



## Psychiatry & Behavioral Science Section - 2015

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### I26 **Contemporaneous Assessments of Testamentary Capacity and Undue Influence: Strike While the Iron Is Hot**

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After attending this presentation, attendees will gain a better understanding of the advantages offered by contemporaneous evaluations of testamentary capacity and undue influence at the time a will or estate document is executed.

This presentation will impact the forensic science community by offering a new standard of care for conducting testamentary capacity and undue influence examinations that can reduce the risk of future litigation and related unwanted outcomes.

Contested wills, trusts, and estate plans are extremely expensive to litigate and can significantly erode the corpus of the estate while simultaneously undermining the wishes of the testator and creating turmoil among surviving family members and remaindermen. This is particularly true when late changes are made to an existing will or estate plan. Planning for the possibility of a future will contest is both a prudent and cost-effective strategy that holds the potential to avoid these typical adverse outcomes.

A careful and well-documented assessment of the testator's capacity prepared at the time that a will is executed or any significant changes are made can document and preserve evidence of the testator's competency and freedom from undue influence. This simple step can prevent years of litigation and unnecessary delays in executing the client's desires.

International standards and practices in this area of mental health law will be presented with a focus on the laws in Great Britain, where contemporaneous examinations of testamentary capacity are the norm, and the practice is referred to as "The Golden Rule" following the landmark case of *In Re: Simpson Deceased* (1977). The legal criteria for such assessments will be presented, flowing from *Banks v. Goodfellow* (1870), with a focus on the application of contemporary forensic behavioral science methods to these well-established legal standards.

A proposed standard of care for such evaluations will be presented which includes both psychiatric examination and neurocognitive testing. Evaluations are generally conducted as close in time as possible to the date that a will or trust will be signed and can usually be completed in one day. The process includes: (1) a careful review of the medicolegal record; (2) objective psychodiagnostic and neuropsychological testing; (3) a meticulous forensic psychiatric examination of the testator(s); and, (4) interviews of significant others as needed.

A customized neuropsychological test battery is administered, tailored specifically to those cognitive functions most relevant to testamentary capacity, including attention, concentration, memory, and executive functioning. Psychodiagnostic testing is used to evaluate psychiatric symptoms. The forensic psychiatric examination includes taking a complete history, mental status examination, careful documentation of the testator's competency, and assessment of the factors that increase susceptibility to, or protect against, undue influence. The evaluation can be digitally recorded if desired. A comprehensive report is then prepared to be filed with the estate plan.

In an effort to illuminate the advantages of the proposed model of contemporaneous examinations, case examples will be used to illustrate the complexities and complications of waiting until after the death of the testator to evaluate capacity. Problems and pitfalls likely to be encountered by adopting this approach will be discussed and their potential remedies and advantages will be explored. By changing the thinking about how and when to evaluate testamentary capacity and the possibility of undue influence, there is great potential to safeguard both the estate's financial resources and the family's peace of mind.

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#### **Testamentary Capacity, Undue Influence, Neuropsychological Testing**