

Chapter 32

Competency and Capacity: A Primer

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COMPETENCY IN GENERAL

In American society there are few aspects of human endeavor that are not affected in some way by the law. Generally, for someone to “lawfully” engage in some endeavor and be held accountable for his or her actions he or she must be *competent*. Essentially, “legal” competency refers to “having sufficient ability ... possessing the natural or legal qualifications [to engage in something as recognized by law].”¹ This definition is deliberately vague because the term *competency* refers to a broad concept that encompasses many different situations and legal issues. As a consequence the definition, requirements, and application of the term can vary greatly, depending on the act or issue in question. Regardless of the circumstance, however, the law seeks to underscore a basic assumption: only acts of a relatively rational person are to be afforded recognition by the public. In doing so the law attempts to reaffirm the autonomy of the individual and the general integrity and value of society.

Generally, competency refers to some minimal mental, cognitive, or behavioral trait, ability, or capability required to perform a particular legally recognized act or to assume some legally recognized role. Appendix 32-1 identifies a sample of different situations in which competency is typically an essential component. The term *capacity*, which is frequently interchanged with and mistaken for the word *competency*, refers to an individual’s actual ability to understand, appreciate, and form a relatively rational intention with regard to some act.

Appendix 32-2 identifies several human acts for which capacity is legally defined for the purpose of determining whether a person’s actions can be legally recognized as competent. As a distinction, the term *incompetent* is applied to an individual whose actions fail a legal test of capacity. When such a designation is made, the individual is considered by law to be mentally incapable of performing a particular legally recognized act (e.g., executing a will or making medical decisions) or assuming a particular legally recognized role (e.g., serving as a guardian or participating in a trial).

Several important distinctions about competency must be clarified. First, the adjudication of incompetence is subject or task specific. In other words, the fact that a person is adjudicated incompetent to execute a will, for example, does not automatically render him or her incompetent to do other things, such as consent to treatment or testify as a witness. Accordingly, determinations of competency should be made on a case-by-case basis with regard

to a person’s present mental capacity and the specific legal right or act that he or she wishes or is asked to exercise. Second, a finding of incompetency does not translate into and should not be interpreted as a finding of mental illness. The threshold question in any civil or criminal competency inquiry is the ability to understand and engage in whatever legal requirements are defined for a given act (e.g., make a contract, stand trial, or marry). A person may be actively delusional, mentally retarded, or deaf and mute yet still meet the legal specifications associated with certain competency tests. Third, legal incompetency is not synonymous with the need for psychiatric treatment. The fact that a patient is or is not competent has no bearing on his or her need for treatment nor does such a finding necessarily equate with finding an individual dangerous to self or others. Fourth, incompetency and insanity are two entirely distinct concepts, although they are commonly confused with one another. In addition to different legal requirements for their determination, they are viewed from opposite temporal contexts. Legal competency reflects an individual’s present capacity to engage in an act at the time of an evaluation. Legal insanity and questions regarding criminal responsibility refer to a person’s ability, mental state, or both at the time of the offense. Insanity is therefore a historical perspective.

THE LAW IN GENERAL

Generally the law recognizes only those decisions or choices that have been made by a competent individual. The reason for this is that the law seeks to protect the incompetent from the effects of his or her actions and from being taken advantage of because of his or her lack of capacity. Persons over the age of majority, which is now 18 years,² are presumed to be competent.³ However, this presumption can be rebutted based on evidence of an individual’s incapacity.⁴

The issue of competency, whether in a civil or criminal context, is commonly raised in cases involving two classes of parties—minors and persons appearing to be mentally impaired. In many situations minors are not considered legally competent and therefore require the consent of a parent or designated guardian. There are, of course, exceptions to this general rule, such as minors who are considered emancipated⁵ or mature⁶ and some cases of medical need⁷ or emergency.⁸

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The mentally impaired individual presents a slightly different problem in terms of competency. Lack of capacity or incompetency cannot be presumed based on either treatment for mental illness⁹ or institutionalization.¹⁰ Moreover, evidence of significant mental illness, such as acute psychosis or chronic schizophrenia, does not in and of itself render a person incompetent in any particular area or in all areas of functioning. Instead, such a condition should trigger an assessment to determine whether a person is incapable of making a particular kind of decision or performing a particular type of task as defined or required by law. When there is a question about a person's mental status with regard to the capacity to engage in some legal act, one commentator suggests that two questions be addressed:¹¹

1. Is there evidence of mental illness or deficiency (e.g., alcohol-induced, age-related, organic, etc.)?
2. If so, does this condition prevent the person from satisfying the relevant legal test or criterion for competency?

Thus although it is not always obvious from the legal tests themselves (Appendix 32-2), there is typically a threshold condition of cognitive or mental illness or deficiency that serves as a qualifying consideration. However, such conditions, no matter how seemingly severe, should not trigger reflexive examinations intended to "confirm" a premeditated finding of incompetency. Respect for individual autonomy¹² demands that individuals be allowed to make decisions of which they are capable, even if they are seriously mentally ill. As a rule, therefore, a patient or person with a history of mental illness generally must be judicially declared incompetent before he or she loses the legal power to do what adults who are not mentally ill have the legal right or power to do.

COMMON COMPETENCY AREAS

Civil Law

Consent to Medical Treatment

One of the most controversial and vexing areas of potential substitute decision-making concerns the medical treatment of individuals whose competency is in question. The doctrine of informed consent, as described in the following section, was developed to address this issue. Historically, concern about patient decision-making has centered around two essential but sometimes conflicting purposes—individual autonomy and rational decision-making.¹³ As one commentator aptly summarized, the interest in protecting autonomy in treatment-related decision-making is not merely a matter of the value that is placed on liberty or freedom for its own sake. Protection of autonomy also serves to humanize the physician–patient relationship and to restore the balance of authority between the physician and the patient on whose body or mind the proposed treatment would intrude.¹⁴

The Doctrine of Informed Consent Under the doctrine of informed consent, health care providers have a legal duty

to abide by the treatment decisions made by their patients unless a compelling state interest exists. The term *informed consent* is a legal principle in medical jurisprudence that generally holds that a physician must disclose to a patient sufficient information to enable the patient to make an "informed" decision about a proposed treatment or procedure.¹⁵

For a patient's consent to be considered informed, it must adequately address three essential elements—information, competency, and voluntariness. In general the patient must be given enough information to make a truly knowing decision, and that decision (consent) must be made voluntarily by a person who is legally competent. Each of these requirements must be met, or any consent given will not be considered informed or legally valid.

Competent Medical Decision-Making Only a competent person is legally recognized as being able to give informed consent. For health care providers working with patients who are sometimes of questionable competence because of mental illness, narcotic abuse, or alcoholism, this issue can be particularly important. The law presumes that an adult is competent unless he or she has been either judicially determined incompetent or incapacitated by a medical condition or emergency. The mere fact that a person is being treated for a mental illness¹⁶ or is institutionalized¹⁷ does not automatically render him or her incompetent. However, in addition to instances in which a patient's competency is manifestly suspect (i.e., he or she is acutely psychotic), there are several other circumstances in which competency considerations may be raised. First, and likely the most common, a patient of uncertain competency may refuse clearly necessary treatment; such a decision is especially questionable if the explanation for the refusal is illogical or indicates poor comprehension of the treatment information provided. Second, a physician may seek a consultation regarding the ability of a patient who is to undergo a significant medical procedure but is of questionable competency to give informed consent. This consideration may have more to do with protecting the physician against possible liability than with respect for patient liberty and autonomy. Third, a competency evaluation may be sought for a patient who has been legally found to be incompetent in one context (e.g., testamentary capacity) but "appears" to be competent in another context (e.g., giving informed consent to pursue a circumscribed course of treatment, such as drug therapy). Again, this practice may be motivated more by defensive medicine than deference to patient rights.

Notwithstanding the reasons that a person's competency to make medical decisions is questioned, the manner in which such a determination should be made is rarely described in the law and is not universally understood and practiced in the various health care professions. Instead, the treating provider (theoretically) is left to engage in a thoughtful analysis of the existing circumstances and arrive at a reasonable determination. From a legal perspective, the term *competency* is narrowly defined in terms of cognitive capacity.¹⁸ Because there are no set criteria for determining a patient's competence, some commentators have likened "the search for a single test of competency to

a search for a Holy Grail.”¹⁹ Regardless of the lack of a standard, health care providers should ensure that at a minimum the patient is capable of the following:²⁰

1. Understanding the particular treatment being offered.²¹
2. Making a discernible decision, one way or another, regarding the treatment being offered.²²
3. Communicating, verbally or nonverbally, that decision.²³

To assist with what can be a daunting determination for some health care providers to make on behalf of some patients and under some circumstances, asking the following straightforward questions can help in the assessment of a patient’s capacity: What is the patient’s primary health problem at this time? What intervention was recommended? If the recommended intervention is implemented, what is likely to occur? If the recommended intervention is not pursued, what is likely to happen? What is the basis of the patient’s decision to accept or refuse the recommended intervention?²⁴

Mentally ill patients who have been determined to lack the requisite competency to make a treatment decision, except usually in an emergency,²⁵ will have an authorized representative or guardian appointed to make medical decisions on their behalf.²⁶

Capacity to Contract

To execute any business transaction between two parties, the law recognizes that each party must have sufficient capacity to give free and relatively knowing consent to enter into an agreement or contract. Minors and the mentally incompetent historically have been recognized as being incapable of executing a legally recognized transaction because of their presumed lack of the requisite cognitive capacity.

This presumption can be traced back as far as Roman law, which held that “an insane person cannot contract any business whatever because he does not know what he is doing.” Similarly the common law of contracts in England required that two persons who wished to enter into a business agreement had to reach a “meeting of the minds.” If one of the parties lacked the necessary mental capability to reach such a meeting, the law would not recognize the contract.

In *Dexter v. Hall* the U.S. Supreme Court commented on the effect that mental illness could have on the legality of a contract:

*[T]he fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or person non compos mentis (“not of sound mind”), has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have efficacy as such.*²⁷

As noted in the introduction, evidence of mental illness is not “per se” evidence of incompetency. Therefore for the “lunatic” in *Dexter* to legally be considered incapable of executing a contract, he or she would have to demonstrate a present inability to meet the applicable standards for doing so as defined by law.²⁸

The lack of capacity to contract may be total or partial. In cases of total incapacity a person is unable to enter into

any contractual obligation, and any attempt to do so would be considered void. For instance, a person whose property is under the supervision of a legal guardian as a result of a legal adjudication of incompetence is considered “totally lacking contractual capacity.” Capacity to contract also may be partial, as is generally the case with minors, the mentally ill, and persons whose cognitive faculties have been impaired by drugs, alcohol, or medication.²⁹ The extent of the ability of such persons to legally contract depends on the nature of the transaction and the surrounding circumstances.

The interests of commerce underlie the basic values associated with requirements of competency in contracts. When the incapacity or mental unsoundness of one of the parties affects a contract, two contrary public policies come into play. From a business perspective there is a fundamental view that the security of the transaction should be upheld to promote the development of commerce and ensure that the reasonable expectations of the parties are met. However, there is a countervailing public policy grounded in notions of morality and fairness that states that persons who are unable to appreciate the consequences of their actions should not be held accountable for them.

At one time the law regarding contracts entered into by persons lacking capacity held that such contracts were void.³⁰ However, the overwhelming weight of modern authority is that such contracts are merely voidable at the incompetent person’s election.³¹ One exception to this rule is the party who is so mentally disabled that he or she has been adjudicated mentally incompetent and a guardian of the property had been appointed before a given transaction was entered into. In many states a contract made under such circumstances would be considered void.³²

Generally, mental incapacity rising to the level of incompetency to contract is said to exist where a “party does not understand the nature and consequences of his acts at the time of the transaction.”³³ This rather broad and flexible definition often leads to the implicit conclusion that, if the contract is fair and beneficial to the individual alleged to be incompetent, he or she was (would be considered) “sane”; otherwise the tendency is to find him or her incompetent.³⁴ The more contemporary view uses a cognitive test (“ability to understand”) and may conclude that the contract is voidable if the party “by reason of mental illness or defect. . . is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of this condition.”³⁵ This approach allows the incompetent person to disaffirm an agreement or contract that he or she might be capable of understanding but because of some infirmity was without power to resist entering into.³⁶

Cases involving challenges to a party’s competency typically involve one of two scenarios. In the first scenario there is evidence of a mental condition that impairs a person’s cognitive ability (the ability to understand the nature and consequences of the proposed transaction). In the second scenario the evidence indicates that there are mental conditions that impair a party’s motivation or ability to act rationally. When a party to a contract lacks cognitive capacity, the contract is voidable without regard

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to whether the other person knew or had reason to know of the mental impairment. However, when one party has impaired motivational control, the contract is usually held to be voidable only if the other party knew or had reason to know of the mental condition (e.g., alcohol or narcotics intoxication).³⁷

Finally, there are two situations—restitution and necessity—in which the incompetency of a party may not necessarily void the provisions of an agreement. Sometimes a contract may be executed and its conditions performed before the issue of competency is raised. A person seeking to avoid a contract has the burden of proving why it should be voided.

Generally, if one party is incompetent and the contract is still to be executed³⁸ or if the contract is based on grossly inadequate provisions,³⁹ rescission or cancellation will be granted. If, however, the other party had no reason to know of the mental infirmity and the contract is not otherwise unfair, the right to void the agreement may be lost to the extent that the contract has already been executed.⁴⁰ In the latter situation, at the least the incompetent party would have the responsibility to place the other party in the status quo ante (or place he was in before the contract).

In such situations, mental incompetents, like minors, cannot void a contract in which “necessities of life” have been provided.⁴¹ Whether a good or service is considered a necessity is a matter for the jury, but certainly food, shelter, and clothing qualify. Other provisions, such as medical assistance, legal services, and transportation, usually are evaluated based on the party’s situation at the time of the contract.

Wills and Testamentary Capacity

A second area of business activity in which competency is a significant legal factor is the execution of a will. As with contracting, the competency to execute a will is not a matter of general competency but rather is related to specific legal requirements associated with formulating a will. For example, if the individual writing the will, or “testator,” is judged to be without the requisite competency (referred to as *testamentary capacity*) at the time of writing the will, the will would not be admitted to “probate” and would not be judged legally valid. If this occurs, the will’s terms or provisions have no legal effect. In these situations the distribution of the testator’s estate is guided by any valid will that exists. If no other will is available, the rules of “intestate secession” (which favor the immediate family and relatives) are applied. If no immediate family is available, the estate can “escheat” (or revert) to the state.

The conveyance of property through some form of testamentary process has a long and colorful history. Before the sixteenth century there was no law recognizing the written conveyance of real property to third parties. Typically, property rights were passed from one person to another or from one family member (e.g., father) to another (e.g., eldest son) in the form of an oral agreement or understanding. Public declaration or formal written representation of this change of ownership was uncommon and generally had no legal effect even if executed. The basic integrity and

good faith of the two parties involved provided the basis of any exchange of property. If a person died without settling his estate, personal or real, his personal possessions were considered to be “up for grabs” and the local authorities, acting in the name of the king or crown, typically seized his real property. In 1540 the first English Statute of Wills was passed.⁴² This statute and its later amendments authorized wills of land, provided that they were in writing. No other formality was required.

Today the law recognizes that a person may dispose of his or her property in any way he or she sees fit as long as it does not violate state law. However, for a will to be considered valid, it, like a contract, must be executed knowingly and voluntarily. Challenges to the validity of a will frequently concern whether the testator had sufficient testamentary capacity when making the will or was free from any undue influences (i.e., the will was voluntarily made).

Any person wishing to execute a legally binding will must possess, among other things, testamentary capacity. Analogous to the fundamental criminal law concept of mental competency, testamentary capacity involves an individual having a certain level of understanding of what he or she is doing in disposing of his or her property. There are no hard and fast rules or requisite elements that define testamentary capacity. However, the majority of jurisdictions in the United States require some variations of the elements articulated in the early English case, *Banks v. Goodfellow*.⁴³ In *Banks* the court fashioned the following five-part test:

To make a valid will one must be of sound mind though he need not possess superior or even average mentality. One is of sound mind for testamentary purposes only when he can understand and carry in his mind in a general way:

1. *The nature and extent of his property,*
 2. *The persons who are the natural objects of his bounty, and*
 3. *The disposition which he is making of his property.*
- He also must be capable of:*
4. *Appreciating these elements in relation to each other, and*
 5. *Forming an orderly desire as to the disposition of his property.*

If a will is challenged on the basis that the testator lacked the requisite capacity, a probate judge will generally inquire the following: Was the testator aware that he or she was making a will? Was he able to assess and appraise the amount and value of the property? Was he aware of his legal heirs? Finally, was there some organized or rational scheme to the distribution of the property?

In assessing each of these or similar criteria a probate judge will entertain any evidence by the challengers that indicates a contrary finding of fitness. As with all questions involving adults and issues of competency, a testator is presumed to possess the requisite capacity. Therefore the burden is on the challenger to prove that at the time the will was made the testator lacked the requisite capacity.

In determining whether testamentary capacity exists under the standards already articulated, the law does not

require a high degree of capacity or extensive knowledge. As with many tests of competency, only a minimum level of functioning is required. For example, in *In re Estate of Fish*,⁴⁴ a New York appellate court held that a testator “did not need to know the precise size of estate” to be considered competent.

Similar to other areas of competency, the presence of an apparent disability, infirmity, or mental dysfunction, such as mental illness, alcoholism, or narcotics addiction,⁴⁵ does not automatically invalidate an individual’s testamentary capacity. Although these conditions can cloud or impair a person’s ability to think and reason, the extent of any adverse effect is variable and therefore must be assessed. Moreover, even a person who is or appears to be significantly impaired should not be presumed to lack testamentary capacity. For example, if the will is written during a “lucid interval,” it can be deemed valid.⁴⁶ Similarly, evidence of personality quirks, abnormalities in perception, idiosyncrasies, or forgetfulness in and of themselves generally are not sufficient to support a claim of testamentary incapacity.

Guardianship

Guardianship can be defined as the delegation by the state of authority over an individual’s person or estate to another party. Historically the state or sovereign possessed the power and authority to safeguard the estate of incompetent persons.⁴⁷ This traditional role still reflects the purpose of guardianship today. In some states there are separate provisions for the appointment of a “guardian of one’s person” (for health care decision-making) and a “guardian of one’s estate” (who has the authority to, for example, make contracts to sell one’s property).⁴⁸ This latter type of guardian is frequently referred to as a *conservator*, although this designation is not uniformly used throughout the United States. Further distinctions found in some jurisdictions are general (plenary) and specific guardianships.⁴⁹ As the name implies, the latter type of guardian is restricted to exercising decisions about a particular subject. For instance, the specific guardian may be authorized to make decisions about major or emergency medical procedures while the disabled person retains the freedom to make decisions about all other medical matters. General guardians, in contrast, have total control over the disabled individual’s person, estate, or both.⁵⁰

Determination of Need A guardian is necessary only when there is some question as to whether the individual is de facto (actually) incompetent. An interesting aspect of the guardianship proceeding is its relatively flexible and relaxed atmosphere. In most states any interested person can petition to have someone declared incompetent and subject to guardianship.⁵¹ Often there is no requirement of a specific allegation in the petition, and notice to the respondent is limited to the fact that a hearing will be held.⁵² At the hearing itself the respondent frequently has no right to counsel⁵³ or trial by jury.⁵⁴ In some jurisdictions the respondent is rarely present.⁵⁵ If counsel is appointed, he or she is often designated as a guardian ad litem and is free to act in what he or she believes is in the respondent’s

best interest.⁵⁶ Moreover, if the respondent is determined to be in need of a guardian, he or she usually bears the burden of challenging that issue at a later time if he or she is no longer in need of a guardian.⁵⁷ At a later hearing, such a person is placed in the awkward position of persuading the court that the situation has changed and he or she is now competent. This hearing is required even though the respondent has had no opportunity to manage his or her own affairs, which would be compelling evidence that competency has been restored and a guardian is no longer needed.

The informality and procedural permissiveness that define a guardianship proceeding are matched by the vagueness of the standards by which the need for a guardian is determined. For a general guardianship, most jurisdictions simply require evidence of deficient mental status (e.g., mental illness or senility) and incapacity to “care for oneself or one’s estate.”⁵⁸ Standards for specific guardianship are not much better than are those for general guardianship in providing concrete requirements or descriptions. Despite this lack of rigor in definition, some state courts require considerable evidence of incompetency and incapacity before they will order guardianship.⁵⁹ Other courts are less stringent in their scrutiny of the facts.⁶⁰

Selection Anyone can petition the court to become a guardian over the person or estate of another. A diversity of parties may be appointed, ranging from family members and relatives to government agencies and law enforcement authorities.⁶¹ As a rule, the selection of one guardian over another is more likely than not a matter of policy or law.

Role After appointment, the guardian is generally charged with the responsibility to safeguard an incompetent individual’s interests pursuant to one of two decision-making models. In one model an objective test is employed. This test guides the guardian by framing his or her responsibilities in terms of the following question: What action will most effectively serve and protect the incompetent individual’s best interests? The second, subjective, model uses a form of “substituted judgment.” In this model the guardian asks to assume the role of the ward and should “act as he or she thinks the ward would have acted, if the ward had been competent.”⁶² In situations in which there is no relevant history or reliable information from which to hypothesize how a ward might have acted if competent, a guardian is usually left with no alternative but to employ a form of “best interests” test.⁶³ Under these circumstances it is likely that the guardian will objectively evaluate as much relevant information as is available and then determine a course of action that best serves the ward’s interests.

Competency to Testify

Competency to give testimony has generally been defined as follows: “[I]n the law of evidence, the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony

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in a court of justice.”⁶⁴ The determination of whether a witness is competent to provide testimony⁶⁵ rests solely within the sound discretion of the trial court.⁶⁶ The test typically is composed of the following four separate inquiries:⁶⁷

1. Whether, at the time of the event in question, the witness had the capacity “to observe intelligently.”
2. Whether at the time of the trial the witness possessed the capacity to recollect that event.
3. Whether the witness had the “capacity mentally to understand the nature of the questions put and to form and communicate intelligent answers.”
4. Whether the witness had “a sense of moral responsibility, of the duty to make the narration correspond to the recollection and knowledge (i.e., to speak the truth as he sees it).”

Often there are no statutorily defined requirements or standards for evaluating the competency of a witness to provide testimony. Instead, the courts (i.e., judges) apply traditional common law principles in making this determination.⁶⁸ Therefore there is no single, fixed standard of competency to be applied “across the board” to all witnesses.

Because perceptions and memories of events can vary widely and are prone to distortion and impairment by any witness, courts are especially vigilant to question any potential testimony that may be misleading. This concern is commonly raised with regard to the individual whose memory or perception of reality appears suspect because of developmental immaturity or mental or cognitive impairment. Thus in litigation, especially a criminal trial, the issue of competency to testify often arises if the prospective witness is a child, is mentally retarded, or is psychiatrically impaired (e.g., psychotic).

Children Child witnesses present special challenges for the law. As observed by one court:

*Not only does it pose problems in terms of the child's appreciation of the need to tell the truth with precision and accuracy, but the trauma attendant upon testimony in open court—subject to examination and cross-examination—before the unfamiliar faces of jurors, lawyers and judges may be particularly terrifying to a young child.*⁶⁹

In general there is a rebuttable presumption that children are not legally competent to testify. However, the age at which this presumption is rebuttable varies across jurisdictions. Notwithstanding this threshold there is no precise age that determines competence to testify.⁷⁰ The trial court has wide discretion in determining competence and selecting the method for arriving at that determination.⁷¹ Competence of a minor will generally “depend on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the truth.”⁷² To allow the testimony of a child, the court must determine that the child (1) possesses the intellect to differentiate truth and falsity and to appreciate the duty to tell the truth and (2) can recall the events in question.⁷³

Mentally Handicapped and Disabled Individuals Prospective witnesses who are intellectually handicapped, mentally ill, or mentally disabled as a result of drug or alcohol abuse may potentially testify, provided the court is satisfied that they are capable. For example, the determination of testimonial capacity of a witness who is intellectually limited or has learning difficulties generally proceeds in the same manner as the determination of testimonial capacity of a child witness. Expert testimony may be useful or required.⁷⁴

When a witness is a known abuser of alcohol or illicit drugs, the court's determination is guided by whether the witness (1) was under the influence at the time of the events about which he or she will testify, (2) is under the influence while testifying, or (3) is mentally disabled as a result of long-term substance abuse. Because of the potentially technical nature of these questions, their assessment must be thorough,⁷⁵ and competency hearings rely on a variety of evidence, including the examination of medical records, lay and expert testimony, and the results of mental and physical examinations.⁷⁶

A mentally ill person may be a competent witness.⁷⁷ As in the case of the substance-impaired witness, the court may conduct the usual examination of relevant evidence, such as the review of medical records, expert testimony, and the results of mental examinations, in making a determination.⁷⁸

Criminal Law

It is generally accepted in Western jurisprudence that incompetent individuals should not be permitted to proceed with a trial.⁷⁹ Conviction of an accused person while he or she is legally incompetent deprives him or her of liberty without due process of law.⁸⁰ Effective representation of a defendant with mental problems is a difficult task, demanding special skill and care in dealing with the defendant, as well as knowledge of a complicated body of statutory and case law. Consequently, every criminal attorney, judge, or other officer of the court must be alert to the possibility that a defendant's mental state—at the present time, at the time of the alleged offense, or both—may be relevant to the handling of his defense.

Standards and Assessment of Competency to Stand Trial

The legal standard for assessing pretrial competency is well established by the landmark case *Dusky v. United States*.⁸¹ Throughout his or her involvement with the trial process, the defendant must have “sufficient present ability to consult with his attorney with a reasonable degree of rational understanding (and have) a rational as well as factual understanding of the proceedings against him.”⁸² These standards are general legal conclusions, and the precise meanings are deliberately ambiguous. The *Dusky* language suggests several fundamental elements. First, competency reflects a defendant's present ability to consult with counsel and to understand the proceedings. Second, the test of competency applies to the defendant's capacity rather than motivation

or willingness to relate to the attorney and understand the proceedings. There is presently no single “test” that is given to a defendant and yields a valid finding of competency or incompetency. Third, the criterion that the defendant must have a “reasonable” degree of understanding implies that the test for competency in a given case is flexible. As with other tests of capacity, “perfect” or complete understanding on the part of the defendant is not required.⁸³ Fourth, the court’s focus on the defendant’s “factual” and “rational” understanding suggests an emphasis on cognitive functioning.

This final consideration reiterates the fact that evidence of a mental illness or the need for psychiatric treatment is not an automatic indicator of incompetency.⁸⁴ These factors are relevant only insofar as they affect or represent a sufficient impairment in the defendant’s ability to meet the legal test of competency.

Numerous commentators have sought to identify specific reality-based factors that could be used in assessing the general standards established in *Dusky*.⁸⁵ These efforts typically focus on two areas—the defendant’s comprehension of the criminal process, including the role of participants (e.g., attorneys, judge, and jury) in the process, and the defendant’s ability to function in that process, primarily through consultation with defense counsel. For instance, one court noted that a defendant would be determined competent to stand trial if the following were found:

- The defendant possesses the “mental capacity to appreciate his presence in relation to time, place, and things.”⁸⁶
- The defendant has “sufficient elementary mental processes to apprehend (i.e., to seize and grasp with what mind he has) that he is in a court of justice, charged with a criminal offense.”
- The defendant understands that there is a judge on the bench.
- The defendant “understands that a prosecutor is present who will try to convict him of a criminal charge.”
- The defendant “understands that a lawyer will undertake to defend him against that charge.”
- The defendant understands that “he is expected to tell his lawyer the circumstances, to the best of his mental ability (whether colored or not by mental aberration), the facts surrounding him at the time and place where the law violation is alleged to have been committed.”
- The defendant understands that there will be a jury present to determine guilt or innocence.
- The defendant “has memory sufficient to relate those things in his own personal manner.”⁸⁷

The degree of a defendant’s impairment in one specific area of functioning does not automatically equate with incompetency. The ultimate determination of incompetency is solely for the court to decide.⁸⁸ Moreover the impairment must be considered in the context of the particular case or proceeding;

[O]ne or another of the items will not be equal nor is it intended to be. Neither will the weight assigned to a given item by the court in reaching a finding on competency for a particular defendant necessarily apply to the next defendant.

*Considerations of the weight to be assigned a given item in the case of a particular defendant goes [sic] beyond the scope of what should be expected of the examining clinician. The task for the clinician is the providing of objective data, the import of which is the responsibility of the Court.*⁸⁹

Controversy exists regarding the general scope of the term *competency to stand trial* and its practical application in today’s criminal justice system. Some commentators have suggested that the concept is overly broad, inadequate, and misleading in its current use.⁹⁰ For example, some defendants may be required to testify, decide whether to plead insanity, or make choices about plea options and plea bargains. Depending on the nature of the decision to be made, some commentators have argued that a given defendant may be competent to make certain decisions but not others. Although this analysis may be clinically valid and more realistic, it does not square with the present legal precedents on this issue. In a recent Supreme Court case, *Godinez v. Moran*, the majority held that the standard for the various types of competency (e.g., competency to plea, to waive counsel, and to stand trial) should be considered the same.⁹¹

*While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.... Nor do we think that a defendant who waives his right to the assistance to counsel must be more competent than the defendant who does not, since there is not reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.*⁹²

Judicial Evaluation

The judicial determination of competency must be an informed one.⁹³ Accordingly the court has broad discretion in both hearing a motion for a competency examination⁹⁴ and weighing evidence in making a final determination.⁹⁵ Because a careful evaluation of the accused’s mental condition is required,⁹⁶ a hospital report that he or she is mentally competent to stand trial is not binding on the court,⁹⁷ especially if there is no supporting information or reasons regarding that conclusion.⁹⁸ The law often requires that a report or certificate be issued by a qualified mental health professional (e.g., psychiatrist), establishing that a person is competent to stand trial before the court.⁹⁹ This certificate does not preclude the expert testimony of a psychologist,¹⁰⁰ though less weight may be given to his or her testimony.¹⁰¹ The determination of competency does not rest exclusively or primarily on the opinion of experts.¹⁰² For instance, the U.S. Court of Appeals for the District of Columbia Circuit has stated that it would be useful for trial judges to question both the defendant and defense counsel about the ability of the accused to consult with his or her attorney because the attorney’s own first-hand evaluation may be just as valuable as an expert’s opinion.¹⁰³

There are a number of checklists and psychometric tests designed to assist the clinician in assessing a person’s competency to stand trial.¹⁰⁴ One of the more commonly used

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instruments is the Competency to Stand Trial Instrument (CSTI) designed by the Laboratory of Community Psychiatry.¹⁰⁵ The CSTI involves the consideration of 13 functions “related to what is required of a defendant in criminal proceedings in order that he may adequately cope with and protect himself in such proceedings.”¹⁰⁶ The purpose of the CSTI is to standardize, objectify, and qualify relevant criteria for the determination of an individual’s competency to stand trial. The presentation of these functions was written so it would be useful and acceptable to both the legal and medical professions. The 13 functions to be assessed include, among other factors:

- Appraisal of available legal defenses.
- Unmanageable behavior.
- Quality of relating to attorney and planning of legal strategy.
- Understanding of court procedure.
- Appreciation of charges and nature of possible penalties.
- Capacity to disclose to attorney available pertinent facts surrounding the offense.

All “competency-related” assessment instruments are essentially structured formats for interviewing the defendant. Generally a competency evaluation can be performed within the context of an outpatient interview. Actual psychological testing is not likely to be a cost-effective means of gathering relevant information, nor is it any more capable of directly answering the requisite competency questions.

Special Considerations: The Amnestic Defendant

At face value, the defendant who has no memory of the criminal act of which he or she is accused appears to be incompetent on the grounds that the amnesia prevents reasonable consultation with counsel in preparing a defense.¹ However, as a general rule a claim of amnesia is not grounds for a finding of incompetency per se.¹⁰⁷ This rule is largely borne out of judicial mistrust of the authenticity of such claims. However, while generally rejecting outright such claims as an automatic determinant of incompetency, courts have labored to establish guidelines in determining the competency of the defendant claiming amnesia. Probably the most thoughtful analysis of this issue is found in *Wilson v. United States*.¹⁰⁸ In *Wilson* the defendant had no memory regarding the time of the alleged robbery because he suffered from permanent retrograde amnesia. This impairment was caused by injuries he suffered in an automobile accident that occurred as the police were pursuing him after the offense. The court concluded that the competency issue should be tested in accordance with the following criteria:

1. The extent to which the amnesia affected the defendant’s ability to consult with and assist his attorney.
2. The extent to which the amnesia affected the defendant’s ability to testify on his own behalf.
3. The extent to which the evidence could be extrinsically reconstructed in view of the defendant’s amnesia. (Such evidence would include evidence relating to the crime itself, as well as any reasonably possible alibi.)
4. The extent to which the government assisted the defendant and his counsel in that reconstruction.

5. The strength of the prosecution’s case. (Most important here is whether the government’s case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.)
6. Any other factors and circumstances that would indicate whether or not the defendant had a fair trial.

For the clinician faced with a defendant claiming severe memory problems, the first objective is to determine whether the claim of amnesia is valid. If the claim is valid, the “customary” competency examination may proceed because all other functions associated with competency (e.g., communicating with counsel and understanding the legal proceedings) may be unaffected. Moreover, the amnestic defendant may be able to assist the defense by identifying and assessing other evidence depicting his or her conduct at the time of the crime.

Raising the Competency Issue

The competency of a defendant may be raised at any stage in the proceedings up until the time of sentencing.¹⁰⁹ However, prima facie evidence must be presented to support a request for a competency examination, particularly when the request comes on the eve of or the day of trial.¹¹⁰

Although questions regarding competency are usually raised by the defense attorney,¹¹¹ the court and the prosecutor have an obligation to ensure that a defendant whose competency is in question is not permitted to proceed with the trial until competency issues are resolved.¹¹²

Endnotes

1. *Black’s Law Dictionary* 257 (7th ed., West Group, St. Paul, Minn. 1999).
2. See e.g., Department of Health and Human Services, *The Legal Status of Adolescents* 1980 41 (DHHS, Washington, D.C. 1981).
3. See e.g., *Meek v. City of Loveland*, 276 P. 30 (Colo. 1929).
4. See e.g., *Scaria v. St. Paul Fire & Marine Insurance*, 227 N.W. 2d 647 (Wis. 1975).
5. J.T. Smith, *Medical Malpractice: Psychiatric Care* 178–179 (Shepard’s/McGraw-Hill, Colorado Springs, Colo. 1986).
6. See e.g., *Gulf Southern Railroad Co. v. Sullivan*, 119 So. 501 (Miss. 1929).
7. See e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1975) (abortion); Ill. Rev. Stat. ch. 91 1/2, para 3-501(a) (1983) (mental health counseling).
8. See e.g., *Jehovah’s Witnesses v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967).
9. See e.g., *Wilson v. Lehmann*, 379 S.W. 2d 478, 479 (Ky. Ct. App. 1964).
10. See e.g., *Rennie v. Klein*, 462 F. Supp. 1131 (D. N.J. 1978).
11. H. Weihofen, *The Definition of Mental Illness*, 21 Ohio St. L. J. 1 (1960).
12. See e.g., *Schloendorff v. New York Hospital*, 105 N.E. 92 (N.Y. 1914).
13. See e.g., M.B. Staus, *Familiar Medical Quotations* 157 (Little, Brown, Boston 1968) (quoting a 1649 Massachusetts Bay colony law that forbade physicians, midwives, and others from acting on mentally competent patients without their consent). Although the concept of informed consent has deep roots in the centuries-old individual liberty movement, its actual

- development as a legal doctrine did not occur until the 1960s. See e.g., *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 317 P. 2d 170 (Cal. Dist. Ct. App. 1957); *Natanson v. Kline*, 350 P. 2d 1093, reh'g. den. 354 P. 2d 670 (Kan. 1960).
14. J. Katz, *The Silent World of Doctor and Patient* 59–80 (Free Press, New York 1984).
 15. *Supra* note 1, at 701.
 16. *Supra* note 9.
 17. *Supra* note 10.
 18. See e.g., *Yahn v. Folse*, 639 So. 2d 261 (La. App. 1993). (An 82-year-old illiterate and hard of hearing woman was sufficiently alert [cognitively] and communicative to give valid consent to a medical procedure.)
 19. Meisel, Roth & Lidz, *Tests of Competency to Consent to Treatment*, 134 Am. J. Psychiatry 279, 283 (1977).
 20. See also Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 N. Engl. J. Med. 1635–1638 (1988) (proposing four different standards for assessing competency to consent to treatment).
 21. Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 Am. J. Psychiatry 285 (1977).
 22. M. Perlin, *Mental Disability Law: Civil and Criminal*, vol. 3, 80 (Michie Co., Charlottesville, Va. 1989).
 23. *Supra* note 21, at 287 citing 139 Am. Law Rep. 1370 (1942); but see *Lipscomb v. Memorial Hospital*, 733 F. 2d 332, 335–336 (4th Cir. 1984).
 24. P.A. Singer & M. Siegler, *Elective Use of Life-Sustaining Treatments in Internal Medicine*, in *Advances in Internal Medicine* 66 (G.H. Stollerman, ed., Year Book Medical Publishers, Chicago 1991).
 25. See e.g., *Frasier v. Department of Health and Human Resources*, 500 So. 2d 858, 864 (La. Ct. App. 1986).
 26. See e.g., *Aponte v. United States*, 582 F. Supp. 555, 566–569 (D.P.R. 1984).
 27. *Dexter v. Hall*, 82 U.S. 15 (1872).
 28. See generally J. Calamari & J. Perillo, *The Law of Contracts* 305–330 (4th ed. St. Paul, Minn., West Group, 1998) (capacity of parties).
 29. See e.g., Sharpe, *Medication as a Threat to Testamentary Capacity*, 35 N.C.L. Rev. 380 (1957).
 30. See e.g., *Hovey v. Hobson*, 53 Me. 451 (1866).
 31. See 2 Williston, *Contracts* §§249–252.
 32. Restatement (Second) *Contracts*, §13.
 33. See e.g., *Cundick v. Broadbent*, 383 F. 2d 157 (10th Cir. 1967), cert. den. 390 U.S. 948 (1968); see also Guttmacher & Weihofen, *Mental Incompetency*, 36 Minn. L. Rev. 179 (1952).
 34. See e.g., Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 Yale L. J. 271 (1944); Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 Tex. L. Rev. 554 (1943).
 35. Restatement (Second) *Contracts*, §15.
 36. See e.g., Danzig, *The Capability Problem in Contract Law*, 148–204 (Foundation Press, Mineola, N.Y. 1978); but see Hardisty, *Mental Illness: A Legal Fiction*, 48 Wash. L. Rev. 735 (1975).
 37. See generally McCoid, *Intoxication and its Effect upon Civil Responsibility*, 42 Iowa L. Rev. (1956); 2 Williston, *Contracts* §§258–263.
 38. See e.g., *Cundell v. Haswell*, 51 A. 426 (R.I. 1902).
 39. See e.g., *Alexander v. Haskins*, 68 Iowa 73, 25 N.W. 935 (1885).
 40. See e.g., Restatement (Second) *Contracts*, §15(2).
 41. See e.g., *Coffee v. Owens' Admiralty*, 216 Ky. 142 (1926).
 42. E. Clark, L. Lusky & A. Murphy, *Gratuitous Transfers*, 372 (3d ed., West Publishing, St. Paul, Minn. 1985).
 43. *Banks v. Goodfellow*, 5 Q.B. 549 (1870).
 44. *In re Estate of Fish*, 522 N.Y.S. 2d 970 (App. Div. 1987).
 45. 79 Am. Jur. 2d *Wills* §§77–101.
 46. See generally 18 Am. Jur. P.O.F. 2d *Mentally Disordered Testator's Execution of Will During Lucid Interval* §1 (1979).
 47. See generally Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 Wm. & Mary L. Rev. 569, 570–573 (1972).
 48. B. Sales, D.M. Powell & R. Van Duizend, *Disabled Persons and the Law: State Legislative Issues* 461 (Plenum Press, New York 1982).
 49. *Id.* at 462.
 50. *Id.* at 461–462.
 51. *Id.* at 463.
 52. *Supra* note 47, at 605.
 53. *Supra* note 48, at 463. (As of 1988, 10 states provide no statutory right to counsel.)
 54. *Id.* (As of 1988, 22 states provide the respondent with the right to jury.)
 55. *Id.* (As of 1988, only 38 states guarantee the right to be present and that right is often waivable with only a physician's certificate stating that the respondent is unable to attend.)
 56. *Supra* note 48, at 463.
 57. *Id.* at 464.
 58. *Id.* at 469–474.
 59. See e.g., *Plummer v. Early*, 190 Cal. Rptr. 578 (Ct. App. 1983). (Evidence that schizophrenic respondent was dirty, disheveled, and incontinent and spent the majority of his time in the backyard of his home was insufficient to warrant conservatorship or guardianship of person.)
 60. See e.g., *In re Oltmer*, 336 N.W. 2d 560 (Neb. 1983).
 61. See generally Hodgson, *Guardianship of Mentally Retarded Persons: Three Approaches to a Long Neglected Problem*, 37 Alb. L. Rev. 407 (1973).
 62. See e.g., *In re Roe III*, 421 N.E. 2d 40 (Mass. 1981); *Rogers v. Commissioner of Mental Health*, 458 N.E. 2d 308 (Mass. 1983).
 63. See generally Melton & Scott, *Evaluations of Mentally Retarded Persons for Sterilization: Contributions and Limits of Psychological Consultation*, 15 Prof. Psychol. Res. Prac. 34, 35–36 (1984).
 64. *Supra* note 1, at 257.
 65. Competency issues are frequently raised about a number of aspects of a witness's or defendant's conduct or litigation procedures (e.g., waive right to silence, counsel, or jury; stand trial; be sentenced; serve a sentence; and be executed).
 66. See generally *Wheeler v. United States*, 159 U.S. 523, 524–525 (1895); *United States v. Benn*, 476 F. 2d 1201 (D.C. Cir. 1972); *In re B.D.T.*, 435 A. 2d 378, 379 (D.C. 1981).
 67. J. Wigmore, *Evidence*, §478 (Chadbourne rev. 1979).
 68. The four-part test enunciated by Wigmore would be a typical example of a common law rule or guiding principle.
 69. *U.S. v. Comer*, 421 F. 2d 1149, 1152 n.3 (D.C. Cir. 1970).
 70. See e.g., *Galindo v. U.S.*, 630 A. 2d 202 (D.C. 1993) (3-year-old found competent); *Wheeler v. U.S.*, 159 U.S. 523, 524 (D.C. Cir. 1895) (5-year-old found competent).
 71. *U.S. v. Schoefield*, 465 F. 2d 560, 562 (D.C. Cir. 1972), cert. den. 409 U.S. 881 (1972).
 72. *Id.*
 73. See e.g., *Johnson v. U.S.*, 364 A. 2d 1198, 1202 (D.C. 1976); *In re A.H.B.*, 491 A. 2d 490, 492 (D.C. 1985).
 74. See e.g., *U.S. v. Benn*, 476 F. 2d 1127, 1130–1131 (D.C. Cir. 1972).
 75. *U.S. v. Crosby*, 462 F. 2d 1201, 1203 (D.C. Cir. 1972).

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76. See *e.g.*, *U.S. v. Heinlein*, 490 F. 2d. 725, 730 (D.C. Cir. 1973); *U.S. v. Butler*, 481 F. 2d. 531, 533 (D.C. Cir. 1973).
77. See *e.g.*, *In re Penn*, 443 F. 2d 663, 666 (D.C. Cir. 1970).
78. See generally *Vereen v. U.S.*, 587 A. 2d. 456 (D.C. App. 1991), *Collins v. U.S.*, 491 A. 2d. 480, 484 (D.C. App. 1985), *cert. den.* 475 U.S. 1124 (1986).
79. See generally W. Blackstone, *Commentaries on the Laws of England* (9th ed., Clarendon Press, Oxford 1773); see also *Frith's Case*, 22 How. St. Tr. 307 (1790).
80. See *e.g.*, *Pate v. Robinson*, 383 U.S. 375, 378 (1966).
81. *Dusky v. United States*, 362 U.S. 402 (1960) (established the threshold test for determining a defendant's competency to stand trial).
82. *Id.* This standard also is applied to juvenile proceedings; see *e.g.*, *In re W.A.F.*, 573 A. 2d 1264, 1267 (D.C. 1990).
83. The threshold for being found competent to stand trial is generally believed to be low; see generally *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 457–458 (1967).
84. Typically, evidence of a mental disease, condition, or defect is associated with the question of incompetence. However, a defendant may be adjudged incompetent to stand trial even if he or she lacks a mental disorder as defined by current mental health diagnostic standards, such as the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV); see generally *Wilson v. U.S.*, 391 F. 2d 460, 463 (D.C. Cir. 1968).
85. See *e.g.*, T. Grisso, *Competency to Stand Trial: Evaluations* 97–106 (Professional Resource Exchange, Sarasota, Fla. 1988). (See Appendix C: List of Defendant's Abilities and Trial Demands for Use in Pretrial Competency Evaluations and Appendix D: Information about Competency Evaluation Instruments.)
86. Competency is not met by a defendant's mere understanding or the fact that he or she has "orientation to time and place and [has] some recollection of events." *Supra* note 81.
87. *Weiter v. Settle*, 193 F. Supp. 318, 321–322 (W.D. Mo. 1961).
88. *United States v. David*, 511 F. 2d 355 (D.C. Cir. 1975).
89. *Id.* at 99–100.
90. See *e.g.*, Roesch & Golding, *Defining and Assessing Competency to Stand Trial*, in *Handbook of Forensic Psychology* 378–394 (Weiner I.B. & Hess A.K., eds., J. Wiley, New York 1987).
91. *Godinez v. Moran*, 113 S.Ct. 2680 (1993).
92. *Id.* at 2686; but see *id.* at 2691–2694 (J. Blackmon, dissenting). (The "majority's analysis is contrary to both common sense and long-standing case law"; competency cannot be considered in a vacuum, separate from its specific legal context; "competency for one purpose does not necessarily translate to competency for another purpose," noting that prior Supreme Court cases have "required competency evaluations to be specifically tailored to the context and purpose of the proceeding.")
93. See *Blunt v. U.S.*, 389 F. 2d 545 (D.C. Cir. 1967).
94. *Bennett v. United States*, 400 A. 2d 322 (D.C. App. 1979).
95. 18 U.S.C. §4241 (federal statute authorizing a psychiatric or psychological examination of a defendant on the issue of competency to stand trial and presentation of a report to the court).
96. *Supra* note 93.
97. See *e.g.*, *Wider v. United States*, 348 F. 2d 358 (D.C. Cir. 1965).
98. See *e.g.*, *Holloway v. United States*, 343 F. 2d 265 (D.C. Cir. 1964).
99. See *e.g.*, *Bennett v. United States*, 400 A. 2d 322 (D.C. App. 1979). (If neither party objects, the court, without conducting a hearing, may enter an order adjudicating the defendant to be competent based on the certification of the examining psychiatrist.)
100. See *e.g.*, *Jenkins v. United States*, 307 F. 2d 637, 643 (D.C. Cir. 1962).
101. See *e.g.*, *Blunt v. United States*, 389 F. 2d 545 (D.C. Cir. 1957). (The lack of a general medical background may affect the weight given to a psychologist's testimony in a competency hearing.)
102. By analogy, testimony by lay witnesses as to their observations and opinions of the defendant's mental condition is admissible in support of the insanity defense. *Carter v. United States*, 252 F. 2d 608, 618 (D.C. Cir. 1957).
103. *United States v. David*, 511 F. 2d 355 (D.C. Cir. 1975).
104. See generally T. Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* 101–105 (Professional Resource Exchange, Sarasota, Fla. 1988).
105. *Competency to Stand Trial and Mental Illness*, a monograph sponsored by the Center for Studies of Crime and Delinquency, National Institute of Mental Health, DHEW Pub. No. (HSM) 73–9105 (1973) (out of print).
106. *Id.*
107. See generally 46 A.L.R. 3d 544 (1972).
108. *Wilson v. United States*, 391 F. 2d 460, 463 (D.C. Cir. 1968).
109. *Leach v. United States*, 334 F. 2d 945 (D.C. Cir. 1964). (A sentence was set aside and remanded with directions when a district court judge failed to consider evidence presented to him about the psychological unfitness of the individual he was sentencing. The appellate court specifically cited the lower court's failure to make any disposition of the prisoner's repeated request for a mental examination before sentencing. The appellate court noted that the trial court had psychiatric services at its disposal and this was precisely the situation in which to employ them.)
110. See *e.g.*, *Thorne v. United States*, 471 A. 2d 247 (D.C. 1983).
111. An affidavit by defense counsel stating that he or she has serious doubts about the defendant's mental capacity to assist him or her intelligently is sufficient to require the granting of a motion for a mental examination. *Cannady v. United States*, 351 F. 2d 817 (D.C. Cir. 1965).
112. See *e.g.*, *Winn v. United States*, 270 F. 2d 326 (D.C. Cir. 1959), *cert. den.* 365 U.S. 848 (1961).
113. See *e.g.*, *In re Guardianship of Pamela*, 519 N.E. 2d 1335 (Mass. Sup. Jud. Ct. 1988).
114. See *e.g.*, *McAlister v. Deatheridge*, 523 So. 2d 387 (Ala. 1988).
115. See *e.g.*, *Daughton v. Parson*, 423 N.W. 2d 894 (Iowa Ct. App. 1988) (transfer of property set aside where the grantor did not have sufficient mental capacity to execute the deed).
116. See *e.g.*, *Annas & Densburger, Competence to Refuse Medical Treatment: Autonomy vs. Paternalism*, 15 U. Toledo L. Rev. 561 (1984).
117. See *e.g.*, *Weldon v. Long Island College Hospital*, 535 N.Y.S. 2d 949 (Sup. Ct. 1988).
118. See *e.g.*, *Pace v. Pace*, 513 N.E. 2d 1357 (Ohio Ct. App. 1986).
119. See *e.g.*, *Manhattan State Citizen's Group, Inc. v. Bass*, 524 F. Supp. 1270 (S.D. N.Y. 1981).
120. 42 U.S.C. §423(d)(1)(A) (1983 and Cumm. Supp. 1985 *et seq.*); see also 20 C.F.R. §404.1520–404.1574 (1983).
121. *In re Conservatorship Estate of Moehlenpah*, 763 S.W. 2d 249 (Mo. Ct. App. 1988).
122. See *e.g.*, D.C. Code §16-904 (d)(1)–(5) (grounds for annulment of marriage, including "insanity" at the time of marriage).
123. See *e.g.*, *In re Marriage of Steffan*, 423 N.W. 2d 729 (Minn. Ct. App. 1988) (divorce decree binding where the wife's mental condition did not interfere with her comprehension).
124. See *e.g.*, *In re Jason Y*, 744 P. 2d 181 (N.M. Ct. App. 1987).
125. See *e.g.*, *In re J.O.L. II*, 409 A. 2d 1073 (D.C. 1979). (Defining factors used in the District of Columbia delineate whether an adoption by a petitioning party is in the "best interests of the child." Among these factors is the mental state of the

petitioning party. Clearly, if the petitioner were incompetent, placement would not be in a child's best interests.)

126. *Dusky v. United States*, 362 U.S. 402 (1960).
127. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).
128. A defendant who has been found "competent" is not necessarily capable of making intelligent decisions on all issues, for example, the decision to waive an insanity defense. *Frendak v. United States*, 408 A. 2d 364, 379 (D.C. App. 1979).
129. *See e.g., Lyles v. U.S.*, 254 F. 2d 725 (D.C. Cir. 1975).
130. *See e.g., Nebraska v. Tully*, 413 N.W. 2d 910 (Neb. 1987) (defendant's confession and guilty plea held to be "knowingly, intelligently, and voluntarily made" despite IQ of 81 and diagnosis of mild mental retardation).
131. *See e.g., Faretta v. California*, 422 U.S. 806 (1975).
132. *See e.g., Note, Mental Aberration and Postconviction Sanctions*, 15 Suffolk Univ. L. Rev. 1219 (1981); *State v. Hehman*, 520 P. 2d 507 (Ariz. 1974); *Commonwealth v. Robinson*, 431 A. 2d 901 (Pa. 1981).
133. *See e.g., In re Hews*, 741 P. 2d 983 (Wash. 1987).
134. *North Carolina v. Alford*, 400 U.S. 25 (1970).
135. *See e.g., Journey v. Arkansas*, 766 S.W. 2d 1 (Ark. 1989).
136. *See e.g., Ford v. Wainwright*, 477 U.S. 399 (1986); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 Stan. L. Rev. 765 (1980).
137. *See e.g., United States v. Thornton*, 498 F. 2d 749 (D.C. Cir. 1974); *Bethea v. United States*, 365 A. 2d 64 (D.C. App. 1976).
138. *See e.g., Fuller v. Texas*, 737 S.W. 2d 113 (Tex. Ct. App. 1987).

Suggested Readings

General

- S. Brakal, J. Parry & B. Weiner, eds., *The Mentally Disabled and the Law* (3d ed., American Bar Foundation, Chicago 1985).
- T. Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (Plenum Press, New York 1986).
- G.B. Melton, J. Petrila, N.G. Poythress & C. Slobogin, *Psychological Evaluations for the Courts* (2d ed., Guilford Press, New York, 1997).
- R. Reisner & C. Slobogin, *Law and the Mental Health System: Civil and Criminal Aspects* (2d ed., West Publishing, St. Paul, Minn. 1990).

Competency to Stand Trial

- T. Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* (PAR Inc., Sarasota, Fla. 1988).
- M. Perlin, *Mental Disability Law: Civil and Criminal* (3 volumes) (Michie Publishing, Charlottesville, Va. 1989).
- Public Defender Service, *Criminal Practice Institute Trial Manual* (PDS, Washington, D.C. 1996).

Children and Juveniles

- S.J. Ceci & M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (American Psychological Association, Washington, D.C. 1995).
- T. Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (Plenum Press, New York 1981).

Consent to Research

- Berg, *Legal and Ethical Complexities of Consent with Cognitively Impaired Research Subjects: Proposed Guidelines*, 24 J.L. Med. & Ethics 18 (1996).

Guardianship

- J. Parry, *Incompetency, Guardianship, and Restoration*, in *The Mentally Disabled and the Law* (S. Brakal, J. Parry & B. Weiner eds., American Bar Foundation, Chicago 1985).
- Parry & Hulme, *Guardianship Monitoring and Enforcement Nationwide*, 15 Ment. & Phys. Disability L. Rptr. 304 (May/June 1991).

Treatment Decision-Making

- B. Winick, ed., *A Critical Examination of the MacArthur Treatment Competence Study: Methodological Issues, Legal Implications, and Future Directions*, 2 Psychol., Pub. Policy & L. 3-181 (1996).
- American Bar Association, *The Right to Refuse Antipsychotic Medication* (American Bar Association, Washington, D.C. 1986).
- B. Corsino, *Informed Consent: Policy and Practice* (Virginia National Center for Clinical Ethics, White River Junction, Va. 1996).
- Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 Wash. & Lee L. Rev. 695 (1993).

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APPENDIX 32-1: SOME AREAS OF LAW IN WHICH COMPETENCY IS AN ISSUE

Civil Law

- Guardianship (care for one's self and property)¹¹³
- Contract¹¹⁴
- Make a will¹¹⁵
- Consent to treatment¹¹⁶
- Authorize disclosure of medical records
- Sue¹¹⁷ or be sued¹¹⁸
- Testify in court
- Vote¹¹⁹
- Obtain a driver's license
- Act in public or professional capacity
- Receive benefits (e.g., Social Security)¹²⁰
- Retain private counsel¹²¹

Family Law

- Marry¹²²
- Divorce¹²³
- Terminate parental relations with a child¹²⁴
- Adopt¹²⁵

Criminal Law

- Stand trial¹²⁶
- Assume responsibility for a criminal act
- Raise the question of competency and order an examination¹²⁷
- Waive the insanity defense¹²⁸
- Make a distinction between insanity and competency¹²⁹
- Make a confession¹³⁰
- Waive the right to counsel¹³¹
- Be sentenced¹³²
- Make a plea¹³³
- Plead guilty¹³⁴
- Provide testimony in court¹³⁵
- Be executed¹³⁶
- Entertain premeditation or "specific intent" of a crime¹³⁷
- Consent to sexual intercourse¹³⁸

APPENDIX 32-2: SOME GENERAL TESTS OF COMPETENCY

| Relevant Act | General Legal Test Regarding Competency |
|-----------------------------------|---|
| Make a will | Understand the nature and object of the will, one's holdings, and natural objects of one's bounty |
| Make a contract | Understand the nature and effect of the proposed agreement or transaction |
| Marry | Understand the nature of the marital relationship and the rights, duties, and obligations it creates |
| Drive | Understand the pertinent laws of the state with regard to licensure; refrain from driving in a dangerous manner |
| Testify in court | Be capable of observing, remembering, and communicating about events in question; understand the nature of an oath |
| Be responsible for a criminal act | Possess sufficient capacity (cognitive) to understand and appreciate the criminality of one's acts and conform one's conduct to the requirements of the law |
| Stand trial | Possess sufficient capacity to rationally and factually understand the nature of the proceedings and be able to assist and consult with legal counsel |
| Make a confession | Possess sufficient capacity to make a knowing and intelligent waiver of certain constitutional rights and a knowing and voluntary confession |
| Be executed for a criminal act | Possess sufficient capacity to rationally and factually understand the nature of the trial proceedings and purpose of punishment |
| Consent to treatment | Possess sufficient mental capacity to understand the particular treatment choice being proposed and any relevant adverse effects associated with it |

The specific and applicable language of these and other tests of capacity is generally defined by state or federal statute or administrative regulation. Their interpretation and practical usage are typically defined in case law, scholarly treatises, and commentaries.