

Legally Relevant Assessments for Legal Competencies

One of the primary contributions of the first edition of EC was the introduction of a model for conceptualizing all legal competencies. The model was first developed as an intellectual challenge. Could a set of concepts be constructed that would identify a common structure among legal competencies that are encountered throughout criminal and civil law? The model was published as a test of the hypothesis. Like a good theory, if the model had utility, it would survive and serve a heuristic function for the field across time.

The hypothesis seems to have been confirmed. The model has been cited widely and appears to have been useful for both researchers and practitioners across the past 15 years. Experience has identified a few features of the model that were unnecessarily complex. But the basic form of the model has encountered no serious challenges and continues to be of value as a structuring tool.

Therefore, in preparation for the instrument review chapters, the present chapter describes the model almost in the same form and with the same arguments that appeared in the first edition of EC. Where there have been minor changes, they are noted and explained.

INTRODUCTION

Legal competencies are constructs, in the same sense that this term is used in psychology and psychiatry. *Constructs* are hypothetical conditions or states that cannot be observed directly; only their behavioral signs can be observed. We use constructs to summarize our observations about individuals, and we presume that the inferred condition has some consequence for how individuals will behave or how we may want to respond to them. We may agree on certain observable phenomena to guide our use of the construct. Yet a construct is “open-textured” (Meehl, 1970); it can never be captured by an invariable set of facts. Its use may vary somewhat across cases, and it is open to various operational definitions. In summary, a construct is an abstraction; despite its inferred relation to observations, it retains the elusive quality of an idea.

Legal competencies have these same qualities (Roesch & Golding, 1980; Melton et al., 1997). Each competence (e.g., competence to stand trial, competence to care for self or property) is defined by broad statutory phrases and by case law interpretations of the statutory definition. For example, most states define an individual’s competence to stand trial as a “sufficient present ability to consult with his lawyer” and a “rational as well as factual understanding of proceedings against him” (*Dusky v. United States*, 1960, p. 402). These conditions are said to be absent or present in individual cases on the basis of the court’s consideration of relevant facts and circumstances in each case. Yet no particular set of facts ever defines the condition for all cases. The legal competence construct is an abstraction, unable to be defined by verbal precision or specific observations.

Gordley’s (1984) essay on legal reasoning aptly describes why the law does not reduce its decision criteria to a set of specific facts or circumstances that would promote mechanical interpretations (or what behavioral scientists would call “operational definitions”). Legal authorities that frame the law’s definitions recognize that the purpose of a definition is to contribute to just, right, or useful decisions. To enumerate the exact circumstances that must be present in order to arrive at these decisions would require the presumption that no other circumstances could arise that would achieve the legal purpose. Legal authorities recognize that the world is not that predictable: “No set of invariable rules,” Gordley observed, “could even tell one the best way to make a trip downtown” (1984, p. 142), unless one presumes that there will never be changes in the weather, one’s health, public transportation schedules, and so forth. Therefore, the law’s definitions for legal competencies provide broad discretion in determining whether a set of case facts satisfies the criteria for competence or incompetence.

This quality of legal competencies as constructs tells us that we should not expect any clinical assessment to define operationally a legal competence. The results of an assessment may be more or less useful in providing information that assists courts to make legal competence decisions. Yet the decision will not depend on any particular set of assessment observations across cases.

Despite the elusive quality of legal competence constructs, one can discern a common structure in legal competencies as diverse as competence to stand trial, competence as caretaker of a child, and competence to manage one's property. The analysis in this chapter describes this structure, offering five components that define all legal competencies. As will be shown in the following discussion, this structure provides a model to guide assessments toward objectives that are consistent with the legal criteria and process in competence cases. The discussion at this point will not attempt to demonstrate how each of the five components applies to each legal competence. That evidence appears in subsequent chapters (4 through 9), wherein the utility of the five-component model is tested by its ability to structure and organize our thinking about legal competencies and related assessments.

The conceptual model offered here is essentially the same as the one that was first described in the 1986 edition of this book, but with one significant structural change. The original model consisted of six components that the legal competencies have in common. Experience has suggested, however, that the important aspects of one of these components (the *contextual* component) could be folded into one of the others (the *functional* component) without loss of meaning and with gains associated with simplification. In addition, the present version uses the term "components" of legal competencies rather than the term "characteristics" used in the original version. According to this model, the primary components of all legal competencies are: (1) Functional, (2) Causal, (3) Interactive, (4) Judgmental, and (5) Dispositional.

FIVE COMPONENTS OF LEGAL COMPETENCIES

FUNCTIONAL COMPONENT

Definition

Legal competence constructs focus on an individual's *functional abilities, behaviors, or capacities*. As used here, the term *functional abilities* refers to that which an individual can do or accomplish, as well as to the knowledge,

understanding, or beliefs that may be necessary for the accomplishment. Examples of functional abilities include the capacity to engage in disciplinary responses to a child's misbehavior (relevant for parenting competence), and being able to keep track of one's financial expenditures (for questions of competence to manage one's property).

Functioning is related to, but distinct from, psychiatric diagnoses or conclusions about general intellectual abilities and personality traits. Psychiatric and psychological conditions (e.g., psychosis, abstract reasoning ability, introversion) are hypothetical constructs that are presumed to influence functioning. The functional component of legal competence constructs, however, refers to functioning itself and to specific knowledge or understanding for relevant functioning, not only to the hypothetical traits or psychodiagnostic conditions that might influence it.

The specific functional abilities that are relevant will vary depending on the legal competence construct in question. Each legal competence construct refers to a general environmental context that establishes the parameters for defining the relevance of particular functional abilities for the legal competence construct. The relevant environmental context is some class of external situations to which a person must respond. Various legal competencies examined in this book specify widely differing contexts: for example, criminal proceedings (trials), police interrogations, home life, and treatment services. Each context is presumed to require certain types of functional abilities in order to manage one's role within that context. Roles consistent with the contexts noted above would include, respectively, the role of defendant, suspect, manager of one's everyday affairs, and patient.

Different general contexts and roles are presumed to require somewhat different functional abilities. For example, a person's ability to discipline a misbehaving child may be quite relevant for the context and role with which legal definitions of parent competence are concerned, when applied in questions of child custody. Yet this functional ability would not be relevant for the legal construct of competence to stand trial, which refers specifically to the context of trials and defendants' roles in these proceedings. Conversely, a person's ability to understand the gravity of potential consequences of a criminal conviction may be relevant for competence to stand trial, but not for competence to care for a child. Clearly, there is no single construct of legal competence. There are several legal competencies distinguished by their different contexts, which in turn refer to different functional abilities.

The law, however, usually does not identify in great detail specifically which abilities are demanded of people in these general contexts. For example, guardianship cases generally apply the legal construct "ability to

care for oneself and one's property," and competence to stand trial refers to "a defendant's ability to assist a lawyer in his defense." These guidelines and subsequent case law, however, do not provide a finite listing of functional abilities that are necessary in order to perform the role of manager of oneself or one's property, or the role of client/defendant in trial preparations with a lawyer. Both contexts merely define the parameters of a hypothetical domain of functional abilities. Identification of specific functional abilities that may be relevant for a legal competence requires some form of exploration and interpretation of this domain.

Assessment Implications

The most fundamental objective of a related assessment is to obtain information about a person's functional abilities—*what the person understands, knows, believes, or can do that is directly related to the competence construct.*

This objective contrasts with most clinical assessments designed to determine psychiatric diagnoses, to provide trait-based descriptions of examinees, and to recommend interventions. As explained in Chapter 1, mental health professionals often have assumed that a diagnosis of some major mental disorder is sufficient basis for determining legal incompetence. The functional characteristic of legal competencies, however, requires a good deal more, because neither the law nor theories of psychopathology assume that any mental disorder always renders individuals incapable of all intellectual, behavioral, and social functions. The assessment should be designed so that the examiner will not be caught unprepared when the judge asks: "We understand that the defendant is schizophrenic and has severe delusions, Doctor. But that is not entirely the point. What can he do and what is he not able to do that is relevant for the question before this court?"

In the past, mental health professionals often attempted to respond to questions of this type by inferring from a diagnostic or trait-based description the specific functional abilities with which the law is concerned. For example, an examiner might infer that an individual with a diagnosis of Major Depressive Episode will be unable to manage financial matters, such as buying necessities, paying bills, and keeping accounts. The logic is based on the symptomatic behaviors that the examiner observed in forming the diagnosis: the patient's prominent and persistent dysphoric mood, loss of energy, poor appetite, insomnia, decrease in sexual drive, slowed thinking, and perhaps even recurrent thoughts of death. Given these observations, the expert infers that the patient will be incapable of, or disinterested in, managing the tasks associated with daily financial transactions or maintenance of property.



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