

Legal Guidelines and Methods For Evaluating Capacity

by Richard F. Spiegle and Spencer J. Crona

This column is sponsored by the CBA Trust and Estate Law Section. The column focuses on trusts and estate law topics, including estate and trust planning and administration, elder law, probate litigation, guardianships and conservatorships, and tax planning.

This article presents information on modern clinical methods of assessing a person for purposes such as testamentary capacity or the need for assistance with personal care or financial management. Some methods of evaluating competency comport with recent developments in both statutory and case law.

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Concerns about an individual's testamentary, contractual, or functional capacity often create havoc within a family. Issues of competency may arise when a person is writing a will, making gifts or joint ownership arrangements, or attending to various estate planning matters. Such issues may arise after a person's death, typically when probate litigation is involved. The need to evaluate an individual's competency also may be an issue if a guardianship or conservatorship proceeding is being contemplated or is in place.

The terms "capacity" and "competency" have both legal and medical connotations, depending on the context in which they are used. Where mental and functional capabilities are concerned, "capacity" generally is a legal concept, while "competency" usually is a medical or clinical concept. Nonetheless, in this article, those terms are used interchangeably, except where explicitly distinguished.¹

This article reviews Colorado probate law pertinent to the issue of capacity. It addresses capacity in both the lifetime and testamentary contexts, as well as in areas of guardianships and conservatorships. How conditions affecting capacity might be evaluated and under what circumstances an evaluation may be needed are explored. The article also provides an overview and analysis of several methods used by clinicians and others in evaluating an individual's competency.

Testamentary Capacity

Under the Colorado and U.S. Constitutions and the Colorado Probate Code ("Code"), individuals have the right to dispose validly of their personal assets and property as they choose. Such decisions are not constrained by age or choice of beneficiary, as long as an individual is possessed of "sound mind."² Thus, a testator "may indulge his prejudice against his relations and in favor of strangers . . ." as desired.³

The capacity to contract, make a gift, or execute a will relates to the individual's legal abilities to make decisions about the management and disposition of his or her financial assets. These are specific instances of the capacity to care for one's property, and assessing such capacities accordingly may require specialized methods, as described in this article.

Unfortunately, the evaluation of a person's testamentary capacity, which can apply where people choose estate planning through various instruments as alternatives to wills, often is done post-mortem. Commonly, this is accomplished through review of medical records that may leave many unanswered—and perhaps unanswerable—questions. In such cases, a forensic evaluator may be asked to opine retrospectively about the individual's competency on the basis of medical records, other records, documents written by the deceased, recollections of friends or associates, and the circum-

stances of execution of the instrument in question.

Postmortem forensic evaluation of testator capacity frequently becomes a complex aspect of contentious and costly estate litigation, perhaps fostering the observation, "A will is a terrible thing to waste." When a court invalidates a will, that will amounts to a direful waste of a precious opportunity to establish and enforce a person's last wishes. For those who choose instead, for whatever personal reasons, to err on the side of caution, the best way to protect against family misunderstanding, diagnostic ambivalence, and a potentially acrimonious will dispute is to engage a trained and experienced forensic examiner to evaluate the testator for the purpose of a determination as to his or her testamentary capacity.

Testamentary Requirements

The act of making a valid will requires relatively basic mental ability and can be a straightforward task when properly handled. At minimum, the Code mandates that a testator may write a valid holographic will, provided that "material portions" are rendered in the testator's handwriting and the testator signs it.⁴ Other provisions of the Code describe the features of those instruments that may be deemed "writings intended as wills,"⁵ while still others prescribe the elements of a will presumptively valid on its face, without evidence extrinsic to the instrument itself.⁶ All of those methods of expressing testamentary intent depend for validity on the overriding prerequisite that the testator must be age 18 or older and possessed of sound mind.⁷

The Colorado Supreme Court addressed the definition of a "sound mind" in the context of testamentary capacity in an important 2000 case, *Breeden v. Stone (In re Estate of Breeden)*.⁸ In that opinion, the Court addressed two standards for the legal determination of sound mind, known as the "Cunningham Test"⁹ and the "Insane Delusion Test."¹⁰ The *Cunningham* Test standard for sound mind comprises five elements. The testator must: (1) understand the nature of his or her act in making a will; (2) know the extent of his or her property; (3) understand the proposed testamentary disposition (how the will would dispose of that property); (4) know the "natural objects of his or her bounty"¹¹ (the testator's natural heirs); and (5) understand that the will represents his or her wishes.

The Insane Delusion Test might be described as a "negative" standard—what

"sound mind" for testamentary purposes is *not*. This test refers to "a persistent belief" that materially affects the preparation or dispositions of the will, "in that which has no existence in fact and which is adhered to against all evidence."¹² Thus, even a considerable degree of eccentricity does not necessarily indicate that the testator is incapacitated for testamentary purposes. Likewise, a testator's delusions do not contradict testamentary capacity if they do not affect how he or she disposes of property by will.

The Colorado Supreme Court concluded that the two standards for determining sound mind were not mutually exclusive. The *Cunningham* Test applied, for example, to cases where pervasive mental illness, cognitive or physical infirmity, or dementia affected the making of the will. The Insane Delusion Test applied, for example, to cases where paranoid or schizophrenic delusions affected the making of the will. Influence of prescribed or illicit medications might play into the factual circumstances for application of either standard. Thus, in *Breeden*, the Colorado Supreme Court enunciated the consolidated rule that sound mind "includes the presence of the *Cunningham* factors and the absence of insane delusions that materially affect the will. . . ."¹³ (*Emphasis in original.*)

The Code confers a presumption of validity on a will prepared and executed within statutory norms, either by compliance with the "self-proved" will statute¹⁴ or by proofs of writings and due execution as an intended will or holographic will.¹⁵ Consequently, a disappointed (legitimately or not) heir or beneficiary can challenge a will chiefly on the ground that the testator lacked testamentary capacity at the time of the making of the will, as a result of an identifiable cognitive or physical disorder. Alternatively, an heir or beneficiary can challenge a will on the ground that the testator was extraordinarily susceptible to duress or deception and was impelled by such "undue influence" or fraud at the time of execution of the will.¹⁶

Notably, proponents of a will bear the burden of establishing *prima facie* proof of due execution, while contestants of a will bear the burden of proof as to lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.¹⁷ Accordingly, the issue of sound mind can be raised in either the context of testamentary capacity or susceptibility to exploitation, but more than mere identification of a mental disorder is required to invalidate a will.

Mental illness alone is not equivalent to testamentary incapacity. A person with a mental-illness diagnosis may make a valid contract or a testamentary instrument, as may an individual addicted to narcotics or alcohol, or even an individual who at the time of execution of the will is emotionally overwrought and has a history of substance abuse.¹⁸ However, a conclusion that such maladies did not in fact affect the instrument in question might be the outcome of protracted and expensive litigation.

Such litigation over the issues of sound mind or undue influence likely would include discovery of estate-planning counsel's file and conversations with the client, based on the testamentary-intent exception to the rule that the attorney-client privilege survives the death of the client.¹⁹ The rationale for that exception is that it furthers the policy interest in effectuation of the testator's true testamentary intent,²⁰ which is one of the fundamental purposes of the Code.²¹

Incapacity in Conservatorship and Guardianship Contexts

A time may come in a person's life when he or she is no longer capable of self-care. The person might become confused about what comes into the home through the mail. He or she might forget when to take prescription medications or may be unsafe in the home. The person might need the assistance of a court-appointed guardian or conservator, regardless of whether he or she desires such appointment.

Guardianship generally is the court process for appointment of a person responsible for the management of another's personal care, including decision-making about place of residence and health care. Conservatorship generally is the court process for appointment of a person responsible for the management of another's financial interests, including decision-making about how property and liquid assets are to be apportioned among personal needs and investments. In various, statutorily prescribed ways, guardians and conservators are accountable for their conduct to the persons for whom they are appointed and to the court.

There are different standards for evaluating a potentially "incapacitated person" outside the testamentary scenario. As the result of statutory enactments effective as recently as January 2001,²² there are more stringent legal requirements for finding that an incapacitated person needs ap-

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pointment of a guardian or conservator. For example, a doctor's scrawl of a brief note on a prescription pad stating that an individual is not competent or needs a guardian will not be sufficient. As described in the Code, the evaluator must specify the details sufficiently to reveal the individual's functional strengths and weaknesses with respect to the activities of daily living to determine whether he or she is

... unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonable available technological assistance.²³

In an adult guardianship or conservatorship proceeding, one of the court's objectives is to determine the degree of discrepancy between the person's abilities and his or her situational demands. The abilities perceived as necessary to care for property depend on the size, type, and complexity of the estate. The inability to manage one's estate often exists not because of changes in the elderly or infirm person's functioning, but because of changes in property or income, to which the person might not have the capacity to adjust. In some such cases, in consideration of the person's discrete abilities, a limited guardianship or conservatorship may be more appropriate than an all-or-nothing conceptualization of incompetence.

Indeed, Colorado's Uniform Guardianship and Protective Proceedings Act ("CUGPPA"),²⁴ effective January 1, 2001, reflects that emphasis on "tailoring" the limited appointment to the individual's circumstances.²⁵ The CUGPPA sets forth a pragmatic definition of incapacity as the basis for guardianship and conservatorship proceedings. It contains a narrower, yet more comprehensive, definition of "incapacitated person" compared to the definition of testamentary capacity.²⁶

The CUGPPA emerged, in part, from a re-emphasis on the preservation of individual rights and the concomitant conception of an unlimited guardianship or conservatorship as a last resort. The CUGPPA favors limited appointments, whenever possible, and places the burden of proof on the petitioner to show substantive need for unlimited authority. Further, the CUGPPA fortifies due-process safeguards, such as the rights to counsel, an independent professional evaluation, and appearance at the hearing.²⁷

Perhaps most significant, the CUGPPA statutory scheme requires evaluation of specific *functional* aspects of capacity and provides for the court-ordered evaluation of mental and physical condition, educational potential, adaptive behavior, prognosis for improvement, and recommendations for rehabilitation. The law mandates qualifications for such an evaluator. He or she must be "a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment."²⁸ The CUGPPA effectively declares that the global opinions of health care providers, family members, and others are inadequate for this objective.²⁹

In keeping with the limited conservatorship or guardianship concept as the "least restrictive alternative," the court will order only those powers made necessary by the individual's limitations and demonstrated needs, and for which appropriate technological assistance cannot compensate.³⁰ In summary, the CUGPPA mandates a comprehensive and careful approach to assessment of incapacity, based on an individual's day-to-day functional abilities and limitations pertinent to the specific capacity in question.

Methods of Evaluating Competency

Professionals in the field have not established universal guidelines for when and how a forensic examiner should conduct an assessment for competency. One well-known forensic psychologist expressed:

The construct of incompetency to care for self and/or property is not merely a question of the absolute level of functional deficit caused by physical or mental disability. The individual's capacities must also be described and considered in relation to the demands of living arrangements and personal financial circumstances.³¹

In the case of a proceeding or litigation involving a guardianship and conservatorship, the specific circumstances of the case should dictate the method of assessment. Ideally, a forensically trained mental health professional should conduct some form of assessment at the time of execution of a will, perhaps as part of a general medical evaluation. Especially in the context of a large or complex estate, the assessment should address any questions of capacity at the time of execution, or in consideration of reasonable suspicion that a will contest will ensue on the death of the testator.

Traditionally, professionals have evaluated competency or capacity by one or more of the following methods: (1) physician report based on global impressions derived from formal diagnosis or observation of the individual in the office setting; (2) self-report of the individual of his or her own abilities; (3) reports setting forth observations by family, friends, or caretakers of the individual's day-to-day functioning in his or her own environment; and (4) evaluation of cognitive functioning through tests administered by a clinician.

Each of these methods provides important data. At the same time, all of these methods may be subject to bias or substantial limitations in scope when used as the sole source of information on which conclusions as to competency are drawn. Following is a description of tests that commonly are used to assess an individual's cognitive mental status and skills in daily living (from least to most elaborate), as well as an analysis of some of the shortcomings of these tests.³²

Mini-Mental State Examination

A method some evaluators frequently use to measure an individual's cognitive mental status is the Mini-Mental State Examination ("MMSE"),³³ a standardized and scorable version of the well-known Mental Status Examination.³⁴ The MMSE, which measures cognitive functioning, is popular because of its ease and brevity (administration and scoring take about fifteen minutes), suitability for office use, quantification of test results based on population norms, and usability without extensive training. It should be noted, however, that the authors of the MMSE indicate that the test should be properly administered by an examiner well-versed in test administration and interpretation.³⁵

Format and Administration: The MMSE consists of eleven questions that are used to assess such cognitive functions as orientation, learning and memory, attention, calculations, comprehension, reading, writing, and drawing. Prior to administering the test questions, the examiner is advised to note any physical or sensory impairments of the individual, such as arthritic hands or poor vision, that may negatively affect the individual's test performance or lead to invalid conclusions based on it. Similarly, the examiner rates the individual's level of consciousness on a four-point scale.

The *User's Guide* accompanying the MMSE provides the scoring criteria for the

eleven test questions. Depending on the question, each test response may earn between zero and five points. To illustrate, on the "Orientation To Time" question, the individual is asked to identify the year, season, month of the year, day of the week, and date of the month. Each of these aspects is scored zero or one, yielding a maximum of five for the question. It is obvious what a perfect answer would be—for instance, "2003, spring, May, Monday, the fifth of the month." With certain exceptions, any response divergent from this will lose points. A response identifying the day of the week as Friday or as the third of the month would lose one point each. In terms of the summary score, poor performance on a particular question may not result in a summary score suggesting impairment. That would depend on how the individual performs on the remainder of the items.

A summary score, which is the total of the scores on the eleven test questions, is used to identify cognitive impairment, if any. The summary score also is interpreted as a measure of the gross intactness (or lack thereof) of cognitive thought processes. The maximum possible summary score is thirty. As a general guideline, a summary score of twenty-three or less indicates a likelihood of cognitive impairment. Recommended cut-off scores for quantifying the severity of the impairment are provided in the *User's Guide*. Scores may be further evaluated using a table of norms presented as median scores on the MMSE relative to age and education.

Interpretation of MMSE: When it comes to scoring, the reason why a person answers questions incorrectly is not a significant consideration. However, when it comes to interpreting the score, the "why" can be important. For example, it is common for a person who is living in an institution to make errors regarding dates of the month or days of the week because his or her daily life is not organized around a predictable daily schedule. Similarly, an examinee can make such mistakes if he or she is experiencing side effects from medication.

Minor errors with respect to the day of the week or month are not of great concern when it comes to interpretation, although such responses still are scored as incorrect. Of greater concern would be a response indicating the year is 1958. An error of this type is more commonly associated with—although not determinative of—cognitive impairment. Further evaluation would be necessary to clarify the meaning of this kind of error.

As to the summary score, suppose an individual earns a score of twenty-six. This score is higher than the suggested cut-off score of twenty-three, which generally indicates cognitive impairment. According to the *User's Guide*, a score of twenty-three qualifies as a likely indicator of "mild" cognitive impairment. Considering the norms relative to age and education, a summary score of twenty-six is the median score for an individual between the ages of 30 and 34 with less than or equal to a fourth grade education.³⁶ Under this set of circumstances, a professional would be less likely to view such an individual as "mildly cognitively impaired," based on MMSE scores.

Issues Involving MMSE and Competency: Overall, there are some assessment situations where the MMSE can be quite appropriate and useful. However, with respect to using the MMSE as a measure of competency, several problems exist. Because the MMSE allows one question to measure each cognitive function, this test provides only a cursory assessment. In addition, the MMSE frequently erroneously overlooks instances of true impairment.

The MMSE screens *cognitive processing* rather than the multiple, specific day-to-day functional abilities that pertain to competency in both the practical and legal sense. Thus, an individual who scores in the impaired range on the MMSE may be competent, for example, to execute a legally valid will. Likewise, the opposite is sometimes encountered where the individual shows no sign of impairment on the MMSE but is not competent to execute a valid will, perhaps because of a delusion directly related to his or her property or potential heirs.

Accordingly, when used as a measure of competency, the summary score on the MMSE encourages all-or-nothing conclusions as to incompetence. This is inconsistent with current legal and clinical standards. The developers of the MMSE have stated that its primary use is as a screening tool for deciding when referral for more comprehensive evaluation is appropriate.

Other Psychological Tests

Evaluators have used IQ tests, diagnostic inventories, neuropsychological assessments, and other psychological tests to

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make inferences as to competence in daily living. Formal tests such as these tend to yield a formal but global diagnosis, such as intellectual impairment, cognitive impairment, or mental illness. However, a diagnosis indicating illness or disorder is not synonymous with incapacity. Similarly, it does not necessarily present an accurate picture of a person's functionality on a day-to-day basis, ability to care for basic needs, or capacity to execute a will.

The evaluator making such a formal diagnosis should assess further how such an illness affects an individual on a day-to-day basis. In particular, the evaluator would examine skills or tasks of concern. In a legal proceeding, such analysis would take place in reference to the relevant legal standard.

Activities of Daily Living and Independent Living Scales

Current standards of assessing competency, as recommended by psychologists and other forensic examiners, have developed parallel to and are consonant with Colorado law. The concept of competency as an "either-or" characteristic is rejected in favor of the view that there are multiple, discrete competencies in reference to specific tasks of daily living. Many professionals refer to this concept as "functional competence." It encompasses the discrete, practical skills involved in self-care, managing one's own property and personal affairs, and living independently. Professionals characterize these skills or abilities as activities of daily living ("ADLs") and define them in reference to the environmental or situational demands faced by the individual being evaluated.

After an evaluator identifies any limitations or mismatches between abilities and life circumstances, he or she can determine if the limitations are remediable and whether adaptations are available that may compensate for the limitations. The emphasis of the evaluation is on direct, objective observation and measurement of the individual's ability to function in daily life (that is, can attend to his or her ADLs) in the home environment.

This detailed assessment of ADLs is a particularly relevant, if not a necessary, part of the process to determine the need for guardianship or conservatorship. However, ADL assessment is too elaborate and unnecessary in the determination of testamentary capacity.

Methods of Assessing ADLs: Researchers have developed structured checklists and other methods of evaluation

that can identify discrete, practical skills necessary to daily living.³⁷ These checklists usually are administered and interpreted by a mental health professional or other health care specialist. Each skill is rated as to adequacy based on one or more sources of information, which may or may not include observation of the individual in the home setting.

A variety of tests and measurements are available for the assessment of ADLs; they are uniform in terms of the specific ADLs assessed, as reflected in the following categories. Each measures the multiple discrete skills constituting that category:

- Sensory-motor functioning
- Memory
- Money management
- Home management
- Use of transportation
- Health and safety
- Social adjustment
- Problem-solving ability
- Ability to learn new tasks.

The ILS Test: Sophisticated tests designed to assess ADLs are available that meet psychometric standards: standardization, validity and reliability of data, and appropriate normative data. For example, the Independent Living Scales ("ILS") is a test that is administered by a qualified mental health specialist or forensic examiner.³⁸ The ILS is an objective, individually administered test developed to assess the essential abilities associated with caring for oneself and/or managing one's property—in other words, for managing day-to-day life independently. The evaluation is based on direct observation of the individual's functioning in a structured group of activities that require problem-solving, specific knowledge, and performance of actual tasks.

Results on the ILS can be helpful in determining the most appropriate living situation and assessing the ability for a person to care for self and manage his or her financial matters, personal property, and personal affairs. The ILS has a long history of sophisticated research development with community populations.³⁹ Rather than rendering a conclusion of competence or incompetence, the ILS provides an overview of a person's strengths, as well as weaknesses. Therefore, the evaluator can use the test results to help identify support services, adaptations, and potential for rehabilitation that will enable the individual to function as independently as possible.

Because this test is designed to assess an individual's ADLs, taking into account the individual's current circumstances and

environmental demands, it has a history of excellent reliability in all domains of functional competence. It adds the dimension of comprehensiveness unavailable in, for example, intelligence testing or neuropsychological testing. Similarly, the ILS provides an assessment that is more objective than a self-report or the report of family or caregivers.

Format and Administration: The ILS begins with a brief, structured preliminary screening of basic sensory-motor functions (vision, hearing, speech, reading, writing, and mobility) that could influence responses to the test questions. The ILS then is administered. It consists of seventy items across five subscales: Memory/Orientation, Managing Money, Managing Home and Transportation, Health and Safety, and Social Adjustment. The ILS takes approximately forty-five minutes to administer, although this can vary considerably, depending on the individual's level of functioning. The evaluator most likely will administer the test in one session, usually in the individual's current living situation. The test administrator will need additional time to complete a statistical interpretation.

The ILS results provide an overall score, the five individual subscale scores, and scores on two factors that cut across the subscales: (1) Performance/Information, which reflects the ability to learn new tasks or information; and (2) Problem-Solving, which reflects the ability to apply this new knowledge. The lengthy accompanying *Manual* and *Stimulus Book*⁴⁰ provide detailed instructions on administration, scoring, and interpretation.

The ILS subscales have an average of fourteen items each (the range is from eight to twenty items). For most items, test responses may earn from zero to two points, depending on the quality of the response, thereby allowing some credit for partially correct answers. Item scores are added up to provide raw scores for each individual scale or factor, and then totaled for the raw Full Scale Score. These scores then are converted to statistically derived standard scores, using tabular data in the *Manual*. Finally, the scores are compared to community-based norms and plotted on a graph.

A profile is generated, providing a graphic display of the individual's strengths and weaknesses. It allows for inferences about overall functioning, as well as about each of the individual domains of functioning (the five subscales and two factors described above). Using the cut-off scores

provided, functioning in each of the domains can be categorized as low, moderate, or high.

To illustrate item content and scoring using one of the subscales, Managing Money includes such items as asking the individual to demonstrate counting money, writing a valid and accurate check, computing change from a purchase, explaining the purpose of a will, and describing Social Security benefits. On another item, which asks the individual to calculate what would be owed on a medical bill considering a certain percentage of co-payment, the person obtains a two-point score for the precisely correct answer, a one-point score on correctly framing the problem although unable to compute it mentally due to over-reliance on a calculator, or a zero-point score if unable to do either of the above.

ILS as Method of Evaluating Competence: As a method of evaluation, the ILS is sufficiently consonant with current legal standards of competency that it almost appears they had developed in concert. For example, an individual so evaluated can be overall moderately to highly functioning, yet have a significant weak-

ness in an area that might pertain to competency, might be remediable or transient, or might be irrelevant when considered in view of the circumstances or demands of the individual's current living situation.

Subscale scores identify the domain of functioning that is difficult for the individual, such as the Managing Home and Transportation subscale, while responses to individual test questions can pinpoint that with which the individual has particular difficulty—for instance, he or she understands how to make calls on the telephone but not how to use public transportation). Conversely, the individual might score in the low functioning range overall, but might be high functioning in the area of concern, such as the Managing Money subscale. This level of detail is helpful in designing any needed assistance or adaptation.

Regarding methods for evaluating competence, the ADL assessment, such as provided by the ILS, is crucial. However, the assessment typically should be done in the context of a comprehensive evaluation that includes a clinical and diagnostic interview, mental status exam, review of medical and other records, and input from such collat-

eral sources as family and caregivers. Additional formal psychological testing may be included, if indicated.

Conclusion

Competency evaluations can be important to transactional validity in a variety of testamentary, contractual, donative, and personal or financial care situations. In view of developments in the law over the past three years, competency evaluations have become more conducive to the aim of protecting a person's true wishes for disposition of his or her assets. The requirement that guardian-conservator intervention should narrowly address the person's actual needs for outside assistance and care also is important. In many instances, trouble may be avoided by enlisting the services of a forensic evaluator to apply modern, functionally-oriented methods as a precautionary measure during estate planning and related legal matters.

NOTES

1. See CRS § 15-14-401 regarding standards for a court-ordered conservatorship; CRS §§ 15-14-102(5) and 15-14-311 for court-imposed



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guardianship standards; CRS § 15-11-501 regarding testamentary capacity.

2. CRS § 15-11-501.
3. *Lehman v. Lindemeyer*, 48 Colo. 305, 109 P. 956 (1910).
4. CRS § 15-11-502. *See also* Tucker, Swank, and Hill, "Holographic and Nonconforming Wills: Dispensing With Formalities—Part I," 31 *The Colorado Lawyer* 57 (Dec. 2002); "Part II," 32 *The Colorado Lawyer* 53 (Jan. 2003).
5. CRS § 15-11-503.
6. CRS § 15-11-504.
7. CRS § 15-11-501.
8. *Breeden*, 992 P.2d 1167 (Colo. 2000).
9. *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953).
10. *Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946).
11. *Lehman*, *supra*, note 3.
12. *Breeden*, *supra*, note 8; *see also* *Hanks*, *supra*, note 10.
13. *Breeden*, *supra*, note 8.
14. CRS § 15-11-504.
15. CRS § 15-11-503; *see, e.g.*, *Matter of Grobman's Estate*, 635 P.2d 231 (Colo.App. 1981).
16. *See* CJI 4th 34:14. *See also* *Gehm v. Brown*, 245 P.2d 865 (Colo. 1952) (where beneficiary of a will at time of preparation and execution was in confidential or fiduciary relationship with testator and actively involved in execution or preparation of will, law presumes that procured by undue influence); *Blackman v. Edsall*, 17 Colo.App. 429, 68 P. 790 (1902) (proof of undue influence typically must be made by circumstantial evidence).
17. CRS § 15-12-407.
18. *See, e.g.*, *Hanks*, *supra*, note 10; *Breeden*, *supra*, note 8.
19. *See Wesp v. Everson*, 33 P.3d 191 (Colo. 2001), *citing* affirmation of testamentary exception enunciated in *Swidler & Berlin and James Hamilton v. U.S.*, 524 U.S. 399 (1998). *See also* *In re Estate of Shapter*, 35 Colo. 578, 85 P. 688 (1905) (attorney may testify about testator's estate-planning instructions); *Denver Nat'l Bank v. McLagan*, 298 P.2d 386 (Colo. 1956) (attorney may testify after client's death about communications with client related to execution and validity of will).
20. *Swidler*; *supra*, note 19, *citing* *Glover v. Patten*, 165 U.S. 394, 17 S.Ct. 411, 41 L.Ed. 760 (1897).

21. CRS § 15-10-102(2)(b).

22. *See* Glatstein *et al.*, "Highlights of Colorado's New Guardianship and Conservatorship Laws," 30 *The Colorado Lawyer* 5 (Jan. 2001).

23. CRS § 15-14-102(5).

24. CRS §§ 15-14-101 *et seq.*, -201 *et seq.*, -301 *et seq.*, and -401 *et seq.*

25. *See, e.g.*, CRS §§ 15-14-304(2)(h) and -403 (3)(c), requiring affirmative showing to the court of why a limited, as opposed to an unlimited, appointment of guardian or conservator, is "inappropriate."

26. *Breeden*, *supra*, note 8.

27. *See, e.g.*, CRS § 15-14-308.

28. CRS § 15-14-306(1).

29. CRS § 15-14-306.

30. CRS §§ 15-14-102(5) and -401(1)(b)(I).

31. Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (New York, NY: Plenum Press, 1986).

32. The tests described in this article are not the only methods available to evaluate competency. *See, e.g.*, Williams *et al.*, *Assessment of Living Skills and Resources* (ALSAR, 1991); Gurland *et al.*, *Comprehensive Assessment and Referral Evaluation* (CARE, 1977); McCue, Rogers, and Goldstein, *Performance Assessment of Self-Care Skills* (PASS, 1990); and Mahurin, DeBettignies, and Pirozzolo, *Structured Assessment of Independent Living Skills* (SAILS, 1991). *See also* Pierce, *Adult Adaptive Behavior Scale Manual of Directions* (Togus, ME: AFABS, 1989).

33. Folstein, Folstein, and McHugh, *Mini-Mental State Examination (MMSE)* (Odessa, FL: PAR Psychological Assessment Resources, Inc., 2001).

34. The Mental Status Examination is an assessment of a person's overall mental functioning. It may be either a formal evaluation or a brief assessment.

35. *Id.*

36. *MMSE User's Guide*, *supra*, note 33.

37. Loeb, *Independent Living Scales* (San Antonio, TX: The Psychological Corp., Harcourt Brace & Co., 1996).

38. *Id.*

39. *Id.*

40. *Id.* The *ILS Stimulus Book* is used by the examinee throughout the ILS test. ■

DBA Legal Services Committee Seeks Spanish-Speaking Attorneys to Volunteer for Legal Clinics

The Denver Bar Association Legal Services Committee ("Committee"), whose mission is to help fulfill the legal information and education needs of the community, is seeking Spanish-speaking attorneys to donate two hours per month to assist at informational legal clinics in Denver, provided at no charge to the public. The Committee also needs attorneys who specialize in the practice of family law. For more information and to volunteer, contact Dave Ells, (303) 824-5323 or toll-free, in state: (800) 332-6736, or e-mail: dells@cobar.org; or Marte Timmers, Committee Co-Chair, at (303) 764-4014.