



## **Representing Clients with Intellectual Disability<sup>1</sup>: Developmental Disability (DD) or Traumatic Brain Injury (TBI)**

When representing a client with impaired intellectual functioning, the first and most important task for the defense attorney is recognizing that the individual client has limitations, identifying the extent of those limitations, and then adapting to and accommodating the client in order to be both effective and ethical in representing the client throughout the case.

### **Developmental disability (DD):**

A developmental disability is a birth defect related to a body part or body system. It may affect many body parts or systems. In Washington, the statute governing state services for those with a developmental disability (DD Services) is found at RCW 71A. “Developmental disability” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual that the secretary has found to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities.<sup>2</sup> An individual qualifies for DD Services if his or her disability originates before age 18, is expected to continue indefinitely, and constitutes a substantial handicap to the individual. *Id.* There are many more individuals who qualify or would qualify for services than are enrolled and receiving services.

### **Traumatic Brain Injury (TBI)**

A traumatic brain injury is an injury that results from a blow or jolt to the head *OR* from a penetrating head injury that disrupts function of the brain.<sup>3</sup> Clients with a history of a traumatic brain injury may have experienced physical changes as a result of their head injuries that range from subtle to obvious, including changes in motor skills, changes in speech, seizures, hearing loss, tremors and fatigue. They may have any of the following mental health symptoms: depression, mood swings, anxiety, problems with anger, impulsivity, or an inability to inhibit remarks or recognize social cues. An individual with a history of a traumatic brain injury may have behavioral challenges, including difficulty with initiation, low self-esteem, problems relating to others and a high level of frustration and reduced tolerance.

Not all blows or jolts result in traumatic brain injury. Traumatic brain injuries range widely in severity, from “mild,” with a brief change in mental status or consciousness, to “severe,” with extended period of unconsciousness or amnesia following injury. Leading causes of traumatic brain injury include head injuries stemming from falls, motor vehicle accidents, sporting events, being struck by or against an object, physical assaults or violent crime (including domestic violence), and blasts for active duty military personnel in war zones.

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<sup>1</sup> In October 2010, President Obama signed Rosa’s Law, changing the phrase “mental retardation” to “intellectual disability” amending federal health, education and labor laws.

<sup>2</sup> RCW 71A.10.020(3).

<sup>3</sup> RCW 74.31.010(4).

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The CDC has recognized traumatic brain injury in prisons and jails as an important public health problem.<sup>4</sup> An individual who experiences more than one traumatic brain injury will likely have a slower recovery with a subsequent traumatic brain injury.<sup>5</sup> Young adults with a history of traumatic brain injury are at increased risk for sustaining another traumatic brain injury.<sup>6</sup> Women inmates convicted of violent crime are likely to have sustained a pre-crime traumatic brain injury and /or some other form of physical abuse.<sup>7</sup>

### **Identifying Clients with an Intellectual Disability**

Defense attorneys may readily identify some clients who are developmentally disabled or who have a history of traumatic brain injury, but many individuals are guarded and do not share this information. Be alert to any of the following symptoms or traits of these clients:

- May not understand outcomes of situations
- May not behave appropriately
- May have difficulty performing tasks
- May be unable to move from concrete to abstract thought
- May have memory gaps and may have minimal understanding about what is being said to them
- May have a short attention span
- May have impaired judgment
- May have difficulty understanding rights, court proceedings or punishment
- May have problems with speech and comprehension
- May be quick to take blame; may be eager to please authority

### **Tips for Effective Communication for DD/ID or TBI Clients**

- Use a checklist designed to help you identify a client who may be intellectually disabled for the initial visit.
- Use simple and clear questions.
- Speak slowly.
- Minimize distractions whenever possible.
- Have your client repeat back what you have explained to be sure he understands.
- Encourage your client to ask questions when she doesn't understand anything.
- Allow extra time for meetings and court hearings; make the court take extra time.
- Be patient with your client; give him time to respond.
- Avoid arguing with your client.
- Consider involving a support person in court settings, and ask permission for the support person to be seated or standing with the client during a hearing or trial. Ask the court to order that the communication remain confidential when a support person is used, as an accommodation for the client's condition.

### **Legal Issues and Practical Considerations:**

- **Experts:** Get the right expert or experts to evaluate your client. You may need a forensic psychologist and a neuropsychologist to assess your client's limitations.

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<sup>4</sup> Traumatic Brain Injury in Prisons and Jails: An Unrecognized Problem, CDC, found at [http://www.cdc.gov/TraumaticBrainInjury/factsheets\\_reports.html](http://www.cdc.gov/TraumaticBrainInjury/factsheets_reports.html)

<sup>5</sup> Traumatic Brain Injury: A Guide for Criminal Justice Professionals, CDC, found at [CDC - Injury - TBI -Fact Sheets and Reports](#)

<sup>6</sup> Id.

<sup>7</sup> Id.

- **Competency:** Pay careful attention to issues of competency throughout the case. RCW 10.77.060(1)(b) requires the state/court expert to be a “developmental disabilities professional” for all evaluations when a defendant “may be developmentally disabled.” The potential “restoration” period is shorter for felonies if client is developmentally disabled<sup>8</sup>. An individual who is found incompetent by the court must be evaluated at the direction of the Secretary for developmental disability and placed in a program providing supports, subject to available funding. See RCW 10.77.0845.
- **Mental defense or general denial:** Carefully consider whether the defense of diminished capacity is possible. If there is not a diminished capacity defense, consider whether the client didn’t form the *mens rea* due to mental condition (didn’t as opposed to couldn’t) given the case facts and client’s condition.
- **False Confessions:** Evaluate any alleged statements or confessions for coercion; consider having a forensic evaluator examine the client and the circumstances surrounding a confession; some clients may be highly suggestible, may be eager to please authority and may falsely confess or over confess. Some clients may not understand their rights and options and involuntarily waive their rights.
- **Pre-trial release:** Seek alternatives to confinement prior to trial. (Workgroup Report to Legislature, Dec, 2009, supports this as an alternative; see page 3).
- **Sentencing:** Argue for sentencing alternatives like Mental Health Courts or the use of “Alternatives to Confinement” for sentences that are 12 months or less. A mental health condition or impairment is a mitigating factor and can be a basis to depart from a standard range sentence<sup>9</sup>
- **Information sharing:** With the client’s consent, share information about the client’s condition or diagnosis with the court, prosecution, and jail/prison staff if appropriate.
- **Death Penalty:** It is unconstitutional to execute persons with intellectual disability; a state threshold requirement that requires an individual to have an IQ of 70 or below before allowing additional evidence of intellectual disability is unconstitutional<sup>10</sup>.

### **Additional Resource/Further Reading:**

WDA Practice Advisories: Exceptional Sentence Down Based on Mental Impairment, Alternatives to Confinement. The WDA Brief Bank has sample pleading for an exceptional sentence downward.

Washington Legislative Reports:<sup>11</sup> (1) *Concerning Persons with Developmental Disabilities and Traumatic Brain Injury in Correctional Facilities and Jails: Work Group Report*, December 2009, found at [http://www.ddc.wa.gov/Publications/091208\\_2078\\_Final\\_Report2.pdf](http://www.ddc.wa.gov/Publications/091208_2078_Final_Report2.pdf), and *Screening for People with Developmental Disabilities and Traumatic Brain Injury in Jails and Correctional Facilities: Task Force Report, Part 2*, August 2010; found at [http://www.ddc.wa.gov/Publications/100810\\_HB\\_2078\\_Final\\_Report\\_Part%20II.pdf](http://www.ddc.wa.gov/Publications/100810_HB_2078_Final_Report_Part%20II.pdf)

<sup>8</sup> RCW 10.77.086(4)

<sup>9</sup> Support for this can be found in the report: Concerning Persons with Developmental Disabilities and Traumatic Brain Injury in Correctional Facilities and Jails: Workgroup Report to Legislature, Dec. 2009, page 3. WDA has sample pleadings and a practice advisory on this subject.

<sup>10</sup> Hall v. Florida, Slip Op. 12-10882, \_\_\_ US \_\_\_, (May 27, 2014); Washington’s death penalty statute 10.95.030(2)(a) currently establishes an IQ of 70 as the cut off of for a determination that an individual is intellectually disabled.

<sup>11</sup> *If you have the time, read, and consider attaching these documents to your pleadings in support of a motion for pretrial release or alternative sentences<sup>11</sup>:*