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Forensic Psychiatric Examinations: Competency

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ABSTRACT: The many definitions of competency in civil, criminal, and domestic relations law are discussed with emphasis on the various legal criteria for competency and the different classes of psychiatric information required to apply the criteria to a given case. Within the context of a general discussion of forensic examinations, techniques for gathering the right kind of information are systematically related to the exigencies of evaluating past, present, or future mental states by selectively altering the focus of mental status evaluations and history-taking. In addition, special investigative techniques such as hypnosis, Amytal® sodium interview, stress interview, psychological testing, and others are discussed.

KEYWORDS: psychiatry, competency

Competency is a broad legal term that encompasses many different legal issues and contexts. In common legal parlance, the term often refers to the need for a guardian or, in the criminal law context, competency to stand trial. However, there are a great many highly specific meanings for the term, depending on the legal issue. Almost every area of human relations and activities is embraced by the law and, as a threshold condition, requires one to be mentally competent. Competency, generally speaking, refers to some minimal mental or behavioral ability, trait, or capability required to perform a particular jural act or to assume some legal role. Table 1, adapted from Mezer and Rheingold [*1*], illustrates many of the different areas of the law in which competency is an element. There are many more areas of law in which mental illness is a qualifying condition but in which competency is not an issue. Examples of this include parole, civil commitment and discharge from a hospital, divorce, and ability to tolerate a penal environment or military service.

Historical Considerations

While the word *competency* is ambiguous enough, old terms such as insanity, lunatic, and non compos mentis linger and obfuscate. As recently as the 1950s, the old term "monomania" was used in a legal opinion [*2*]. Part of the confusion in semantics is a very old failure to distinguish between insanity as a medical condition and insanity as a legal status. A brief review of the history of these concepts will shed some light on the historical link between these medical and legal concepts and will help to clarify the current situation.

The Greeks used the word "mania," which they defined as a disturbance of thought, mood, or behavior, not associated with fever [*3*]. The Romans adapted Greek legal principles, and the earliest written legal instrument, *The Twelve Tables* of Rome, makes reference to various equivalent terms, such as *furiosus* and *dementia,* applying to either

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TABLE 1—*Some areas of law where competency is required.*

General/civil
Make a contract (gift, conveyance, and such)
Testify
Care for one's self and property (guardianship)
Vote
Drive
Receive benefits (Social Security, Veterans Administration)
Sue, be sued
Act in public or professional capacity
Act in a fiduciary capacity
Make a will
Consent to treatment
Give release or waiver
Domestic relations
Marry
Adopt (consent)
Act as parent
Criminal
Responsible for criminal act
Stand trial
Make a confession
Make a plea
Be executed
Entertain specific intent or premeditation

mental illness or to its legal consequences. Even at that time (around 500 BC), it was established that people so afflicted often required commitment or guardianships and could not make wills or possess goods. There were no particular criteria for such abridgments of legal freedom other than a finding of the presence of *furiosus* or some other incapacitating illness. A penumbra of incapacity was thus cast over all of such an individual's jural acts, including the capacity to make contracts or conveyances, marry, make a will, or be liable for a tort [*4*].

In the pre-Christian millenia, employment of psychiatric knowledge in the law is documented only with difficulty. However, by the time of Christ, Celsus (25 BC to 50 AD) was using the term *insania* (a translation of the term mania) to mean delirium without fever [*5*], and this word joined its earlier counterparts in the legal lexicon. Subsequent Roman legal codes [*6*] used the term to refer to the legal status of the mentally ill, as well as to their mental condition itself, setting the stage for future confusion between the two meanings.

Once Roman law made the transition to 13th century England [*7*], much of the law of "insanity," especially that involving rudimentary tests in the areas of criminal responsibility, guardianship, tort liability, contracts, wills, and civil commitment, slowly crystallized and underwent refinement. Two major insights emanate from a reading of legal psychiatric history, especially from medieval England. What tests developed as measures of "insanity" were so conceived that, in order to qualify as "insane" one had to be grossly mentally ill; this being true, an insane person had difficulty in passing almost any test involving competency to perform a legal function.

A clue to the validity of these assertions can be gained from a perusal of tests for criminal and civil insanity extant in the medieval England of Bracton, a noted 13th century ecclesiastical judge and scholar of Roman law. Bracton [*8*], when discussing the incapacity of the "insane" in civil action (as well as criminal), reasoned that a person who is mad (*furiosus*) or of unsound mind (*non sanae mentis*) is totally and absolutely lacking in understanding or discretion (*discretionem*):

> Such are not very different from animals who lack understanding (ratio), and no transaction is valid that is entered into with them while their madness lasts.

In the psychology of Bracton's day, *ratio* could mean either the understanding of one's act or knowledge of its wrongfulness, and *discretionem* seems to have meant "knowing what was what," a basic common sense. Bracton explained in the passage quoted that the terms he used meant a *total* lack of discretion and understanding, an animal-like state [*7*].

That picture of insanity held sway for many centuries. Those centuries witnessed a burgeoning of terms used synonymously with insanity. By the 16th century the "lunatic," "foole," "non compos mentis," or "idiot" was a person who "hath no understanding of reason, . . . is of unsound memory and hath not any manner of discretion" [*9*] or was "fully deprived of his understanding and memory and doth not know what he is doing no more than an infant, than a brute, than a wilde beest" [*10*]. At that time the great English legal scholars Coke [*11*] and Hale [*12*] were recommending that the condition of insanity must be "absolute madness and deprivation of memorie." It was not until the middle of the 19th century that the standard of absolute madness was relaxed. Until that point, only those who were grossly and profoundly ill or brain damaged were regarded as insane enough to require commitment or appointment of a guardian. Such highly disordered individuals were regarded as incapable of performing any jural act requiring understanding, and probably quite legitimately.

Current Development

Loosening of standards for "insanity" has come neither smoothly nor easily. The authors of a recent major study of mental incapacity [*13*] examined the guardianship and civil incompetency statutes of the 50 states and the District of Columbia and isolated 49 key words and phrases, such as incompetent, insanity, lunatic, unsound mind, and noncompos mentis:

> Each of them either alone or in combination with a finding that by "reason of" the specified condition or characteristics, the alleged incompetent is unable to manage his affairs, or is likely to be imposed on by others, may provide the basis for depriving one of his rights to control his person and the disposition of his property, and conferring that power upon another. . . . In sixteen of them the term is apparently intended to identify the "legal status" of one who because of some stated condition (e.g. mental illness, old age) is deemed incapable of managing his property or person: In six it seems to be used in a *quasi medical sense* denominating some presumably diagnosable *mental condition;* in another state it is used in contradistinction of the word "insane"; and in four others it is quite unclear in what sense the term is to be construed. . . . The next most popular term in guardianship or incompetency statutes is "insane" which appears in the statutes of 23 states, in at least seven of which it may be the sole basis for an adjudication (of incompetency). (Emphasis added.)

Thus, the age-old confusion between insanity as a legal status and insanity as a mental condition permeated even our recent statutes on guardianship and incompetency.

The current situation, however, has changed very rapidly, and because of some of the studies quoted, law commentaries, and the work of conscientious legislators and civil rights groups, the various areas of civil competency have effectively been separated from the question of mental illness and hospitalization in many states. In Massachusetts and other states, for example, one who is civilly committed has many rights guaranteed by law and is no longer automatically divested of the right to vote, drive, marry, manage one's own affairs, and make contracts [*14*]. As the need to separate the various areas of competency from mental illness accelerates, the incidence of individual determinations of de facto competency in many areas of the law increases rapidly. In clarifying the relationship between civil competency and mental illness, Weihofen [*15*] pointed out that where competency is concerned the question has two parts:

1. Is the person mentally ill or deficient (or alcoholic, aged, and so forth)?
2. If so, is the condition such as to satisfy the particular legal test or criterion?

Thus, although it is not always apparent from the tests themselves (Table 2), there is often a threshold condition of mental illness, mental defect or deficiency, alcoholism, old age, or whatever law and social policy establish as a qualifying condition.

TABLE 2—*Some representative tests for competency.*

In order to:	the individual must:
Be responsible for a criminal act	possess the substantial capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law
Marry	be able to understand the nature of the marital relationship and the responsibilities and duties it creates
Stand trial	have a rational as well as factual understanding of the proceedings and the present ability to consult with his lawyer with a reasonable degree of rational understanding
Avoid appointment of a guardian	be able, unassisted, to care for one's self or one's property without being imposed upon by artful or designing persons
Make a will	understand the nature and object of the will, the nature and extent of one's holdings, and the natural objects of one's bounty without the will being affected by an [insane] delusion or by undue influence
Confess to a crime	make a knowing and intelligent waiver of certain constitutional rights and a knowing and voluntary confession
Drive	not drive in a dangerous manner
Be executed for a crime	understand the nature and purpose of the trial and the purpose of punishment
Make a contract	understand the nature and effect of the particular transaction and not enter a contract because of an [insane] delusion or under the compulsion of a mental disease or disorder
Consent to adoption (termination of parental rights)	understand the nature and quality of the transaction
Testify	be able to observe, remember, and communicate about events in question and to understand the nature of an oath

Often these qualifying conditions are well defined in law and sometimes in other legal contexts. The various tests of illness or other conditions may be very specific and stringent or may be a broad, vague term of art allowing considerable latitude to the professional examiner. For example, to be found not guilty by reason of insanity in Michigan, one must at the time of a criminal act have a mental illness or mental retardation, both of which are rigorously defined in other sections of the law and also subserve civil commitment [*16*]. By contrast, to be found incompetent to stand trial, one must have a "mental condition" (as opposed to physical) which is not further defined [*17*].

Current Tests of Competency

Table 2 shows the various elements or human abilities involved in competency tests. Some of these tests have been traditionally supplemented by insane delusion tests, for example in tests to determine testamentary capacity and contractual capacity. A will or contract may be invalidated if either is the product of a delusion. However, many authorities [*18*] believe that jural acts produced by delusional beliefs are logically subsumed under the understanding test. In addition, some of the tests (testamentary capacity and contractural capacity) have been supplemented by a control or a compulsion test [*19,20*]. In order to orient the forensic psychiatrist who desires to do a very thorough evaluation of a competency issue or who is encountering an issue for the first time or who is in a new jurisdiction, several points about competency tests should be made.

Some of these tests are highly developed (such as competency to stand trial) and have published checklists and scales as well as numerous articles written about them, and some competency tests are very rare and esoteric (such as driving and voting). In addition, all jural acts requiring mental competency are essentially performance situations and are very specific, for example, fitness to perform a particular act (or complex of acts). Determinations of competency are thus very dependent on the complexity and difficulty of the particular act that is being questioned.

Apart from the competency test itself, there are often relevant collateral issues that are important to the determination. For example, in an examination to determine competency to stand trial, it is not enough to address simply the elements of the competency test. Questions of medication, the possibility of decompensation, the ability to tolerate the particular stresses of trial, and competency to make a plea often arise within the context of such evaluations and, if they are not expressly dealt with by the examiner, may arise on direct or cross-examination or go unanswered and lead to aberrant judicial results. Also, the exact nature of "standing trial" must be clarified on a case-by-case basis. There are differences in degree as well as kind between standing bench trial for a simple misdemeanor and a complex jury trial of a major felony where the defendant is to take the stand, all of which must be considered when trying to ascertain the defendant's understanding of the nature of the proceedings. "Standing trial" is in reality a broad complex of acts, and the examiner must focus on the appropriate acts in question.

Clinical Correlations

All these principles have important clinical ramifications. Thus, it is not only important to be very familiar with the tests and relevant collateral issues, it is also important to know the elements of the various tests [*21*]. Table 3 isolates and lists some of the various abilities inherent in such competency tests. Although this list is not exhaustive, it ranges from more or less singular abilities or faculties ("understand") to a broad complex of abilities ("care for one's self"). The more complex elements of tests may often resolve to simpler individual elements or capacities. For example, in guardianship evaluations the legal notion of "care for one's self" often resolves into abilities to make medical decisions, to procure food, to maintain one's personal hygiene, and so forth. The individual elements of the competency tests in each area require that the psychiatric inquiry be so focused that the most relevant information can be brought to bear in answering the consulting questions.

While forensic psychiatric consultation requires first of all a complete psychiatric examination including mental status, certain aspects of the mental status examination or history must be selectively emphasized to conform to the informational requirements of a particular competency test. For example, when examining for contractual capacity in an individual who wishes to make a contract and where an understanding test is the main criterion, one necessarily emphasizes cognitive process in the examination. Similarly, where control of behavior is an important criterion, the history and examination should especially

TABLE 3—*Analysis of some competency tests with synonymous concepts.*

Understand:
  Know
  Appreciate
	Control:
	  Conform conduct
	  Voluntariness
	  Compulsion
		Manipulability:
		  Fraud
		  Undue influence
		  Imposed upon

Cooperate:
  Consult
  Communicate
	Remember:
	  Observe
	  Perceive
		Drive

Care for one's self	Manage financial matters	

deal with these aspects of human functioning. Special techniques, such as psychological testing, Amytal® sodium interview or hypnosis, and the stress interview, may be rationally employed to obtain particular kinds of information and to shed light on particular kinds of functioning.

Cursory examinations (the bane of forensic psychiatric practice) usually fail for want of information relevant to the required test or to other collateral issues. Another common reason for failure is that, in examining a relevant area of function, the appropriate range of functioning may not be tested for possible deficiencies. For example, where a contract at issue is a complex one involving highly abstract notions, the ordinary mental status examination might be inappropriate. Instead, sophisticated neuropsychological testing might be required.

Summary

Competency tests have evolved into very individualized tests of the ability to perform particular jural acts. When examining for competency, it is important to know the elements of the required test as well as relevant collateral issues for framing the consulting questions and to match the examination to the informational requirements of the test. Rational selection of examination techniques to produce relevant information and to test appropriate ranges of human functioning is also important.

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