

Testamentary Capacity Expert Opinions: Common Pitfalls and Strategies to Cross Examine Psych Experts

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Presentation Outline

Basic Principles of Capacity Assessment

Testamentary Capacity Analysis Pitfalls and Cross Examination Strategies:

- Equating Diagnosis with Capacity
- Failing to Distinguish between Legal Standards and their Implications
- Privileging Neuropsychology Test Results over Functional Assessment
- Providing Opinions out of Scope of Expertise
- Failure to Consider Complexity of Testamentary Act
- Not the Man He Used To Be Fallacy
- Failure to Consider Relevance of Delusions

Capacity: Foundational Concepts

What is Capacity?

- A legal criteria for what is a required to do a specific act in a specific context. A determination of whether an individual's capacities, relevant to a specific act in question, are impaired to the extent that they are legally incompetent.
- Terms capacity and competency are used inter-changeably.
- Criteria for incapacity is usually based upon a legal standard.

Capacity: Foundational Concepts

- Capacity is based upon an analysis of the ability of the examinee perform functional abilities relevant to the capacity in question.
 - Functional ability: what a person know, understands, and can do.
 - Functional abilities are unique to the capacity in questions.
- Capacity may fluctuate depending upon impairments.
 - Dementia vs. Delirium.
- Capacity is not a set standard but exists in relation to the complexity of the act in question. More complex acts require more complex capacity.

Thomas Grisso's Five Step Model for the Assessment of Competencies/Capacities

- Standard of Practice for assessing competency/capacity in forensic psychology.
- Works for most psychological assessments
- Logical
- Helpful to the court
- Allows simple explanation

Grisso's Model

Step 1: Functional Component

Determine the degree of functional abilities that exist.

- Functional ability: what a person knows, understands, and can do.
- Functional abilities are unique to the legal standard in question.
- In testamentary capacity, functional abilities are clearly outlined in CA testamentary and contractual capacity legal standards PC 6100.5 & PC 810-812 (e.g., understanding the nature of the testamentary act, one's property, and one's relations).

Grisso's Model

Step 2: Causal Component

- If there are deficits in functional abilities, why?
- Diagnosis is most relevant to this analysis.
- Diagnosis informs expectations regarding the permanency vs. intermittent/temporary nature of condition which is causing functional impairments or incapacity (e.g. while incapacity due to severe dementia is unlikely to improve, incapacity due to delirium is likely intermittent due to the fluctuating nature of the disorder.)

Grisso's Model

Step 3: Interactive Component

Determine the complexity of the task in question.

- A straightforward and simple will/trust vs. a complicated plan of disposition.
- Examiners must take the time to understand what the will/trust does .
- Greater complexity in the plan of disposition requires a greater degree of functional abilities to meet the standard for capacity.

Grisso's Model

Step 4: Conclusory Component

Determine if capacity exists *based upon an analysis of the degree of congruity, or lack thereof, between the examinee's functional abilities and what is required during this specific testamentary act, based on its complexity.*

Pitfall 1: Equating Diagnosis with Capacity

- Diagnosis (e.g. delirium) was developed to appropriately assess and treat patients. It's utility is limited in assessing capacity.
- Many psychiatric diagnoses serve primarily to label frequently co-occurring symptoms – these symptoms may have different causes and implications in different patients.
- The same diagnosis may cause varying levels of impairment, in varying domains, in different individuals.
- Impairment related to a diagnosis may or may not cause incapacity.
- NGRI Example

PC 810-812: The mere diagnosis of a mental or physical disorder shall not be sufficient, in and of itself, to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

Pitfall 1: Equating Diagnosis with Capacity

Examples of limitations in utilization of diagnosis to infer capacity:

- Moyer et al. 2006 – Only 9 to 24% of individual adults diagnosed with dementia lacked the capacity to make medical treatment decisions.
- Warner et al. 2006 – 24% of participants with mild to moderate dementia were able to give informed consent to medical research.
- Roke and Patel 2008 – Studied testamentary capacity on individuals with Alzheimer's dementia based upon British legal standard: 62.5 % of individuals with AD and mild cognitive impairment (based on MMSE scores) demonstrated testamentary capacity, 35.0 % with moderate cognitive impairment demonstrated testamentary capacity, and 2.5% with severe cognitive impairment (MMSE below 11) demonstrated testamentary capacity.

Pitfall 1: Equating Diagnosis and Capacity

- Newer version of this fallacy is using neuroimaging to advance the argument that the testator lacks capacity.
- May be relevant in a retrospective case in the absence of functional data regarding actual abilities but findings must be extremely tentative.
- If data about actual capacities is available this is significantly more relevant.
- No research I'm aware of linking neuroimaging to specific functional deficits, and thus a very significant degree of inference is being utilized and must be acknowledged.

Cross Examination Strategy

- Vigorously challenge an expert that equates diagnosis and capacity.
- Ask for the base rates of incapacity in a specific diagnosis to highlight the lack of a research basis for the opinion.
- “Doctor do all individuals with AD lack capacity? What are the rates of incapacity in individuals with AD?”

Pitfall 2: Failing to Distinguish between CA Legal Standards and Their Implications

- For more complicated testamentary acts, probate code 810-812 also requires more reasoning (e.g. executive functioning) to understand and appreciate:
 - a) The rights, duties, and responsibilities created by, or affected by the decision.*
 - b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision*
 - c) The significant risks, benefits, and reasonable alternatives involved in the decision.*

Primary Cognitive Capacities Required by PC 6100.5 and PC 812

PC 6100.5

- Attention
- Language
- Verbal Recall of Overlearned Information
- **Limited Executive Functioning**
- *recall of overlearned information is typically less affected by brain impairment than many other cognitive tasks.*
- *Critical that expert distinguishes between what legal standard they are opining regarding.*

PC 812

- Attention
- Language
- Verbal Recall of Overlearned Information
- **More Executive Functioning**

Cross Examination Strategy

- Push the experts to provide two specific opinions relevant to the two distinct legal standards (if both are potentially applicable in a case).
- Challenge over-reliance on signs of poor reasoning, judgement, on executive functioning in opinions on capacity pursuant to PC 6100.5

Pitfall 3: Privileging Neuropsychological Test Results Over Functional Assessment

- While neuropsychological test results may provide incremental validity beyond records and clinically based assessments, they are often over-emphasized.
- Testamentary capacity is fundamentally a determination of the extent to which an individual knows what a will is, knows his family relations, knows the nature and extent of his estate, and has a general plan for distribution. These functional abilities can be most easily assessed by using a structured interview, in which the testator is asked specifically about these relatively circumscribed issues.
- Risk of Low Ecology Validity
- Case Example

Cross Examination Strategy

- Challenge an overreliance on neuropsychology test data.
- Ask the doctor about research on rates of scattered neuropsychological impairment in the general population.
- Ask the doctor if there are potential limitations in ecological validity when using neuropsychology test data to determine capacity.
- Ask for research linking neuropsychological test results to a finding of capacity vs. incapacity.

Pitfall 4: Failure to Consider the Complexity of the Testamentary Act

- What is the complexity of the task in question.
 - Straight forward and simple will vs. large and complicated estate.
 - Examiners must take the time to understand the specifics of the act in question.
 - Key question is not what a testator can do relevant to the legal standard but what is the degree of congruity or incongruity between the examinees functional abilities and what is required of them during the testamentary act.

Cross Examination Strategy

- Ask the expert if they have read the trust
- Ask the expert how the complexity of the trust decision factored into their opinion re capacity.

Pitfall 5: Not the Man He Used to be Fallacy

- A significant decline in daily functioning should not be misconstrued as evidence of testamentary incapacity.
- The bar for testamentary capacity is relatively low in CA, and does not require full cognitive capacity in most individuals.
- The question is not the extent to which an individual has cognitively declined, but whether they retain enough cognitive functioning to satisfy the legal standards for capacity.
- The test for capacity is not whether you are at 100% of your normal cognitive capacity but whether your capacity is sufficient to meet the legal standard for the act in question. In regard to cognitive functioning, the higher IQ you are the more room for cognitive decline there is before incapacity occurs.

Example: Consider a woman who was once a CEO of a Fortune 500 company but currently, as a result of dementia, cannot care independently for her basic needs. While she has undoubtedly declined significantly, she does not necessarily lack testamentary capacity.

Cross Examination Strategy

- Challenge experts who over-emphasize a decline in functioning as particularly relevant to capacity.
- Question if the expert considered premorbid cognitive capacity when determining the relevance of a decline in functioning.

Pitfall 6: Failure to Consider the Relevance of Delusions

- A will may be invalidated in most districts if the testator was suffering from "insane delusions." Nevertheless, most courts have held that the presence of insane delusions per se does not invalidate a trust or will.
- Psychiatric evaluators err if they conduct a single-step approach that determines whether a testator suffers from delusions and then conclude, based on delusions only, that an individual lacks testamentary capacity.
- A two-step process is required.
 - A) Does the testator suffers from delusions?
 - B) Did the delusions caused the testator to make the disputed changes in his will?

Pitfall 6: Failure to Consider the Relevance of Delusions

Case Example:

A testator may present with the delusional belief that the FBI is surveilling him because they falsely believe he is a Russian spy. This same individual chooses to give all money to charity while leaving none of his estate to his children. Should this decision be based on the delusional belief that leaving the estate to his children would place them in grave danger because the FBI would then believe the children were also Russian spies, the testator would likely lack testamentary capacity. Alternatively, should the testator choose not to leave his children his estate because they never visited him, in a line of thinking unrelated to his delusional beliefs, then the presence of delusions would not cause him to lack capacity.

Cross Examination Strategy

- Challenge the expert to specifically describe how the delusions or hallucinations did or did not influence the testamentary decision.

Thank you for the Opportunity to Present

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