Forensic Evaluations: Testamentary Capacity

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This article focuses primarily on the issues facing a psychiatrist who has been retained as an expert witness in a will or trust contest involving claims of a lack of capacity.

As the US geriatric population grows and more than a trillion dollars are expected to pass from the elderly to their heirs, psychiatrists are increasingly asked to render opinions regarding an elder's mental capacity to engage in self-care and legal decisions. This article focuses primarily on the issues facing a psychiatrist who has been retained as an expert witness in a will or trust contest involving claims of a lack of capacity.



© **Lightspring/Shutterstock** Clinicians who are considering the possibility of performing forensic psychiatric evaluations should first read the American Academy of Psychiatry and the Law's Practice Guideline for the Forensic Assessment, published this year. The guideline provides detailed introductions to numerous topics that may be different in forensic settings than in clinical situations, including:

- Ethical considerations
- Performing assessments for criminal versus civil matters with notes regarding working within various special situations and challenging assessments
- Recording interviews
- The importance of extended information gathering
- Use of collateral information
- Use and limitations of physical examination, imaging, and adjunctive testing
- Performing assessments without an interview and when such assessments are permitted
- The role and limitations of mental status examinations
- The role and limitations of DSM vs International Classification of Diseases and Related Health Problems diagnoses
- Disclosure of information
- Presentation of findings and expert opinions

As stated in the Practice Guideline:

Forensic psychiatrists have a unique role. They must step outside of the usual parameters of the confidential physician-patient relationship in a variety of ways, providing information about the evaluee to lawyers or courts, maintaining a neutral attitude toward the evaluee interview, investigating the evaluee's account through other interviews and reports, recording interviews, and referring the evaluee to colleagues for needed treatment to avoid conflict of interest. The expert thus must tread a fine line between referring agent and the evaluee, seeking to answer the psychological question as objectively as possible.¹

Types of evaluations

Assuming a psychiatrist agrees to act as an expert in a legal setting, there are 2 general types of testamentary capacity examinations: a contemporaneous examination and a historical reconstruction.

CASE VIGNETTE 1:

Contemporaneous Evaluation

An attorney calls you and says, "My client, Mr Smith, wants to change his will and trust, but he has a difficult family and I expect that his wife and one of his children will contest the changes after he

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dies. Would you be willing to evaluate him before he executes several new documents and write a report stating whe- ther you think he has—or lacks—the requisite mental capacity?"

"Lack of capacity" is commonly alleged in order to set aside a will, but will contests are often difficult to win because of the low legal thresholds set for testamentary capacity. However, when testamentary documents include changes from historical patterns, such as disinheriting a child or suddenly including an organization or religious institution that had never been included before, the disappointed heirs may seek to have the document invalidated. Because of this, careful attorneys will involve a psychiatrist at the time of the drafting and execution of testamentary documents, especially if the client, or testator, intends to make gifts to someone outside of his or her close family or intends to completely eliminate one or more family members. The need for this psychiatric evaluation increases depending on the client's age and mental condition and anticipated acrimony in the family. If testamentary documents are contested, most judges or juries are required to consider the time period as close to the actual execution as possible. As such, an assessment done on the same day or the same week as the execution could be persuasive.

To have the requisite capacity to execute a testamentary document in most jurisdictions, the testator must:

- Know the natural objects of one's bounty (that is, the members of the family who would most typically expect to inherit)
- Know—or have a general understanding of—the nature and extent of the testator's property
- Be able to form a rational plan for the disposition of the property

This is known as the Greenwood-Baker rule and is the standard measure of testamentary capacity in the US. The rule derives from 2 English cases, *Greenwood v Greenwood* (1790) and *Harwood v Baker* (1826), and was originally intended to clarify situations involving elderly testators. Every state has its own case law on the topic, but almost all can be reduced to a variation of the Greenwood-Baker rule.²

"Knowing the natural objects of one's bounty" may seem straightforward; but some complexities may arise depending on the jurisdiction and the degree to which the term "know" may be open to interpretation. In general, courts consider that a testator "knows the natural objects of his bounty" if the testator has an understanding of the basic relationship between himself and the other person (eg, "My child's name is . . ."). Some courts are more restrictive and require that the testator understand the duties arising from those familial relationships. Most courts, however, are more lenient and require only evidence that the testator recalls his relatives (with or without recognition).

CASE VIGNETTE 1 CONT'D

On review of the medical records and examination, you learn that Mr Smith is 85 years old with a history of coronary artery disease, atrial fibrillation, and a left-sided stroke 1 year earlier with mild residual paralysis of his right leg. His mental status examination is unremarkable, and neuropsychological tests show no cognitive deficits.

Mr Smith tells you that he is married to Laurie and has a son (Michael) and a daughter (Michelle). He has no other family. The attorney confirms this information.

A testator does not need to be able to describe his assets in order to fulfill the criteria of "knowing the nature and extent of the testator's property." A general understanding is usually sufficient. Many people will not know the specific value of their estate; therefore, it is important for the psychiatrist to confirm whatever information is provided by the testator—to the extent that such confirmatory information is available.

CASE VIGNETTE 1 CONT'D

Mr Smith says he owns a corporation that has several holdings, including a manufacturing plant, golf course, and several business properties. He also has multiple brokerage accounts, multiple savings and checking accounts, and safe deposit boxes. In addition, he owns multiple houses in different states. He does not know the exact value but thinks it is "about \$150 to \$200 million if you include everything." The attorney says that the fluctuating real estate values affect the overall worth of Mr Smith's holdings but thinks the estimate is reasonable.

For most jurisdictions, the criterion "be able to form a rational plan for the disposition of the property" means assessing the testator's reasoning and ruling out the possibility that the testamentary decisions are the result of delusions. Note that testators may be delusional—as long as

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the delusions do not form the basis for the estate planning decisions. "Overvalued" ideations—in contrast to delusions—should also be assessed, but the evaluator must always remember that this element of testamentary capacity refers only to rationality, not reasonableness. Disagreeing with a testator's decisions does not mean that those decisions are irrational.

To complicate matters, some jurisdictions interpret this criterion to be a more general assessment of the testator's motivations. In those jurisdictions, a finding of undue influence may be used to show that this criterion is not met and therefore the testator, by definition, lacked testamentary capacity. It is important to note that psychiatric evaluations of "undue influence" involve much more than a capacity assessment.

Finally, some jurisdictions re-word this element to some variation of "understanding the legal significance of the testamentary act." This requires a more specific and precise psychiatric assessment than the other, more common versions.

CASE VIGNETTE 1 CONT'D

Mr Smith tells you that he plans to bequeath the majority of his estate to charity; part to his employees and partners, who he says "really made the company a success"; and part to his family. Regarding his family, Mr Smith says he always planned to give each of his children \$1 million. He thought this was sufficient, given that they are adults who should be able to take care of themselves. He also says he planned to leave \$2 million for his wife, in addition to their house.

He wants to make changes to his will and trust, however, because of events that occurred in the past 5 years. Mr Smith says that his son, Michael, borrowed \$1 million for a business venture and has not repaid the loan. "I'm not going to make him re-pay the loan, but the way I see it, he has already gotten his inheritance," says Mr Smith. Regarding his wife, Mr Smith states, "She and I have not gotten along for years. She moved out 5 years ago and is living in one of our houses. When I had my stroke, she tried to have me declared incompetent, and when that didn't work, she withdrew nearly \$2 million from our joint accounts and moved it into one of her own accounts. As far as I'm concerned, I don't want to give her any more money."

Based on all the above information, you conclude that Mr Smith has testamentary capacity. You discuss your findings with the attorney, who asks you to write your report, and then has Mr Smith execute the will and trust changes.

A contemporaneous evaluation is usually optimal. The psychiatrist has the opportunity to actually meet the testator and form his or her own impressions regarding the testator, his values, motives, etc. Unfortunately, for a variety of reasons, the drafting attorney may not be able to involve the psychiatrist before the documents are drafted and executed.

CASE VIGNETTE 1 CONT'D

The same attorney calls you 2 years later and requests a mental capacity examination of Mr Smith once again. Since you last saw him, Mr Smith divorced his wife and had another stroke. He is currently dating a woman several decades younger than he is, whom he wants to include in his new estate plans.

On examination, Mr Smith has mild to moderate executive dysfunction and memory impairment. His ability to focus and pay attention is clearly impaired, and he recalls approximately half of a short paragraph after reading it. Nonetheless, he tells you the approximate value of his assets and the natural objects of his bounty; and he says that the trust changes "are supposed to tell people what my wishes are and who will get my money when I die, I guess." There is no evidence of delusion affecting his decisions.

The attorney confirms Mr Smith's estimate of the value of his assets. His new estate plan calls for dividing portions of his companies among a dozen different beneficiaries and charities. The changes include considerations of the tax implications for each beneficiary and potential alternative bequests in the event the value of individual assets markedly differs by the time of his death. The new estate plans, with supporting documents, run more than 300 pages.

Mr Smith is cognitively impaired, and although he may meet the minimal requirements for testamentary capacity, he cannot understand the complexities of the new estate plan. You discuss your concerns with the attorney and his client. They agree with the analysis, and the attorney adds that having a complicated estate plan would invite litigation, which would decrease the estate and enrich the litigators. The estate plan is re-formulated into something the client is clearly able to understand and recall.

Mr Smith dies several years later, and his will and trust are not contested. His final wishes are carried

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out just as he wanted.

CASE VIGNETTE 2:

Historical Reconstruction

It is September 2013 and you receive a telephone call from an attorney who wants to hire you to consult—and possibly testify—on a case. A daughter claims that her mother (the decedent) had impaired cognition since 2004 and that her brother financially exploited her. The decedent had \$6 to \$8 million in assets. The daughter claims that her brother engaged in elder abuse, undue influence, and financial exploitation of an incompetent adult.

The son co-owned multiple businesses with his mother. In 2007, she executed a health care power of attorney, which he used in 2010 or 2011 when his mother had (reportedly transient) cognitive problems. The mother died 3 months ago, but there are numerous medical records available for review. A settlement hearing is scheduled within the next few weeks and a trial in 4 months. Three days (minimum) out-of-state travel will be necessary for examination and also for the trial. The attorney asks about your background and your fees to review documents, consult with him, and testify. You ask for information to conduct a conflicts check (names of all parties, attorneys and their law firms, and deadlines/trial dates) and offer to speak with him to get more details once the conflicts check clears. The attorney says he does not want to divulge the names of the parties unless the case does not settle, but he wants to discuss the claims and "hear how you would go about countering those accusations."

What do you do? Be wary; the attorney is hoping that sharing limited information will cause the psychiatrist to provide free training, insight, or other work. (Whereas the goal of forensic psychiatric assessment should involve seeking the truth of the matter, the goal for an attorney is to provide the best possible argument to advocate for his client.) Tell the attorney that you cannot discuss the case in detail until first confirming there is no conflict of interest, then review the relevant records and applicable legal standards.

Historical reconstruction is difficult to do properly under the best of circumstances, but it is a common situation for forensic evaluators. The patient is either not available for interview and evaluation—or conditions have changed so much that a current examination is not representative of the patient's cognitive abilities and psychological state at the time in question. This means that the evaluator has to perform an assessment based on collateral information, which makes these cases document intensive. Much time is needed to obtain the available records, review them, and summarize the often conflicting information and observations contained therein.

It is important to become familiar with the typical types of records, documents, and testimony that play a role in this type of litigation, and specifically ask for them. At a minimum, the psychiatrist should ask to review medical records, psychological test results, any existing collateral sources of information such as affidavits and depositions, personal notes and diaries, adult protective services reports, police reports, and email or text communications.

In addition, the psychiatric expert has to consider the quality of information contained in the records. Some guidelines to consider:

- 1. Litigants and associated parties are motivated to obtain a particular legal outcome; therefore, information they provide should be considered suspect. They are more believable if their statements are corroborated by independent evidence or are against their self-interest.
- 2. Contemporaneous documentation of relevant behavior or situations is usually more reliable than later recall.
- 3. When evaluating information in medical records, consider whether the writer had relevant expertise; for example, an entry of "dementia" may reflect something different if the writer was a neurologist rather than an emergency department physician.
- 4. Try to find comparable descriptions of behavior and/or circumstances from multiple, independent sources. This is generally more reliable than information from a single source.

CASE VIGNETTE 2 CONT'D

The attorney sends no information and does not call again until June 2014. He says the matter did not settle and he is ready to hire you. The trial has been delayed until January 2015. You reply that you still need to perform the conflicts check and again request the necessary information. Two months later (August 2014), he sends an email saying he wants to hire you and finally sends the information needed for a conflicts check. The conflicts check clears, and you speak with him several days later. The scope of your work would be to assess the mental capacity of the decedent from 2006 through 2013 (she died in 2013 at age 85).

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After hearing the details of the case you determine that your expertise is appropriate, and that you would have access to all of the records. You send a contract and request several documents, including the initial pleadings from both sides, medical records, caregiver notes, and any available affidavits and depositions. He tells you there are no police reports or attending physician statements, but he will send the other documents right away. You receive scattered documents in September and every month thereafter, until your deposition is taken.

It is not unusual for will contests to drag on for many months or years, and the attorney's contact with the expert may seem erratic and incomplete. This may be annoying, baffling, and frequently inconvenient for the psychiatric expert. Because the expert's notes, reports, telephone and email messages, etc, are discoverable, many attorneys will ask that the expert keep minimal notes while reviewing records and not write a report until discussing the final analysis with him. When the records arrive sporadically over months, or sometimes years, it can become necessary to repeatedly review the earlier material in order to properly incorporate the new information.

CASE VIGNETTE 2 CONT'D

The matter involves a woman, her son, her daughter, and her son-in-law. The woman died in 2013 at the age of 85. Her daughter and son-in-law claim that she began having confusion, memory loss, and related symptoms in 2006. By 2013, her long-time internist noted that she had "severe dementia—probable Alzheimer vs vascular." A second internist diagnosed "severe Alzheimer dementia."

You are asked to evaluate her cognitive abilities during 3 separate periods: 2007: when she executed powers of attorney and trust amendments; 2009 to 2010: when the decedent combined many of her son's businesses with her own; and after 2010 until her death in 2013. She executed an additional trust amendment in February 2011 that bequeathed ownership of her businesses to her son. The majority of the damages alleged in this case occurred as a result of the business transactions and subsequent change in ownership. The son claims that his mother had adequate mental capacity at this time and had valid business reasons for her actions, and that all transactions were done with the input and oversight of independent business advisors and attorneys. You call the attorney to seek clarification because the case seems to involve the decedent's capacity to execute the power of attorney and business contracts in addition to trust amendments. Are there different standards, or are you to assess testamentary capacity only?

The ability to competently execute business contracts is called "contractual capacity," and it requires a higher degree of cognitive ability than that needed to make a will. In general, contractual capacity requires the ability to comprehend the nature and quality of the transaction, combined with an understanding of its significance and consequences—that is, the reciprocal obligations created by the contract. There is no uniform set of criteria to assess contractual capacity, and jurisdictional requirements can vary. The ability to execute powers of attorney is considered comparable to contractual capacity in some jurisdictions. It is important to ask for clarification in every case. Another common scenario is that the expert is asked to opine about an elder's competence when he or she gave a "gift" before dying. This type of competence is "donative capacity," and similar to contractual capacity, the standards for assessment may vary greatly between jurisdictions.

CASE VIGNETTE 2 CONT'D

The attorney says that you are to focus only on the decedent's capacity to execute the trust amendments. He also says he just received the report from the opposing expert and is sending it to you. The opposing expert is a well-known psychiatrist. He reviewed the medical records, observations of her behavior made by various laypeople, and various financial documents from the decedent, including her checkbook. He says he discounted everything except the medical records, because he believes that medical records are more objective and contemporaneous. He concludes that the decedent had dementia due to Alzheimer disease and that it was of mild severity from 2006 to 2009, moderate from 2009 to 2012, and severe after 2012. Furthermore, the decedent's executive function was "severely impaired," but he does not render an opinion as to her capacity to sign business documents or powers of attorney. He cites the following supportive evidence:

- In 2006, an internist noted that the decedent complained of new-onset occasional forgetfulness
- In 2009, the same internist wrote that he noticed some memory impairment
- The decedent scored 18/30 on a Mini-Mental State Examination (MMSE) in 2012, and 9/30 when retested 1 year later
- The 2013 diagnoses from the 2 internists (noted above)

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When reviewing reports from opposing experts, start by noting whether you have reviewed the same information. In this case, the opposing expert is correct that medical records are generally more objective and contemporaneous; however, he intentionally disregarded other sources of information instead of making the effort to consider their potential usefulness. Moreover, he makes the tacit, illogical assumption that medical personnel are more capable of recognizing cognitive dysfunction than laypeople. This belief is true sometimes, but there are many medical professionals who have little training or skill in the recognition of cognitive impairment. Important mild or subtle signs often go unrecognized by clinicians in non-mental health fields.

CASE VIGNETTE 2 CONT'D

You have been provided the same records as the opposing expert. Upon reviewing the medical records, you note some things that were missing from the opposing expert's report:

- **1** The 2006 note by the internist included a notation that there was no observable memory deficit. Furthermore, there are explicit notations throughout the remainder of 2006, and all of 2007 to 2008, that the decedent had no complaints or indications of memory problems. There is a note in 2008 stating that the patient "does not have memory problems."
- 2 There are no indications of any other type of cognitive impairment during the same period.
- **3** The decedent complained of vertigo in late 2007, and her physician ordered a magnetic resonance imaging scan. The scan showed "mild ventriculomegaly, mild prominence of the cortical sulci which is consistent with mild cortical neuronal volume loss." The radiologist concluded the scan was "normal for her age."
- **4** The 2009 note by the internist does not include any form of memory assessment or testing. Although the internist had seen the decedent frequently in 2009, there is no other notation of memory impairment. There is also no indication of other cognitive deficits at any time throughout that year.
- **5** In late 2010, her internist had suggested that the decedent consider taking either rivastigmine or donepezil. She refused. Subsequently, severe blockage of the right carotid artery was found. A brain computed tomography scan showed no pathological changes, and the radiologist concluded the scan was normal for her age.
- **6** The decedent underwent an endarterectomy and recovered uneventfully; there are no further indications of any cognitive impairment until late 2011, when memory deficits were noted. **7** By mid-2012, the internist diagnosed "mild dementia." An MMSE was performed, and the patient scored 18/30. She had memory, language, and visuospatial problems.
- **8** The decedent displayed severe and multiple cognitive impairments by mid-2013. A CT scan showed severe periventricular white matter ischemic changes, ventricular dilation, and atrophy. Based on the medical records, you conclude that the decedent did not have significant chronic cognitive problems until 2011, and her problems were likely due to vascular disease. You then review the rest of the available documents.

As you re-read the legal pleadings, you note that both sides agree that the decedent had maintained her own checkbook, without assistance from others, until 2013. When you look at the check registers, you see clear evidence of problems beginning in late 2012. However, entries from 2006 through 2011 are entered legibly, include explicit memos as to the nature of each check, and the arithmetic is flawless. You cannot draw conclusions from this, but it is consistent with the medical record.

You review the affidavits and depositions, and learn that the decedent had been highly active in her local community, in addition to being actively involved in the running of her businesses. She was observed at public government events, as well as business meetings, asking relevant technical questions and making appropriate comments and replies. Colleagues, attorneys, and business advisors all say she had no apparent cognitive or behavioral problems until late 2011 or early 2012. This is consistent with the other information available for your review.

Medical records emphasize information relevant to the diagnosis and treatment of a problem; however, they often do not do a thorough job of describing the patient's real-world functioning. In contrast, observations by laypeople tend to focus on the person's actual behavior. There are many limitations to lay observations, but nonetheless, they are often critical when performing forensic evaluations. In this case, multiple independent laypeople noted that Mrs Jones displayed appropriate—and sometimes sophisticated—cognition until late 2011 or early 2012.

CASE VIGNETTE 2 CONT'D

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You discuss your findings with the attorney—noting the limitations that arise when performing a retrospective analysis based only on record review—and ask if you can interview the medical personnel who had treated and/or evaluated the decedent. He thanks you for your preliminary findings and says he will try to arrange permission for you to conduct the interviews. The physicians refuse to speak with you.

It is sometimes helpful to interview medical personnel or lay witnesses in order to clarify the information they provided. If the retaining attorney agrees, try to schedule a telephone or in-person interview. Interviews with medical personnel may involve Health Insurance Portability and Accountability Act limitations. In those situations, have the attorney make the necessary arrangements.

Written reports are not always needed, or desired, in forensic evaluations. Most attorneys want to hear the expert's findings first and then decide whether to request a written report.

CASE VIGNETTE 2 CONT'D

After the opposing expert is deposed, the attorney says that he claimed that laypeople are unreliable, so their information should not impact his assessment, and the other medical information was "just not relevant for the diagnosis."

The lesson here is to be prepared to explain why your chosen methodology is better and why information dismissed by the other side is, nonetheless, important. Do not assume that the attorney, judge, or jury understands your reasoning. Be clear and concise. And do not—under any circumstances—engage in ad hominem attacks on the opposing expert.

CASE VIGNETTE 2 CONT'D

Your deposition is taken soon after, on a Friday. The following Tuesday, the attorney calls you to say that the case settled. The opposing side requested settlement discussions Friday night, but the attorney says he thinks your testimony had little impact. He believes they "just realized it wasn't worth fighting. My guy got most of what he wanted, and his sister got some of what she asked for. It wasn't a perfect solution, but these things rarely are."

The majority of these cases settle. Sometimes it is because of the expert's input, but often the reasons have nothing to do with the psychiatrist. Most of the time, however, the retaining attorney at least thanks the expert. The lesson from this case: do not expect gratitude, let alone fame, from your work.

Questions

These cases are often hotly contested, so even though most cases settle, the psychiatric expert should be prepared to respond to numerous questions from the retaining attorney, opposing counsel, or occasionally, the court (if the matter goes to trial). The following are some common general areas and questions you may be asked.

Your background. How/when did you become an expert in testamentary capacity evaluations? Who trained you? Was your work on these types of cases ever supervised? By whom? What training do you have regarding the testing that was done (if any)? How many cases have you worked on as a consultant? As a testifying expert? How many were for plaintiffs? How many for defense? (If there is a significant difference.) Why is there a difference? How much of your time is devoted to forensic cases? What do you charge for forensic work? (Forensic evaluations are not covered by health insurance.) How much for your clinical work? Why is it different?

Methodology. What method(s) do you use to evaluate these cases? Why? What are the limitations of these methods? (If testing is involved.) What are the limitations of the tests that were performed? Are these methods and tests generally accepted in the psychiatric community? Are there alternative methods or tests? If so, what are they? Why don't you use them? What did you review? Who did you speak to? When? Why did you talk to that person? Did you examine the person? Where? When? Did you make notes? Write a report? Who did you discuss your findings with? Did anyone else in your office have access to your files on this case? Who?

Findings. Did you consider all of the information? What information supports your conclusions? What information contradicts your findings? What other limitations are there on your findings? (For written reports.) Do you discuss the limitations of your analysis and findings in your report? Where?

Summary

Clinicians who are considering acting as experts in testamentary capacity cases need to be aware of

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the 4 main points covered in this article:

- 1. Forensic evaluation is different than clinical evaluation: there are different responsibilities, ethics, procedures, and liabilities.
- 2. The basic criteria to establish testamentary capacity arise from the Greenwood-Baker rule: know the natural objects of one's bounty; know the nature and extent of the testator's property; be able to form a rational plan for the disposition of the property. Each of these may have unique interpretations in different jurisdictions; therefore, it is important for the psychiatric expert to ask the retaining attorney to clarify the standard being used.
- 3. In general, there are 2 types of assessments involving testamentary capacity: contemporaneous assessment and historical reconstruction. Contemporaneous assessments usually require less time and are similar to traditional clinical examinations in that the psychiatrist is able to interview and examine the elder. Historical reconstruction relies heavily on collateral information, requires critical evaluation of the credibility and reliability of information sources, is document intensive, and takes much more time to perform.
- 4. Be prepared for intensive questioning and cross-examination.

Disclosures:

Dr Blum is Director of the Geriatric Division of Park Dietz and Associates, Inc, in Newport Beach, CA. He reports no conflicts of interest concerning the subject matter of this article.

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