those without disabilities.

The misconceptions and discomfort can be addressed by prosecutors in a variety of ways:

- Acknowledge the misconceptions, bias, and discomfort
- Learn more about I/DD or mental illness, including outreach to these communities
- Practice empathy, e.g., how would you like to be treated?
- Obtain advice from friends, colleagues, and advocates who have experience working with people with I/DD or mental illness
- If unsure of what to do or what language to use, ask the person or the I/DD or mental illness community for guidance

Interviewing Victims and Witnesses with I/DD or Mental Illness and Trial Considerations

The general rule for speaking with victims or witnesses with I/DD or mental illness is to approach the case like any other. In other words:

- Assess credibility
- Evaluate the evidence
- Look for corroboration.

However, some additional preparation may be needed in order to maximize the communication and understanding between the victim or witness and the prosecutor.

Preparing for the Interview

Where possible in advance of the interview, the prosecutor should determine the nature of the disability and potential accommodations. The prosecutor can learn more about the victim or witness from the victim or witness themselves, family members, service providers, police, or others. Questions to ask may include:

- What supports may be helpful to the victim or witness during the first interview?
- Does the disability or mental health symptoms interfere with the ability to perceive, communicate or recall events?
- If yes, what supports could be provided to assist the victim or witness with these functions?
- What is the best way to communicate with the victim or witness?
- Are any reasonable accommodations needed?
- Would the victim or witness like to have a support person present?
- What would make the person most comfortable?
- What is the victim or witness' relationship to the other people involved in the case?
- How can the interview be made less frightening or confusing?
- Does the victim or witness need services? If so, can the services be provided by the prosecutor's office or community-based providers?

Medical and Psychiatric Records

In some instances, it may be necessary to obtain the victim or witness's medical, psychiatric, or other types of service records.

An example of when the records will be needed is when the person may have been symptomatic at the time of the incident, for example, if there is a concern

that the victim or witness was experiencing delusions or hallucinations at the time of the crime. These factors should not preclude the prosecutor from moving forward, but it may be important to know if, and to what extent, those symptoms affected the witness's ability to perceive, recall, and communicate.

Consider the sensitivity around medical, psychiatric, or other types of service records and what the larger impact might be for the victim or witness. Exposing this personal information could be a deterrent for a victim or witness to participate in the court process or report future victimization. Prosecutors should start by considering what information they need and whether there is a way to narrow the scope of requested records. Next, prosecutors should inform the victim or witness that they may need to obtain these records, address any questions or concerns, and seek the individual's permission to retrieve them. Throughout the process, it is important to:

- Explain to the impacted individual what information is needed and why;
- Discuss under what circumstances the defense or other court personnel would gain access to the individual's information; and
- Ask the person directly to consent to sharing that information.



Records may have to be obtained, even if the victim or witness does not consent. Records can be obtained by serving a subpoena on the service provider or seeking a waiver of HIPAA from the victim or witness. HIPAA is the Health Insurance Portability and Accountability Act of 1996 and is legislation that provides data privacy and

security provisions for safeguarding medical information. A subpoena in connection with a criminal investigation should override HIPAA constraints. However, understandably, service providers are extremely protective of these types of records. As a result, they may ignore a subpoena unless it has been ordered by a

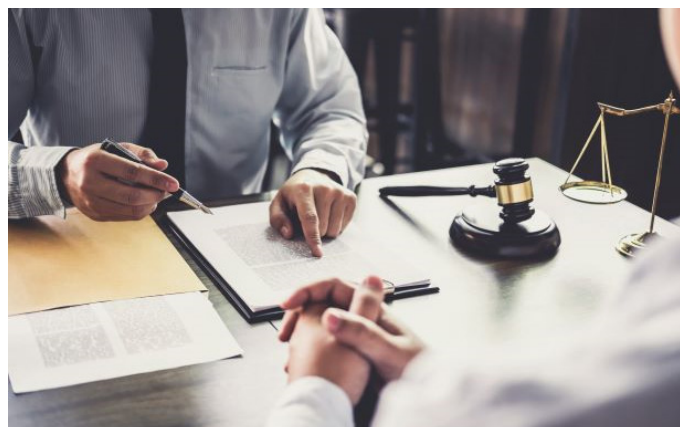
court. Even then, some providers may refuse to honor subpoenas, inaccurately believing that HIPAA rules prevent the disclosure. In such cases, contacting the provider's Risk Management Office can resolve the issue. Finally, if the provider continues to refuse to provide the information, the prosecutor can consider filing a motion to compel the production of the records or seek contempt proceedings.

Once records are obtained, they may be discoverable as Brady/Giglio material. Given the sensitive nature of the records, the prosecutor should seek an in camera ruling from the judge on whether the documents have to be disclosed, and if so, to what extent and how.

Another approach is to seek a HIPAA waiver from the victim or witness to obtain the records. If so, the best course of action is for the prosecutor to explain to the victim or witness why the records are needed and to advise the person about if, when and how the records may be disclosed to the defendant. Some victims or witnesses may be quite willing to waive, while others may be less so. It is important that the victims or witnesses understand that they have the option to waive or not waive and that the investigation will proceed regardless of their decision.

Conducting the Interview

As with any other victim or witness, the prosecutor should start by listening and being objective; the prosecutor should not assume the person is incapable of being a witness simply because of a disability. There is often a misperception that individuals with disabilities are not credible; and unfortunately, this may lead to under-prosecution in cases involving someone from these communities. As in all cases, the victim or witness's testimony will have to be assessed in light of the other facts and circumstances of the case to determine if the person is ultimately worthy of belief. It is always important to listen to the victim or witness's experiences and demonstrate respect. There are some helpful strategies for speaking with a victim or



witness with I/DD or mental illness. Be flexible in determining which approaches are needed and which ones are not. These strategies include:

- Introduce yourself clearly, explain the role of the prosecutor, and outline the process of a criminal case.
- Speak slowly and clearly.
- Use layperson's language and not technical legal terms or jargon.
- Be prepared to repeat yourself.
- Ask the victim or witness to introduce themselves and share why they have come to the prosecutor's office.
- Allow the victim or witness to share their story or experience in their own way. It is possible that the victim or witness may not recall events in a logical or chronological fashion. Strategic questions may be needed to get a sense of the whole story and obtain crucial details.
- Accommodate the victim or witness's needs. These accommodations could include:
 - Taking extra breaks
 - Explaining things more than once
 - Providing written instructions
 - Using visual or other forms of communication aids
 - Adjusting the physical space
 - Being mindful of the impact of trauma
 - Be respectful, but set boundaries regarding personal space, time, issues outside of the court case.
- Build a rapport with the victim or witness.
- Consider allowing others to sit with the victim or witness during the interview, if requested by the person. However, be aware of the person's right to confidentiality and the possible tainting of evidence.
- Look for areas where the victim or witness's statements can be corroborated by other evidence.
- In addition to asking the victim or witness what happened at the time of the incident, also ask what happened before and after the incident.

Preparing the Victim or Witness for Trial

If the case goes to trial, a victim or witness with I/DD or mental illness, like any other witness, will have to be prepared for that process. This preparation can include:

- Explain what a trial is and how the person will participate in that trial.
- Describe the different people and their roles in the courtroom: the judge, defense attorney, court officers, spectators. If the prosecutor will be asking the victim or witness to identify the defendant in court, the witness should not be told where the defendant will be sitting.
- Visit the courtroom with the victim or witness and have them sit on the witness stand.
- Make sure that the courtroom has the necessary accommodations for the victim or witness. Work with the Court's Americans with Disabilities Act Coordinator to help ensure the appropriate supports are provided and understood by all parties. As noted above, the Americans with Disabilities Act requires any public entity with 50 or more employees to have a designated ADA Coordinator.
- Let the judge and defense counsel know if you are requesting reasonable accommodations.
- Ask the victim or witness if they would like an advocate or support animal to accompany them to and from the courtroom or stay in the courtroom during the testimony.

Disability Rights and Resources: Be aware of disability rights and resources throughout the process. As described above, a victim or witness with I/DD or mental illness has legal rights to effective communication and access. If an ADA Coordinator is not available, state or local disability groups and advocates may be able to assist with determining the appropriate accommodations and finding the right tools and services to support the victim or witness.

Special Considerations for Defendants with I/DD or Mental Illness

For defendants with I/DD or mental illness, the prosecutor's role is to evaluate

the evidence, charge the defendant where appropriate, assess the defendant's competence, prove the case, and determine an appropriate disposition, with an overall goal of preserving public safety. Prosecutors rarely speak with defendants in a criminal matter, unless it is to evaluate the defendant's eligibility for Mental Health Court or other diversion program. However, prosecutors can help ensure that defendants with disabilities receive the necessary accommodations during the process, for example, by sharing contact information for the ADA Coordinator or other potential resources with defense counsel.

Competency

In some instances, the defendant's I/DD or mental illness renders the defendant unfit to participate in the criminal proceedings. The defendant has a constitutional right to assist in his own defense and to understand the nature of the charges against him. If the defendant is incompetent to participate in this way, the case cannot proceed against him.¹⁸ This paper does not provide a detailed discussion of the issues involved in defendant competency; however, some standard questions to determine competency include:

- Is the defendant oriented as to time and place?
- Is the defendant able to perceive, recall, and relate?
- Does the defendant understand the process of the trial and the roles of judge, jury, prosecutor, and defense attorney?
- Can the defendant establish a working relationship with the defendant's attorney?
- Does the defendant have the ability to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial than another?
- Can the defendant withstand the trauma and stresses of the trial without lasting effects?¹⁹

¹⁸ Pate v. Robinson, 383 U.S. 375, 378 (1966); Medina v. California, 112 S.Ct. 2572 (1992).

¹⁹ People v. Picozzi, 106 A.D.2d 413 (1984).

Though the specifics of determining whether a defendant is competent varies from state to state, a few factors are worth noting:

- A defendant can have I/DD or mental illness and still be competent to participate in the criminal proceedings.
- A defendant may be feigning I/DD or mental illness to avoid responsibility for a criminal act. This is commonly referred to as malingering.
- A defendant may come in and out of competence.
- The defendant must be competent at each stage of the criminal proceedings from the time of initial charging through sentencing.
- Even if a defendant is found competent to stand trial, lack of competence can be used as a defense to a crime.
- The defendant can be held in custody, even if the defendant is found incompetent.



Customized Dispositions

Assuming the defendant is deemed competent to participate in the proceedings, the prosecutor will be involved in determining the proper outcome for a defendant with I/DD or mental illness. An appropriate disposition can be crafted for the defendant at various stages of the case ranging at any time from before a case is charged through a verdict at trial. If the disposition does not involve incarceration, but instead a diversionary program, the disposition is likely to require a customized plan that is tailored to the defendant's specific needs. To recommend an appropriate disposition, the prosecutor should consider the following factors:

- What are the public safety implications of a diversionary disposition?
- What are the defendant's needs?

- Does the defendant have access to appropriate disability or mental health services? What barriers may prevent the defendant from accessing services?
- What will keep the defendant from engaging in criminal behavior in the future? Has a risk assessment been conducted?
- Would education be appropriate, such as education on healthy relationships and sexuality?
- What are the available resources for alternative dispositions to incarceration?
- Is the defendant eligible for diversionary programs? If not, should and can creative alternatives be crafted? If yes, what modifications may be needed to better ensure the defendant's access to the program?
- How should compliance with a diversionary program be monitored?
- How can the defense attorney assist with developing an appropriate disposition?
- How can state and local disability advocacy organizations and/or service providers assist with developing an appropriate disposition?

Diversion to Mental Health Court

Among the various options for crafting an appropriate disposition for a person with mental illness is referral to a Mental Health Court. Though developing and running a Mental Health Court is not the focus of this paper, the following are some considerations to assist a prosecutor to decide whether a defendant is eligible for Mental Health Court:

- Does the Mental Health Court provide the services needed for the defendant? For example, Mental Health Courts are unlikely to be appropriate for those with I/DD or those with both I/DD and a mental health condition. This is because a Mental Health Court does not have the services typically provided for someone with I/DD. As discussed below, the Rockland County District Attorney Office's Intellectual and Developmental Disabilities Alternative to Incarceration (IDDATI) Program was developed to provide an alternative to a Mental Health Court tailoring available services tailored for the needs of defendants with I/DD.

- What is the defendant's criminal history, and does the defendant pose a risk to public safety? It is important to note that mental illness alone is not a predictor of future violence.²⁰
- What are the facts of the current case and prior cases? Has the defendant exhibited violent behavior, and if so, to what degree and under what circumstances?
- Is the defendant competent to proceed in the case?
- What is the defendant's medical and psychiatric history? Has the defendant been compliant with medication and therapy in the past?
- What is the defendant's daily routine, for example, where and with whom does the defendant live, what are the living conditions, is the defendant employed, is the defendant connected with services?
- What information can be obtained about the defendant from the defendant, family members, or others?
- Does the defendant have any substance use history and, if so, has the defendant received any services?
- What are the expectations of the defendant and the defense attorney regarding participation in the Mental Health Court program?
- What advice or services can state and local disability advocacy organizations and service providers offer?

If a defendant agrees to participate in a Mental Health Court, the terms of the participation and any plea agreement should be in writing, clarifying expectations regarding the service plan, the terms of the plea, and the various outcomes of the case, depending on whether the defendant succeeds or fails the program. Any Mental Health Court should continually assess the barriers and challenges a defendant may experience in accessing services and successfully completing the program's requirements.

Resource materials for developing and running a Mental Health Court can be found in the Resources section of this paper.

²⁰ See, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2686644/> (last viewed 8/16/19)

PART 3 – PROSECUTOR-INVOLVED INITIATIVES



Intellectual and Developmental Disabilities Alternative to Incarceration Program - Rockland County District Attorney's Office, New York

The Intellectual and Developmental Disabilities Alternative to Incarceration (IDDATI) Program is a new problem-solving program developed and led by the Rockland County District Attorney's Office (RCDAO). The need for an alternative to incarceration program for defendants with an intellectual or developmental disability was identified in 2015, following the completion of a county-wide assessment on behavioral health. In addition, there were participants in the Mental Health Alternative to Incarceration (MHATI) program who were unsuccessful as they were later identified as having an I/DD.

Unlike Drug Courts, Mental Health Courts, and Veterans Courts, IDDATI is not a treatment court. Since a person with I/DD or significant brain injury (TBI) cannot 'recover', the format of this court program is different from traditional treatment courts in that its focus is on helping people with I/DD or TBI to reach their potential rather providing treatment. The strength of the IDDATI paradigm is that it includes stakeholder collaboration, individualized programming, flexibility, and family involvement.

Program Stakeholders

Identifying the need for the IDDATI program, the RCDAO reached out to local service providers, behavioral health organizations, educational support agencies, governmental agencies, and policy makers to seek their support. Given the overwhelming support for the concept, the RCDAO convened an executive-level stakeholder group to develop and run the program. The stakeholders include:

- Rockland County Department of Mental Health (RCDMH). RCDMH also oversees the Behavioral Health Unit of the local jail.
- New York State Office for People with Developmental Disabilities (OPWDD). They are a direct service provider.
- Rockland Board of Cooperative Education Services (BOCES), funded through the State Department of Education. They provide supportive educational services for youth with I/DD within local schools and within their own school settings. BOCES also has adult literacy and vocational training programs. The BOCES representative provides the

educational/vocational perspective that is an integral piece of the ID-DATI program.

- Local disability rights advocates
- A local victim advocacy rights group
- The Arc of the United States' National Center on Criminal Justice and Disability
- Local service providers.

The monthly Stakeholders Meeting are chaired by the District Attorney's Office with assistance from the IDDATI Case Manager. Through the stakeholder meetings, a policy and procedure manual was developed and updates on the IDDATI participants are given. The stakeholders provide recommendations, guidance, and assistance with issues raised. Between meetings, the IDDATI Case Manager reaches out to stakeholders when necessary for assistance, referral to services, or to problem-solve systemic issues when they arise.

Case Management

The RCDAO contracted with BRiDGES, a community-based organization that “helps people with disabilities to self-determine their own lives and works to overcome barriers, stigma, indifference, and the quiet prejudice of low expectations.”²¹ A BRiDGES caseworker refers participants to the services identified during the intake and throughout the IDDATI program. Case management sessions are held weekly in the beginning of the program and can be reduced on an individualized basis. The Case Manager provides support and coordinates the services with which the participant is involved. These can include skills development, mental health or substance use treatment, housing, educational or vocational programs, social services, etc. If there is a need for an intervention with the participant, the Case Manager coordinates the attendees and location. The Case Manager also works with the Program Director from the RCDAO when participants make requests for travel. The Case Manager is supervised by a clinician at BRiDGES as well as the Program Director.

²¹ See, Bridges website: <https://www.bridgesrc.org/> (last viewed July 5, 2019)

Qualifying for the Program

A defendant may be referred by a prosecutor, defense counsel, behavioral health unit of the jail, service providers, or others. All participants must be Rockland County residents. Once a referral is received, the defendant is vetted for issues in their criminal history or current legal involvement to determine if the defendant qualifies for the program. The defendant's admission into the program is approved by an RCDAO Assistant District Attorney, who balances the needs of the defendant against public safety concerns. If the defendant poses a risk to public safety, that will be a disqualifier.

If accepted into the program, the defendant is evaluated for clinical eligibility by the RCDAO's contract psychologist and/or the IDDATI Case Manager. If there is no available documentation to identify I/DD, the psychologist completes various standard tests to determine approximate IQ and to identify adaptive behavior challenges. If the defendant is found to be appropriate for the program by the psychologist, the defendant and defense counsel will consider the merits of joining the program. If found eligible, and the defendant is willing to join the program, the defendant will plead guilty to the criminal charges. The date of the guilty plea is considered the entry date for the IDDATI program. If the defendant successfully completes the program, the charges will either be dismissed or reduced.

Following the plea, the defendant and Case Manager complete the intake, which gathers information about the defendant's medical issues, substance use, mental health, family, education, employment, and convictions. Behaviors associated with the participant's arrest are also reviewed to identify services that may help address these problem behaviors. Using both the information collected and the interests of the participant, a service plan is developed. The service plan identifies goals that the Case Manager and participant have developed collaboratively. The plan may be modified at any time by either the Case Manager or the participant and agreed upon by both. The Case Manager then makes referrals to the appropriate service providers, which may include employment referrals, mental health and/or substance use services as needed. The level of engagement is assessed by the Case Manager through regular contact with the service providers and case management meetings with the participant, sometimes including family members or significant others.

Length of Program

The IDDATI program is a minimum of 12 months for those charged with a misdemeanor and 18 months for those charged with a felony. These timeframes are similar to the timeframes for the Drug Courts and other alternative to incarceration programs. There is no maximum length for the program, but most participants are able to complete the program within the minimum timeframe. For those who need more time, there is no limit on the time given to participants to be successful.

Individualized Service Plans

Each participant is provided an individualized Service Plan developed collaboratively with the IDDATI Case Manager. This Service Plan incorporates both the needs and interests of the participant and is always open to revision. A revision can result from the attainment of a goal, request by the participant, recommendation of the Case Manager, or through an intervention.

Individualization within the IDDATI program is best exemplified by the process of incentives and sanctions, which are customized for each participant. In traditional problem-solving court programs, standard non-customizable forms of incentives and sanctions are commonplace. In contrast, the incentives and sanctions of the IDDATI model are based upon the individual participant. Foremost is a consideration of the internal motivators for each participant and what is personally important to this individual. For example, one participant enjoyed riding the bus. As an incentive, the participant was allowed to ride the bus more frequently.

Sanctioning of IDDATI participants is considered a last resort. Problematic behavior exhibited by an IDDATI participant is addressed by the Case Manager in collaboration with service providers. The use of interventions, such as bringing together the service providers and significant others with the Case Manager, is the process used for 'non-compliant' behavior. Multiple interventions may take place before a collaborative decision to sanction a participant is made. If this decision is made, the sanction is specific to the individual participant. There are no standardized sanctions in the IDDATI program. Jail sanctions are rarely used and only as a last resort.

An example of IDDATI's flexible model is the approach to participants who use

marijuana. In Drug Court, the participant would be given four weeks to provide a negative urine test result to demonstrate that marijuana is no longer being used. In IDDATI, the participant is given a longer timeframe with additional supports to help stop the marijuana use.

Completion of the IDDATI program is also an individualized process. The objective of engagement in the program is applied to each participant differently, depending upon the individual's set of skills and abilities and the effort displayed by the participant to meet their agreed upon goals. Aside from the minimum time required and meeting the agreed upon goals, there are no specific standards for successfully completing the program.

Family Involvement

The IDDATI program frequently incorporates family members or significant others, if available and willing. Many of the participants live with others who have an active role in their life, some who have guardianship. It is essential to involve those close to the participant in the IDDATI program as early as possible and maintain routine communication throughout the program. Family members can be very helpful with the intake process, particularly since they may have additional information. Also, family members and significant others are appreciative of the added support.

Throughout the IDDATI process, the Case Manager maintains contact with the family member or significant other. This collaboration provides better support for the participant, informs the Case Manager about issues that may otherwise go unrecognized, and helps the participant become more successful. Family involvement is varied and ranges from providing transportation to working with the participant on independent living skills.

Though family members or significant others are important to the process, the program is mindful that separate time with the participant is needed to ensure privacy for issues that the participant may not want to share with others.

Number of People in the Program

The number of participants usually ranges from 10–12 at any given time. With a full-time Case Manager, the program could expand to 15–20 participants.

New York State Attorney General’s Office Training on I/DD, Mental Illness and Police Mental Health Collaborations

On July 8, 2015, New York Governor Andrew Cuomo signed Executive Order No. 147 (the “Executive Order”), appointing the Attorney General as special prosecutor “to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian . . . caused by a law enforcement officer.” The Executive Order also authorized the Attorney General to “investigate and prosecute in such cases where, in his opinion, there is a significant question as to whether the civilian was armed and dangerous at the time of his or her death.” The Executive Order includes the requirement that, where a matter is not presented to a grand jury, or where no indictment is voted, the Attorney General provide the Governor with a report explaining the conclusions in the case and “any recommendations for systemic reform arising from the investigation.”²²

Nationwide, mental illness or I/DD has been acknowledged as a contributing factor in some officer-involved fatalities. Thus, the Attorney General requested a training program that could provide an overview of issues relating to mental illness and I/DD and information about police mental health collaborations, including specialized training for police on how best to respond to persons with mental illness or I/DD, commonly referred to as Crisis Intervention Training (CIT).

The Serving Safely initiative—funded by the Bureau of Justice Assistance and spearheaded by the Vera Institute of Justice in partnership with a consortium of other organizations—developed a training program for the Attorney General’s Office that can be replicated by other prosecutors. The training agenda included the following components:

Mental Health and Intellectual and Developmental Disabilities (Presented by NAMI New York and The Arc of the United States)

- Mental health basics
- I/DD basics
- Overrepresentation as victims, suspects and defendants in the criminal justice system

²² New York State Executive Order 147, July 8, 2015

- Common myths and stereotypes
- Overview of relevant disability rights laws

Police Mental Health Collaborations – Best Practices

- Different models of police mental health collaborations (e.g., CIT, co-responder teams), importance of the models, outcomes, and how they are tailored to local considerations. (Presented by Vera)
- New York Police Department CIT training details (Presented by the NYPD Assistant Chief in charge of CIT training)
- Behavioral health and best practices in collaborating with police and treating justice-involved people with mental illness and I/DD (Presented by a representative from the New York City Department of Health and Mental Hygiene)
- The Arc of the United States’ national training program focused on I/DD, called Pathways to Justice[®], was also briefly discussed.

Prosecutor’s Perspective (Presented by prosecutors)

- Victims and Witnesses: How prosecutors can interview victims and witnesses with mental illness or I/DD.
- Defendants: Eligibility for Mental Health Court; Issues of competence.

This training can be useful to prosecutors in offices of all sizes. Prosecutors have to assess cases where victims, witnesses, and defendants have mental illness or I/DD, and they have to evaluate the actions of police officers who have contact with this population. More cross training in model responses and approaches are needed between prosecutors and law enforcement to understand the unique needs and challenges of people with mental illness and I/DD. Local chapters of NAMI and The Arc, as well as CIT trained police officers, can be called upon to provide important training for prosecutors.

CONCLUSION

There is a growing understanding within the criminal justice system of the issues raised by law enforcement interactions with victims, witness, suspects, and defendants with I/DD, mental illness, or both. Many police departments are embracing trainings and new initiatives informed by a deeper understanding of I/DD and mental illness. Prosecutors must do the same. Enhanced knowledge and improved processes within the prosecution sphere that take I/DD and mental illness into account will benefit both individuals with I/DD or mental illness and the community at large.

RESOURCES

I/DD and Disability Resources:

[State and Local Chapters of The Arc](#)

The Arc has over 600 state and local chapters that may be able to assist on matters involving a person with I/DD. Chapters do not provide the same services, so contact your local chapter to find out if they may be able to assist in your unique situation.

[The Arc of the United States' National Center on Criminal Justice & Disability® \(NCCJD®\)](#)

NCCJD serves as a bridge between the criminal justice and disability communities and pursues and promotes safety, fairness, and justice for people with I/DD, especially those with marginalized identities, as victims, witnesses, suspects, defendants, and incarcerated persons. NCCJD also provides training and technical assistance to criminal justice professionals. Email nccjdinfo@thearc.org or complete a [Request for Assistance](#).

[Protection and Advocacy Agencies](#)

For legal or technical assistance on disability-related issues, you can seek assistance from your local Protection and Advocacy (P&A) agencies, federally-funded organizations available in all states and U.S. territories.

Mental Health Court Resources

Some prosecutors around the country have embraced Mental Health Courts, when resources are available. As described above in the summary on the Rockland County District Attorney's IDDATI program, Mental Health Courts are often not appropriate for those with I/DD. Though this paper does not cover how to develop and run a Mental Health Court, many excellent resources exist to guide prosecutors who are either participating in a Mental Health Court or would like

to investigate the possibility of starting one. These resources include:

- Publications on Mental Health Court, The Justice Center - Council for State Governments, <https://csgjusticecenter.org/publications-on-mental-health-courts/>
- Mental Health Courts - Resource Guide, National Center for State Courts, <https://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Mental-Health-Courts/Resource-Guide.aspx>
- Mental Health Courts: A Guide to Research-Informed Policy and Practice, MacArthur Foundation and The Justice Center of the Council of State Governments (2009), https://www.bja.gov/Publications/CSG_MHC_Research.pdf
- Practice Profile – Adult Mental Health Courts, Crime Solutions.gov, <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=34>
- Developing a Mental Health Court: An Interdisciplinary Curriculum, BJA and The Justice Center of the Council of State Governments. (2015), https://www.courtinnovation.org/sites/default/files/media/document/2018/Developing%20a%20Mental%20Health%20Court_Handbook%20for%20Curriculum%20Facilitators.pdf

Resource on Competency

- Treatment Advocacy Center: Competency Restoration versus Psychiatric Treatment, <https://www.treatmentadvocacycenter.org/fixing-the-system/features-and-news/4126-the-distinction-between-competency-restoration-and-psychiatric-treatment>

The Arc
www.thearc.org



NAMI
www.nami.org



Prosecutors' Center for Excellence
www.pceinc.org

