

Evaluating Competencies

FORENSIC ASSESSMENTS
AND INSTRUMENTS

Thomas Grisso

Perspectives in Law & Psychology • 7

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Evaluating Competencies

FORENSIC ASSESSMENTS
AND INSTRUMENTS

Perspectives in Law & Psychology

Series Editor: **BRUCE DENNIS SALES**, *University of Arizona, Tucson, Arizona*

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Forensic Assessments and Instruments
Thomas Grisso

Preface

This book offers a conceptual model with which mental health professionals can design and perform assessments for legal competencies defined in criminal and civil law. In addition, chapters on six different legal competencies provide evaluative reviews of specialized forensic assessment instruments for use in assessments employing the model.

One purpose of the book is to increase the legal relevance of forensic assessments. To achieve this objective, the assessment model (described in Chapter 2) is based on an analysis of competencies as legal constructs. A review of six of these legal constructs, as diverse as incompetency to stand trial and incompetency to care for self and property (need for guardianship), reveals that they share six conceptual characteristics. Each of these characteristics defines the law's need for a particular type of information about individuals whose legal competencies are in question. Therefore, the model uses these six legally relevant characteristics as a structure for the examiner's activities at all stages of a forensic assessment: the identification of the type of data to collect, the selection of assessment methods that will obtain the data, and the interpretation and reporting of results.

A second purpose of the book is to promote the empirical integrity of forensic assessments. There are signs that the field of forensic assessment has not lived up to the empirically based tradition of the sciences from which it has grown. The book's review of 26 specialized forensic assessment instruments, therefore, seeks to encourage the use and research development of standardized assessment methods designed specifically to obtain data required by legal definitions of competencies. Most of these instruments are little known among mental health professionals. This review of their purposes, reliability, and validity marks their first comprehensive evaluation as a body of specialized assessment instruments.

The third purpose of the book is to provide lawyers a basis for using and challenging forensic assessments. Lawyers play an especially important role in the development of the field of forensic assessment. The lawyer who solicits a forensic assessment is its consumer. Like the consumer of any product, the lawyer must understand how to use it, that is, how to apply the results of forensic assessments to the legal and social questions raised in competency cases. The assessment model and the instrument reviews have been developed in part to educate the lawyer-consumer to this objective.

Lawyers also influence the field of forensic assessment in their role as critic, that is, in their test of assessment results on cross-examination. This book, although optimistic in its view of the value of forensic assessments, devotes considerable attention to their conceptual limits and empirical limitations. The lawyer-critic who uses this information to challenge forensic assessments in the "marketplace" (courtroom) makes a major contribution to the field of forensic assessment. These challenges hold forensic examiners accountable to standards for assessment practice, thereby contributing to a synergistic process in which mental health sciences and law can forge forensic assessments with integrity and utility.

This work is the product of a research grant (MH-37231) from the Center for Studies of Antisocial and Violent Behavior, National Institute of Mental Health. The literature review and writing supported by this grant occurred from 1982 to 1985. (The book's information on the 26 instruments and on forensic assessments summarizes the literature published prior to January, 1985, when the manuscript for this book was completed.) The Center funded an extension of the project during 1985 in order to disseminate its results through seminars provided to state departments of mental health in several geographic areas nationally. Saleem Shah and the Center staff are gratefully acknowledged for their encouragement and support.

Many individuals who assisted in the course of this project deserve acknowledgment but are too numerous to identify individually. For example, more than 100 professionals in psychiatry and psychology assisted the author in a networking process for locating potential instruments for review. The authors of many of the instruments were most cooperative in providing unpublished works related to their instruments. In addition, most of the test authors were sent early drafts of reviews of their instruments, and their replies invariably were helpful in refining the reviews. A by-product of these contacts is the author's impression that one would have to search long for a more congenial and enthusiastic group of professionals than those who work in the field of forensic assessment.

Thoughtful suggestions by David Wexler and Stephen Morse on various portions of the manuscript are gratefully acknowledged, as is the expert assistance of Bruce Dennis Sales in his capacity as editor of this Plenum series. Many others who did not review the manuscript contributed in a more informal sense across the years in discussions and sharing of ideas, especially Amiram Elwork, Stephen Golding, Jesse Goldner, Gary Melton, Ronald Roesch, Richard Rogers, Loren Roth, Alan Tomkins, and Lois Weithorn. Graduate students in psychology at St. Louis University who assisted ably in the search for relevant literature and research were Cherie Baetz-Davis, Sandra Seigel, and Danny Williger. The resources and staff assistance of St. Louis University's library and the law library at St. Louis University School of Law were invaluable in the review process.

Finally, especially warm thanks to Donna Grisso in her many roles in this project: as critic when I was obscure, as comforter when I worried, and as the project's word processor from preface to bibliography.

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St. Louis, Missouri

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Problems in Assessments for Legal Competencies

Questions of criminal and civil law frequently require courts to make legal decisions about individuals based in part on their physical, mental, and social capacities. These legal decisions generally are concerned with an individual's capacities to respond to certain past, current, or future circumstances in the individual's life. For example, a court may be required to consider an elderly person's prospect for managing day-to-day tasks of living, in order to determine whether to appoint a legal guardian to provide assistance to the elderly individual. A criminal court may be asked to determine whether a mentally disordered defendant is able to participate in his upcoming trial, or whether the defendant needs treatment in order to prepare for the event.

Many of these questions about human capacities arise because of the law's concern with *legal competencies*. Decisions about these competencies are controlled by statute or case law, just as with any other type of legal decision. They ascribe to the individual in question a status of weakness or insufficiency that is perceived as jeopardizing the welfare of the individual or society. When this status is legally determined, it allows, obligates, or justifies the state's intervention in certain ways in order to protect the welfare of the individual and often to curtail the individual's rights in the best interests of the individual and society.

In recent decades, courts have turned increasingly to mental health professionals to assist them in considering individuals' capacities relevant for legal competencies. Society and the law have long recognized psychiatrists and other physicians, and in more recent history psychologists and social workers, as experts in assessment and understanding of human abilities, emotions, and potentials. Further, many individuals whom the law declares legally incompetent manifest the same mental deficiencies and aberrations that would cause them to attain the status of clinical incompetence: that is, the nonlegal status of client or patient in need of remedial care. Therefore, legal codes and practice rely on mental health professionals to assist courts in their review of mental capacities and human abilities related to the difficult decisions posed by competency laws.

In recent years, however, the legal system has registered its ambivalence and sometimes its disenchantment with this arrangement. Mental health professionals often have not been able to deliver what was expected, or they have insisted on delivering much that the law did not desire. As a consequence, the future of mental health professionals in the courtroom is on trial in every case in which mental health professionals testify. According to Alan Stone (1984), mental health professionals have not lost their place in the courtroom; but the battle to maintain the necessary credibility to continue in their role has left them "wounded and bloody" (p. 57).

The purpose of this book is to lay a new foundation for clinical assessments related to legal competencies. It proposes a conceptual and methodological approach that would allow mental health professionals to respond more effectively to the law's needs and to the needs of individuals about whom the law makes competency decisions. If it is effective in achieving these goals, this book will, I hope, contribute to a positive resolution of the previously mentioned controversy.

The rest of this chapter will briefly identify the legal competencies to be considered, the specific criticisms and shortcomings of past practice in forensic assessments and testimony concerning legal competencies, and the broad assumptions that guided the formulation of the assessment approach outlined in subsequent chapters.

TYPES OF LEGAL COMPETENCIES

There are many legal competencies, each with somewhat different criteria. Further, each legal competency may be defined somewhat differently across the statutes or case law of the nation's fifty-one legal jurisdictions. Subsequent chapters provide discussions of the major variations in legal definitions of each of six legal competencies. The present discussion provides a more general introduction to each of the legal competencies addressed in this book, and notes several other legal competencies that will not receive attention in later chapters. Complete citation of references supporting the descriptions of the six legal competencies will be reserved for the more detailed discussions in subsequent chapters.

LEGAL COMPETENCIES IN CRIMINAL CASES

Several points in the criminal trial process may require legal decisions based wholly or in part on a consideration of a defendant's physical and psychological capacities. These include the defendant's capacities: (1) to waive rights to silence and counsel "knowingly, intelligently, and voluntarily," prior to questioning by law enforcement officers; (2) to plead guilty; (3) to dismiss counsel, or to conduct one's own defense without benefit of counsel; (4) to stand trial (i.e., to function in the role of defendant in the trial process); (5) to possess the requisite cognition, affect, and volition for criminal responsibility (i.e., the insanity defense); (6) to serve a sentence; (7) to be executed (i.e., to undergo capital punishment).

Of these areas, three more frequently require the assistance of mental health professionals: capacities related to standing trial, waiver of rights, and criminal responsibility.

Competency to Stand Trial

The legal doctrine of competency to stand trial arose in English common law out of a concern for fairness in the trial of accused persons who, if found guilty of criminal charges, would suffer deprivations of liberty and other penalties. It was recognized that certain defendants with serious mental deficiencies might not be capable of defending themselves, therefore being at great risk of suffering the consequences of a miscarriage of justice. Further, they might be unable to contribute to their part in the proper search for truth at trial, thereby weakening the integrity of the justice system itself. The United States Supreme Court (*Dusky v. United States*, 1960) determined that a defendant's competency to stand trial depended on "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "whether he has a rational as well as factual understanding of the proceedings against him" (p. 402).

The question of a defendant's competency to stand trial is raised frequently, in comparison to other competencies in criminal law, although only in a minority of a jurisdiction's total criminal cases. If the question is raised, it will usually be prior to a hearing on the criminal allegations, for which reason the term *pretrial competency* often is used to refer to the legal concept; yet on some occasions the question of competency to stand trial arises in the midst of a trial.

Determining whether a defendant is incompetent to stand trial requires an inquiry into the defendant's capacities as defined by the *Dusky* standard, although typically such incompetency often is associated with mental illness or other psychological disabilities. An examination of the defendant's abilities by a mental health professional, therefore, is a standard part of the competency inquiry in most jurisdictions. The forensic examiner's findings are reported to the court in writing and often in oral testimony, during a competency hearing at which a judge weighs all relevant evidence and makes a finding of competency or incompetency. A finding of incompetency to stand trial usually will result in involuntary treatment to bring the defendant to competency, with resumption of the hearing on the criminal charges being delayed until the results of the treatment effort become apparent.

Competent Waiver of "Miranda Rights"

A defendant's statements to law enforcement officers (e.g., offense-related information or confession during pretrial arrest and questioning) may be entered into evidence in criminal proceedings against the defendant only if the defendant was afforded adequate opportunity to choose to withhold the information or to have the benefit of legal counsel at the time the statement was made. This protection arises from constitutional requirements designed to curtail the potential abuse of power by the state in seeking convictions and criminal sanctions against individuals.

A defendant's opportunity to claim the right to silence and to legal counsel requires not only freedom from coercive police actions, but also knowledge that the rights are available and an understanding of the nature and significance of the rights. Police are required to inform the individual of the rights (*Miranda v. Arizona*, 1966) in what are called "*Miranda* warnings," usually consisting of four or five standard sentences describing the rights. The individual's subsequent choice to waive the rights and make a statement must be made "knowingly, intelligently,

and voluntarily.” If the waiver does not meet this test, then it was not made “competently,” the waiver was invalid, and the information obtained by law enforcement officers would be inadmissible as evidence.

When a waiver’s validity is questioned, the court must examine relevant facts to rule on the issue. Generally this will require consideration of circumstances of the police inquiry, as well as the psychological characteristics of the individual who was involved. Mental health professionals may be asked to examine the individual’s abilities or mental status in order to provide information relevant to the person’s capacities to have understood and appreciated the rights of which that person was informed.

The court may determine that the individual was not competent (had insufficient capacity) to waive the rights knowingly, intelligently, and voluntarily. Incompetence to waive *Miranda* rights, however, is not a legal finding or disposition, but rather an intermediate conclusion that may be reached on the way to a legal finding of invalidity of the waiver. Thus, in contrast to incompetency to stand trial, an individual does not acquire a legal status of “incompetent to waive *Miranda* rights.” Nevertheless, the concept of a person’s competency or incompetency to waive the rights is a legal competency because it has evolved through judicial reasoning in appellate cases.

Criminal Responsibility

The law has long recognized two concepts on which responsibility for criminal actions depend: *actus reus*, requiring evidence that the accused person engaged in the alleged act; and *mens rea*, requiring a determination that the accused person manifested the requisite mental state to have intended committing the act or to have foreseen its consequences. The insanity defense doctrine acknowledges that a person who did not possess mental capacities to have conformed to legal requirements should not be held responsible for acts that otherwise would be criminal. Thus a finding of insanity constitutes acquittal on the premise that the defendant could not commit the act with the requisite intent.

At issue when testing legal insanity is the individual’s state of mind at the time of the offense. Somewhat different legal tests for insanity are used in different jurisdictions. All of them, however, refer in one way or another to cognitive, affective, and/or volitional capacities of the defendant, and to the impairment of those capacities as a consequence of mental disorder.

The insanity plea is asserted in a very small minority of criminal cases, and in most jurisdictions it results in acquittal in only a small fraction of the cases in which it is raised. Mental health professionals are almost always used to evaluate defendants who raise this defense, in order to inform the court of characteristics of the defendant relevant to the cognitive, affective, or volitional capacities at issue.

The defendant who meets criteria for the insanity defense is not declared “incompetent to have committed the crime,” yet this is the effect of a legal declaration of insanity. Further, the court and the mental health professional are faced with much the same kind of task in insanity cases as in questions of other legal competencies: that is, assessment and consideration of the person’s psychological capacities. Therefore, legal insanity is dealt with conceptually as a legal competency

in this book, despite recognition that the law formally does not apply the terms *competency* or *incompetency* to the concept of insanity.

Other Criminal Law Competencies

Competency to plead guilty and competency to dismiss counsel refer primarily to capacities to make informed and rational decisions that may have serious consequences for the criminal defendant. In a sense, these competencies are variations on the more general concept of competency to stand trial. Chapter 4 will explain, however, that they involve somewhat different concerns about defendant abilities, and may require a higher threshold of ability, than competency to stand trial.

LEGAL COMPETENCIES IN CIVIL CASES

Many questions of civil law require legal decisions based substantially on a consideration of an individual's physical and psychological capacities. Some of the more common questions refer to a person's capacities: (1) to be responsible for meeting a child's needs, as a parent or caretaker; (2) to consent to medical or mental health interventions (e.g., treatment, counseling); (3) to consent to participation in research; (4) to care for oneself and one's property; (5) to make a contract; (6) to make a will (testamentary competency).

Three of these competency questions will receive relatively greater attention in this book, because they more frequently involve the assistance of mental health professionals in determining related psychological capacities. These are the areas of parental competency, competency to care for self and property, and competency to consent to treatment.

Parental Competency

The *parens patriae* function of the state has long allowed legal intervention to terminate parental rights in relation to a child, when the child's health and welfare are endangered by the parent's care. The decision to terminate a parent's rights requires a determination that the individual is not a "fit parent," as defined by statute. The state then may remove the child from the parent's custody for placement with a more suitable caretaker.

Parental fitness or competency frequently involves an examination of evidence concerning the parent's past abuse or neglect of the child. In addition, a mental health professional may be asked to evaluate the parents and children involved, in order to provide the court with information of a psychiatric, psychological, or social nature that might bear on the question of the parent's legal competency to meet the child's needs and to ensure the child's safety.

The question of parental competency may also be raised in custody cases in which no formal finding of incompetency status is required to determine custody. The most common of these is the legal decision in divorce-related cases, in which two parents are in contest concerning legal custody of their children. In most of these cases, neither parent would meet the legal criteria for parental unfitness. The

court's task in divorce-related cases is to determine which parental situation represents the best prospects for the child's general welfare. Mental health professionals often will be asked to evaluate one or both parents and the child in order to provide the court relevant information concerning custody in the child's best interest.

Finally, parental competency is raised in legal decisions concerning a child's adoption, placement of a child with a family for foster care, or evaluation of families for their eligibility as a resource for foster care programs.

Competency to Care for Self or Property

The state is empowered to intervene in the lives of individuals who are incompetent to care for themselves or to manage their property, so as to ensure their protection and care in accordance with the best interests of the incompetent individual and society. A legal finding of incompetency to care for self or property allows the state to appoint a suitable guardian, who will be responsible for decisions affecting the incompetent person's care and protection. Medical doctors and mental health professionals may be consulted to provide courts with information about the individual's capacities related to this legal determination. Guardianship is most commonly sought for children, the developmentally disabled, the mentally ill, and elderly individuals whose diminished capacities for self-care or property management raise concern for their safety. The guardian may be authorized to make whatever decisions seem necessary for the person's care, including decisions about medical care and institutionalization in mental hospital facilities, residential arrangements, and the conservation and expenditure of the incompetent person's financial resources.

Competency to Consent to Treatment

Law provides for the protection of individuals from medical or psychological interventions against their desires (except in certain court-ordered circumstances). Thus most situations involving proposed interventions by medical or mental health professionals require the consent of either the individual to be treated or a guardian who is legally authorized to consent in the individual's best interest.

The question of an individual's competency to consent to, or to refuse, proposed treatment interventions focuses on the person's capacity to make an informed or rational choice. General populations for whom the question is most often raised include minors, the developmentally disabled or mentally ill, certain elderly persons, or any individuals whose immediate medical conditions render them incapable of responding to a request for consent. In these instances, mental health professionals may be asked to provide evidence concerning the individual's capacities to meet legal requirements for informed or rational decision making about the treatment in question.

The circumstances that raise the question of competency to consent reflect some of the more difficult issues currently facing mental health law and family law. For example, they include mental patients' rights and capacities to refuse highly intrusive treatments, such as medication, electroconvulsive treatment, and