PSYCHOMETRIC PROPERTIES OF A MEASURE OF COMPETENCY

FOR USE IN CIVIL LEGAL PROCEEDINGS

A DISSERTATION

SUBMITTED TO THE GRADUATE SCHOOL

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE

DOCTOR OF PHILOSOPHY

BY

MATTHEW J. HOLCOMB

(RAYMOND S. DEAN ADVISOR)

BALL STATE UNIVERSITY

MUNCIE, INDIANA

JULY 2012

Acknowledgements

Betty Ford once said, "You can make it, but it's easier if you don't have to do it alone." Like most, I can state unequivocally that writing this dissertation was the most difficult task I have ever undertaken. However, my own difficulties in completing this manuscript could not have been overcome simply by force of will. Over the four years this dissertation took to complete, there are innumerable times where the project would have stalled or remained incomplete had it not been for support of my family, friends, and colleagues. This manuscript is dedicated to my father, John Charles Holcomb, who while not here to see its completion nevertheless instilled in me the drive, perseverance, and dedication without which I would have failed long ago. Dad, you always held yourself and those around you to the highest standard. Thank you for all the lessons. I would also like to thank my mother, Donna, who quietly encouraged and patiently listened whenever I called, and for also graciously agreeing to my many requests for proofreading. Also to Katelyn, thanks for always being there, taking an interest in what I'm doing, and providing those reality checks when they were often needed.

To my dissertation committee: thank you for making the process as pain free as it could possibly be. Your ability to find times to meet with me, provide constructive feedback, and ultimately find this dissertation worthy has helped me fulfill a dream 10 or more years in the making. Dr. Finch, I don't have the adequate space here to properly thank you for your help and guidance on this project. I can only hope that one day I'm half as good at managing my professional life as well as you seem to, while still managing to find time for your own pursuits. Dr. Dean, at this point it is not adequate to

simply call you my advisor. In my life I can point to two or three individuals who have been true mentors and you are without a doubt one. You gave both professional and personal guidance which will never be forgotten, and I will truly miss our many and varied discussions in your office. Your influence will be felt throughout the duration of my career and I can't thank you enough for that.

To my many friends and peers at Ball State who have helped me complete this project, thank you. Amy, Beth, and Teresa thank you for putting up with my sullen behavior, finding the positive where I could not, and for your superior writing skills, which made this dissertation readable. To Erin, Jesse, Nina, and Steven a special thank you for your friendship. When all of the craziness of finishing this project, applying for internships, and finishing my academic course work threatened to overwhelm me you guys were always there! Friday night's at the Locker Room, simple encouragement and smiles in the halls of TC, or as teammates on the volleyball court I couldn't have done this without you and I am forever in your debt. To Bradley, Jeremy, and Mallory who are the best friends a guy could ask for, thank you for always reminding me of life beyond Muncie, to laugh and be spontaneous, and for providing me a place to escape whenever I needed. Anya, thank you for everything, there is no way this project gets finished without you. Your friendship, unbelievable professionalism, and drive are worthy of emulation. I truly want to be you when I grow up, and can't wait to tell people over the next 40 years of my career that I once shared an office with you! Lastly, to Josh and Renee simply put, thank you, I hope you are aware of how much your friendship means to me and how this project doesn't succeed without your involvement.

Finally, I would like to thank the wonderful people at Survey Gizmo who provided me with the logistical tools, which I used extensively to gather the data for this dissertation. Beyond your amazing software, which you provided free of charge your technical support team readily responded and helped me resolve all of my questions even when they bordered on the truly stupid. Your software made my dissertation plausible while your technical support, advice, and tutelage made it a reality.

ABSTRACT

DISSERTATION: Psychometric Properties of a Measure of Competency for use in Civil Legal Proceedings

STUDENT: Matthew J. Holcomb

DEGREE: Doctor of Philosophy

COLLEGE: Education

DATE: July 2012

PAGES: 99

The present research concerned the exploration of the psychometric properties of a psychologically based screening measure of competency for use in civil legal proceedings. Specifically, the measure was designed to assess a person's competency before executing a will or other important legal document. In a series of investigations, expert feedback was utilized to formulate the final version of the measure, possible scoring criteria, and overall goodness of fit to the research question. Additionally, reliability and factor structure of the competency measure were explored.

In a two-part study, expert feedback was sought using the Direct Consensus Method to determine final question inclusion for the measure, as well as to create a preliminary scoring system, which could be compared against a random sampling of participants obtained in the second part of the study. The experts (N=49) were members of one of two groups (*N = 22* first feedback, *N = 27* second feedback). Using the expert feedback the measure was presented to a randomized sample of individuals (N=109) who were given the measure and then scored based on the experts proposed methodology.

Under the proposed method of scoring none of the randomized normals would have been misidentified as incompetent. Finally, exploratory factor analysis was conducted using both a 2 and 3 factor model. Results from this analysis were inconclusive.

Table of Contents

List of Tables

List of Figures

Chapter One

Introduction

Statement of Problem

The definition of competency differs with discipline and situation. At its most basic, competency is the ability to perform an action successfully. Put another way, competency is a demonstration of a minimum level of ability. Competency is an idea, which is given great credence in our society; indeed many professions (i.e. doctors, lawyers, mechanics) require a demonstration of competency, often in the form of an examination, for a person to claim membership within a profession. The ability to perform a specific act or acts with minimum levels of success within one's environment is a fundamental concept of life. Competency, as a construct, has little meaning in and of itself. However, when context and situation are applied, the demonstration of competency can become crucial in the instance of a will or important legal decision. Therefore, competency is an issue that is often relevant to our legal system (Pirozzolo, Funk, & Dywan, 1991). What could be more fundamental than a person's ability to act or demonstrate competency in defending themselves against the accusations of another? Indeed, the American Bar Association noted, "the issue of present mental

incompetence, quantitatively speaking, is the single most important issue in the criminal mental health field" (Bonnie, Hoge, Monahan, Poythress, Eisneberg & Feuch 1997).

As will become apparent competency is not an easy concept to grasp, let alone measure. Primarily, competency is thought of as a continuum. As such, encapsulating the term is not easily done. Competency is similar in make up to field theory in that the environment and person are factors which are additive and produce an output of behavior (Lewin & Gold 1999). For example, any numbers of competencies are necessary for interaction with the world, but measuring all competencies would be impractical at best.

The 'balancing' approach
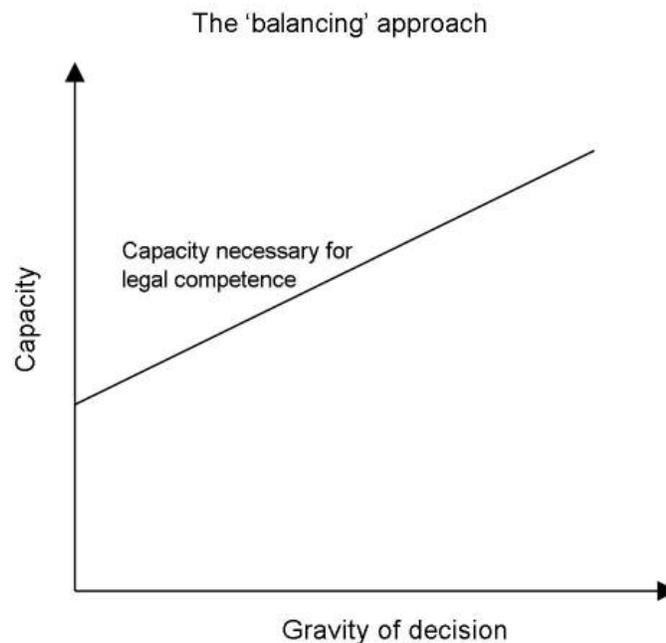
Figure 1.1 - *The Balancing Approach and the Continuous Nature of Competency Taken from (Buchanan, 2004)*

However, if we narrowly define the competency we are interested in, it should be possible to measure and examine it closely; such as in legal competency to execute a will or other important legal document.

Broadly speaking, the law is divided into two parts: civil and criminal. In each, competency takes a different shape and meaning while essentially measuring an individual's ability to perform a task. Criminal law might concern itself with the question of an individual's competency to stand trial (Bonnie, 1993), but it might also be concerned with a person's ability to understand their "Miranda rights" as they are read to them. Conversely, within civil law questions of competency might be asked of a mother's fitness to adopt a child or an elderly man's desire to leave his estate to his twenty-year-old girlfriend (Pirozzolo, Funk, & Dywan, 1991). All of these proposed scenarios involve a legal question of "competence," or a demonstration of minimum ability, but it becomes apparent that the construct of legal competency is dependent on situation and perspective, which makes it difficult to objectively measure. While "competency" may have underlying skills and abilities, which are ubiquitous across scenario or situation to date, no studies have uncovered what measurable skills encompass the construct. As such, we are left with measuring for situational variables or minimum levels of demonstrable ability as it relates to the question being asked. Therefore, with few notable exceptions (The MacArthur Adjudicative Competency Scale; Bonnie et. al, 1997) the study of competency is largely ignored within psychology.

Table 1.1 - *Case Law Concerning Competency*

Case	Area of Legal Concern	Impact on Competency
Dusky v. United States (1960)	Criminal Law	Allowed for the evaluation of an individual preceding a trial to determine competency
Fare v. Michael C. (1979)	Criminal Law	Competency of an individual to waive their right to counsel and silence must be assessed and considered
McNaughtan's Case (1843)	Criminal Law	Established Insanity as a plea and created the need for an assessment of competency to stand trial because of a mental illness
Meyer v Nebraska (1923)	Civil Law	Parental rights are not absolute and parental incompetency can be established by the state.
Fawcett v Smethurst (1914)	Civil Law	Granted unique protection and status to minors with regards to contracts entered
The Uniform Guardianship and Protective Proceedings Act (Revised, 1997	Civil Law	Provides the basics regarding the establishment of a guardianship due to incompetence

To study competency by an empirical method, it is necessary to narrow the scope of inquiry to a point in which the basic equation of man, environment, and behavior are manageable scientifically (Cohen, Sandborn & Shiffrin, 2008). The primary focus of this study was to assess competency from a legal frame of reference. That is, to explore the individual's ability to enter into a legally binding agreement (i.e. a will, contract, or large purchase). While only about 3% of wills in the United States are contested, the courts overturn 15% of those contested. In overturning a will there are two major precedents

that can cause this to occur (Redmond, 1987). The first is that the person making the will was subject to undue influence and coercion while making the will. The second is that the testator (person creating the will) was incompetent at the time of signature (Regan & Gordon, 1997). While 3% does not appear to represent a large number, with approximately half the country executing a will (45%) there is a plethora of opportunities for the overturning of a will to occur (Redmond, 1987). Furthermore, the aging population of the United States is becoming more susceptible to medical conditions that can impair and leave testators vulnerable to outside influences (Libow & Zicklin 1973). For example, signing appropriate paperwork to consent or deny life-saving medical procedures. In all likelihood, we should expect increasing numbers of testator competency questions to occur through the coming years and yet we have no quantifiable method in place for reducing the number of overturned wills or addressing the problems which lead to a will being disavowed (Shulman, Cohen, Kirsh, et al., 2007).

While the study is intended for use with the signing of all legal documents, wills remain the most frequent as well as the most likely to involve a contention of incompetency. Therefore, this research will focus primarily on the endorsement of a will. Litigation questioning an individual's competency has long occurred with regards to wills despite the simplicity of the law surrounding the appropriate use of wills. Two witnesses are needed to testify that a person knows what he or she is doing when signing the document of his own accord. It is due to this witnessing requirement that contested wills remain a comparatively rare occurrence. With the increasing numbers of wills, and the variety of ways in which wills are now being prepared (i.e. internet sites, non-lawyers) the potential for an increase in contested wills is present (Helmholz, 1990).

To sign a will, or any legal document for that matter, the signer must show some abilities that are related to the endorsement of the will: the nature and extent of one's property, the persons who are the "natural objects" of one's bounty, and the disposition of property made in the document (Helmholz, 1990). While perhaps daunting due to their wording, these tests are as a practical matter easily passed. The first test, the ability to understand the nature and extent of one's property, has little practical utility or meaning. It calls for a general knowledge about the differences between types of property: real estate and securities, but does not require a depth of knowledge about either. Value and/or size are an important element under that law, because a person should show understanding between probate versus non-probate property. Second, a person must demonstrate knowledge of the natural objects of his or her bounty. As with the first, this is largely an irrelevant standard of competency (Birgden, & Ward, 2003). Questions of competency typically arise when children are disinherited or given differing amounts than others with no specific rationale explained within the will. Typically, case law has shown that incapacity is not necessarily questioned in such circumstances but that a stronger evidence of procedure and competency is present. Finally, knowledge of the disposition made in the will must be understood. As with the first two, this is largely of little importance as most lawyers make an effort to explain the words contained within a will, and typically, a general knowledge of wills is sufficient to satisfy this criteria (Libow & Zicklin, 1973).

Table 1.2 - *Common Law Requirements for a Will*

Requirement	Explanation
Signature	The most important aspect of a will. Typed names at the bottom of the will is cause for invalidation; typically the end of the will and every page must be signed in a different hand than the one who wrote the will
Time of Production (date)	A date should be affixed to the will so that should multiple versions exist the most current can be determined
Corroboration	Written wills should have witness signatures. These are done to verify free will, often times to avoid identity challenges a notary public will also sign and affix their seal to a will.

With case law as a guide, these requirements create an understood requirement and ability of communication that must be present. Will's or Last Testaments are unique in that, much of the communication requirement is done after the person is deceased and the will itself serves as the only form of communication. It is possible, although rare, that the clarity of a will or the competency of the person signing the document might come into question (Drane, 1985). However, the writing of a will and the common law expectations, as outlined above, which govern its execution make it difficult to overturn a document that has been signed and properly witnessed. The presumption of competency is often made with the executor of the will and therefore difficult to establish when the force and effect of a will or last testament are felt (Secker, 2002). Additionally, it has been standard legal practice to assume competency making it difficult to overturn a legal document. This is a positive since it keeps the number of wills which are contested fairly small, but also lends credence to the notion that since such basic standards and

procedures must be met in order for a will to be secure there must be another explanation as to why some 15% of questioned wills are eventually overturned. It is the author's contention that one such explanation is the lack of standardization and common requirements, to establish the veracity of the three tests.

The purpose of this study was to design an instrument, which would standardize the procedures for assessing a person's competency when signing a civil document (i.e. a will). Creating such an instrument would allow for the decrease in the number of overturned wills. Additionally, when questions of competency should arise, the presence of the instrument will allow the purveyors of justice (namely judges) to have more evidence to consider in making their decisions.

<div align="center">Competency</div>

The construct of competency is a difficult one to agree upon from a psycholegal standpoint for a number of reasons. Foremost of those reasons is that competence is a legal, social, and moral matter (i.e., a normative judgment) determined by courts and legislative bodies, and most importantly through the common-sense viewpoint of lay persons (Morse, 1978). While the concept of competency is difficult to define, its importance and impact are seen throughout our legal system since only the acts of rational individuals are recognized by our society (Melton, Petrila, Poythress, & Slobogin, 1997). Additionally, competency is highly individualized and contextualized based on inquiry. A participant in the legal system must demonstrate abilities required specific to his or her own situation. In other words, the requirements for standing trial, facing the death penalty, creating a will, or paying a parking ticket are all different (Birgden & Ward, 2003). Therefore, any study of incompetency must take into

consideration context and the continuum nature that varies with each legal situation (Winick, 1996). Incompetence in any legal setting is not static and consequently must be treated as a "single moment in time" situation in which the establishment of competency is made (Birgden & Ward, 2003). Therefore, in order to provide the most utility to the present study and also simplify the discussion and disagreement surrounding competency, only the strict standards of the law will be considered with regards to instrumental design. Issues such as emotional competency, psychological competency, and other competencies, while important and ultimately necessary in an overall evaluation of competency, will be disregarded within the narrowed scope of the present study for both the sake of expedience, ease of measurement and the error associated with it, and the current state of the literature. While the author admits that more sophisticated methodologies of measurement can be employed, there is simply not available, at this time, literature support for causal relationships between cognitive and neurological functioning and behavioral outcomes which would be pertinent to the research question being considered.

Further confusing the issue of competency as a psycholegal term is the dichotomous emphasis that is placed by the legal and psychological world on the concept (Birgden & Thomson, 1999). While both psychology and the law rely on "normative data" to base decision-making skills, they go about the process in remarkably different ways. For example, in a legal setting judgments are used to set legal precedents which then become the standard until other precedence is set. As such, a strictly legal definition of the term has the tendency to ignore the fluidity of competency (i.e. a person who is cognitively impaired will always be such and coaching, teaching or explanations are not

sufficient to change their status) and leaves out the highly individualized nature of competency (Grisso, 2003). Psychology on the other hand, uses scientific theory for the purpose of hypothesis testing. Psychologists form their opinions based on tests, which are normative and data driven (i.e. a person is cognitively impaired if their IQ drops below a certain point). This approach fails to recognize the contextual nature that is important when making a legal decision and therefore does not serve the purpose it is needed for within a legal context. To rectify these seemingly incongruent processes, Lewin and Gold proposed a theory-based behavioral measurement (Lewin & Gold, 1999) and that a theoretical framework to the psycholegal construct(s) of competency (Grisso, 1988) can and should be merged to produce a harmonious and scientifically valid measure for competency; with regards to legal documents. Such an approach would satisfy both the rigors of psychological validity and the clinical utility and expedience of the courts and legal system.

Such an approach is not a novel concept within psychology or science in general. Out of necessity, the courts have created an informal process by which individuals suspected of mental infirmity are examined by lay people with the purpose of determining the competency of the individual. Indeed, within the very topic discussed, one of the primary functions of having two people witness a will signing is to not only serve as witnesses to its veracity, but also as a safeguard to the person doing the signing. Undue influence, or inability to understand the concepts and wishes expressed in a will, in other words the common law questions discussed previously, are informally assessed by the witnesses and their signature is seen as minimum criteria having been met (Libow & Zicklin, 1976). However simplistic this process may appear on the surface from a

scientific standpoint it is incredibly complex and misunderstood. As such, a formalized

process for establishing a person's competency would only further strengthen the last

wishes of an individual, clarify their wishes, and decrease the number of disputed wills

and other legal documents.

A formalized and scientifically valid process to examine a person's competency

to enter into and execute a legal document not only progresses scientific practice, but also

helps within the law itself by setting a standard by which the courts can establish a

person's abilities and differentiate between those who are competent and those who are

not. The courts themselves have identified this last point as a particularly important idea.

Specifically, the case law in question is *Daubert v. Dow Chemicals* (43 F.3d 1311, 1995),

which has called for increased scientific rigor in legal processes, admitted evidence, and

expert testimony. The court's finding that unscientifically validated opinions had no

standing, or at least a lesser standing, in the eyes of the court is further evidence for the

need of a standardized process for assessing a person's competency.

With this in mind, it is no wonder that competency evaluations within the legal

setting have evolved into a series of checklists of specific behaviors and functions that are

little more than a structured interview which focuses on items that are thought to be

relevant. Birgden and Ward (2003) have argued that no set of facts can indicate

competence nor can a set of rules about the facts be created. While this may be difficult

to acknowledge in the data driven "rule" oriented world of psychology what is most

important in understanding the determination of competency is that regardless of method

the determination should be functional (related to the legal criteria), context-dependent

(applicable to the individual circumstance of the defendant), and pragmatic (have practical utility; e.g., Bonnie, 1992, 1993; Freckelton, 1996; Grisso, 1988, 2003).

Experimental Strategy

The current study is the execution of a scientifically-based and empirically-validated assessment for use within the legal community for the assessment of competency of those who wish to create a Last Will and Testament. Specifically, the assessment does the following: (1) fulfill the requirements of common law in the United States with regards to the establishment of competency (2) fulfill the requirements discussed and handed down in the 1960 Supreme Court Decision *Dusky v United States* (3) fulfill the requirements outlined within the *Daubert v United States* case so that the assessment provides practical utility for defending Last Will and Testaments (4) provide an easy to use and practical assessment for those working in the legal profession as opposed to psychology (5) consider and adjust for the unique issues that the population this assessment is aimed at will provide for a quality assessment (i.e. unique situation problems, age and demographic issues for those entering into a Will) (6) be both a reliable and valid measure of competency for those creating a will (Rogers & Barrett, 1996).

As previously mentioned, there are a number of limitations to an assessment of competency in general. First, this assessment is intended to be used in only a narrow setting within the legal community (i.e. the creation and signing of a will). This is necessary because of the sliding scale criterion that permeates competency decision-making processes within the legal community. Additionally, while legally anyone may enter into a will and sign legal documents it is assumed by the author that the vast

majority of people entering into a will are elderly (i.e. 50 years and more in age) and therefore unique issues associated with the development of the elderly will be considered within the assessment design. Finally, the intention of the author, with the design and proposal of this instrument is for clinical utility rather than academic. As such, the instrument will be designed for use by legal professionals with little or no training in psychological testing, assessment, or diagnostic issues. This is to provide a measure that has as much practical utility as possible. Finally, it is the author's opinion that the neuropsychological approach to assessment is best suited for translation into an assessment of legal competency for the signing of a will. Neuropsychological assessments are the most comprehensive and inclusive of psychological examinations and in order to provide practical utility of the proposed measure to the legal community, then the proposed assessment must follow a similar trajectory (Boll, 1977).

Table 1.3 - *Table of specifications for a test of competency in the execution of legal documents*

	Content Area		
Objective	Knowledge	Application	# Items (% of test)
General Knowledge	mini-Mental Status examination; Orientation, Standard practice for the assessment of competency	establishes knowledge of self, legally shows ability to communicate, basic mental stability	7 items (36%)
Adaptive Functioning	measure of personal abilities; shows level of life competency; allows for normative judgment based on other abilities	awareness of personal surrounding and situation, related to ability to recognize the beneficiaries of ones bounty	6 items (32%)
Will Specific Questions	based on three principles of competency as created by legal precedence	establishes awareness of legal requirements, consistent with current legal practices	6 items (32%)

The study contains broad significance on a number of levels. On the personal level, the execution of a will is one of the most significant documents that a person creates during their lifetime and with few exceptions it is one of the only documents which goes into effect only after a person is no longer able to explain their reasoning or decision making process to others. As such, the wishes and beneficiaries of a person's will deserve protection, as does the wishes of the person creating the will. Additionally, contesting a will is typically a long and drawn out legal affair where parties involved likely do not see results for a protracted period of time. A second reason for the creation of the proposed assessment is the current aging population of the United States. As this country continues to grow older and the prevalence of diseases of old age (i.e. dementia,

Alzheimer's) continues to become more commonplace, something must be done to ensure that those who create a will are of sound mind and are capable of understanding the decisions that they are making. Any will that is made as a result of undue influence is invalid, but proving undue influence is almost impossible, as it must be shown as coercion. Again, considering that a person's will only goes into effect after their passing, this creates a number of problems.

Finally, this study will help rectify paucity within the research but also proposes a viable alternative to the assessment of competency, which has heretofore been deemed by the researchers to be unavailable. In creating this assessment, Neuropsychologists will be fulfilling their ethical obligations to use the most scientifically sound methods and assessments available in their decision making process within their respective practice. An assessment of competency for use in the creation of wills will add to the literature as a whole and provide a rich and new vein of further research.

Chapter Two

Review of Literature

Prevailing Theories and Relevant Federal Case Law

Introduction

With the average age of the United States population increasing, there has been a growth in the need to make decisions about the abilities of the elderly in the United States to engage in self-determined activities; in other words gauge or determine their competency (Hayslip & Panek, 2007). Psychology has long studied the actions of the demented and mentally ill, and the effects mental and neurocognitive disorders have on decisional capacity. However, little has been done to examine the decisional capacities of adults who, by virtue of their advanced age, display cognitive impairment but do not exhibit pathological symptomology. Typically, if concerns are raised about a persons' ability to perform within the legal setting, a competency evaluation is conducted to determine their abilities and fitness to participate. Competency assessments with the moderately impaired are difficult considering the current diagnostic tools and standard practice for psychologists. For example, a person of advanced age may show the inability to drive a car but may still demonstrate independent thought and maintain the desire to live independently. With the

advances in any variety of intervention with the elderly to augment adaptive abilities (i.e. public transit, bill paying services), the idea of competency has become fragmented and narrowly focused. At the same time, competency assessment in general is underprepared and inadequately equipped with a multiple of assessment theories and theoretical frameworks. Such paucity in the research, when considering the trends, represents a serious deficiency in our knowledge and a blind spot within clinical practice (Moye, Marson, Edelstein, Wood & Saldivar, 2011).

At its core, the term competency means adequate capacity for self-determination within a given context (Grisso, 2003). Therefore, any decision of incompetency is a determination that an individual no longer displays adequate resources, both personal and environmental, for which to self-determine. Indeed, a determination of incompetence means a label of insufficiency has been prescribed to an individual. Such labeling in our society jeopardizes an individual's ability to live independently or interact with his larger environment (Grisso, 1988). To further complicate an already convoluted definition, competency is a psycho-legal term that is context and time sensitive. This implies that competency status is subject to change and is not stable.

The construct of competency is not entirely self-contained within the field of psychology. Indeed, the term competency is rarely used within psychology, but rather is somewhat synonymous with the term capacity. Capacity is the ability for an individual to adequately identify, categorize, and process information into something meaningful, and then evaluate that information as to possible consequences (Saldivar, 2005). Competency, unlike capacity, has some noteworthy differences from capacity (Moye et. al, 2011). For example, competency has structure built around at least one theoretical

framework. In contrast, capacity is typically thought of as a unit of measurement meant to be quantified but lacking in relative theoretical framework. Furthermore, competency is more valuable in practical terms and is, therefore, preferable in linking both psychology and law (Moye et. al, 2011).

Competency, as a psycho-legal term, can be divided into two main categories: criminal competency and civil competency. Criminal competency, such as the ability to stand trial, waive Miranda Rights, and assume criminal responsibility, has to this point been the most studied area of competency within the literature. Less studied, and therefore less understood, is the area of civil competency (Moye et. al, 2011). The main areas of civil competency are parental capacity decisions (child custody), self-care (guardianship or conservatorship determinations) competency in directing or consenting to medical treatment, and directing or entering into legal contracts (wills, etc., Grisso, 1986). Primarily civil related psycho-legal issues of competency tend to be extremely discretionary and situation specific. As such, determinations of competency under this broad category present unique issues and challenges to researchers. While difficult to determine, civil competencies are nonetheless as important as their more illustrious counterparts in criminal competency and are as often just as reliant on clinical recommendations in providing the foundation for judgment (Appelbaum & Gutheil, 2007).

An assessment of competency carries with it significant implications and, therefore, deserves the attention of researchers and clinicians. Foremost as an issue is the possibility of restriction of civil liberties being unduly placed on an individual. With few exceptions, competency evaluations continue to be carried out through nonstructured

interviews and other unproven techniques that rely heavily on clinician skill (Wang & Ennis, 1986). Again, any competency evaluation has the potential of a determination of incompetence, which necessitates a change in a person's environment, decision-making capacity, or autonomy; all of which are highly valued attributes within our society (Moye et. al, 2011). Autonomy is especially important both in psychological and legal ethics, and therefore should not to be left to chance, evaluator error, or an unscientifically validated method (Nicholson, Robertson, Johnson & Jensen, 1988). Any determination of incompetency comes with tremendous burdens upon clinician, examinee, and family, as it may result in an undesirable outcome and should be avoided if alternatives are available. A determination of incompetency often leaves the incompetent in a vulnerable position and restricted options, which may include having a navigator present, keys confiscated or hidden, or disabling a car permanently to prevent continued operation (Odenheimer & Minaker, 1994).

It is worth mentioning that a determination of incompetency is likely to result in a number of psychologically related concerns. Indeed, a number of studies have demonstrated that one of the major outcomes is a change in the personal sense of well-being and perception of personal freedom and autonomy (Bowsher & Gerlach 1990; Rodin & Voshart 1987; Dittman-Kohli, Lachman, Kliegl & Baltes, 1991).

<div align="center">Determining Competency</div>

Over the last 40 years there has been a paradigm shift within the field of competency determination. The movement from attempting to develop a generic or standardized process, which could be prescribed to all individuals, to one in which competency decisions are made on more specific and situational evidence is evident

(Appelbaum & Gutheil, 2007). Specifically, there has been an uptick in the number of competency determination cases, such as court appointed guardianships that rely heavily on clinical evidence (Schmidt, 1984; Schmidt & Peters, 1987; Schmidt, Akinci & Wagner, 2007). In most states, clinical determinations rely on doctoral level psychologists or physician with mental illness expertise (Moye et. al, 2011).

Relying upon expert evaluators carries with it inherent risks and limits the field to the individual expertise of those conducting the evaluations. Predictably, research has found that when compared with multidisciplinary assessments, individual "expert" evaluations lack cohesive agreement and reliability (Kaplan, Strange, &Ahmed, 1988; Rutman & Siberfeld, 1992). Additionally, there are a number of ethical considerations to be aware of when using "expert" opinions in competency assessments. For example, dual relationships can develop between examiner, client, and employer in evaluations such as conservatorship or guardian decisions (Moody, 1987). With the increasing lifespan these ethical issues only compound when considering long-term treatment and extended care treatment facilities for the elderly (Bennett, 1989).

Determining competency is an issue that researchers have discussed with regards to the future of psychology. Competency, as a legal concept is determined, established, governed, and decided by the judicial system. However, psychologists are often also called upon to give expert testimony as part of the legal process. As previously mentioned, "determination of incompetence represents one of the most profound infringements of a citizen's rights" (Grisso & Appelbaum, 1998, p. 15). Considering the seriousness of the matter, issues of competency determination necessitate the fields of psychology and law to approach the problem from the most ethical, scientific, and

professional manner possible. Also there are a number of considerations, which many in the field may be overlooking when conducting a competency assessment. The first and probably most important is that most psychological tests are not validated for use in a functional assessment of competency. Rather, these tests are in large part designed to be diagnostic tools. Current competency evaluations that are based on popular neurocognitive batteries, therefore, lack validity for use as an assessment of competency (Moberg &Kniele, 2006). A second issue to consider is the degree to which many clinicians rely on unstructured interviews when gathering their information. These interviews are the primary basis for making many competency determinations (Grisso, 2003) and yet they rely in large part on the clinician's expertise, skill, and experience in developing correct assumptions concerning a person's overall functioning. In terms of competency evaluations, the clinical approach is often argued to be unethical as it poses multiple threats to reliability and validity of the examination (Moberg & Kniele, 2006). A preferable method of evaluation is the use of an empirically validated structured interview, designed with ecological validity for competency evaluations and within a competency-specific framework or theoretical model (Moberg & Kniele, 2006). Furthermore, there must be the ability to differentiate within types of competency regardless of test. For example, Buchanan and Brock (1990) argue that the criterion for incompetency in cases of a civil nature must be artificially higher than those of criminal cases. The argument is that competency cases result in changes in personal autonomy and the likelihood of posing danger to different parties involved.

Finally, to determine competency all clinicians must consider the legal standards that their determination must meet. Courts at various levels and across the country have

differing standards to declare someone incompetent. Regardless of a standard, it would

seem only ethical, on the part of mental health professionals to provide competency

evaluations or assessments that meet the most stringent of legal standards. As such, using

the federal framework of appropriate psychological practice within the legal setting is

arguably the best indicator of what competency evaluations should entail. Particular

attention should be paid to relevant case law which could affect the practice of

psychology as it relates to not only competency evaluations but also all forensic practice

(Faigman & Monahan, 2009.) One such example would be the Supreme Court case

Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993), which held that scientific

evidence including testimony of an individual's competency is only valid in court if it is

also scientifically valid. Such a decision, while currently only applied in Federal Courts,

has and will invariably dramatically impact psychological practice in forensic settings

and therefore should be a consideration for any assessment of competency (Greiffenstein,

2009).

<div align="center">Components of Legal Competency</div>

Grisso (1986) first offered a comprehensive model of competency. Grisso's

model has become regarded as the standard for understanding competency. According to

his model, the components for all legal competencies were: (1) Functional, (2) Causal, (3)

Interactive, (4) Judgmental, and Dispositional. Each component works with the others to

create an overall picture of competency across the legal setting. However, each

component is not necessarily equally present or as important depending on the type of

competency requirements or evaluation which is conducted. Many of the instruments

used to measure competency are not transferrable across the legal environment. For

example, the MacArther Competence Assessment Tool-Criminal Adjudication (MacCat-CA; Otto, Poythress, Nicholson, Edens, Monahan, Bonnie et. al, 1998) is a widely used and fairly well studied assessment of ability to stand trial. However, this assessment would be completely inappropriate for use in almost all civil settings (Moye, 1995).

Functional

Of importance to any evaluation of competency is an understanding of an individual's functional abilities. Although there is disagreement in the literature as to what functional abilities are, it seems to be a generally accepted concept that the term refers to an individual's abilities to meet societal expectations for personal independence and retain the ability to manipulate his environment (Moberg & Kniele, 2006). Included within functional ability is the demonstration of an individual's ability to understand his actions and goals (Grisso, 2003). Specifically, there is (1) a need to demonstrate understanding, and, at the same time, (2) the ability to project forward the consequences of a person's intended actions that must be measured. In the case of legal documents, a demonstration of the functional capacity to understand binding agreements and the ability to understand and conceptualize future obligations required of a person by signing to a legal document. Overall, there is little evidence, or guidance, under legal jurisdiction as to what general functional capabilities a person must be able to show to demonstrate competency in any situation. Generally, the "ability to care for one's property" (Moye & Marson, 2007) would be the closest legal guideline used in most civil cases. There are no explicit lists of functional behaviors associated with the identification of specific traits capabilities, which represents a significant shortcoming of any model with functional behavioral component (Grisso, 2003).

The functional capacity of an individual may cause concerns to be raised from those with a traditional view of competency assessment. Traditionally, there has been an underlying assumption in the mental health profession that functional characteristics are largely related to legal competency and autonomous decision-making. In other words, a major deficit in functional capability could be interpreted as a decline in the area of competency (Moye & Marson, 2007). This rational relates directly back to thinking through problems based on pathology and developing diagnostic criteria. Psychopathology dictates that a number of debilitating functional deficits impacts a person's intellectual, behavioral, and/or social functioning. However, civil-related issues of competency, and the relatively high standard of proof necessary to demonstrate incompetence in essence negates the diagnostic approach. This is an important idea since, traditionally; competency is assessed through interview and clinical judgment that may lead to false and grievously incorrect assumptions about a person's competency (Grisso, 2003).

Morse (1978) argued that mental health professionals are not qualified to engage in forensic assessment related to functional capacity. Morse argued that to provide information about functional capacity, mental health professionals had to step out of their "expert" status and make too many inferences about abilities. As such, this may be an area of competency assessment where neuropsychology is better suited to provide an in-depth exploration of functional capacity (Moye & Marson, 2005). Neuropsychology, with its emphasis on looking at all aspects of the brain behavior relationship, is perfectly situated within the psychological community to assess functional competency (Marson & Hebert, 2006; Moye & Marson, 2005) Indeed, the idea of capacity, which has been well

studied in neuropsychology, has many parallels to functional competency (Moye et. al, 2011.).

Causal

The causal component of a competency evaluation is the need for the courts to understand, or be informed on, how a functional deficit may impact an individual given a specific legal question. For example, functional deficits in cognitive abilities may be causally related to problems with understanding the importance (or salient details) of a legal document such as a will. Additionally, the causal component of the competency model is concerned with explaining mental health pathology and its direct impact on competency. This is different from the inferences made about functional abilities and they are well within the role of "expert" for a psychologist to take part in. Consequently, it is important to note that with this area of a competency model, a distinction must be made in functional deficits that are transient in nature (i.e. fatigue, or non-pathological conditions) from those that would represent a constant and damaging influence on a person's competency (Grisso, 2003).

A measure designed to assess competency in a civil setting must account for the causal relationship influencing factors, functional abilities and competency. This relationship is important to consider because competency is a civil issues argued to exist (or be necessary) for only as long as it took to reach an agreement or sign a document (Finkle, Kurth, Cadle & Mullan, 2009). In other words, if judgment is made that functional capabilities allow for a person to enter into the civil legal setting (and that causal factors are ruled out for a psychological condition in that moment, i.e. lucidity in someone with Alzheimer's), then the person in question would demonstrate sufficient

competency to engage in a civilly related legal activity (Grisso, 2003; Moye et. al, 2011).

Areas suggested for assessment within this domain of competency include general

intelligence, memory, reality and a connection to it, reasoning or problem solving,

motivation, and psychological control (Grisso, 2003).

Interactive

While no set criteria exist of the functional behaviors that must be demonstrated

in to be deemed competent, a consideration for the interaction of the functional demands

placed on an individual and the legal environment are clearly defined (Grisso, 2003).

This interactive characteristic of competency suggests that assessments in a legal setting

should be conducted with an understanding between the client and attorney based on

demands. In other words, a demand for and having the ability to interact with a lawyer

would be a reasonable expectation for someone on trial for criminal wrongdoings. In the

same light, interaction with a lawyer would be a reasonable expectation with someone

wishing to enter into a legally binding agreement such as a will. Interactive capability is

one area in which researchers constituted minimum standards of interactive capability.

The following table is a summary of some of those findings, and while not exhaustive, it

does provide general guidelines for any evaluation of competency. The table is primarily

focused on criminal competency rather than civil. However, many of the ideas and

standards expressed should be easily adaptable to civil law and conversely civil

competency.

From an assessment perspective, the interaction between behavioral, cognitive

functioning, and environmental factors has been a long-standing preference in the

literature (Bem & Allen, 1974; Mischel, 1984). This is one area in which the unique

forensic setting lines up well with previously conducted research and theory. Certainly, information considering environmental and social context should be part of any competency assessment. Doing so provides the overall assessment with several key elements. First, the objective of any appraisal of competency is an effort to describe to others the overall functioning and explain the examinee's abilities as the abilities relate to the demands of a specific task. Second, and perhaps more importantly competency is not, in the legal sense, an examination of complete and overarching ability. Rather it is a specific evaluation of a person's capability as they relate to a particular issue, which is an important legal distinction. Finally, this methodology allows an increase in congruency of the findings. In other words, if a person is incapable of performing or making decisions in their present environment, it is possible to change the environment and therefore allow the person to retain a level of anonymity (Grisso, 2003).

Table 2.1 - *Considerations of an Interactive Component for Competency Evaluations*

Consideration	Area of Competency it may be beneficial to asses for
- Complexity and multiplicity of charges	Criminal and Civil
- Particular events associated with the alleged offense	Criminal and Civil
- Range of possible penalties for this alleged offense, and probabilities of their occurrence	Criminal
- Ranger and types of evidence available to counsel without defendant's report	Criminal and Civil
- Simplicity or complexity of the legal defenses available	Criminal and Civil
- Necessity for defendant's own testimony at trial	Criminal
- Probably length of trial	Criminal and Civil
- Probably complexity of trial (e.g., types and number of witnesses)	Criminal and Civil
- Potential of trial to arouse emotion (e.g., due to the nature of offense, relation of parties in trial process)	Criminal and Civil
- Sources of social support for defendant during trial process	Criminal

Adapted from Grisso (1995) Evaluating Competencies: Forensic Assessments and Instruments.

Judgmental and Dispositional

Any measure of competency has as a final outcome in a form of judgment of

incongruence existing between the examinee and the context for the evaluation. This is

significant given that under the law, a decision of incompetency requires, or at least

prescribes, certain outcomes with regards to the examinee. These outcomes, or

dispositional consequences, are necessarily part of the competency construct (Grisso,

2003). To this point, the model of competency espoused an assessment of the functional

ability of the individual, an examination of the demands the context of the assessment

places on the individual, and finally a comparison of the two for some form of discrepancy (Girsso, 1995).

Competency, as a legal construct requires that any decision made be based on the law, and therefore, must take direct measure of the person-context incongruence and apply it in an appropriate manner. This provides guidance for the assessment of competency for signing legal documents, as great incongruence would be necessary to declare someone as incompetent. However, it should be noted that simply demonstrating incongruency may still not cause a judge to decide for incompetency. The judgmental aspect of any competency assessment is necessarily difficult because at this point in the model an actual determination is made, and therefore, the possibility of affecting someone's freedoms and liberties become real considerations.

> Judgmental and dispositional components identify the question, "how much incongruency is enough," as an interpretation of justice, in light of the instant circumstances and the dispositional consequences that will accrue for both the individual and society. This interpretation invariably constitutes a legal, moral, or social judgment, no matter how it is made. IN the last analysis, interpretations of the sufficient conditions for depriving individuals of constitutional freedoms, even for their own good are moral judgments requiring legal authority" (Grisso, 2003, p. 37).

An implication of any assessment of competency is the judgment aspect. As practitioners of mental health, responsibility to make a definitive decision of competency is not within the scope of practice. It is not the ultimate goal of an assessment to answer the question of competency. Rather, any assessment of competency is, and should be, designed by a psychologist to simply address and illuminate the issue of competence (Denney, 2005). This represents a fine line but an important distinction within the field (Grisso, 2003; Appelbaum & Gutheil, Morse, 1983). From a practical standpoint, there is

no need for any measure of competency to create cut off scores or, for that matter, use standardized scores for the purpose of classification (Moye et. al, 2011). Rather, any designed measure of competency should attempt to document for legal professionals the amount of incongruence that may exist for a person, given the context-specific reasons for which an assessment of competency was conducted (Grisso, 2003).

Summary of the Construct

The construct of legal competency is primarily concerned with the issue of functional capability. Functional capabilities are defined as what a person understands, knows, believes, or can do. In neuropsychology this is sometimes referred to as capacity. Any assessment of competency is therefore primarily concerned with relating to a legal body the functional abilities that are relevant to an individual taking part in a legal process. Those functional abilities will necessarily vary widely across the forensic and legal setting and are highly context specific. Any functional measure of competency should therefore strive to document and measure by reliable means a person's functional capabilities, rather than rely on psychological ideas or psychopathology as a causal explanation of functional deficits that may exist. For this reason, neuropsychology and its approach towards functional capabilities seem eminently more prepared and qualified than other specialties within the field of psychology to assess and create a measure of competency. As with all measures proposed, competency as a construct would benefit greatly from sound psychometric design and well established and standardized procedures. However, the primary objective of a competency assessment is not to answer the legal question of competency, but rather provide the court with more information specific to any incongruency between functional capabilities of the legal competency.

Civil Competency

While more research has been conducted on criminal competency, the amount of carryover between criminal and civil competency is negligible. As for the purposes of this review, civil competency is the most important; its unique characteristics will be explained along with a delineation of the important aspects specific to the research question. As explained in Chapter 1, the purpose and intent of the present study is to create a test for use in civil competency assessment, specifically when a legal document is under consideration (i.e. will). At this time there is no direct measure for this type of competency in the literature, and so parallels between the proposed measure and other established measures in the field must be drawn.

The competency to enter into a legally binding document is similar to the competency under question in a guardianship hearing. Guardianship competency is usually related to an individual' control of the day to day decision making with regards to health care, finances, and other provisions deemed basic necessities. There are a number of parallels to someone being deemed legally incompetent and provided guardian by the courts and someone attempting to show legal competency in a civil setting to enter into legally binding agreements. For example, the ultimate purpose of many wills is to bequeath assets to various institutions, family members, or charities. A determination by the courts that someone was incompetent to do this would carry the same force and effect as someone declared incompetent and given a conservator or guardian over their estate. For example, someone who wanted to make a large purchase (i.e. a car or a house) and was not permitted to do so due to a ruling of incompetence would be functionally similar to someone who had lost the ability to control his day to day finances through the

appointment of a guardianship. Of course some fundamental differences with regard to guardianships and entering into legal agreements do exist. For one, the context and circumstances are entirely different. The legal proof necessary for incompetence when entering into a contract or executing a will would be more restrictive than in conservatorship or guardianship cases. At the same time, the judgment of circumstances would also differ greatly. A person granted a conservatorship, for example, might prove a danger to himself or society at large should he not take a certain medication on a daily basis. However, it is difficult to think of many circumstances where executing a will would cause self-damage or damage to one's environment. Much more likely is a questioning of competency for the purposes of invalidating a signed will after the person's death. In such circumstances, similar arguments used in conservatorship hearings could be used to overturn a will (i.e. they couldn't handle daily routine etc.).

As previously mentioned, there are enough functional parallels between the ideas of guardianship and legally binding agreements to warrant an exploration of established measures that have been used to help courts decide guardianship cases. In many circumstances, measures designed for use in this area of competency indirectly measure functional capabilities by looking at overall daily functioning. Independent Activities of Daily Living (IADL) scales have been created and assessed for use within the legal system specific to issues such as guardianship hearings (Moye, 1995). Guardianship hearings, much like competency assessments for legal documents, are difficult to conduct because of the breadth of functional behavior, which could play a part in a determination (Moye, 1995.) Additionally, many of the functional demands required for legal contracts may have interventions that if applied could augment skills and would move the

incongruence of an individual closer to his functional capabilities. For an overview of

some of these examples please see the table below:

Table 2.2 - *Areas of Assessment for making Guardianship or Conservatorship Decisions*

Category	Tasks	Social Services	Legal Mechanisms
Finances	Managing Assets Paying Bills	Bill paying services Bill paying services	Conservatorship Power of Attorney
Health	Medical decision making	On call nursing/In home services	Guardianship
Independent Living	Household cleaning and maintenance	Home services	Guardianship
Transportation	Driving	Skill training classes	License revocation

Adapted from Guardianship and Conservatorship in Evaluating Competencies Forensic
Assessments and Instruments, edited by Grisso, 2003 (Moye, 1995).

Based on the competency model and parallels between civil competencies the

most likely measure of competency assessment for use in determining ability to sign and

enter into legal agreements would focus on two primary ideas. The first would be to

define, quantify, and measure possession of functional abilities when entering into legal

agreements. For example, having the functional ability to express preference and choice

would be important to demonstrate in the creation and execution of a will (Nicholls,

1984). Largely this has been an ignored area of measurement; and there does not appear

to be any clearly designed assessments within this narrow focus of competency

evaluation. The second area, which needs empirical measurement, is situational context.

Within the competency model, the context is as important as the abilities of a person. An

indirect measurement of a person's independence is the most appropriate way of

quantifying context. After measuring the two proposed component areas, functional

abilities and situational context, a congruence comparison should be conducted using sound psychometric principles. Together the three elements are able to provide the legal system with optimal information necessary to make a decision. Several measures designed to address the issue of functionality in adults specific to determining competency exist (Spirrison & Sewell, 1996). Almost all of the measures are designed in conjunction with a guardianship or conservatorship hearing by the courts. However, in much the same way that the legal competency questions mirror one another in functional abilities so too do the context specific requirements seem to have parallels to one another.

Measures designed to establish adult's functional capabilities within their environment also exist (Spirrison & Sewell, 1996; Spirrison & Pierce, 1992). However, only a few were specifically designed to be used within a forensic setting. Of those the most important are the *Adult Functional Adaptive Behavior Scale (AFABS;* Spirrison & Pierce, 1992), *Multidimensional Functional Assessment Questionnaire (MFAQ;* Fillenbaum, 1988), *Direct Assessment of Functional Status (DAFS;* Loewenstein, et. al., 1989), and *Everyday Problems Test (EPT,* Willis & Marsiske, 1991). Below is a table summarizing the areas assessed by these instruments.

Table 2.3 - *Content Areas on IADL Instrument*

	AFABS	MFAQ	DAFS	EPT
Money				
Cash/Check		X	X	
Knowledge/Judgment	X			X
Home				
Maintenance				
Safety				
Cleaning	X	X		X
Health				
Health Maintenance	X			X
Transportation				
Using bus/taxi		X		X
Driving			X	
Communication				
Telephone		X	X	X
Mail			X	

Adapted from Guardianship and Conservatorship in Evaluating Competencies Forensic Assessments and Instruments, edited by Grisso, 2003 (Moye, 1995).

Daubert v. Merrell Dow Pharmaceuticals, Inc.

In 1993 the United States Supreme Court heard a case that has had a dramatic impact on the practice of psychology within the court systems of the United States. The Court decided in *Daubert v Merrell Dow Pharmaceuticals, Inc.* (*Daubert*) that admissibility of evidence considered "expert" within the court system must also reach certain scientific criteria. Specifically, scientific expert testimony must be able to be scientifically validated. While this finding by the court initially only impacted the Federal Court over the last 15 years, *Daubert* has become a standard by which a number of states have prescribed (Faigman & Monahan, 2005). Psychology as a science must be particularly concerned with this case law as it dramatically impacts what is and is not acceptable as expert witness in the courts.

For psychological science *Daubert* has several key implications. For example, differentiation is drawn between expert knowledge that is based on clinical experience or in empirical testing carried out within the laboratory. In other words, having worked with a given population or having extensive experience conducting competency evaluations does not an expert make. *Daubert* has since been modified by cases such as *Kumho Tire Ltd. V. Carmichael* (1999), which allowed for the differentiation of "expert" knowledge and allowed for the bases of expert opinions being based on "specialized knowledge". Primarily, *Daubert* presented the courts and conversely psychologists with an ultimatum that expert testimony must be based on science, and that opinions or clinical intuitions were no longer going to be given the weight of "experts" testimony. *Daubert* further instructed judges to be the gatekeepers and deciders in determining whether expert testimony of a scientific nature was reliable and valid (Faigman & Monahan, 2005).

Daubert's impact on psychological practice, and more specifically on the field of competency assessment can be seen in many ways. First and foremost, *Daubert* makes the assumption that expert witnesses take on the burden of proof for their opinions. This has created a rich backdrop of case law that is replete with examples of experts who were incapable of proving their "expert" status (Faigman & Monahan, 2005). Typically, these cases fall into two categories: (1) the expert called upon to testify did not have the basic credentials or background necessary to testify on the subject for which he or she was called, (2) the second and far more common are experts who are qualified in one area but have insufficient expertise to testify on the specific subject in dispute (Razavi, 2008). Both of these issues are important to psychologists who use tests on a regular basis to qualify their opinions about legal matters. For example, a psychologist with a research specialty may be disqualified under the first criteria from testifying about a cognitive test in court because necessary training to testify adequately on that subject had not been obtained. In the same light, a general psychologist may be hard pressed to present himself or herself to court as an expert in interpreting neuropsychological test results if she or he had not specialized in neuropsychology or received extra training in the area. This issue while appearing straightforward on the surface is tremendously important with regard to competency evaluations. With much of the research suggesting that most clinicians simply rely on an unstructured and un-validated interview to establish competency (Razavi, 2008) there are major obstacles that they may have to overcome in order to convince the court that the testimony they offer is at a level which would be considered expert instead of just studied opinion (Razavi, 2008). Fortunately, some have seen the problems that *Daubert* might provide clinicians in establishing their "expert"

status and have argued for a change in the way in which we approach competency

evaluations (Moye et. al, 2011; Grisso, 2003.).

Moberg & Kniele (2006) have argued that the foremost issue before the court in

any competency hearing is the issue of decision-making capacity. Moberg & Kniele

(2006) go on to argue that neuropsychologists are best suited to provide expert testimony

on capacity given the multimodal methods of assessment and training which most

neuropsychologists follow. Additionally, continuing to use traditional measures of

neuropsychological assessment outside the realm of their original intent not only doesn't

pass the criteria of *Daubert* but also is unethical (Moberg & Kniele, 2006).

Consequently, there is the need for further test development and standardization of

practice in the area of competency assessment, and forensic practice in general to provide

not only the best scientific and ethical practice but also satisfy the criteria of *Daubert*

(Moberg & Kniele, 2006).

Additionally, *Daubert* insists that information provided from a scientist, as

science in an expert capacity to the court, must present information that is relevant to the

case at hand and be reliable and valid. *Daubert* specifically outlined four criteria for the

courts to use in determining the validity of expert testimony. These areas were (a)

testing, (b) error rate, (c) peer review and publication, and (d) general acceptance. While

not intended to be simply a checklist from which the courts could work, the four areas

mentioned in *Daubert* are guidelines which should be followed whenever possible

(Givelber & Strickler, 2006.).

Testing

Daubert requires that the basis for any opinion be testable, and such testing has already been conducted. In other words, experts need to provide a rationale backed by the literature as to why they reached their opinion. This has a direct implication to competency testing. It can be argued that the testing requirement of Daubert requires practitioners to use a standardized form in competency assessment, and that a "mixed" battery approach is unacceptable. In other words, in order to provide scientifically backed evidence on a person's competency there must be a standardized way in which that competency is determined. At this time, no such method exists, and practitioners have had to rely heavily on the literature and common acceptance to justify their opinions. Daubert clearly states this to be an unacceptable practice (Faigman, & Monahan, 2005.).

Error Rate

"In the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error" (Daubert v. Merrel Dow Pharmaceuticals Inc. 1993, p. 594). Under Daubert the Supreme Court mandated that an understanding of the potential for mistake by a scientific instrument be an integral part of the admissibility of results. Error rates impact the field of psychology most notably in the areas of assessment and testing results. Many clinicians rely extensively upon assessments when testifying in a forensic setting, which opens this area of psychological practice up to tremendous scrutiny. Additionally, considerations must be given in the area of competency assessment due to the unstructured and unstandardized battery approach that many clinicians use. With few exceptions there is no standardization and therefore no

known error rate, meaning admissibility could prove difficult. Finally, it is important to note that the courts have been instructed and typically limits any discussion of the error rate of a given scientific measure to methodological problems that might affect the results being presented in court (Faigman & Monahan, 2005). This is an indictment on behalf of the courts for clinicians and psychologists to make sure that the tests are both used for their designed purpose and have been designed using sound psychometric procedures and principles. Tests must be standardized on populations for which they will be intended. In other words, standardization samples obtained from college students may not be adequate for proving the utility of a test (Faigman & Monahan, 2005).

Peer Review and Publication

In *Daubert,* the Supreme Court articulated a position that peer review and publication would and should be considered in the admissibility of evidence. However, the court also cautioned that peer review and publication alone were not enough to provide sound evidence. Certainly much of the research that is published even in the best of psychological journals is difficult to substantiate, and results at times turn out to be invalid (Lynch & Jasanoff, 1998). The inclusion of these criteria has direct impact upon competency assessment because of the lack of solid empirically supported research in the area of competency assessment. This is especially applicable to assessments involving questions of civil competency. Furthermore, it has been argued that a general inclusion of peer review in all scientific endeavors is essential for having good science. The need for replication for example is one area in which psychology is woefully underprepared and unconcerned (Faigman, 1989). One argument that appears to hold great credence to this lack of replication is the impact that some social science research has on policy

agendas and in the political realm (Redding, 2001). Studies that don't substantiate facts that are already largely accepted are often rejected by publishers, making further advances in the field difficult (Redding, 2001). Regardless, the Court's decision was specific in stating that peer review and acceptance in the literature are not enough to qualify testing results or testimony as expert.

General Acceptance

General acceptance is similar to peer review and publication, in that it serves as a criterion for validity. This is especially important to mention with regards to psychology because validity and general acceptance run the risk of being associated with consensus rather than critical assessment (Faigman & Monahan, 2005). This took place multiple times, especially in the areas of forensic psychology where certain principals have become a cannon and contrary research is not paid any attention. Although researchers in the field of psychology and competency assessment typically are highly judgmental and critical, special attention should be paid to making sure that consensus is not the driving force behind any form of competency assessment. This is especially important when considering the impact that *Daubert* has had on the field because one measuring stick that researchers in this area could use as their guide is simply whether the courts are accepting their science or not (Faigman & Monahan, 2005).

Chapter 3

Research Methodology

Statement of Purpose

The focus of this research project was to construct a rating scale of competency using psychometric methods. This rating scale will attempt to measure this concept with a more empirical methodology, as well as lend more understanding to the construct of "competency." For the purpose of this project, the examiner conceptualized competency as demonstrating sufficient ability to enter into a legally binding agreement by signing a legal document.

Description of Participants

General Description

The participants were 158 normal adults who encompass both the expert feedback portion of the rating scales creation as well as the randomized standardization sample. While the criteria of competency do not change based on age, care will be taken to create a representative sample stratified by age to better represent those who are likely to make use of the proposed scale. Age was restricted to individuals above the age of 30, as the majority of individuals that the measure is designed for will fall into this category. In both the case of

experts' feedback and of random participants demographic data was not a major concern since the construct of competency is independent of race, sex, or age.

Selection of Participants

Participants will be recruited through the use of online software "Survey Monkey." Contact was made to potential participant through an introductory email, which briefly explained the purpose of the survey, made mention of possible compensation, and encouraged participation. All participants gave implied consent before data collection.

Characteristics of Participants

For the experts providing feedback on the measure as well as a proposed scoring method, all participants were lawyers who specialized in estate planning. All respondents from the expert sample reported spending at least 50% of their time in the preparation and execution of legal documents such as wills. Demographic data such as gender, age, and ethnicity were not gathered. A screening question of current employment was used to insure that expert's responses were appropriate for the given measure. Respondents who were part of the randomized normalization sample were recruited from Ball State Universities Faculty and Staff.

Description of Instrumentation Procedures

A rating scale was constructed through extensive literature review for the purpose of discriminating individuals who do not meet the legal standards of competency from those that do. For the purposes of this research no other measures were employed.

Defining the Construction of the Measure

According to Grisso's (2003) model of generalized competency, four components need be present in all assessments of competency: (1) Functional, (2) Causal, (3) Interactive, (4) Judgmental and Dispositional. The major issue of civil competency and specifically the signing of legal documents are the interactive capabilities of the person in question. Specifically, with any assessment of competency the interaction between the functional abilities that a person possesses to live within their environment and the casual factors (or minimum requirements) necessary to engage in a specific task. Thus, the purpose for the construction and standardization of this scale was to measure a person's actual abilities and compare it to the expectations of the law when it comes to civil competency.

Scale Construction

The competency scale was designed for use by non-psychologists or those not trained in assessment administration. As such, the scale was designed to be easy to administer, fill out, and score. Items were written for the scale in three distinct areas of assessment: (1) General Information (2) Adaptive Functioning (3) Will Specific Questions. For a full copy of the measure that was used please refer to Appendix A. All areas were designed so that both verbal and nonverbal methods of administration could be used to elicit a response. However, a limitation of the chosen method of data collection is that all responses' will be required in a non-verbal fashion.

Figure 3.1 - Theoretical Model for Competency Questionnaire
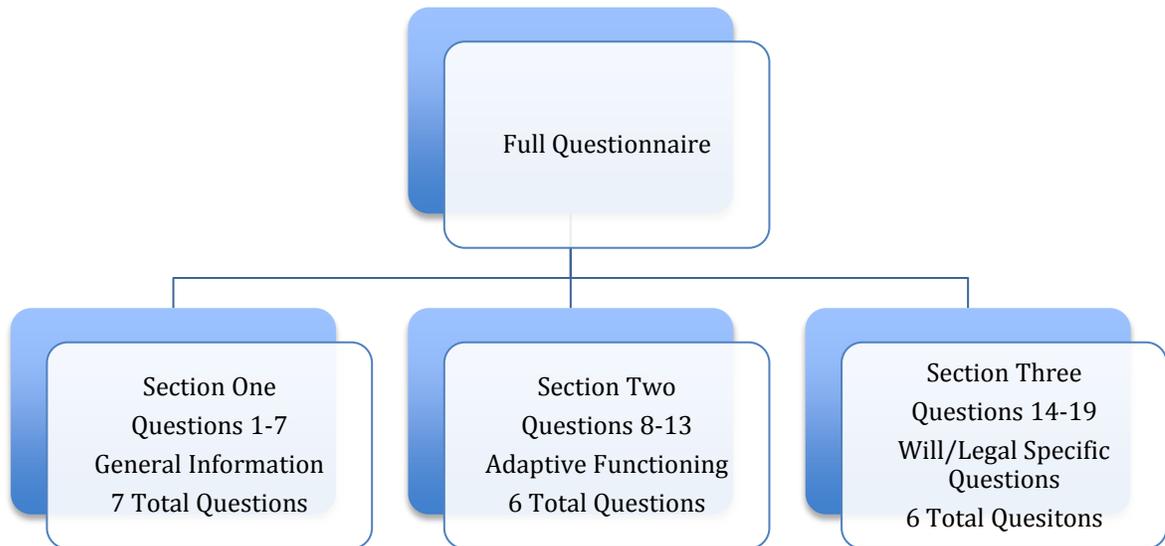
The full measure, which was used for this study, is included in Appendix A

The constructs of the competency assessment were behavioral manifestations of the ideas outlined by Grisso's (2003) theoretical model of competency. Each section of the measure was selected and adapted to Grisso's model while also taking into consideration the narrow scope of inquiry (e.g. civil legal proceedings.) The five domains of the scale were derived in what seemed the most appropriate and least time consuming and intensive way with which to demonstrate a person's ability with regards to the competency in question or lack thereof. During item and scale construction consideration was given to the varying developmental presentations that would later need to be accounted for. In other words, some respondents might have suffered from

debilitating and catastrophic medical events such as a stroke or a heart attack. As such,

the scale provides multiple modalities for the possibility of response by the person being

assessed and attempts to make it possible for the widest range of respondents while

limiting such other confounds as participants education level and cultural bias.

<div align="center">Sections of the Scale</div>

The first section of the scale, General Information, comprises the first 7 questions

of the overall measure. As stated previously, scale design was chiefly concerned with

ease of use and therefore brevity was sought with each section of questions. The *General

Information,* section of the scale is a set of 7 questions commonly used on Mental Status

Examinations by Psychologists.

Table 3.1 – *Items from Section One of the Competency Questionnaire*

Question #	Text of Question
1	What is your given name?
2	Where are we at right now?
3	In what year were you born?
4	What is your Social Security Number?
5	Who is the current President of the United States?
6	What day of the week is it?
7	Where do you live?

The purpose of these questions has to identify a base level of understanding from

the person being assessed and to establish a basic level of orientation for the person.

Items were either created by the author or adapted from various non-trademarked mental

status exams, which are commonly used among psychological professionals. In other

words, the general information section is an assessment of a respondent's awareness, which is important to establish should a person wish to sign a will or legal document that binds them legally. The 7 questions are all dichotomous choice questions "yes or no" and are scored accordingly.

The second section of the overall measure is the "Adaptive Functioning" section and is comprised of 6 forced choice questions.

Table 3.2 – *Items from Section Two of the Competency Questionnaire*

Question #	Text of Question
8	Do you live independently?
9	Do you drive your own vehicle on a regular basis?
10	Do you make your own medical decisions?
11	Has anyone been assigned to help you make decisions?
12	Do you make your own financial decisions?
13	Do you currently have problems reading?

This section of the scale was included to keep with the basic ideas of Grisso's (2003) overall model of competency and yet adapt it to the situation specific concerns, which are present for people signing a legal document. Scale items can be responded to by either indicating *Yes or No*. For example, question number 8 on the competency measure and the first question of the adaptive functioning section asks respondents, "Do you live independently?" Response to the 6 questions of this section will require a verbal response or written response. Additionally, space is provided for examiners to explain unique situations or adaptive functioning that might not be adequately explained by the closed nature of the questions. For example, the first question seeks information on a

person's ability to operate a motor vehicle. However, many elderly may have given up

the use of their own car but use public transportation on their own on a regular basis.

Such would be an example of adaptive functioning which isn't fully assessed by the

question within the competency assessment. Table 3.1 is a visual representation of the

theoretical model with which the measure was designed and questions selected. In

keeping with the review of the literature and published theoretical models the questions

fall into three broad categories.

The third and final section of the scale is designed to look at "will specific"

questions. These questions were adapted from the common law practices as discussed in

Chapter 2. The "will specific" section is a set of 6 questions, which can be score on a 0,

1, or 2 point scale. A score of 0 represents a clearly incorrect answer to the question, or

an answer which does not adequately address the question being asked. A score of 2 on

an item in this section would indicate a respondent had answered the question with full

and unconfused understanding.

Table 3.3 – *Items from Section Three of the Competency Questionnaire*

Question #	Text of Question
14	What is a will?
15	Has anyone talked to you about what your wishes are?
16	Upon your death what will happen to everything you own?
17	What are some specific things, which you are leaving behind in your will?
18	What makes sure these things will be given to whom you want?
19	Did anyone force you here to sign a will?

Description of Procedures

Scale Validation

Content Validation. Content validity is the extent to which the items of a measure reflect the intended content. To establish content validity for the competency scale (i.e. how well the items of the competency measure reflect actual competency) experts in the field were asked to review an initial list of items that were included on the final measure. Upon the recommendations of the experts the overall measure was adjusted. Additionally, it is important for the clinical utility of the competency scale that some form of cut off score/scoring methodology be established to differentiate between those who are competent and those who are not. Therefore, experts were asked for feedback on the number of questions that they felt a person could miss before incompetency was reached. This will, in essence, give the author a de facto cut off score/scoring system, which can then be compared against the scores obtained for participants in the normalization sample.

There are a number of methodologies that can be utilized to create cut off scores, but many of them require a great deal of time and participation by experts and are therefore cumbersome. As such, a relatively new methodology known as the Direct Consensus Method (DCM; Hambleton, 2001; Hambleton, Brennan, Brown, Dodd, Forsyth, Mehrens et al., 2000; Hambleton & Pitoniak, 2006; Hambleton & Slater, 1997) incorporates cut off scores into the process of providing individual item feedback and imposes less of a cognitive burden on expert participants (Cizek & Bunch, 2007). The DCM methodology calls for experts to be polled on their opinion of proposed items for a particular measure. After a first round of data is collected, the experts are then repolled

and asked to give the opinions on the same items with the added information of the preceding groups opinions added in.

Collection of normalization data. Data was collected from the faculty and staff of the Ball State University Community. Data was entered into an SPSS database to determine the reliability and validity of the scale. The following psychometric procedures were used for the rating scale:

Internal Reliability

Internal consistency is an indicator of how well individual items of a scale reflect underlying constructs. According to classic test theory, there should exist an underlying relationship between items that logically connect them to a latent variable. Typically, it is believed that a scale is internally consistent to the extent that items are intercorrelated. In other words, high measures of intercorrelation suggest items are measuring the same construct. Internal consistency is usually equated through Cronbach's (1984) coefficient alpha that can be calculated through SPSS. Nunnally (1978) provided for a generally accepted rule that the measured alpha level should be at least .70 for a scale to demonstrate acceptable internal consistency, of a single factor.

Construct Validity

Construct validity concerns the theoretical relationship of items. Much of the construct validity is hypothesized to follow the general guidelines discussed in Chapter 2. In other words, the constructs within the rating scale should reflect a measure of abilities such as: *Adaptive Behavioral Abilities, Cognitive Abilities, and Discrepancy of Skills*. Thus, a 3-factor solution was hypothesized for the rating scale. Factor analysis is the most common way to estimate the construct validity of a scale/measure. Exploratory

Factor Analysis (EFA) allows for the statistical probing of factors found. Two major

questions that can and should be addressed when conducting EFA are: a) what number of

factors best represents the items and b) how does the grouping of those items affect the

interpretation of the factors.

Chapter 4

Results

Introduction

The primary purpose of this study was to create a psychometrically sound rating scale of competency. The results and accompanying statistics are presented in the same order in which data was collected and the measure itself was designed and analyzed. Therefore, the first half of the chapter deals largely with the data and analysis surrounding inclusion of individual items of the rating scale. As such, Table 4.1 provides the percentage of expert respondents ($N = 49$) who felt a question from the proposed measure was of sufficient quality to include in the normalization sample. The chapter goes on to explore a proposed method of scoring that experts ($N = 49$) provided during feedback (see Table 4.2) and ends with an analysis of the normative sample ($N = 109$) for the finalized measure. The results of these inquiries are briefly discussed as many of them may have an impact on future iterations of the measure.

Psychometric Outcomes of the Rating Scale

Content Validity

To establish the degree with which items from the measure reflected the constructs for the measure, experts ($N = 49$) in the field of estate planning and civil law were recruited to review the initial list of items from the proposed rating scale.

Experts were recruited through the Internet from a national list-serve of lawyers specializing in civil law, and estate planning (www.naecp.org., 2011). Participation was completely voluntary and no compensation was provided. Feedback from the experts was sought and obtained based on the Direct Consensus Method, which requires at least two phases of feedback ($N = 22$ first feedback, $N = 27$ second feedback). Therefore, it is worthwhile to mention that during both the first and second stages of seeking expert feedback ($N = 49$) 96.4% of the respondents identified their primary area of employment as being within the legal setting. Additionally 72% of the 49 experts indicated that at least half of their professional time were spent preparing legal documents such as wills and working with clients in civil legal settings. No other demographic data was collected on the expert responses. Expert feedback was sought for the measure through the paradigm of the Direct Consensus Method (DCM, Cizek & Bunch, 2007.).

Table 4.1 – *Means and Standard Deviations of Expert Reponses*

To a 4-point Likert Scale with no knowledge (phase one) and with knowledge of previous ratings (phase two)

Item	Phase One		Phase Two	
	Mean	SD	Mean	SD
1	2.27	1.07	2.33	1.00
2	2.00	1.07	2.11	1.01
3	1.86	0.99	2.03	0.98
4	1.90	0.92	2.07	0.92
5	1.50	0.80	1.81	0.68
6	1.13	0.77	1.67	0.78
7	1.60	0.91	1.89	0.75
8	1.04	0.72	1.42	0.74
9	0.59	0.73	1.07	0.92
10	1.64	0.66	1.77	0.70
11	1.82	0.66	1.89	0.64
12	1.64	0.85	1.70	0.78
13	1.00	0.76	1.22	0.85
14	1.95	0.95	2.15	0.95
15	1.41	1.00	1.56	0.97
16	1.91	0.92	2.03	0.90
17	2.00	0.81	2.15	0.82
18	1.36	0.73	1.48	0.70
19	1.68	0.57	1.81	0.62

Several reasons were given for using DCM in an attempt to estimate validity of this measure: time constraints, ease of participation, and the ability to create cut-off scores through expert feedback. For a more in-depth discussion of DCM please refer to Chapter 3. Participants during the first phase ($N = 22)$ were asked, via an Internet survey, to indicate the number of items on the measure an incompetent client would answer incorrectly. Additionally, participants were asked to rate the importance of each item in measuring competency, which was later used as criteria for inclusion of items. After responses were received, statistical analysis of the expert responses to individual measure ($N = 22$) was conducted and the survey was resubmitted to the same list serve for a second round of expert feedback ($N = 27$), with the average ratings of the first group reported to the second responders. The second round of responses was sought to see if feedback from the original ratings would improve expert's opinions about item validity.

For each phase of expert feedback raters were allowed to choose whether or not they wished to participate. Participation was random for both the first and second samplings and overlap may exist between the two samples. This is consistent with standard DCM methodology. Participation of experts was anonymous and the only demographic data that was collected was primary job responsibilities and percentage of time spent involved with the preparation and execution of legal documents. To compensate for different raters in each phase a larger number of raters was consulted.

Content Validity Data and Analysis

Each "expert" ($N = 49)$ was asked to rate individual items on the measure for its appropriateness for inclusion in a measure of competency ($N = 109$). These experts were also asked to rate each item on a four point Likert-type scale with: "Not at all, Somewhat,

Very Well, Crucial" being the responses allowed for. A four-point scale was used intentionally to force the experts into providing negative feedback where it was warranted instead of that criticism being watered down in providing more points on the Likert-scale. While the percentages representing great enthusiasm on the part of the experts for including an item in the final scale may appear low, only two questions had over 10% of the experts after consensus that felt that the question did not adequately assess a person's competency. Those questions were: "What is your entire Social Security number?" and "Do you drive your vehicle on a regular basis?" After examining these data it was decided to keep the question on Social Security because it represented, next to date of birth, one of the most commonly used and memorized numbers for the average person (Campion, Fink, Ruggenberg, Carr, Phillips, & Odman, 2011) The overlearned nature of the number insures that minor disturbances in memory are unlikely to affect a person's ability to recall their social security number, and it represents a person's ability to demonstrate intact remote memory as opposed to recent memory, which would be tested by asking someone to repeat a recently presented string of numbers. Additionally, both questions were kept in the final draft of the measure because the experts proposed cut-off scores (see Table 4.3), which allows for some latitude in subjects' responses. The following table is a summary of the percentages of respondents for both the first validity check by experts as well as the consensus building second grouping.

Table 4.2 – *Item Validity*

Question	1st Group Rating	2nd Group Rating
Is anyone forcing you to sign this will?	95.5	100.0
What city do you currently live in?	63.6	81.5
What is your given name?	72.7	74.1
In what year were you born?	63.6	74.1
Is anyone assigned to help you make decisions?	68.1	74.1
What is aw ill?	63.6	74.1
What are some specific things that you are leaving in your will?	69.2	74.1
Where are we now?	63.6	66.7
What day of the week is it?	59.0	66.7
Upon your death what happens to everything you own?	63.6	66.7
Who is the current President of the U.S.?	59.0	63.0
What is your entire social security number?	36.4	55.6
Has anyone question your ability to make medical decisions for yourself?	54.6	55.6
Do you make your own financial decisions?	50.0	55.6
Has anyone talked to you about what your wishes are after you die?	50.0	55.6
What makes sure the things left behind will be given to whom you want?	40.9	55.6
Do you live independently?	27.3	44.4
Do you drive your own car?	13.6	33.3
Do you currently have problems reading?	18.1	18.5

As mentioned previously, one of the reasons for using the DCM method was to

get expert feedback in the form of proposed cut-off scores for the measure. Cut-off

scores offer both clinical utility, and also identify false positives. Additionally, experts

provided at least a rudimentary cut-off score for incompetency which could later be used

to compare against the normalization sample, and which ultimately should lead to a

standardized scoring system. A summary of these proposed scoring criteria and cut off

scores is found in the table below:

Table 4.3 - *Proposed Cut Off Scoring of Experts*

Average number of questions for each section of the measure that a person could miss before incompetency was suspected and determined.

	Section 1	Section 2	Section 3	Composite
	7 items	6 items	6 items	19 items
1st Rating - Incompetency Suspected	2.09	2.36	2.18	6.63
1st Rating - Incompetency Established	3.36	3.91	2.45	9.72
2nd Rating - Incompetency Suspected	2.03	2.15	1.85	6.03
2nd Rating - Incompetency Established	2.96	4.07	2.19	9.22
Consensus - Incompetency Suspected	2.06	2.24	2.00	6.30
Consensus - Incompetency Established	3.13	3.99	2.31	9.43

These mean ratings are important because they can be compared to the random

sample of norms to see false positives. As stated previously, the goal of the measure was

to create a minimum threshold that could be used to judge a persons' competency.

Clearly the experts still felt that multiple items from the proposed measure must still be answered incorrectly before incompetency could be considered.

Internal Consistency Reliability

Internal consistency is most often equated with Cronbach's (1951) coefficient alpha. Nunnally (1978) described what is widely considered the accepted rule of thumb for interpreting Cronbach's alpha, with a scale needing to be at least .70 for internal consistency to be reached. The Cronbach's Alpha Reliability Estimate of the 19-item scale of competency was .522. While lower than expected several reasons for such an outcome exist. First the number of items on the measure is fairly low. Additionally, with the proposed 3-factor structure very few items are intended to relate to one another, and finally most of the items of the scale were designed to be dichotomous (yes or no questions). These factors dramatically limit the variability in the data. Finally, the scale was designed as mentioned with "minimum abilities" or a minimum threshold in mind; creating a situation where most people should answer any given scale question unidirectional most of the time. As such, in a random sample of average to above average intelligence, as was obtained for this measure the variability is further diminished. Indeed, several items on the scale had a 100% unidirectional answering pattern, which causes difficulty when conducting statistical analysis. Clearly, as the number of constructs within a test increases the correlation between items decrease.

Table 4.4 - *Frequency Distributions of Answer Patterns for Random Sample*

Question #	Frequency of Same Answers	% of Randoms Providing Correct Response
1	9/100	91.7
2	7/102	93.6
3	38/71	65.1
4	1/108	99.1
5	1/108	99.1
6	14/95	87.2
7	2/107	98.2
8	104/5	95.4
9	105/4	96.3
10	0/109	100.0
11	2/107	98.2
12	107/2	98.2
13	1/108	99.1
14	5/12/92	84.4
15	44/2/63	57.8
16	17/17/75	68.8
17	15/13/81	74.3
18	11/12/86	78.9
19	0/0/109	100.0

* Lines separate the three sections of the overall measure, "General Knowledge, Adaptive Functioning, and Will Specific Questions."

Construct Validity

Exploratory Factor Analysis (EFA) was conducted to ascertain the factor structure hypothesized. As outlined in Chapter's 2 and 3 the original intent of the author was for a three-factor solution. This would best explain both the theoretical basis of the measure design as well as the presence of three distinct areas of inquiry found within the measure. However, a three-factor solution was not obtainable based on the data and therefore a 1 and 2 factor solution are reported here to better explain the data. Here again it is important to note that much of EFA is reliant on sample size, distribution of responses, and internal consistency. Two different Factor Correlations were conducted in an attempt to understand some of the underlying structure contained within the measure. Both analyses used Pearson Correlation Unweighted Least Squares (ULS) with a Promax factor rotation for simplicity. The first EFA, overview given in table 4.4, was conducted looking for a two-factor correlation structure including all the items of the measure with the exception of items 10 and 19 due to no variation in the answers obtained by the randomization sample. The KMO statistic is 0.694, indicating that a mediocre factor solution could be obtained from the data set.

Table 4.5 - Pattern Matrix of Correlations between Item Variables and Factors (Item-Loadings)

Question	Factor 1	Factor 2
Question 1		-0.351
What is your given name?		
Question 2	-0.522	
What city do you currently live in?		
Question 3	-0.568	
Where are we now?		
Question 4	-0.385	
In what year were you born?		
Question 5	-0.475	
What day of the week is it?		
Question 6	-0.378	0.304
What is your entire social security number?		
Question 7	-0.302	0.329
Who is the current President of the U.S.?		
Question 8		0.460
Do you live independently?		
Question 9		0.544
Do you drive your own car?		
Question 11		0.553
Is anyone assigned to help you make decisions?		
Question 12	0.464	0.343
Do you make your own financial decisions?		
Question 13	0.527	
Do you currently have problems reading?		
Question 14	0.454	
What is a will?		
Question 15	0.544	
Has anyone talked to you about what your wishes are after you die?		
Question 16	0.406	-0.358
Upon your death what happens to everything you own?		
Question 17		-0.437
What are some specific things which you are leaving in your will?		
Question 18		-0.558
What makes sure the things left behind will be given to whom you want?		

A second factor analysis was conducted removing those items from the measure

with little or no variation in participants' responses (i.e. items 10, 13, 19, etc.) in an

attempt to see if restriction of those items would lend itself to more interpretable data.

Specifically, there was concern that with a small sample size such as the one obtained and the nature of the majority of items (dichotomous) with a few items being ordinal that factors would appear simply because of the uniqueness of the ordinal data. Obviously, the drawback to such a solution is the exclusion of much of the scale from analysis. However, a look at both factor analyses does provide information worth explanation. The KMO statistic is 0.694, indicating that a mediocre factor solution could be obtained from the data set.

Table 4.6 - *Pattern Matrix of Correlations between Item Variables and Factors (Item-Loadings)*

Question	Factor 1
Question 1 What is your given name?	0.658
Question 2 What city do you currently live in?	-0.006
Question 3 Where are we now?	-0.166
Question 6 What is your entire social security number?	0.555
Question 8 Do you live independently?	-0.322
Question 9 Do you drive your own car?	-0.549
Question 14 What is a will?	0.499
Question 15 Has anyone talked to you about what your wishes are after you die?	0.460
Question 16 Upon your death what happens to everything you own?	0.679
Question 17 What are some specific things which you are leaving in your will?	0.746
Question 18 What makes sure the things left behind will be given to whom you want?	0.614

Chapter 5

Discussion

Summary

Given the absence of a standardized, or even consensuses, methodology for identifying individuals' competency to sign legal documents, this study reports the construction and psychometric characteristics of a measure that could be used by legal and psychological professionals as a screening measure for the competency of an individual signing a legal document. The issue of competency has been singled out by the American Bar Association as one of the single most important issues currently facing the legal field (Bonnie et al., 1997). Therefore, the lack of a standardized methodology for lawyers, judges, or mental health professionals to establish a person's mental competency for a specific behavior represents an oversight within each respective field's literature and practice.

Construction of the measure began with an extensive review of the literature, leading to the adoption of the model offered by Grisso (2003). Competency is considered a continuous variable, but for practical purposes, must be measured as a discreet variable under the law. Additional efforts were made to examine how the proposed measure would interact with current legal precedent such is in the *Daubert v. Dow Chemicals* (43 F. 3d 1311, 1995).

Care was also taken to consider precedence within the legal community for various definitions of competency. This was considered in both the review of the literature, which included a discussion on common law and a tracing of competency findings back to it, as well as in the design of the initial measure that was put forth for psychometric composition. The literature suggested that an attempt to make a measure such as the one offered would encounter difficulty in melding psychological principals with legal ones. Discussions of continuous and discreet variables and the ability for psychometrically sound tests to overcome these obstacles are contained within the literature and were incorporated to create the measure. This was done with the hopes that the finalized measure would provide useful information to both psycho-legal professionals attempting to assess a person's competency.

Every attempt was made to make the assessment as "user friendly" as possible so that it could be administered and interpreted by those outside the field of psychology. This is important since we know that those with a less advanced degree may give many competency evaluations, it served as an important criterion when designing this studies measure of competency. As such, Likert Scale items were written for many of the construct questions that were included on the final measure as well as limiting the number of questions that required any degree of interpretation on the part of the examiner.

Psychometric examination of the measure was a two-part process that required data to be collected on two separate occasions from "experts" in the field of competency assessment, as well as a random sample of individuals, that were used to compare against what the experts had predicted. The experts were drawn from across the United States by

soliciting participation in the research through online list serves for lawyers who specialized in estate planning, legal documents, and issues relating to elderly clients. Contact was made through the list serve and participants were directed to answer questions via surveymonkey.com. After an initial screening of items and an examination of feedback, the measure was re-released on the same servers and participation was again solicited this time to see if consensus could be reached between experts on the items proposed for the measure. The third step in the standardization process of the proposed measure was the random sample, which was obtained through use of the faculty and staff list serve at Ball State University in Muncie, Indiana. Participants were limited to faculty and staff for age reasons. Participants in the random sample included both males and females, with females comprising approximately 2/3 of the same (female = 66.1%). 97% of the respondents described themselves as Caucasian and almost 60% (59.6) held an advanced degree beyond their college diploma.

As mentioned previously the measure was designed with low benchmark principles in mind. In other words, meeting the standards of the measure would prove you were competent. As such, with a randomized sample of normal to slightly higher educated people the lack of variability and "incorrect" responses was to be expected and fits with the overall design of the measure. This step was necessary to "pre-test" the measure as to make certain that average individuals would answer most questions correctly and not be falsely identified as incompetent by the measure. Certainly, the measure does not follow traditional patterns, which are expected in most social science research, but the measure itself was not designed for use in social science nor was it designed with the traditional underpinnings of much research. The author's intent for the

measure was always to identify those individuals who are incompetent from those who are not. Based on the random sample, feedback from the experts sample, and the proposed scoring methodology from the experts, there is strong evidence to suggest further follow-up, research, and study with the population that ultimately the measure is targeted at; namely the incompetent.

Under the scoring guidelines as outlined by the experts, none from the randomization sample would have been falsely identified as incompetent. This is an important consideration, both by the author and for the potential utility of the measure. Considering the long case law history we have in the United States with regards to establishing competency.

While the factor structure was not revealed to be the same as was hypothesized, there is evidence that groups of questions as laid out by the author do group together. While not what was intended, the findings do still add to a paucity in the literature and lay an important foundation for future studies that still providing a scientifically sound instrument that may have some clinical utility in establishing a person's competency in specific legal matters.

The collection of both the expert's and normative data and its subsequent analysis for the validation of the proposed measure of competency answered the research questions posed by this study. The measure met criterion that experts in the field currently use in deciding the competency of an individual to sign a legal document. In addition, it proposes a set of expectations that experts would have for a normal person completing the proposed measure to assess their competency. Moreover, the average

person was able to perform well enough on the proposed measure of competency so as to not be misclassified as incompetent by the measure itself.

Conclusions

Summary of Results

The results and conclusions of the study may be summarized as follows:

1. Content validity of the proposed scale of competency was obtained when forty-seven experts in the practical assessment of a person's competency to sign a legal document were surveyed on two occasions for their review of the competency measure. Feedback given during these two initial surveys was acted upon during scale revision and before obtaining a normative sample.

2. When presented with the first phase of expert's findings, experts asked to respond to individual items during the second phase of the Direct Consensus Method (DCM) generally rated individual measure more favorably and with less variability. It is possible that such a finding is consistent with the expert's argument that without a standardized methodology many in the field of competency assessment simple go along with established practice of others.

3. Experts in providing feedback on individual items relevance for inclusion in the final measure also provided the author with a preliminary scoring system that could be used to determine the competency of an individual completing the measure. During the normalization sample and using the criteria as created by the experts, no person would have been mistakenly identified as incompetent by the measure.

4. The internal consistency reliability of the 19-item Competency scale was moderate with a Cronbach's Alpha of .522. The lower statistic obtained for this measure can be attributed to the high uniformity in the data obtained from the normalization sample.

5. Exploratory Factor Analysis (EFA) results were inconclusive and difficult to interpret due to the lack of variability in the data and the high number of questions that were dichotomous in their design. However, there do appear to be some question groupings that would fit with the author's proposed factor structure.

Implications of Results

The results of this study indicated that the experts with little modification accepted the proposed model of assessing a person's legal competency to sign wills. Furthermore, based on the expert's predictions on what incompetent performance would be on the proposed measure, the standardization sample did not misclassify anyone as being incompetent when they were not. However, revisions and further evaluation of the parent scale are needed before it can be used due to a number of difficulties during the normative process. Specifically, the measure was not designed for use outside of the legal setting, which requires the writing and presentation of a scenario for participants to understand an incorporate into their answers during the normative sample. For a few questions on the proposed measure (i.e. What is your social security number) this created, in the author's opinion an abnormal response pattern that may not be reflective of the population at large. It should be noted that the experts themselves did not provide

specific questions that would immediately classify someone as incompetent but rather a range of questions that could be missed before suspecting incompetence. As such, the proposed measure and resulting normative sample appears to have successfully been implemented based on the review of the literature, and might have useful clinical validity in its current form.

<div align="center">Recommendations for Future Research</div>

This study provides a number of possibilities for future research with the most pressing being the continued validation process of the competency rating scale. The competency rating scale may be revised based on the findings of this research, and therefore it may be necessary for new expert feedback to be sought and analyzed. In addition, another normative sample should be collected to ensure that findings from this study are replicated in further reiterations of the competency measure.

Further research using the current scale could include a standardization sample of individuals who have already been declared incompetent by the court system and a comparison of those scores to both the obtained normalization sample, and that of the proposed scoring system, which was created during expert feedback. Such a sample of individuals would prove invaluable in proving the clinical utility of the competency measure as well as providing more scientific evidence for its usage.

Generally speaking, research in the area of competency is greatly needed. Many in the research (Grisso, 2003) argue for the presence of a single "competency" construct, which is fluid and static regardless of situation. However, at present our understanding of competency is not to a point where situation can be taken out of the equation. The designed measure set forth in this document is an example of having to take competency

in a situation specific and discreet basis in order to accurately measure it. Further

research should seek to identify those aspects of competency that are similar across

situations to add greater clinical utility to its ultimate assessment by professionals.

References

Appelbaum, P.S., & Gutheil, T. G. (2007). *Clinical handbook of psychiatry and the law (4th ed.).* Philadelphia, PA US: Lippincott Williams & Wilkins Publishers.

Birgden, A., & Thomson, D. (1999). The assessment of fitness to stand trial for defendants with an intellectual disability: A proposed assessment procedure involving mental health professionals and lawyers. *Psychiatry, Psychology and Law, 6(2),* 207-214.

Birgden, A., & Ward, T. (2003). Pragmatic psychology through a therapeutic jurisprudence lens: Psycholegal soft sports in the criminal justice system. *Psychology, Public Policy, and Law, 9,* 334-360.

Bem, D. J. & Allen, A. (1974). On predicting some of the people some of the time: The search for cross-situational consistencies in behavior. *Psychological Review, 81(6),* 506-520.

Bennett, J. C. (1989). Ethical aspects of aging in America. In W.M. Clements, W. M. Clements (Eds.), *Ministry with the aging: Designs, challenges, foundations* (pp. 137 – 152). New York, NY England: Haworth Press, Inc.

Boll, T. (1977). A rationale for neuropsychological evaluation. *Professional Psychology, 8,* 64-71.

Bonnie, R. J. (1992). The competence of criminal defendants: A theoretical reformulation. *Behavioral Sciences and the Law, 10,* 291–316.

Bonnie, R. J. (1993). The competence of criminal defendants: Beyond *Dusky* and *Drope. University of Miami Law Review, 47,* 539–601.

Bonnie, R., Hoge, S., Monahan, J., Poythress, N., Eisenberg, M., and Feucht-Haviar, T. (1997). The MacArthur Adjudicative Competence Study: A comparison of criteria for assessing the competence of criminal defendants. <u>Journal of the American Academy of Psychiatry and the Law, 25</u>, 1-11.

Bowsher, J. E., & Gerlach, M. J. (1990). Personal control and other determinants of psychological wellbeing in nursing home elders. *Scholarly Inquiry for Nursing Practice,* 4(2), 91-102.

Buchanan A. E., & Brock, D. W. (1990). *Deciding for others; the ethics of surrogate decision making*. Cambridge University Press: New York, New York, US.

Campion, M. A., Fink, A. A., Ruggenberg, B. J., Carr, L., Phillips, G. M. & Odman R. B. (2011) Doing competencies well: Best practices in competency modeling. *Personnel Psychology,* 64, 225-262.

Cizek, G. J. & Bunch, M. B. (2007). *Standard setting: A guide to establishing and evaluating performance standards on tests*. Thousand Oaks, CA: Sage Publications Ltd.

Cronbach, L. J. (1984). *Essentials of psychological testing* (4th ed.). New York: Harper & Row.

Cohen, A., Sandborn, A., & Shiffrin, R. (2008). Model evaluation using grouped or individual data. *Psychonomic Bulletin & Review, 15 (4)*, 692 − 712.

Daubert v. Merrell Dow Pharmaceuticals (1993). 509 U.S. 579.

Denney, R. L. (2005). Constitutional, Judicial, and Practice Foundations of Criminal

　　　　Forensic Neuropsychology. In. Denney R. L. & Sullivan J. P. (Eds.). *Clinical*

　　　　Neuropsychology in the Criminal Forensic Setting. (pp. 1-290 Guilford Press:

　　　　New York, New York US.

Dittman-Kohli, F., Lachman, M. E., Kliegl, R., & Baltes, P.B. (1991). Effects of

　　　　cognitive training and testing on intellectual efficacy beliefs in elderly adults.

　　　　Journals of Gerontology, 46(4), P162-P164.

Drane J. The many faces of competency. *Hastings Center Rep* 1985; 15: 17-21.

Faigman D. L., & Monahan J. (2009). Standards of legal admissibility and their

　　　　implications for psychological science. In Skeem, J. L., Doglas, K. S., &

　　　　Lilienfeld, S. O. (Eds.). *Psychological science in the courtroom: consensus and*

　　　　*controversy. (*pp. 3-25). Guilford Press: New York, New York US.

Fillenbaum, G. (1988). *Multidimental functional assessment of older adults: The Duke*

　　　　Older American Resources and Service procedures. Hillsdale, NJ England:

　　　　Lawrence Erlbaum Associates, Inc.

Finkle, M. J., Kurth, R., Cadle, C & Mullan J. (2009). Competency courts: a create

　　　　solution for restoring competency to the competency process. *Behavioral*

　　　　Sciences & the Law Special Issue: Correctional Mental Health Care, 27(5), 767-

　　　　786.

Freckelton, I. (1996). Rationality and flexibility in assessment of fitness to stand trial. *International Journal of Law and Psychiatry, 19,* 5–33.

Givelber, D. & Strickler, L. (2006). Junking good science: Undoing *Daubert v Merrill Dow* through cross-examination and argument. *American Journal of Public Health,* 96(1), 33-37.

Greiffenstein, M. F. (2009). Clinical myths of forensic neuropsychology. *The Clinical Neuropsychologist,* 23(2), 286-296.

Grisso, T. (1988). *Competency to stand trial evaluations: A manual for practice.* Sarasota, FL: Professional Resource Exchange. Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments* (2nd ed.). `New York: Kluwer Academic/Plenum.

Grisso, T. & Appelbaum P. S. (1998) *Assessing Competency to Consent to Treatment: A Guide for Physicians and Other Health Professionals*. Oxford Press: New York, New York US.

Hambleton, R. K. (2001). Setting performance standards on educational assessments and criteria for evaluating the process. In G. J. Cizek (Ed.), *Setting performance standards: Concepts, methods, and perspectives*, pp. 89-116. Mahwah, NJ: Lawrence Erlbaum Associates.

Hambleton, R. K., Rennan, R. L., Brown, W., Dodd, B., Forsyth, R. A., Mehrens, W.A., et al. (200). A response to "Setting reasonable and useful performance standards" in the National Academy of Sciences' *Grading the nations report card.* *Educational Measurement: Issues and Practice,* 19(2), 5-14.

Hambleton, R. K., & Pitoniak, M. J. (2006). Setting performance stands. In R. L. Brennan (Ed.), *Educational Measurement (*4th Ed., pp. 433-470). Washington, DC: American Council on Education.

Hambleton, R. K., & Slater, S. C. (1997). Reliability of credentialing examinations and the impact of scoring models and standard setting policies. *Applied Measurement in Education,* 10, 19-38.

Hayslip, B. R., Panek, P. E., & Patrick, J. (2007). *Adult development and aging (4th ed.).* Malabar, FL US: Krieger Publishing Company.

Helmholz, R. H. (1990). Continental Law and Common Law: Historical Strangers. *Duke Law Journal, 6,* 1207-1228.

Lynch, M. & Jasanoff, S. (1998). Introduction: Contested identities: Science, law and forensic practice. *Social Studies of Science,* 28 (5/6) 675-686.

Kaplan, K. H., Strange, J. P., & Ahmed, I. (1988). Dementia, mental retardation, and competency to make decisions. *General Hospital Psychiatry, 10,* 385-388.

Lewin, K., & Gold, M. (1999). Intention, will, and need. In Gold, M. Lewin, K. (Eds.), *The complete social scientist: A Kurt Lewin reader* (pp. 83-115). Washington, DC US.

Libow, L. S. & Zicklin, R. (1973) The Penultimate Will. Its potential as an instrument to protect the mentally deteriorated elderly. *The Gerontologist, 13 (4),* 440-442.

Loewenstein, D.A., Amigo, E., Duara, R., Guterman, A., Hurwitz, D., Berkowitz, N., Wilkie, F., Weinberg, G., Black, G. M., Gittelman, B., * Eisdorfer, C. (1989). A new scale for the assessment of functional status in Alzheimer's disease and related disorders. *Journal of Gerontology, 44,* 114-121.

Marson D. & Hebert K. R. (2006). Functional Assessment. In Attix D. K., &Welsh-Bohmer K. (Eds.) *Geriatric neuropsychology: assessment and intervention* (pp. 158 – 197) Guilford Press: New York, New York US.

Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (1997). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (2nd ed.). New York: Guilford Press.

Mischel, W. (1984). Convergences and challenges in the search for consistency. *American Psychologist*, 39(4), 351-364.

Moberg, P. J., & Kniele, K. (2006). Evaluation of competency: Ethical considerations for neuropsychologists. *Applied Neuropsychology, 13(2)*, 101-114.

Moody, H. R. (1987). Ethical dilemmas in nursing home placement. *Generations: Journal of the American Society on Aging,* 11(4), 16-23.

Morse, S. (1978). Crazy behavior, morals, and science: An analysis of mental health law. *Southern California Law Review, 51,* 527–654.

Moye, J. & Marson, D. C. (2007). Assessment of decision-making capacity in older adults: An emerging area of practice and research. *The Journals of Gerontology Series B*, 62, P3-P11.

Moye, J., Marson, D. C., Edelstein, B., Wood, S., & Saldivar, A. (2011). Decision making capacity. In K. Schaie, S. L. Willis, K. Schaie, S. L. Willis (Eds.), *Handbook of the psychology of aging (7th ed.) (pp. 367-379).* San Diego, CA US: Elsevier Academic Press.

Nicholls, J. G. (1984). Achievement motivation: Conceptions of ability, subject experience, task choice, and performance. *Psychology Review,* 91(3), 328-346.

Nicholson, R.A., Robertson, H.C., Johnson, W. G., & Gensen, G. (1988). A comparison
of instruments for assessing competency to stand trial. *Law and Human Behavior, 12(3)*, 313-321.

Nunnally, J. C. (1978). *Psychometric theory (2nd Ed.).* New York: McGraw Hill.

Odenheimer, G. L., & Minaker, K. L. (1994). Functional assessment in geriatric
neurology. In M. L. Albert, J. E. Knoefel, M. L. Albert, J. E., Knoefel (Eds.),
Clinical neurology of aging (2nd ed.) (pp. 181-189). New York, NY US: Oxford
University Press.

Otto, R., Poythress, N., Nicholson, R., Edens, J., Monahan, J., Bonnie, R., et al. (1998).
Psychometric properties of the MacArthur Competence Assessment Tool-
Criminal Adjudication. *Psychological Assessment, 10 (4),* 435-443.

Pirozzolo, F. J., Funk, J., & Dywan J. (1991). Neuropsychology and Its Applications to
the Legal Forum. In Dywan, J., Kaplan, R. D., & Pirozzolo, F. J. (Eds.),
Neuropsychology and the law (pp. 1 – 23). New York: Springer-Verlag.

Redmond, F. C. (1987). Testamentary capacity. *Bulletin of the American Academy of
Psychiatry & the Law, 15(3)*, 247-256.

Razavi B. (2008). Admissible expert testimony and summary judgment: reconciling
Celotex and Daubert after Kochert. *Journal of Legal Medicine,* 29(3), 307-343.

Redding, R. E. (2001) Sociopolitical diversity in psychology: The case for pluralism.
American Psychologist, 56(3), 205-215.

Regan, M.W. and Gordon, S.M. (1997) Assessing testamentary capacity in elderly
people. *Southern Medical Journal, 90,* 13-15.

Rodin G. & Voshart, K. (1987). 'Overdiagnosis of depression in the medically ill': Dr. Rodin and Ms. Voshart reply. *The American Journal of Psychiatry, 144(1)*, pp. 126.

Rogers, F., & Barrett, D. (1996). Daubert v. Merrell Dow and expert testimony by clinical psychologists: Implications and recommendations for practice. *Professional Psychology: Research and Practice, 27 (5)*, 467-474.

Rutman, D., & Silberfeld, M. (1992). A preliminary report on the discrepancy between clinical and test evaluations of competency. *Canadian Journal of Psychiatry, 37,* 634-639.

Saldivar, A. (2005). Introduction to the Special Section on the Role of Psychology in Capacity Evaluations. *Rehabilitation Psychology, 50(3)*, 195-196.

Schmidt, W. C. (1984). The evolution of a public guardianship program. *Journal of Psychiatry & Law,* 12(3), 349-372.

Schmidt, W.C., & Peters, R. (1987). Legal incompetents' need for guardians in Florida. *Bulletin of the American Academy of psychiatry & the Law,* 15(1), 69-83.

Schmidt, W.C. & Akinci, F., & Wagner, S. A. (2007). The relationship between guardian certification requirements and guardian sanctioning: A research issue in elder law and Policy. *Behavioral Sciences & the Law,* 25(5), 641-653.

Secker, B. (2002). Labeling patient (In)Competence: A feminist analysis of medico-legal discourse. *Journal of Social Philosophy, 30(2),* 295-314.

Shulman, K. I., Cohen, C. A., Kirsh, F. C., Hull, I. M., & Champine, P. R. (2007). Assessment of testamentary capacity and vulnerability to undue influence. *The American Journal of Psychiatry, 164(5),* 722-727.

Spirrison C. L. & Pierce, P. S. (1992). Psychometric characteristics of the adult functional adaptive behavior scale (AFABS). *The Gerontologist,* 32 (2), 234-239.

Spirrison, C. L. & Sewell, S. M. (1996). The adult functional adaptive behavior scale (AABS) and psychiatric inpatients: Indices of Reliability and validity. *Assessment Resources*.

Wang, P. L., & Ennis, K. E. (1986). Competency assessment in clinical populations: An introduction to the cognitive competency test. In B. P. Uzzell & Y Gross (Eds.), *The clinical neuropsychology of intervention.* Boston: Martinus Nijhoff.

Willis, S. L. & Marsiske, M. (1991). Life span perspective on practical intelligence. In D. E. Tupper & K.D. Cicerone (Eds.), *The neuropsychology of everyday life: Issues in development and rehabilitation* (pp. 183-198). Boston: Kluwer.

Winick, B. J. (1996). Incompetency to proceed in the criminal process: Past, present, and future. In B. Sales, D. W. Shuman, B. Sales, D. W. Shuman (Eds.) , *Law, mental health, and mental disorder* (pp. 310-340).

Appendix A

(Competency Questionnaire)

Questionnaire Paper Version

General Information/Orientation (1 correct – 0 incorrect)

Directions: Ask each question individually and allow time for response. Verbal and written answers should be given equal consideration in scoring. Present response board to allow for touched answers.

General Knowledge Questions	Correct

Response

1) What is your given name_____?   Yes

    No

2) Where are we at right now_____?   Yes

    No

3) In what year were you born_____?   Yes

    No

4) What is your Social Security Number_____?   Yes

    No

5) Who is current President_____?   Yes

    No

6) What day of the week is it_____?   Yes

    No

7) Where do you live_____?   Yes

    No

Total Score General Knowledge Section   _____

Adaptive Functioning Questions

Directions: Ask each question individually and allow time for response. Verbal and written answers should be given equal consideration in scoring. Present response board to allow for touched answers. If questions in this section are answered "NO", follow up questions to determine if any adaptive measures are being taken should be asked. A response of "Yes" should receive a score of "1" and No "0".

8) Do you live independently?   Yes   No

9) Do you drive your own vehicle on a regular basis?   Yes   No

10) Do you make your own medical decisions?   Yes   No

11) Has anyone been assigned to help you make decisions?   Yes   No

12) Do you make your own financial decisions?   Yes   No

13) Do you currently have problems reading?   Yes   No

Total Score Adaptive Functioning _____

<u>Will Specific Questions</u>   **<u>Score (0,1,2)</u>**

Directions: Ask each question individually and allow time for response. The examiner should write out all answers to the questions in their entirety. Each question should be scored on a 0, 1, or 2 basis. Scores of 0 indicate no understanding of the questions being asked. Scores of 1 should indicate a basic understanding of principals and procedures involving the question being asked. Scores of 2 indicate a complete understanding of the question being asked.

1.) What is a will?   _____

2.) Has anyone talked to you about what your wishes are?   _____

3.) Upon your death what will happen to everything you own?   _____

4.) What are some specific things, which you are leaving behind in your will?   _____

5.) What makes sure these things will be given to whom you want?   _____

6.) Did anyone force you here to sign a Will?   _____

Total Score Will Specific Questions _____

_____

_____ **Examiners Signature**

Date

_____

_____ **Examiners Signature**

Date

Appendix B

(Informed Consent)

Informed Consent Document

Validation of a Measure of Competency: Civil Proceedings

Involving the Signing of Legal Documents

Project Description: The purpose of this study is to validate a measure designed to assess the competency of an individual attempting to sign a legal document such as a will.

Methods and Procedure: You will be asked to complete a series of questionnaires. All of these questionnaires will ask for information, which is readily available to you and should require no outside research or help. The testing will be completed during the spring, summer and fall semesters of 2010. It is expected that each testing period will be completed in one session. It is expected that it will take you approximately 15 minutes to compete the questionnaires. You will be tested individually, through self-guided means, and will be allowed as many breaks as you require. You will be able to discontinue the testing at any point and for any reason without negative repercussions.

Requirements of participation: Criteria for inclusion in the study will be based on two principles: (1) the participant is at least 18 years of age at the time of the study; (2) the participant has access to the Internet.

Confidentiality: A primary concern of the proposed study is maintaining the confidentiality of the data that is being collected. For research purposes, all information regarding you will be kept confidential. Your name and other identifying information will not be released for any reason. Your name will not be recorded at any time; rather the protocol will be identified with an identification number. The information from the protocols will be transferred into a computerized data set that will be stored on the computer of the graduate student principal investigator, which is password protected. In the data set, no identifying data will be collected or recorded, including your name, address, or phone number. Your information will be recorded under an identification number in the data set.

Participation is Voluntary: Your participation in the research project is voluntary. Despite participation, you will not be given feedback about your performance or scores. You can withdraw from the project at any time without negative consequences.

Potential Risks: This study will involve filling out brief questionnaires, which may place you at risk for experiencing anxiety and/or other negative feelings. If at any time you feel discomfort with the questionnaire, you may discontinue testing immediately. If you continue to experience negative feelings as a result of participation in this study you may wish to seek assistance from the Ball State University Counseling Center. Contact information is provided below:

Ball State University Counseling Center   **Hours:** 8 a.m. - 5 p.m., Monday through Friday
Lucina Hall, Room 320   **Phone:** 765-285-1736
Muncie, IN 47306   **Fax:** 765-285-2081

Questions: Please call Dr. Raymond Dean or Matthew Holcomb, Principle investigators, at (765) 285-8500, with any questions. If you have any questions regarding the rights of research participants, please contact the Sponsored Programs Office, Ball State University, Muncie, IN 47306, (765) 285-5070.

I have read and understand the above information and agree to participate in the research project entitled, "**Validation of a Measure of Competency: Civil Proceedings Involving the Signing of Legal Documents**".

_____   _____

Signature   Date

<u>Researcher Contact Information</u>

Principal Investigator:

Matthew J. Holcomb, Graduate Student
Educational Psychology

Ball State University
TC #906
Muncie, IN 47306
Telephone: (765) 285-8500
Email: mjholcomb@bsu.edu

Faculty Supervisor:

Dr. Raymond S. Dean
Director Ball State
Neuropsychology Laboratory
Ball State University
TC #904
Muncie, IN 47306
Telephone: (765) 285-8508
Email: rdean@bsu.edu

Appendix C

(Sample Email)

Sample Email

You are invited to participate in a research study to validate a measure designed to assess the competency of an individual signing a legal document. The study is being conducted by Matthew J. Holcomb, M.A., under the direction of Raymond S. Dean, Ph.D. in the Ball State University Department of Educational Psychology. You were selected as a possible participant because you are 18 years of age or older and have access to the internet.

What will be involved if you participate? Your participation is completely voluntary. If you decide to participate in this research study, you will be asked to read a brief scenario and fill out a questionnaire. You total time commitment will be approximately 15 minutes.

Are there any risks of discomforts? The risks associated with participating in this study are minimal. If for any reason you do feel uncomfortable at any time, you have the right to discontinue participation in the research study.

If you change your mind about participating, you can withdraw at any time by *(example: closing your browser window).* If you choose to withdraw, your data can be withdrawn as long as it is identifiable. Once you've submitted anonymous data, it cannot be withdrawn since it will be unidentifiable.

If you have questions about this study, please contact Matthew J. Holcomb, M.A. at mjholcomb@bsu.edu or Raymond S. Dean, Ph.D. at rdean@bsu.edu.

If you have any questions regarding the rights of research participants, please contact the Sponsored Programs Office, Ball State University, Muncie, IN 47306, (765) 285-5070.

HAVING READ THE INFORMATION ABOVE, YOU MUST DECIDE IF YOU WANT TO PARTICIPATE IN THIS RESEARCH PROJECT. IF YOU DECIDE TO PARTICIPATE, PLEASE CLICK ON THE LINK BELOW.

YOU MAY PRINT A COPY OF THIS LETTER TO KEEP.

Matthew J. Holcomb, M.A.
Investigator   March 14, 2010

The Ball State University Institutional Review Board has approved this document for use from _____ to _____ Protocol # _____

Appendix D

(Questionnaire Scenario)

Questionnaire Scenario

You are currently sitting in your lawyer's office prepared to sign your will. However, before doing so the two witnesses, who work for your lawyer, wish to satisfy themselves that you are of sound mind and judgment with regards to your will. As such, they have a few questions they would like to ask you. Each question will be asked aloud and you will have the opportunity to respond (for the purposes of this survey your responses should be typed in the appropriate box).

You are to do your best to answer every question asked of you. Since you are in your lawyer's office you have only your own knowledge to answer these questions (i.e. don't look anything up on the internet).

You will notice that some of the questions ask for personal information. In order to keep responses anonymous below you are provided with the answers to those questions. You may write them down on a piece of paper at this time if it will help you remember them.

Your Given Name: John Q. Smith or Jane Q. Smith

Your Birth Year: 1965

Your Social Security Number: 555-55-5555

The Date: Monday, July 3, 2010

For all other questions please answer them just as you would. No identifying information will be gathered.

Appendix E

(IRB)

Section I-Title, Purpose of Study, and Rationale

Title: Validation of a Screening Measure for Competency in Civil Legal Proceedings

Purpose: The purpose of this proposed research is to investigate causal factors in incompetency determinations and propose a standardized and empirically validate methodology for future inquires of competency (see appendix A for proposed measure).

Hypotheses

1) Due to recent Supreme Court decisions the current methodology employed in determining competency is both inadequate and inadmissible as expert testimony in court. A standardized method with sound psychometric principles should be employed using a theoretical basis as its design.

Objectives
1) Validate the proposed measure for competency in civil proceedings requiring signed legal documents
2) Create a standardization sample for further research and for use in validating the proposed measure.

Rationale:

The construct of competency is a difficult one to discuss from a psycholegal standpoint for a number of reasons. Foremost of those reasons is that competence is a legal, social, and moral matter (i.e., a normative judgment) determined by courts and legislative bodies, and most importantly through the common-sense viewpoint of lay persons (Morse, 1978). While the concept of competency is difficult to define its importance and impact is seen throughout our legal system because only the acts of rational individuals are recognized by our society (Melton, Petrila, Poythress, & Slobogin, 1997). Therefore, it is imperative that we have a standardized, psychometrically valid way of proving that a person is competent when they interact with the legal system. The proposed study is an attempt to create such a measure for a very narrow area within the legal system, the signing of legal documents (i.e. wills).

Section II-Description of Subject Population

Number of Subjects: In order to perform advanced statistical analyses on the proposed data it is anticipated that 50 to 100 participants will participate in the proposed study. The participants will be drawn from the email list serve of faculty and staff at Ball State University. Age is not a factor, but descriptions of the survey being used will encourage those of "will signing age" (30 and over) to participate. Participants will be given a URL link to participate in the online-based survey designed and hosted by Surveygizmo.com.

Describe the subject population: The characteristics of the participants are expected to be representative of the Ball State Faculty and Staff. There will be no demographic exclusion criteria such as gender, ethnicity, race, or religion although demographic information will be collected from participants (age, sex, and level of education). This demographic information will be collected so that the variables can be compared across gender, educational level, etc. and provide for a more specific data analysis. Subjects who are interested in participating in the study will provide implied consent by participating in the research, but will also be given an introductory email that explains the purposes of the research and potential risks before participation. Additionally, upon activating the survey a similar statement of introduction and potential risks will be included.

Describe any specified inclusion/exclusion criteria: Criteria for inclusion in the study will be based on: (1) the participant is at least 18 years of age at the time of the study; (2) the participant has access to the Internet.

Section III-Subject Recruitment

Describe the method of subject recruitment: Participants will be recruited through the Ball State University list serve for faculty and staff. Included with additional materials (see Appendix A) is both an informed consent which can be used as part of the online survey, or should that requirement be waived an introductory email explaining the research and procedure. Participants will be offered the opportunity to enter a drawing for reimbursement for their time.

Section IV-Methods and Procedures

Describe the methods and procedures to be used: All participants will be informed of the nature of the research in an introductory email, which will also outline any potential risks and include contact information to the principal researchers involved for further inquiry. The email will also detail the possibility of reimbursement for time spent in the form of a drawing. After consent is obtained a scenario explaining the purpose of the survey (i.e. you are in a lawyer's office prepared to sign your will) will be presented to participants to read through. After reading the scenario participants will be asked to fill out a psychologically based assessment of competency, which is intended to be used in legal settings where a person is to sign a legal document. It is expected that each testing period will not be completed in one session and that further sessions will not be necessary. It is expected that it will take each participant approximately 15 minutes to complete the assessment, depending on ability, effort, compliance, and motivation. Each participant will be tested individually through the use of an online survey program. Participants will not be under a time limit so breaks will be allowed. Discontinued testing will be available to any and all participants as at any time they can stop participating in the experiment/questionnaire.

Section V: Anonymity/Confidentiality of Data

Describe how data will be collected and scored: A primary concern of the proposed study is maintaining the confidentiality of the data that is being collected. Each questionnaire administered will be done so separately through the use of Surveygizmo.com and can be done in the privacy of persons home should they desire it. No identifying information will be asked that can be linked to individual responses and the only identifying information being gathered will be voluntary and for the purpose of dispersing reimbursements. It should therefore be impossible to link identity to any information being gathered. The proposed measure does ask for some identifying information and participants will be given "false" information in the introduction with which to fill those parts of the survey out. This will provide to additional safety to all study participants. The participant's name will not be recorded within the data set; rather each will be identified with an identification number. The information from the protocols will be transferred into a computerized data set that will be stored on the computer of the student principal investigator, which is password protected. In the data set, no identifying data will be collected or recorded, including the participants' name, address, or phone number. Each participant's information will be recorded under an identification number in the data set. Additionally, surveygizmo.com is a well-respected and often used online survey program that counts numerous academic institutions and major corporations as clients and offers password protection to online-based materials.

Section VI: Potential Risks and Benefits

Describe the potential risks and discomfort: This study will involve tests of recall as well as assessments of current adaptive functioning, which may place the participant at risk for experiencing anxiety and/or other negative feelings.

Describe how the risks will be minimized: If at any time the participant expresses discomfort with the assessments, the participant has the ability to stop participating. If the participant continues to experience negative feelings as a result of participation in this study he or she may wish to seek assistance from the Ball State University Counseling Center. Contact information is provided below:

Ball State University Counseling Center   Hours: 8 a.m. - 5 p.m., Monday through Friday
Lucina Hall, Room 320   Phone: 765-285-1736
Muncie, IN 47306   Fax: 765-285-2081

Describe the potential benefits: It is expected that participation in this study will benefit the fields of psychology, forensics, neuropsychology, and the law. There is a dearth of research considering issues of competency and psychology's role within legal settings.

Section VII-Subject Incentives/Inducements to Participate

Describe any incentive/inducements to participate that will be offered to the subject:

Participants will be offered the opportunity to participate in a drawing for four Wal-mart gift cards in the amount of 25$. All participants will have the choice to participate in this drawing or not based on their filling out identifying information at the end of the survey. Incentives will be mentioned in the introductory email so that participants are aware of the drawing.

Section VII-Other Financial Considerations

Describe any financial expenses to the subject: None

Describe any provisions for compensation for research-related injury: N/A

Section IX-Informed Consent

(See Appendix A)

Other Documents

(see Appendix A)

References

Melton, G., Petrila, J., Poythress, N., & Slobogin, C. (1997). Psychological evaluations

for the courts: A handbook for mental health professionals and lawyers (2nd ed.).

New York, NY US: Guilford Press.

Morse, S. (1983). Mental health law: Governmental regulation of disordered person and

the role of the professional psychologist. In B. D. Sales (Ed.), *The professional*

psychologist's handbook (pp. 339-422). New York: Plenum Press.