

REPRESENTING KIDS
IN CHAPTER 938
JUVENILE
DELINQUENCY CASES

JUVENILE
COMPETENCE
TO STAND TRIAL

AMANDA J. POWELL

APOWELLNJDC@GMAIL.COM

got competence?

OVERVIEW

LAW OF
COMPETENCE TO
STAND TRIAL

EVALUATIONS

CHOOSING AND
WORKING WITH
THE EXPERT

RESOURCES FOR
YOU

COMPETENCY
REPORT
COMPONENTS

LAW OF COMPETENCE TO STAND TRIAL

Whether the person “has sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding - and whether [they have] a rational as well as factual understanding of the proceedings against [them.]”

DUSKY v. U.S., 362 U.S. 402, 403 (1960)

DUSKY IN WI? 917.13

LAW OF COMPETENCE TO STAND TRIAL

But why must a person be competent to stand trial?

- persons should not be tried *in absentia*;
- Incompetent persons cannot defend themselves, and
 - as a consequence they cannot exercise their constitutional right to be informed of the accusation, cannot confront their accusers; and the court lacks jurisdiction over them

WHY IS COMPETENCE NECESSARY AND REQUIRED?

Preserve the integrity and credibility of the justice system process

Reduce the risk of erroneous convictions

Protect the youth's decision-making autonomy

Fairness!

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Protect the youth's decision-making autonomy

Fairness!

UNDER WI LAW...

- Who can raise the issue?
- Is there a presumption (competent or incompetent)?
- Who has the burden of proof?
- What is the standard of proof?

UNDER WI LAW...

- Who can raise the issue?
 - Counsel
 - ?????

UNDER WI LAW...

- Who **must** raise the issue?

If there is a “reason to doubt” competence, counsel *must* raise it:

- Failure to raise renders counsel’s representation unreasonable. *Johnson*, 133 Wis.2d 207
- Failure to raise renders counsel’s representation deficient. *Haskins* 139 Wis.2d 257
- Strategic considerations do not eliminate counsel’s duty to raise competence. *Johnson*, 133 Wis.2d 207

UNDER WI LAW...

- Who **must** raise the issue?

If there is a “reason to doubt” competence, counsel *must* raise it:

- Failure to raise renders counsel’s representation unreasonable. *Johnson*, 133 Wis.2d 207
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- Strategic considerations do not eliminate counsel’s duty to raise competence. *Johnson*, 133 Wis.2d 207

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Milk has nine essential nutrients your kids' active bodies need. Which means you'd better remember to save some for yourself.

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The Milk Processor Education Program

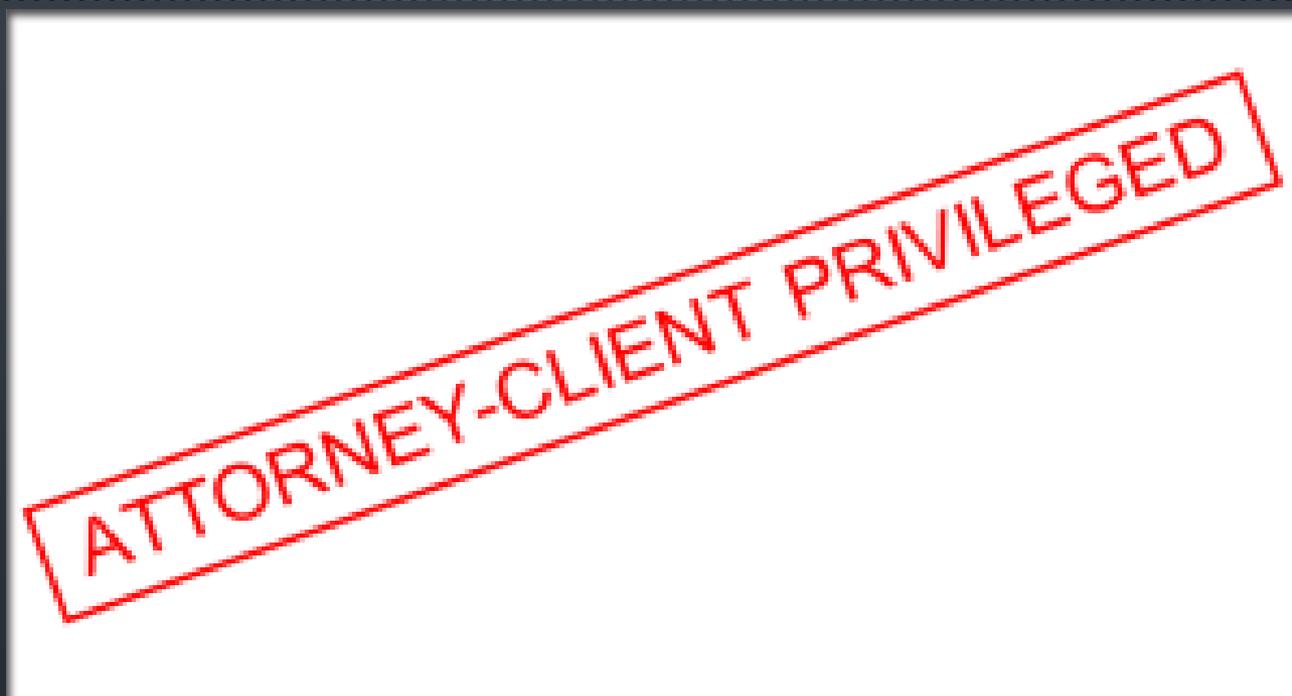
got doubt?

Factors supporting a “reason to doubt”?

- Young age
- Difficulty communicating, especially about the case
- Limited intellectual functioning
- Poor academic record
- Receives special education services
- History of emotional or behavioral issues
- Being tried in adult court



How much do you have to tell the court?



“an attorney’s opinions, perceptions, and impressions of a client’s competency to proceed are protected by the attorney-client privilege.” *Meeks*, 263 Wis.2d 794

Wis. Stat. 971.14

Courts are required to
determine
competency
whenever there is
reason to doubt
competence

UNDER WI LAW...

- Is there a presumption (competent or incompetent)?

UNDER WI LAW...

- Who has the burden of proof in raising issue?
 - Party raising the issue bears the burden
 - Suggestion of incompetency must be supported by facts giving rise to the doubt.
McKnight, 65 Wis.2d 582

UNDER WI LAW...

- Who has the BOP in *proving* competence?
 - The government (generally)
- What is the standard of proof?
 - If the defendant claims to be incompetent, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is competent.
 - If the defendant claims to be competent, the state must prove by clear and convincing evidence that the defendant is incompetent.

I. **FACTUALLY** AND RATIONALLY UNDERSTAND THE NATURE AND PURPOSE OF THE PROCEEDINGS

Factual understanding requires
an ability to understand:

The nature and
seriousness of
the charges;

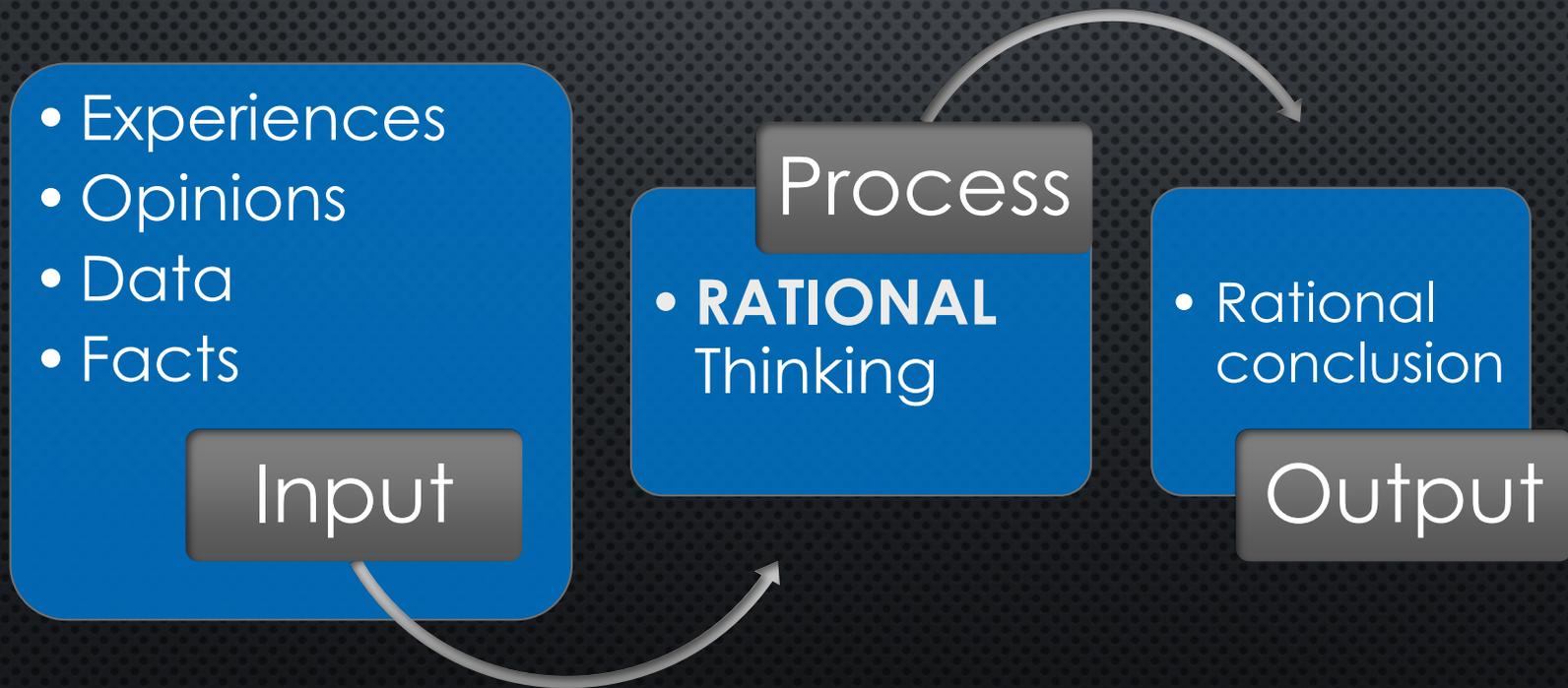
The purpose of
a trial and
possible
consequences;

Pleas and the
nature of plea
agreements;
and

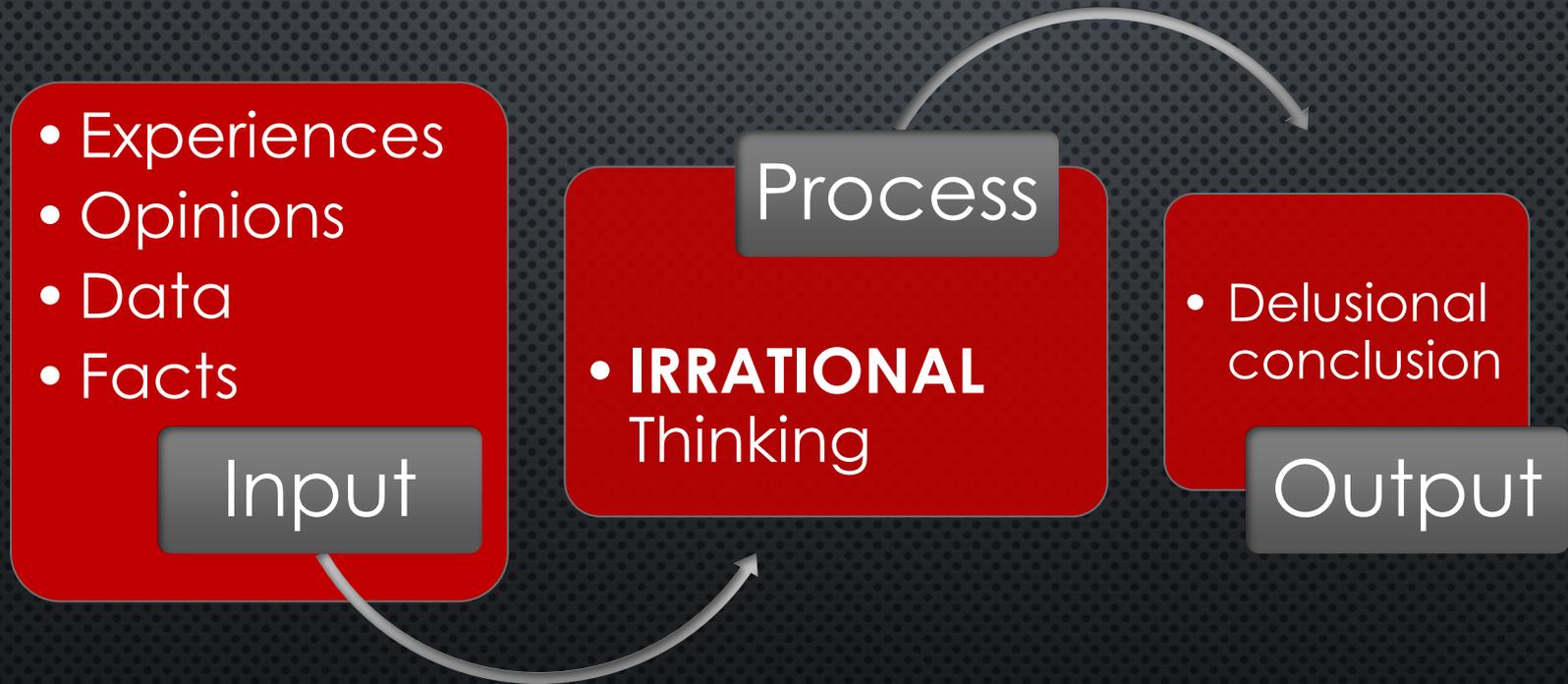
The role of
various
participants in
the court
process
(including the youth
themselves as the
defendant).

I. *FACTUALLY* AND *RATIONALLY* UNDERSTAND THE NATURE AND PURPOSE OF THE PROCEEDINGS

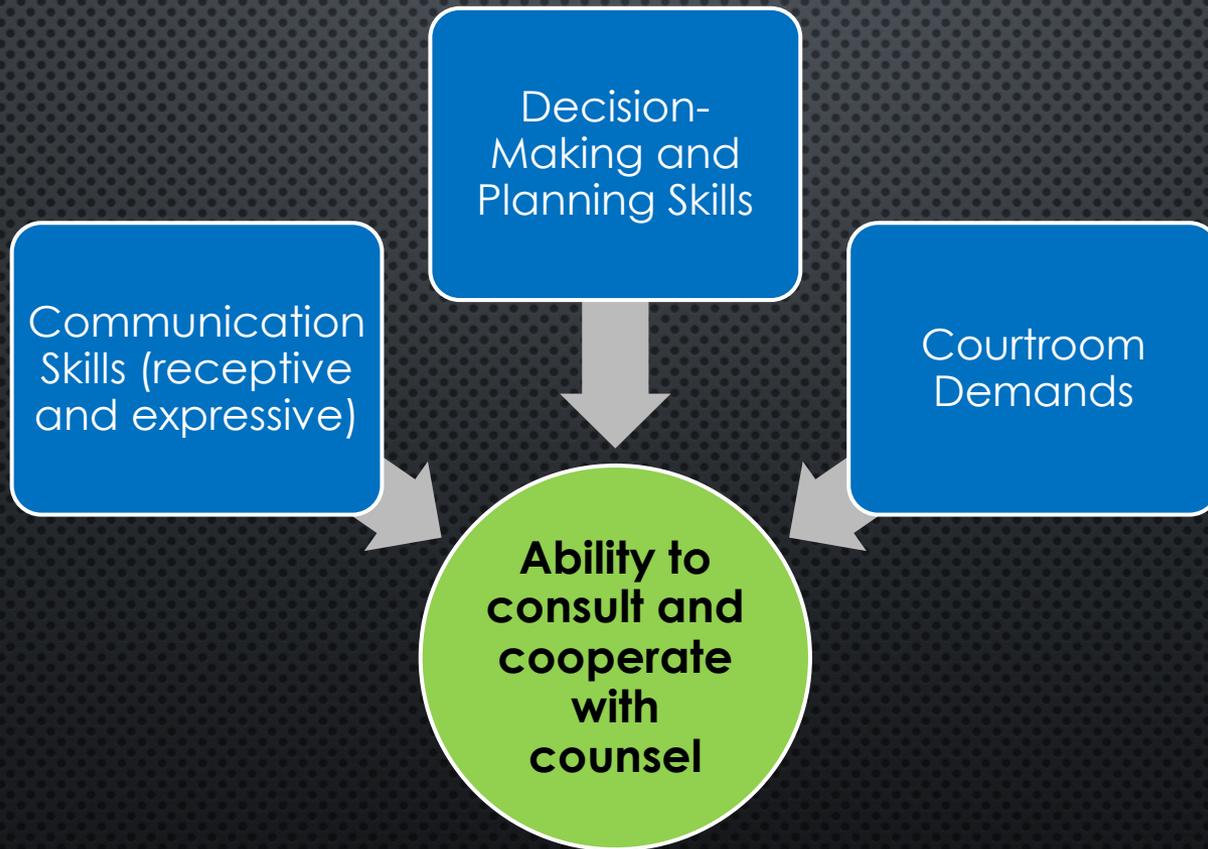
RATIONAL UNDERSTANDING REQUIRES THE ABILITY TO APPLY THE
FACTUAL KNOWLEDGE EFFECTIVELY



IRRATIONAL OR DISTORTED CONCLUSIONS - TO DECISIONS AND ACTIONS RELATED TO THE PROCEEDINGS



II. CONSULT AND COOPERATE WITH COUNSEL IN PREPARING AND PRESENTING THE DEFENSE.



II. CONSULT AND COOPERATE WITH COUNSEL IN PREPARING AND PRESENTING THE DEFENSE.

Communication Skills (receptive and expressive)

Ability to comprehend the defender's questions and inquiries;

Ability to discern what information is relevant to the defender's questions; and

Ability to articulate the relevant information related to the defender's questions.



II. CONSULT AND COOPERATE WITH COUNSEL IN PREPARING AND PRESENTING THE DEFENSE.



Decision-Making and Planning Skills

Ability to appreciate time

Ability to appreciate or weigh likely outcomes

Ability to consider the evidence

Ability to understand the rights they will relinquish to enter a plea

II. CONSULT AND COOPERATE WITH COUNSEL IN PREPARING AND PRESENTING THE DEFENSE.

Courtroom Demands

Endure the stress of trial;

Maintain demeanor;

Testify relevantly, if necessary; and

Follow the flow of the proceedings.



**WHAT HAPPENS UPON A FINDING
OF INCOMPETENCE?**



VINYL SCRATCH

WHAT HAPPENS UPON A FINDING OF INCOMPETENCE?

938.30(5)(d)

- If the court finds the young person not competent to proceed as described in 971.13(1) and (2), the court shall suspend proceedings on the petition and do one of the following:
 1. [invol commitment]
 2. JIPs

WHAT HAPPENS UPON A FINDING OF INCOMPETENCE?

938.30(5)(e)

- If the court finds the young person not competent to proceed as described in 971.13(1) and (2) **but likely to become competent to proceed** w/in the lesser of 12 months or within the time period of the max sentence for and adult for the offense:
 - Yada yada yada

SUPREME COURT OF WISCONSIN

CASE No. : 2016AP880

COMPLETE TITLE: If the defendant claims to be incompetent, the state bears the burden of proving by ***222** the greater weight of the credible evidence that the defendant is competent. *Id.* If the defendant claims to be incompetent, the state must prove by clear and convincing evidence that the defendant is incompetent. *Id.*

REVIEW OF DECISION OF THE COURT OF APPEALS
Reported at 378 Wis. 2d 721, 904 N.W.2d 543
PDC No:2017 WI App 72

OPINION FILED: March 7, 2019

SUBMITTED ON BRIEFS:

ORAL ARGUMENT: November 5, 2018

938.30(5)(a)

NOT COMPETENT OR NOT RESPONSIBLE.

(a) If there is probable cause to believe that the juvenile has committed the alleged offense and if there is reason to doubt the juvenile's competency to proceed, or if the juvenile enters a plea of not responsible by reason of mental disease or defect...

938.30(5)(c)

(c) If the court finds that the juvenile was not responsible by reason of mental disease or defect, as described under s. 971.15

(1) and (2), the court shall dismiss the petition with prejudice and do one of the following:

1. [invol commitment]

2. JIPs

938.30(5)(c)

(c) If the court finds that the juvenile was not responsible by reason of mental disease or defect, as described under s. 971.15

(1) and (2), the court shall dismiss the petition with prejudice and do one of the following:

1. [invol commitment]

2. JIPs

938.30(5)(c)

(c) If the court finds that the juvenile was not responsible by reason of mental disease or defect, as described under s. 971.15

(1) and (2), **the court shall dismiss the petition with prejudice** and do one of the following:

1. [invol commitment]

2. JIPs

¶17 Second, Wis. Stat. § 938.30(5) distinguishes between dismissal of a petition where a circuit court finds a juvenile not responsible by reason of mental disease or defect, and suspension of proceedings on the petition where a circuit court finds a juvenile is not competent. Compare § 938.30(5)(c) with § 938.30(5)(d).

¶18 Further, there is a logical distinction between the suspension of a case where a juvenile is not competent to proceed and the dismissal of a case where a juvenile's affirmative defense is lack of mental responsibility. The latter resolves the case on the merits and there is no matter left for the circuit court to decide. On the other hand, a juvenile's lack of competency bears only upon the juvenile's current ability to participate in the proceedings; it is not related to the merits of the case.

STATE LAW VARIES: COMPETENCE EVALUATIONS

938.295

- Are there time limits for the evaluation?
- Must it occur in the least restrictive setting?
- Are there minimum qualifications for the examiner?
- What is the examiner expected to provide in the report?

BASIC COMPONENTS

- REVIEWING RECORDS
- CONDUCTING INTERVIEWS
- ADMINISTERING TESTS?

REVIEWING RECORDS SUCH AS:

School records

Mental health
records

Child
protective
records

Arrest reports

Charges and
possible
consequences

Witness/victim
reports

INTERVIEWS

- PARENT/GUARDIAN
 - BACKGROUND
 - ISSUES OF MATURITY, AND
 - ASPECTS OF COMPETENCE

INTERVIEWS (CONTINUED)

INTERVIEW THE JUVENILE REGARDING:

- BACKGROUND
- COMPETENCE SPECIFIC QUESTIONS
 - TEACH
 - ASSESS RETENTION

INTERVIEWS (CONTINUED)

COULD INCLUDE COLLATERAL SOURCES, SUCH AS:

- THERAPIST
- TEACHER
- CASE WORKER

THE COMPETENCY EVALUATION

Should be an analysis of:

Functional Abilities for Competence

- Ability to understand the trial process
- Ability to assist in their defense
- Assessing : Understanding, Appreciation and Reasoning

Developmental Status

- Cognition
- Psychosocial (im)maturity

Disabilities

- Mental status
- Clinical disorders
- Intellectual incapacities

Causes/Symptoms Behind Functioning

- What has led to current functioning?
- What contributed to deficits related to CST?

Possibility of Remediation

- If possible, how much time is likely to be needed?
- If possible, how?

CHOOSING AND WORKING WITH THE
EXPERT

Step One: Gathering Information and Records

School records

Mental health
records

Child
protective
records

Pediatric and
other medical
records

Arrest reports

Charges and
possible
consequences

Prior disposition
reports

Witness/victim
reports

Family
accounts

CHOOSE THE EXPERT

WHAT TRAINING SHOULD THE EVALUATOR HAVE?



THE FIRST CONTACT

- “I HAVE A 13-YEAR-OLD KID AND HE NEEDS A COMPETENCY EVALUATION. I WOULD LIKE TO HIRE YOU. HOW SOON CAN YOU EVALUATE MY CLIENT?”
- “I HAVE A CLIENT WHO IS THIRTEEN YEARS OLD FACING A SEXUAL OFFENSE CHARGE. IF ADJUDICATED, HE COULD HAVE TO REGISTER, BE SENTENCED TO DOC OR PROBATION. I AM CONCERNED ABOUT HIS COMPETENCY BECAUSE HE RECEIVES SPECIAL ED. SERVICES AND HAS DIFFICULTY TELLING A STORY SEQUENTIALLY. I HAVE A FEW QUESTIONS FOR YOU....”

RESOURCES FOR YOU...

SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY: GUIDELINE 5.03: PRO-BONO SERVICES

“FORENSIC PSYCHOLOGISTS...STRIVE TO
CONTRIBUTE A PORTION OF THEIR PROFESSIONAL
TIME *FOR LITTLE OR NO COMPENSATION OR
PERSONAL ADVANTAGE.*”



DIAGNOSTIC AND STATISTICAL
MANUAL OF
MENTAL DISORDERS

FIFTH EDITION

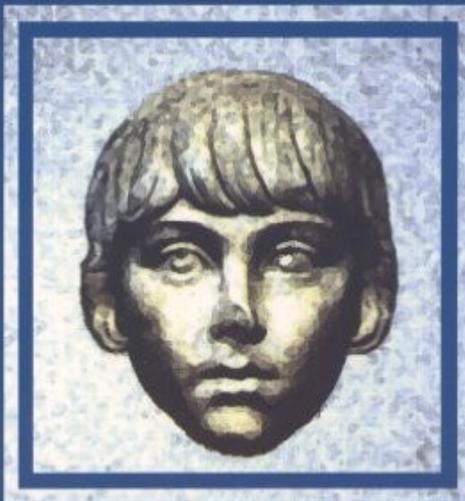
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AMERICAN PSYCHIATRIC ASSOCIATION

FORENSIC EVALUATION OF JUVENILES

Forensic Evaluation of Juveniles

Second Edition



Thomas Grisso

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EVALUATION OF JUVENILES' COMPETENCE TO STAND TRIAL

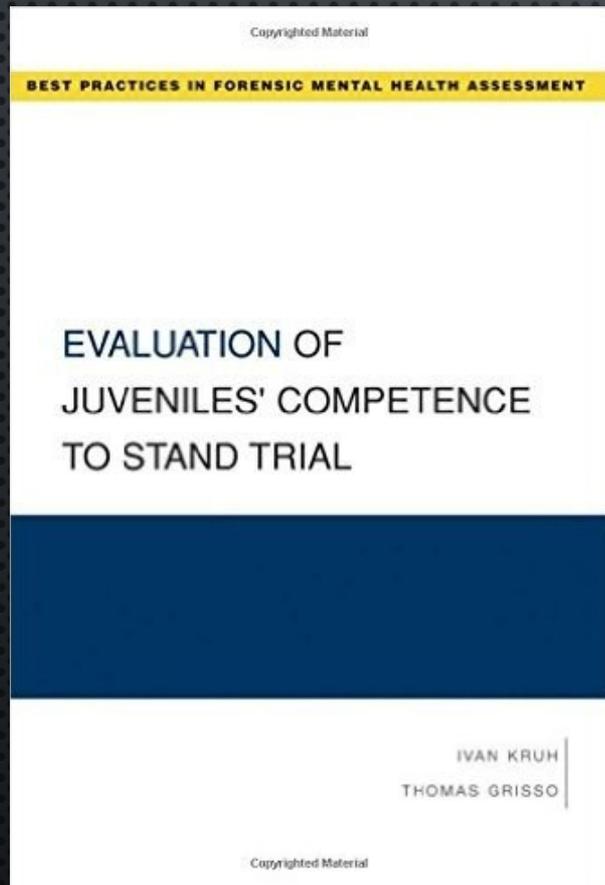


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EVALUATION JUVENILES' ADJUDICATIVE COMPETENCE

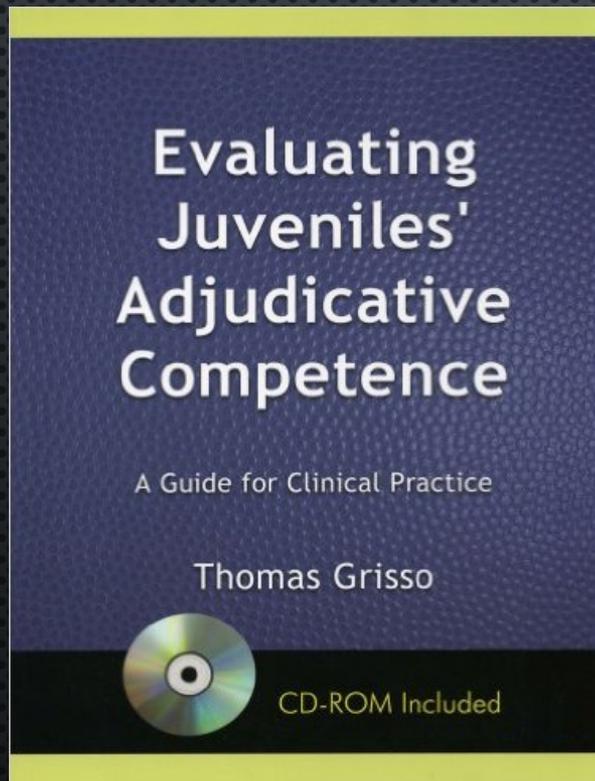


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CHALLENGING THE
OPPOSING EXPERT

**Clinical Evaluations
for Juveniles'
Competence to Stand Trial**

A Guide for Legal Professionals

Thomas Grisso

SPECIALTY
GUIDELINES FOR
FORENSIC
PSYCHOLOGY

“FORENSIC PRACTITIONERS ARE ENCOURAGED TO ... IDENTIFY THE SOURCE OF EACH PIECE OF INFORMATION THAT WAS CONSIDERED AND RELIED UPON IN FORMULATING A PARTICULAR CONCLUSION, OPINION, OR OTHER PROFESSIONAL PRODUCT.”

I. Choosing a Potential Expert Witness

Provide the potential expert with a brief description of the case including what gave rise to concerns about your client's competency as well as the nature of the legal case.

A. Ask About:

- | | Response was adequate? | |
|--|--------------------------|--------------------------|
| | YES | NO |
| 1. The clinician's experience evaluating adolescents? | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. The clinician's experience conducting forensic evaluations? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. The clinician's knowledge of the difference between a clinical and forensic evaluation? | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. The clinician's experience testifying in court? | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. The legal standard. If applicable did the response mention: | | |
| a. Need to give an opinion about treatment | <input type="checkbox"/> | <input type="checkbox"/> |
| b. How long the statute requires that an unfit youth has to regain competency and what is required to achieve that goal | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. What (s)he would do if you client discloses potentially self-incriminating information related to the case during the evaluation (some jurisdictions specifically indicate that such information should not be included in the report). | <input type="checkbox"/> | <input type="checkbox"/> |

B. Ask the clinician to describe how (s)he will conduct the evaluation. Did the response include:

- | | Response was adequate? | |
|---|--------------------------|--------------------------|
| | YES | NO |
| 1. Reviewing relevant records (e.g. records related to the current case, academic, mental health and substance abuse records) | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Interviewing the youth's parent or guardian to, at a minimum, obtain a developmental history | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Interviewing the youth RE: | | |
| a. Developmental history (academic, mental health, substance use, trauma, medical history and prior experience with the legal system) | <input type="checkbox"/> | <input type="checkbox"/> |

CHECKLIST FOR CHOOSING AN EXPERT

Response was adequate?

| | YES | NO |
|--|--------------------------|--------------------------|
| b. Fitness abilities e.g.: | | |
| i. Explain the current case | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. Explain the potential outcomes | <input type="checkbox"/> | <input type="checkbox"/> |
| iii. Explain the role of the judge, defense attorney, ASA and jury | <input type="checkbox"/> | <input type="checkbox"/> |
| iv. Explain terms such as guilty, not guilty and plea bargain | <input type="checkbox"/> | <input type="checkbox"/> |
| v. Explain how the youth would reason about potential plea bargain | <input type="checkbox"/> | <input type="checkbox"/> |
| vi. Understanding of the attorney/client relationship | <input type="checkbox"/> | <input type="checkbox"/> |
| vii. Understanding of the youth's role in the defense | <input type="checkbox"/> | <input type="checkbox"/> |
| viii. Youth's ability to provide coherent details regarding what they were doing on the day of the alleged offense | <input type="checkbox"/> | <input type="checkbox"/> |
| c. Interviewing of collateral resources – ask them to explain why or why not | <input type="checkbox"/> | <input type="checkbox"/> |
| d. If they mention testing: | | |
| i. For each test, ask why? How would the data aid the clinician in answering the referral question? | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. Ask them to describe the normative sample (you don't want the clinician to use tests that have not been normed on those similar to your client in terms of age, education and culture ¹) | <input type="checkbox"/> | <input type="checkbox"/> |
| iii. If they don't mention testing, ask them why not? | <input type="checkbox"/> | <input type="checkbox"/> |
| e. Ask them to explain how developmental or psycho-social immaturity might impact fitness abilities. | <input type="checkbox"/> | <input type="checkbox"/> |

CHECKLIST
FOR
CHOOSING
AN EXPERT

C. Information you need to provide the clinician includes:

1. Mental health, academic and substance abuse records
2. Legal and police records related to the current case
3. Relevant prior court records
4. Contact information for the youth's parent/guardian

| | |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |

CHECKLIST
FOR
CHOOSING
AN EXPERT

D. Reviewing the Report (from your expert or theirs):

Response was adequate?

YES NO

- | | | |
|--|--------------------------|--------------------------|
| 1. Does the report indicate: | | |
| a. The reason for the referral? | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Which records were relied upon in forming the clinical opinion? | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Do you have those records and agree with how the information was described? | <input type="checkbox"/> | <input type="checkbox"/> |
| c. Which tests were conducted and when? | <input type="checkbox"/> | <input type="checkbox"/> |
| d. Who was interviewed, when and for how long? | <input type="checkbox"/> | <input type="checkbox"/> |
| e. A section containing background information and clearly indicating who provided the information? | <input type="checkbox"/> | <input type="checkbox"/> |
| f. If tests were administered, an explanation of the purpose of the test and of the results? | <input type="checkbox"/> | <input type="checkbox"/> |
| g. Mental status and behavioral observation sections? | <input type="checkbox"/> | <input type="checkbox"/> |
| h. Data, separate from the opinion, regarding the defendant's fitness abilities including the defendant's: | | |
| i. Explanation of the current case | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. Explanation of the potential outcomes | <input type="checkbox"/> | <input type="checkbox"/> |
| iii. Explanation of the role of the judge, defense attorney, ASA and jury | <input type="checkbox"/> | <input type="checkbox"/> |
| iv. Explanation of terms such as guilty, not guilty and plea bargain | <input type="checkbox"/> | <input type="checkbox"/> |
| v. Explanation of how the youth would reason about a potential plea bargain | <input type="checkbox"/> | <input type="checkbox"/> |
| vi. Understanding of the attorney/client relationship | <input type="checkbox"/> | <input type="checkbox"/> |
| vii. Understanding of the youth's role in the defense | <input type="checkbox"/> | <input type="checkbox"/> |
| i. A clinical opinion section | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Does it include a clear explanation of the data used to support the clinical opinion? | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. If applicable, does it include an opinion and data RE: | <input type="checkbox"/> | <input type="checkbox"/> |
| – Likelihood of obtaining fitness within the required time | <input type="checkbox"/> | <input type="checkbox"/> |
| – Need for treatment | <input type="checkbox"/> | <input type="checkbox"/> |

CHECKLIST FOR CHOOSING AN EXPERT

E. Preparing for Trial

1. Do you have a copy of the expert's: CV, raw data and notes?
2. Have you reviewed literature regarding juvenile fitness evaluations (see bibliography)
3. Have you prepped with your expert?
 - a. Has your expert identified potential weaknesses in his/her report?
 - b. Has your expert reviewed the opposing expert's CV, raw data, notes and report?

Response was adequate?

YES **NO**

- | | |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |

CHECKLIST
FOR
CHOOSING
AN EXPERT

THE COMPETENCY REPORT I

Reason for Referral

- The charge(s)
- Circumstances that gave rise to the evaluation

Competency Standard

- Cite the standard

Evaluation Techniques

- Clear statement of who was evaluated, for how long and where
- Indicate which tests (if any) were administered
- Indicate which records were reviewed

Purpose and Limits of Confidentiality

- What was said and the youth's ability to paraphrase that information

THE COMPETENCY REPORT II

Records Review

- Should contain the information the clinician thought was relevant
- Should be exact enough so you can review the information

Background Information

- Indicate who provided the information
 - Developmental
 - Academic
 - Mental Health/Substance Abuse
 - Medical
 - Abuse/Neglect /Trauma
 - Mental Health/Substance Treatment
 - Prior Legal Involvement

Mental Status and Behavior Observation

- Self-explanatory

Collateral Interviews

- Who provided information
- Relevant data provided

THE COMPETENCY REPORT III – DATA

Test Data

- For each test:
 - An explanation of the test
 - The results and interpretation

Data from the Competency Interview

- Understanding of the charges and potential consequences
- Understanding of the trial process
- Ability to participate in his/her defense
- Understanding of plea and plea bargain process
- Ability to make relevant legal decisions

THE COMPETENCY REPORT IV

Clinical Opinion

- For each prong of the standard the clinician should give an opinion and supporting data

An Example

- Does the youth have mental disease or disorder?
 - Yes or no?
 - Why?
- If yes, does it make the youth unable to understand the nature and purpose of the proceedings, or consult and cooperate with counsel in preparing and presenting the defense?

First Prong

- Give data RE: what the youth does and does not understand RE: the nature and purpose of the proceedings

Second Prong

- Give data RE: the youth's ability to consult and cooperate with counsel in preparing and presenting the defense

THE COMPETENCY REPORT V – OPINION

Remediation

- Can it be obtained within X time?
- Why or why not?
- Under what conditions?

Other
Treatment
Needs

- Some states include this.
- If so why or why not?