
REPORT

Introduction

The three black letter Standards set forth in Appendix A to this Report relate to a criminal justice mental health issue - competence and confessions - which was not addressed when the Criminal Justice Mental Health Standards were overwhelmingly approved by the House of Delegates in 1984.

To facilitate consideration of these recommendations, Appendix A sets forth only the proposed black letter Standards which, if adopted, will become Association policy. Appendix B to this Report contains, in addition to the black letter Standards, extensive commentary explaining the legal and mental health rationale for each of the black letter policy recommendations. Commentary for these Standards does not
represent Association policy and is offered solely to assist users of the ABA Standards. It will also, we hope, serve as resource and background material for members of the House of Delegates as the House considers the black letter recommendations in Appendix A.

Background

The three proposed black letter Standards emerged out of the work of a special interdisciplinary task force which was appointed by the now abolished ABA Standing Committee on Association Standards for Criminal Justice in the fall of 1985. In August 1986, the Standing Committee on Scope and Correlation of Work recommended to the House of Delegates that the responsibility for the ABA Standards for Criminal Justice be transferred from the Standing Committee on Association Standards to a newly created standing committee of the Criminal Justice Section. This recommendation was approved at the 1986 annual meeting.

The recommendations of the special seven-member task force were extensively discussed at the first meeting of the newly constituted Criminal Justice Standards Committee in February, 1987, and subsequently approved with some modifications by that Committee.

The Section of Criminal Justice Council extensively reviewed the recommendations of the Standards Committee at its April 1987 meeting and made some suggestions for revision. After considerable discussion and redrafting at both its August 1987 and January 1988 meetings, the Criminal Justice Standards Committee forwarded its recommendations to the Section of Criminal Justice Council for consideration at its April 1988 meeting. With minor modifications, the Council approved the suggested recommended Standards.

The proposed Standards received considerable external scrutiny as well, as they were circulated for comment to over twenty-four organizations and individuals with expertise in the mental health field. The final proposed Standards contained within Appendix A to this Report are thus the result of a very careful drafting and review process.
Proposed Additions To The Standards

The impetus for the proposed additional Standards relating to competence and confessions came in part from the recognition that the complicated procedural issues related to determinations of the reliability and voluntariness of confessions by mentally disabled individuals have not been resolved by many states since the Supreme Court's decision in Colorado v. Connolly, 107 S.Ct. 515 (1986). In that decision the Court observed that those determinations are traditionally made under state evidentiary law. The proposed ABA Standards therefore constitute a recommendation to the states regarding the reliability and voluntariness of confessions by mentally disabled individuals as an evidentiary matter.

Conclusion

The Section of Criminal Justice respectfully requests the House of Delegates to adopt the proposed additions to Chapter 7 of the Association's Second Edition ABA Standards for Criminal Justice.

Respectfully submitted,

John M. Greacen
Chairperson
Section of Criminal Justice

August, 1988
APPENDIX A

ABA CRIMINAL JUSTICE STANDARDS COMMITTEE
SECTION OF CRIMINAL JUSTICE

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS
ADDITION TO PART V:
COMPETENCE AND CONFESSIONS

BLACK LETTER STANDARDS
August, 1988

This Appendix sets forth three black letter Standards recommendations dealing with competence and confessions. A second Appendix to this report, Appendix B, contains the black letter Standards recommendations with supporting commentary, footnotes, and case citations. Appendix B is intended as a useful reference document, as House of Delegates policy consideration is limited to the black letter Standards which appear in Appendix A.
CHAPTER 7: CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

ADDITION TO PART V: COMPETENCE AND CONFESSIONS
STANDARD 7-5.8. STATEMENTS BY MENTALLY ILL OR MENTALLY RETARDED PERSONS

(a) MENTAL ILLNESS OR MENTAL RETARDATION CAN AFFECT THE RELIABILITY OF STATEMENTS. WHERE THE COURT FINDS THAT THE RELIABILITY OF SUCH A STATEMENT HAS BEEN SIGNIFICANTLY IMPAIRED BY A PERSON'S MENTAL ILLNESS OR MENTAL RETARDATION, IT SHOULD EXCLUDE THE STATEMENT FROM EVIDENCE. WHERE THE STATEMENT HAS NOT BEEN EXCLUDED, THE COURT SHOULD PERMIT EVIDENCE TO BE PRESENTED TO THE TRIER OF FACT REGARDING THE EFFECT OF THE DEFENDANT'S MENTAL ILLNESS OR MENTAL RETARDATION ON THE RELIABILITY OF THE STATEMENT.

(b) MENTAL ILLNESS OR MENTAL RETARDATION CAN AFFECT THE VOLUNTARINESS OF STATEMENTS. OFFICIAL CONDUCT THAT DOES NOT CONSTITUTE IMPERMISSIBLE COERCION WHEN EMPLOYED WITH NONDISABLED PERSONS MAY IMPAIR THE VOLUNTARINESS OF THE STATEMENTS OF PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED. WHERE SUCH IMPAIRMENT OF VOLUNTARINESS IS SIGNIFICANT, THE COURT SHOULD EXCLUDE THE STATEMENT FROM EVIDENCE. HOWEVER, IN THE ABSENCE OF ANY SUCH IMPERMISSIBLY COERCIVE OFFICIAL CONDUCT, SUCH STATEMENT SHOULD NOT BE EXCLUDED FROM EVIDENCE SOLELY BECAUSE IT WAS THE PRODUCT OF THE PERSON'S MENTAL ILLNESS OR MENTAL RETARDATION, UNLESS IT IS FOUND UNRELIABLE PURSUANT TO STANDARD 7-5.8(a).

STANDARD 7-5.9. WAIVER OF RIGHTS BY MENTALLY ILL OR MENTALLY RETARDED PERSONS.

(a) CUSTODIAL CONFESSIONS BY PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED SHOULD BE ADMISSIBLE ONLY IF THE PERSON HAS MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF RIGHTS. A PERSON'S MENTAL DISABILITY CAN AFFECT AND IMPAIR EACH ELEMENT OF AN OTHERWISE VALID WAIVER.

(b) LAW ENFORCEMENT OFFICIALS SHOULD BE ALERT TO THE POSSIBILITY THAT A PERSON MAY BE MENTALLY ILL OR MENTALLY RETARDED. MENTAL ILLNESS OR MENTAL RETARDATION MAY IMPAIR THE DISABLED PERSON'S ABILITY TO UNDERSTAND THE RIGHTS EXPLAINED BY OFFICIALS, THEREBY INVALIDATING ANY WAIVER AND SUBSEQUENT STATEMENT. OFFICIAL CONDUCT THAT DOES NOT CONSTITUTE IMPERMISSIBLE COERCION WHEN EMPLOYED WITH NONDISABLED PERSONS MAY INVALIDATE THE WAIVER OF RIGHTS BY PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED.

STANDARD 7-5.10. EXPERT TESTIMONY.

THE COURT SHOULD ADMIT INTO EVIDENCE EXPERT TESTIMONY BY QUALIFIED MENTAL HEALTH OR MENTAL RETARDATION PROFESSIONALS BEARING ON THE EFFECT OF A PERSON'S DISABILITY ON THE RELIABILITY AND VOLUNTARINESS OF A STATEMENT AND THE VALIDITY OF ANY WAIVER OF RIGHTS THAT PRECEDED SUCH A STATEMENT.
APPENDIX B

ABA CRIMINAL JUSTICE STANDARDS COMMITTEE
SECTION OF CRIMINAL JUSTICE

CRIMINAL JUSTICE MENTAL HEALTH STANDARDS
ADDITION TO PART V:
COMPETENCE AND CONFESSIONS

BLACK LETTER STANDARDS
WITH
SUPPORTING COMMENTARY
August, 1988

This Appendix sets forth three black letter Standards and commentary dealing with competence and confessions. The black letter Standards are identical to the Standards contained in Appendix A but add complete commentary that explains the rationale for the proposed Standards. Appendix B is designed to offer background material to members of the House of Delegates considering the black letter Standards recommendations contained within Appendix A. While commentary for the ABA Standards for Criminal Justice does not represent Association policy, the black letter Standards and commentary appearing within this Appendix represent the format in which these Standards, if approved, will appear within the Second Edition ABA Standards for Criminal Justice.
CHAPTER 7: Criminal Justice Mental Health Standards

ADDITION TO PART V: Competence and Confessions

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COMPETENCE AND CONFESSIONS

INTRODUCTION

The mental disability of a suspect can affect a confession or other inculpatory statement in a number of ways. The reliability of such a statement can be affected by mental illness or mental retardation. Disability may impair the suspect's ability to understand his or her rights, and may therefore invalidate any waiver of those rights. Mental disability can render a suspect vulnerable to forms of persuasion and coercion which would have no effect on a nondisabled individual. Mental illness or mental retardation may make it more likely that some suspects will be willing to make a confession.

Each of these effects require extraordinary care on the part of lawyers, courts, and law enforcement officers in handling cases that involve statements by suspects who may be mentally ill or mentally retarded. The following Standards offer guidelines for these circumstances.

Footnotes

1. The previous distinctions in law between confessions and other forms of statements by suspects which tend to prove guilt have diminished over the years. McCormick on Evidence 361-63 (E. Cleary 3d ed. 1984). The terms "confession" and "statement" will be used interchangeably in these Standards and the Commentary to describe all such statements.

2. Either mental illness or mental retardation can produce the problems described in these Standards. Those problems are compounded when the suspect is both mentally ill and mentally retarded. See Luckasson, The Dually Diagnosed Client in the Criminal Justice System, in Mental Retardation and Mental Health: Classification, Diagnosis, Treatment, Services 354 (J. Stark, F. Menolascino, M. Albarelli & V. Gray eds. 1988).

3. Although these Standards are proposed for Part V dealing with competence issues, they are of particular importance to police and other law enforcement officials, and therefore should be emphatically cross-referenced in Part II of Chapter 7, dealing with police and custodial roles.
STANDARD 7-5.8. STATEMENTS BY MENTALLY ILL OR MENTALLY RETARDED PERSONS

(a) MENTAL ILLNESS OR MENTAL RETARDATION CAN AFFECT THE RELIABILITY OF STATEMENTS. WHERE THE COURT FINDS THAT THE RELIABILITY OF SUCH A STATEMENT HAS BEEN SIGNIFICANTLY IMPAIRED BY A PERSON'S MENTAL ILLNESS OR MENTAL RETARDATION, IT SHOULD EXCLUDE THE STATEMENT FROM EVIDENCE. WHERE THE STATEMENT HAS NOT BEEN EXCLUDED, THE COURT SHOULD PERMIT EVIDENCE TO BE PRESENTED TO THE TRIER OF FACT REGARDING THE EFFECT OF THE DEFENDANT'S MENTAL ILLNESS OR MENTAL RETARDATION ON THE RELIABILITY OF THE STATEMENT.

(b) MENTAL ILLNESS OR MENTAL RETARDATION CAN AFFECT THE VOLUNTARINESS OF STATEMENTS. OFFICIAL CONDUCT THAT DOES NOT CONSTITUTE IMPERMISSIBLE COERCION WHEN EMPLOYED WITH NONDISABLED PERSONS MAY IMPAIR THE VOLUNTARINESS OF THE STATEMENTS OF PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED. WHERE SUCH IMPAIRMENT OF VOLUNTARINESS IS SIGNIFICANT, THE COURT SHOULD EXCLUDE THE STATEMENT FROM EVIDENCE. HOWEVER, IN THE ABSENCE OF ANY SUCH IMPERMISSIBLY COERCIVE OFFICIAL CONDUCT, SUCH STATEMENT SHOULD NOT BE EXCLUDED FROM EVIDENCE SOLELY BECAUSE IT WAS THE PRODUCT OF THE PERSON'S MENTAL ILLNESS OR MENTAL RETARDATION, UNLESS IT IS FOUND UNRELIABLE PURSUANT TO STANDARD 7-5.8(a).

Commentary Introduction

Standard 7-5.8 addresses the reliability and voluntariness of statements by mentally disabled individuals. It provides that some such statements should be held inadmissible, and that in other cases the trier of fact should receive evidence on the effect of the mental disability on the statement's reliability. Paragraph (b) provides that statements should be inadmissible when their voluntariness has been significantly impaired by the effect of mental disability. However, it also provides that a statement should be considered involuntary only when it was induced by impermissible official conduct.
Related Standards

ABA Standards for Criminal Justice 7-2.8, 7-5.9, 7-5.10.

Commentary

This Standard addresses the reliability and voluntariness of confessions, whether they are made in custody or in noncustodial settings. Such statements can be affected, and even motivated, by the effects of mental illness or mental retardation. Evidentiary questions about the admissibility of such statements present difficult issues for the courts.

Reliability. Paragraph (a) of the Standard recognizes that even in the absence of any coercion by the police, admissions and confessions by mentally ill or mentally retarded individuals may be of questionable reliability. Its provisions seek to assure that mentally disabled defendants are not convicted on the basis of confessions that are not credible.

The common law has long recognized the potential problems of unreliability inherent in confessions. Concern for the trustworthiness of such statements by defendants and suspects was the original reason for the requirements of corroboration and independent proof of the corpus delicti. The perceived unreliability of coerced statements was also a principal reason for the common law (and later constitutional) requirement of voluntariness for confessions. The issue of a statement's possible unreliability is no less troubling when its questionable truthfulness results from the suspect's mental disability rather than from the effects of official misconduct. As Justice Brennan has observed, "Because the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession's reliability."

The reliability of statements by persons who are mentally disabled is particularly suspect. For example, a mentally ill individual may make a false or inaccurate confession because of a delusional belief. Similarly, a person with mental retardation may make such a statement because of a mistaken understanding of the facts of an incident or the nature of criminal responsibility. Therefore substantial skepticism is warranted regarding the use of confessions by mentally disabled suspects in criminal proceedings.

The Standard provides for evidence on the issue of the reliability of a mentally disabled defendant's statements to be admissible before the trier of fact. Such evidence, as well as
responding evidence which may be presented by the prosecution, may include the expert testimony of mental disability professionals. This allows the trier of fact to determine how much weight to assign to a statement whose reliability is called into question because of the effects of the defendant's mental disability, and to give the statement less credence if the evidence so warrants. An admonitory instruction from the court on this issue may also be appropriate.

Although expert and lay testimony on a statement's reliability will ordinarily suffice to inform the trier of fact about the appropriate weight to assign to a confession, some statements by mentally disabled suspects are so clearly unreliable that they should not be admitted as evidence. Some such statements are simply unworthy of belief, and the prejudicial impact of their introduction would clearly outweigh their negligible probative value. Fundamental fairness requires that obviously unreliable statements by mentally disabled suspects, like other forms of inherently untrustworthy evidence, be excluded from consideration by the trier of fact.

The Standard calls for the exclusion from evidence of statements whose reliability has been substantially impaired by the effects of the suspect's mental disability. But the Standard also recognizes that such instances will be rare, and that most statements by mentally disabled suspects will not be so clearly unreliable as to require their exclusion. In many cases, despite the fact that the court admits the statement into evidence, questions will remain about the reliability of a disabled suspect's statement. The Standard provides that evidence, including expert testimony from mental health or mental retardation professionals, should be permitted to allow the trier of fact to determine the extent to which the individual's mental disability may have undermined the credibility of the statement. The trier of fact can then decide how much credence to give to the statement.

Voluntariness. Paragraph (b) of the Standard recognizes that mental disability may also impair the voluntariness of a suspect's confession or statement.

Involuntary confessions have long been excluded from evidence by the courts. As the Supreme Court has noted, "a complex of values underlies the stricture against the use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary." These include both the fact that involuntary confessions are likely to be factually unreliable and concerns about the acceptability of police practices used to produce involuntary statements. The increasing focus of the
courts on the waiver of rights under Miranda v. Arizona\textsuperscript{11} has reduced the attention paid to the voluntariness doctrine, but it remains clear that due process forbids the admission of an involuntary statement, whether the statement is made in custody or a noncustodial setting.

The focus of modern cases involving the voluntariness of confessions is the extent to which the suspect’s will was overborne by governmental conduct. In this context, the Supreme Court has consistently observed that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned."\textsuperscript{12}

Paragraph (b) of the Standard reflects this rule by providing that interrogation techniques that would not constitute unacceptable coercion in cases involving nondisabled suspects may impair the voluntariness of a confession of a suspect who is mentally ill or mentally retarded.\textsuperscript{13} The increased vulnerability of a mentally disabled suspect, and his or her naivete, ignorance, confusion, suggestibility, delusional beliefs, extraordinary susceptibility to pressure, and similar considerations may make it possible for law enforcement officers to induce an involuntary statement by using techniques that would be acceptable in cases involving mentally typical suspects. Where such a showing is made, typically at a suppression hearing, the Standard provides that the statement should be excluded.

Involuntary confessions, within the meaning of this Standard, involve suspects who make a statement in the context of some form of unacceptable official conduct designed to elicit a statement. The United States Supreme Court\textsuperscript{15} has rejected the invitation to extend this constitutional rule to those statements which are "involuntary" in the sense that they are the product of the suspect's mental disability, but which involve no police attempts to elicit a confession. In Colorado v. Connelly,\textsuperscript{16} the Court held that a confession was admissible despite the fact that it was a product of the "command hallucinations" caused by defendant's mental illness. The majority concluded that a confession could not be considered "involuntary" as a constitutional matter without some form of coercive police activity.

The final sentence of paragraph (b) of the Standard addresses the admissibility of statements made by mentally ill or mentally retarded individuals who are not in custody and who are not the subjects of official attempts to elicit a confession. Such statements may be influenced -- indeed, may be motivated or
"caused" -- by the individual's disability. For example, a mentally ill person may feel compelled by delusional beliefs or hallucinatory instructions to tell law enforcement officials that he committed a crime. The Standard recommends that such statements, if otherwise acceptable, be considered admissible evidence when they occur outside of police custody and in the absence of any official coercion. The Standard thus adopts the holding of Connelly that official conduct is a prerequisite to finding a statement involuntary.

It has been argued that such statements should be excluded on the theory that they are not "voluntary." As a semantic matter, this position has some attraction. Statements blurted out by an individual as a result of mental disability may not involve the same kind of volition as statements volunteered by nondisabled individuals. But the Standard takes the position that "voluntariness" in the context of confessions refers more appropriately to the absence of state coercion. To exclude a reliable statement that involves no official misconduct serves no purpose sufficient to outweigh the cost of losing probative evidence. Therefore the Standard holds that a statement made in the absence of any opportunity for official coercion should not be excluded from evidence on the grounds that it is "involuntary." Such a statement, of course, may still be inadmissible for other reasons, such as lack of reliability.

Confessions produced by the effects of mental disability but without official coercion may also be argued to be inadmissible because the individual lacked the ability to make a legally valid waiver of the right to remain silent and the privilege against self-incrimination. It is true that some individuals who make inculpatory statements as a result of mental disability would not meet the test for voluntary relinquishment of rights as expressed in Johnson v. Zerbst. But the Standard reflects the position that no such waiver is involved in the absence of any official attempt to elicit information, because no constitutional right has attached. The right at issue regarding the voluntariness of confessions is the right not to be forced by the state to make self-incriminating statements, not an abstract right not to make the statements at all. Similarly, "the right to remain silent" as announced in Miranda is a right within the context of custodial interrogation. Where the courts can be certain that no coercion was involved in obtaining the statement, the individual has not waived any constitutional rights within the meaning of Miranda or Johnson v. Zerbst.
Footnotes

1. McCormick on Evidence 365-71 (E. Cleary 3d ed. 1984). See Oppen v. United States, 348 U.S. 84, 98-90 (1954) ("In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession").


3. Colorado v. Connelly, 107 S.Ct. 515, 530 (1986) (Brennan, J. dissenting). Justice Brennan would have based a requirement of reliability on the due process clause. "To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession." 107 S.Ct. at 531. The majority of the Court entrusted the matter to the evidence laws of the states. "A statement rendered by one in the condition of respondent [mentally ill] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, ... and not by the Due Process Clause of the Fourteenth Amendment." 107 S.Ct. at 502.

The Standard constitutes a recommendation to the states regarding reliability as an evidentiary matter. Some state courts may also choose to address this as an issue of state constitutional law. See generally, Perlin, State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?, 20 Loyola L.A. L. Rev. 1249 (1987); Meisel, The Rights of the Mentally Ill Under State Constitutions, 45 Law & Contemp. Probs. 7 (Summer 1982).

4. See, e.g., Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 466 n. 286 (1985) (describing a mildly mentally retarded defendant who entered a guilty plea because he regretted that he had not prevented the commission of a criminal act by another person and therefore believed himself to be "guilty" of the offense).

5. See Standard 7-5.10.

6. The evidence may also involve the circumstances under which the statement was made. As Justice O'Connor recently observed for a unanimous Court, "evidence about the manner in
which a confession was obtained is often highly relevant to its reliability and credibility." Crane v. Kentucky, 106 S.Ct. 2142, 2147 (1986).

7. Such a clearly unreliable statement by a mentally disabled suspect can be analogized to the exclusion of testimony by a child who is found to be too young to give competent testimony. See generally, Christiansen, The Testimony of Child Witnesses, 62 Wash. L. Rev. 705 (1987); T. Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence (1981).

8. The question of whether the reliability of a statement by a mentally disabled suspect has been significantly impaired by mental retardation or mental illness can be determined by the court in a pretrial hearing. Cf. Jackson v. Denno, 378 U.S. 368 (1964). The court should admit expert testimony at such a hearing on the issue of the impact of the suspect's mental disability on the reliability of the statement. See Standard 7-5.10.


14. Defendants are constitutionally entitled to have the voluntariness of their confession determined by the court at a suppression hearing outside of the presence of the jury. Jackson v. Denno, 378 U.S. 368 (1964). The majority of states follow the so-called "orthodox rule," under which the court's determination on voluntariness is not reviewed by the jury. Other states follow the so-called "Massachusetts rule," under which a judge's ruling that a statement admitted into evidence was voluntary can be reviewed independently by the jury. McCormick on Evidence 465-66 (E. Cleary 3d ed. 1984). The Standard makes no recommendation about the relative desirability of these two rules, and is compatible with either. In jurisdictions employing the orthodox rule, the judge at the suppression
hearing should exclude any statement where the suspect's voluntariness was significantly impaired. In states using the Massachusetts rule, the same criteria would apply, but in addition, where the judge has declined to exclude the statement as involuntary, the parties should be permitted to introduce evidence to the jury about the factors, including the effect of the suspect's mental disability, that touch upon the voluntariness of the statement.

15. The Court's majority concluded that any inquiry about voluntariness beyond the scope of official coercion is more appropriately "resolved by state laws governing the admission of evidence...." Colorado v. Connelly, 107 S.Ct. 515, 522 (1986). The Standard makes no recommendation about expanding the rights of suspects beyond the due process clause's protection against official coercion. If subsequent constitutional caselaw provides inadequate recognition of the extraordinary vulnerability of mentally disabled suspects, courts are urged to use their authority over evidentiary matters, and perhaps in interpreting state constitutions, to implement the recommendations of this Standard. See note 3, supra.


18. 304 U.S. 458 (1938).


20. "The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" Colorado v. Connelly, 107 S.Ct. at 523 (citations omitted).
STANDARD 7-5.9. WAIVER OF RIGHTS BY MENTALLY ILL OR MENTALLY RETARDED PERSONS.

(a) CUSTODIAL CONFESSIONS BY PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED SHOULD BE ADMISSIBLE ONLY IF THE PERSON HAS MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF RIGHTS. A PERSON'S MENTAL DISABILITY CAN AFFECT AND IMPAIR EACH ELEMENT OF AN OTHERWISE VALID WAIVER.

(b) LAW ENFORCEMENT OFFICIALS SHOULD BE ALERT TO THE POSSIBILITY THAT A PERSON MAY BE MENTALLY ILL OR MENTALLY RETARDED. MENTAL ILLNESS OR MENTAL RETARDATION MAY IMPAIR THE DISABLED PERSON'S ABILITY TO UNDERSTAND THE RIGHTS EXPLAINED BY OFFICIALS, THEREBY INVALIDATING ANY WAIVER AND SUBSEQUENT STATEMENT. OFFICIAL CONDUCT THAT DOES NOT CONSTITUTE IMPERMISSIBLE COERCION WHEN EMPLOYED WITH NONDISABLED PERSONS MAY INVALIDATE THE WAIVER OF RIGHTS BY PERSONS WHO ARE MENTALLY ILL OR MENTALLY RETARDED.

Commentary Introduction

Standard 7-5.9 provides that mental disability may impair each element of a suspect's waiver of rights concerning a custodial statement. Law enforcement officials should be alert to the possible effect of mental disability on the suspect's ability to understand explanations of rights, and to the fact that a suspect's disability may affect the determination of what constitutes acceptable official conduct in eliciting statements.

Related Standards

ABA Standards for Criminal Justice 1-7.3, 7-2.8, 7-5.8, 7-5.10.

Commentary

In addition to the potential problems of reliability and voluntariness of confessions discussed in Standard 7-5.8, statements made in the context of custodial interrogation may be rendered inadmissible by the effects of mental illness or mental retardation because the disabled suspect may be unable to give an effective waiver of his right to counsel and right to refrain from answering questions. Although the holding of Miranda v. Arizona remains controversial, the Supreme Court has made
clear that it is settled constitutional law. Its teaching, and the policies which underlie it, apply with special emphasis to cases involving mentally disabled suspects.

Paragraph (a) of Standard 7-5.9 recognizes that the admissibility of any custodial confession requires a valid waiver of the suspect's constitutional rights, and that any waiver must be knowingly, intelligently, and voluntarily made. These three elements parallel the requirements for legally valid consent in other areas of mental disability law, and as is true in those other areas, each of the elements is rendered problematic by the effects of mental disability.

The requisite knowledge for an effective waiver may be negated by either mental illness or mental retardation. The standard Miranda warning may not be sufficient to overcome the knowledge deficits a mentally disabled defendant may have. A mentally retarded defendant is unlikely to understand the terminology in the standard warning, and may not understand the basic concepts involved in the idea of adversarial proceedings and of rights and their voluntary relinquishment. Similarly, a mentally ill defendant may misperceive the roles of the police or defense counsel and the nature of the transaction to which he is being asked to agree.

Similarly, the requirement that a valid waiver be "intelligent" may be negated when the disabled defendant fails to understand and appreciate the nature of his relinquishment of rights. The Supreme Court has held, in a case involving a nondisabled defendant, that it is not necessary for the suspect to fully and completely understand and appreciate every aspect of the consequences of his action. But for any waiver to be valid, a suspect must understand clearly that his or her rights include the right to counsel, the right to refrain from answering questions, and the fact that the voluntary relinquishment of these rights may produce evidence that can be used to obtain a conviction. A mentally ill or mentally retarded individual's level of understanding will sometimes be so deficient that a valid waiver is impossible.

Perhaps the most difficult problems arise from the requirement that a waiver of constitutional rights must be voluntary. This rule parallels, but is not identical to, the inquiry into whether a confession is voluntary. Here the inquiry is whether the suspect's decision to give up the right to counsel and the right to remain silent was voluntarily made. Where that decision was the product of unacceptable official coercion, the waiver is invalid, and any resulting statement is inadmissible.
As paragraph (b) of the Standard notes, techniques of interrogation that would be acceptable to the courts for nondisabled suspects may be unacceptably coercive in cases involving mental disability. Just as such techniques may lead a court to conclude that a disabled suspect's statement was not voluntary because of his exceptional vulnerability, similar techniques may invalidate a mentally ill or mentally retarded suspect's waiver of rights. The suggestibility of mentally retarded individuals and their extraordinary susceptibility to the perceived wishes of authority figures have been well documented, and therefore the vulnerability of mentally retarded suspects to nonphysical coercion has been long recognized. Similarly, police techniques that seek to take advantage of extraordinary vulnerability caused by a suspect's mental illness may also invalidate a waiver.

Paragraph (b) of the Standard admonishes law enforcement officials, in particular, to be alert to the possibility that a suspect may be mentally disabled. While Standard 7-2.5(b) addresses the responsibility of the police to obtain evaluation of a disabled suspect who may meet the legal criteria for emergency detention and treatment, this Standard focuses on the need to ascertain whether a suspect's disability may affect the admissibility of any statement that might be made.

This will require careful attention, since some forms of mental disability are not clearly visible or readily apparent. Although mentally ill individuals who are violent, irrational, or engaging in bizarre behavior often will be easy to detect, many other disabled suspects will present no such apparent manifestations of their illness or retardation. A mentally ill individual whose principal symptom is clinical depression may present few overt signs of his illness, and many mildly and moderately mentally retarded individuals have learned to devote a considerable amount of effort to hiding their disability. Failure to identify the possibility that a suspect is disabled may result in a confession or statement that later proves inadmissible because of the lack of a valid waiver, and this can imperil the prosecution of the case. The significance of this matter emphasizes the importance of the recommendation in Standard 7-2.8 that law enforcement agencies should provide their personnel with specialized training in the basic elements and manifestations of mental illness and mental retardation.

Footnotes


4. The United States Supreme Court has recently summarized the requirements of Miranda:
First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.


9. See Standard 7-5.8(b) and accompanying Commentary.

10. This conclusion is not affected by the United States Supreme Court's decision in Colorado v. Connelly, 107 S.Ct. 515 (1986). In that case, the Court's majority held that a waiver of Miranda rights was not "involuntary" where it was the product of effects of his psychotic mental illness. The Court cautioned against "importing . . . notions of 'free will'" into the area of Miranda waivers. 107 S.Ct. at 523. But the Court's admonition went only to rejecting the possibility of finding involuntariness in waivers which involved no police coercion. Connelly certainly does not stand for the proposition that courts need not inquire into the voluntariness of the waivers of mentally

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disabled defendants, nor does it indicate that a suspect's mental disability is irrelevant to the issue of whether psychological pressure or other interrogation tactics constitute overreaching in a particular case. The test remains whether, given the totality of the circumstances, the mentally disabled suspect made a free choice to give up rights that he fully understood.

11. A majority of the United States Supreme Court has accepted waivers of rights from nondisabled suspects in circumstances involving some level of deception or withholding of relevant information. See, e.g., Moran v. Burbine, 475 U.S. 412 (1986); Connecticut v. Barrett, 107 S.Ct. 828 (1987). "Mild" deception or a withholding of information that would not invalidate a waiver by a nondisabled suspect could be a form of unacceptable coercion when viewed in the totality of the circumstances of a mentally ill or mentally retarded suspect's confession.


14. See generally Brewer v. Williams, 430 U.S. 387 (1977), where the fact that the suspect was an escaped mental patient was one of the considerations in evaluating the validity of his purported waiver.

STANDARD 7-5.10. EXPERT TESTIMONY.

THE COURT SHOULD ADMIT INTO EVIDENCE EXPERT TESTIMONY BY QUALIFIED MENTAL HEALTH OR MENTAL RETARDATION PROFESSIONALS BEARING ON THE EFFECT OF A PERSON'S DISABILITY ON THE RELIABILITY AND VOLUNTARINESS OF A STATEMENT AND THE VALIDITY OF ANY WAIVER OF RIGHTS THAT PRECEDED SUCH A STATEMENT.

Commentary

Introduction

Standard 7-5.10 provides for the admission of expert testimony bearing on the effect of mental disability on the reliability and voluntariness of statements and on the validity of waivers of rights.

Related Standards

ABA Standards for Criminal Justice 7-3.9, 7-3.11, 7-3.12, 7-5.8, 7-5.9.

Commentary

This Standard emphasizes that expert testimony by mental health or mental retardation professionals may often be appropriate and necessary in evaluating a particular confession under the provisions of Standards 7-5.8 and 7-5.9. This is consistent with the overall view expressed in the Criminal Justice Mental Health Standards that courts should make use of the expertise of professionals in the various disciplines that address the problems of mental disability. Courts will require the assistance of qualified mental disability experts, both at trials on the issue of the reliability of a defendant's statement, and at suppression hearings on the issue of the reliability or voluntariness of a statement or the validity of a waiver of Miranda rights. The qualifications of experts to address the question of the effect of an individual's mental illness or mental retardation on the issues addressed in these Standards should meet the requirements of Standards 7-3.11 and 7-3.12.

Standard 7-5.10 does not address the issue of whether mental disability experts should be permitted to express an opinion on questions requiring a conclusion of law. However, the Criminal Justice Mental Health Standards already contain a general prohibition on "ultimate issue" testimony in Standard 7-3.9(a), which provides, in part, that "the expert witness should not express, or be permitted to express, an opinion on any question requiring
some situations call for value judgments or conclusions of law, concerning which expert witnesses should not be permitted to testify. For example, they should be precluded from testifying that a confession was "voluntary" or "involuntary"....

Mental health or mental retardation professionals can give the court or jury the benefit of their expertise in the field of mental disability, as well as observations about the particular defendant, without directly commenting upon the issue properly reserved to judicial decision-makers.

Footnotes

1. The provisions regarding expert testimony do not, of course, preclude the use of competent lay testimony on these issues where that is appropriate.


3. Commentary to Standard 7-3.9, at page 7.124.
1. **Summary of Recommendation(s).**

The Section of Criminal Justice recommends that the ABA adopt, as additions to Chapter 7 of the Second Edition ABA Standards for Criminal Justice, the Criminal Justice Mental Health Standards entitled "Competence and Confessions," dated August, 1988, which are set forth in Appendix A to the Report.

The proposed Standards address the reliability and voluntariness of confessions by mentally disabled individuals.

2. **Approval by Submitting Entity.**

This recommendation was approved by the Section of Criminal Justice Council at its meeting on April 9, 1988.

3. **Background.** (Previous submission to the House or relevant Association position.)

This recommendation has not been submitted previously. There is no Association policy on this topic.

4. **Need for Action at This Meeting.**

The Section of Criminal Justice urges prompt consideration of the proposed Standards by the House due to the ABA's continuing obligation to see to it that the Second Edition ABA Standards for Criminal Justice reflect current developments in the law. In light of expressed concern among the states to develop appropriate guidelines regarding confessions of mentally ill and mentally retarded individuals, it is appropriate for the ABA to provide guidance as expeditiously as possible.
5. **Status of Legislation.** (If applicable.)

There is currently no legislation pending in the U. S. Congress on this issue.

6. **Financial Information.** (Estimate of funds required, if any.)

Adoption of the proposed Standards will entail no financial obligation for the Association.

7. **Disclosure of Interest.** (If applicable.)

None.

8. **Referrals.**

On June 7, 1988, a copy of this Report with its attachments was sent to the following:

**Standing Committees:**
- Federal Judicial Improvements
- Law and National Security
- Legal Aid and Indigent Defendants

**Special Committees:**
- Commission on the Mentally Disabled

**Sections and Divisions:**
- Family Law
- General Practice
- Individual Rights and Responsibilities
- Judicial Administration Division, including all six conferences
- Law Student Division
- Litigation
- Senior Lawyers Division
- Young Lawyers Division

**Affiliated Organizations:**
- American Judicature Society
- The American Law Institute
- Conference of Chief Justices
- The Federal Bar Association
- Judges Advocates Association
- National Association of Attorneys General
- National Association of Criminal Defense Lawyers
- National Bar Association, Inc.
9. **Contact Person.** (Prior to meeting.)

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10. **Contact Person.** (Who will present the report to the House.)

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