

Identifying Undue Influence

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David Godfrey, JD, Director ABA Commission on Law and Aging, Washington, DC

Sandra D. Glazier, Esq. Special Advisor to the ABA Commission on Law and Aging and Equity Shareholder of Lipson Neilson P.C.

ABA Commission on Law and Aging and Lipson Neilson

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons. The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

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Key Lessons

1. Undue influence is influence exerted that changes the will or choice of another person. It is often a factor in elder abuse or financial exploitation. An understanding of undue influence helps lawyers and other advocates identify undue influence, prevent it, and remedy it.
2. Undue influence is a viable cause of action in civil litigation and increasingly is included in state adult abuse codes. Undue influence can be used to set aside transactions and estate plans.
3. There are a variety of tools for screening for undue influence. Screening create an opportunity for prevention or intervention.

Overview

Undue influence is often a factor in financial exploitation and other forms of elder abuse. Undue influence exploits relationships, dependence, and cognitive differences to take advantage of another person. Not all influence is undue influence. Undue influence results in a loss for the person, such as a loss of property or social contact, for the benefit of a third party. With the compounding factors of a growing population of older adults, increased reliance on caregivers, and more people with neurocognitive decline, it is essential that attorneys and other advocates understand undue influence, screen for it, work to prevent it, and have a strategy for intervention should it occur.

Undue Influence Defined

Undue influence generally is not a single act. It is a process that:

- Exploits perceived or actual vulnerabilities of an adult;
- Is committed by a person in a position of control or authority;
- Is carried out to change the free will or informed consent of the adult; and
- Benefits a third party (often the influencer), with an outcome that is not aligned with the adult's true wishes and intent.

Undue influence is a possible cause of action in civil legal matters. It is a form of abuse recognized in some state adult abuse codes and may be a factor in a criminal case for abuse or exploitation. Undue influence is influence that destroys free agency and supplants one's will with that of another. At the most basic level, it is generally persuasion that abuses a relationship.

Example

An example of a clear state statutory definition can be found in California (Cal. Definition- Welf. & Inst. Code §15610.70) (a): *“Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:*

- The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.
- The influencer’s apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.
- The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
 - A. Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep.
 - B. Use of affection, intimidation, or coercion.
 - C. Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.
- The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.
 - » Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

Recognizing Risk Factors

Most definitions of undue influence recognize there is generally some element of vulnerability of the person being influenced that may put them at risk. Diminished capacity may be a factor, though it is important to note that the person must have the ability to make and communicate a choice for that choice to be influenced. A person with some cognitive impairment may be unduly influenced, but a person who lacks the capacity to understand the consequences of and make a choice cannot be unduly influenced.

Dependency can also be an important factor in determining if undue influence has occurred or is more likely to occur. Any condition that creates a reliance or dependency creates a higher risk of undue influence. Close personal or intimate relationships create potential for risk and vulnerability. But, often, vulnerability is enhanced by isolation (whether from meaningful relationships and contact with others and/or from pertinent

information). Individuals who commit undue influence (and other forms of abuse) often seek to isolate the person to create a dependency relationship and a false belief that the influencer is the only person who cares or is able to provide contact or help. Some risk is also created by a sense that the influencer has power over the person.

Position of Power or Authority

Many state definitions of undue influence require that the person exerting influence be in a position of power or authority. Authority may be actual or perceived. Close family or intimate relationships may create a position of power or authority. Anyone that the person is dependent on for care, safety, or security may be a person in a position of authority. Advisors such as a lawyer, health care provider, financial services provider, or spiritual advisor may be in positions of power or authority.

Actual authority may be legal, such as an agent on a power of attorney, a guardian or conservator, a trustee, or a representative payee. Additional people who may have authority include:

- Anyone who controls the person's finances.
- An immigration sponsor.
- Someone who controls housing, such as a landlord.
- A predatory salesperson.
- A person who has access or control of the person's possessions, finances, or private information.

Anything that causes a shift in the power equation can create a position of authority. Power can be created by family conflict, as well as fears or threats of abandonment or isolation. Often, the person in a position of power or authority is someone well known, but they may also be a recent contact such as an emergency service provider.

Capacity and Undue Influence

Diminished capacity is often a factor that can make an individual at risk of undue influence. For undue influence to apply, the person can have some degree of diminished capacity, but not a total lack of capacity. Capacity tends to be on a spectrum, as opposed to an on/off switch, and a full understanding of assessing and documenting capacity is necessary. NCLER's issue brief on [Assessing Legal Capacity](#) provides more guidance on this topic.

Screening Tools

California developed a comprehensive [undue influence screening tool](#) based on California law, for use by adult protective services. In a checklist format, it identifies factors that may indicate risk of undue influence, ways that the influencer may have power, authority, or control over the person, actions or tactics often utilized to change the free will or informed choice of the person, and a list of outcomes that may be indicative of undue influence. The tool can be customized to the law in other states and developed for use by other professionals, such as estate planning attorneys or health care providers.

Additional screening tools exist and some may require administration by a professional. Others are tools that may be indicative that a more thorough assessment may be merited. Some of those tools include the Financial Decision Tracker, Financial Vulnerability Assessment, and Family & Friends Interviews found at [Family & Friends Interview about an older adult's financial decisions](#). For professionals, other models such as the Undue Influence Wheel, SCAM, IDEAL, SODR, and factors outlined by Dr. Bennett Blum can be found in the ABA's Commission on Law and Aging publication "[Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists](#)."

While attorneys and financial advisors should not attempt to administer cognitive and psychological assessment tests, a knowledge of the factors addressed in those assessments can help advocates recognize “red flags” of which they may wish to be cognizant.

Prevention Strategies for Lawyers and Other Advocates

Lawyers, financial service providers, and other advocates play a key role in preventing or stopping undue influence.

It is important for advocates to always clearly identify who the client is and to meet with the client in private. That meeting has three goals: to assess the client’s understanding or capacity to understand; to determine the client’s wishes or goals; and to determine if their decisions are being influenced by others.

Screening for capacity is covered in detail in the NCLER issue brief “[Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach](#).” Some tips for advocates include:

- Start off with a few minutes of small talk to get to know the person.
- Ask questions and listen to the answers.
- Provide answers or information to the client and ask follow-up questions to assess their memory and understanding. If you have concerns about capacity, move through a structured assessment.
- Ask open ended questions about why the client has come to see you, who their historical advisors were, and why a change is occurring, if applicable.
- Determine who recommended you to the client and what they want you to help with.

Find out what they really want to do and what they are hoping for the outcome or goal of the work to be. If the client is accompanied by others or the appointment was made by a third party, most often this information will match (but not always), and when it does not match that is a warning that the client may be facing pressure by others to seek legal help. If the client has no idea why they are meeting with you, there may be either a capacity issue or undue influence.

In the interview, advocates should ascertain if the choices being made are those of the client and determine if anyone is asking them to make those choices. It is also helpful to ask if anyone has access to their money and property. Additional information to gather is to determine who lives with the client and if there is anyone who provides support or care. An advocate’s goal is to identify any persons in a position of power, authority, or control who may be trying to unduly influence the client.

If concerns arise, attorneys and advocates should discuss them with the client. If the concern is about capacity, advocates may check in with their client to verify that information and explanations are clear to them. This shifts the burden to the attorney to provide careful explanation.

If there are concerns about the reason, objectives, or goals of representation, advocates may honor what the client tells them. If concerns arise about undue influence, attorneys should openly discuss these concerns and assure the client of their role in directing services, but express to them when their choice may have negative consequences or outcomes. Not all influence is undue, so advocates should try to determine that the client is truly comfortable with the choice being made.

Documenting observations is important. Whenever practical and possible, sending documents to the client for review in advance of execution will allow them to carefully and thoroughly review the document and provide time for them to ask questions or raise concerns. Ultimately, if the client insists on a course of action that both the attorney and client agree is probably unwise, an attorney may consider withdrawing.

Use of Undue Influence in Litigation

Undue influence is a viable cause of action to set aside contracts, transactions, or estate plans. There is a [50 state survey of undue influence statutes and case law](#) from the ABA Commission on Law and Aging. The elements needed to establish undue influence vary from state to state, and undue influence cases are very fact and evidence heavy. Generally, to prevail, a party needs to show an ongoing pattern or relationship that results in overcoming the free will of the client. An alternative approach is to assert that there was a lack of capacity at the time the person “consented.” Lack of capacity at the moment of execution can be hard to prove. In litigation, attorneys are often trying to prove it with evidence available for a period before or after the time of execution.

Most state statutes define financial exploitation for adult protective services purposes. Increasingly, states are allowing a private civil action based on the definition of financial exploitation. Some financial exploitation cases are based on a fraud. Fraud requires an intentional misstatement, or withholding of material fact with the expectation that the person will rely on it to the benefit of the fraudster. Sometimes these causes of action overlap, with more than one theory applying to a particular event. Litigation to recover stolen assets is a growing area of practice. Attorneys who do not do this area of practice may help their client connect with someone who does.

Conclusion

Undue influence is influence by a person in a position of power, control, or authority over another person who is vulnerable in some way, which benefits a third party, most often the influencer. Undue influence is frequently used to commit financial exploitation. Lawyers, financial service providers, and other advocates play an important role in screening for undue influence and helping their clients avoid being taken advantage of by financial exploitation. Undue influence is a viable cause of action in the growing field of litigation to recover stolen assets as well as in attempting to implement the true intent of an individual in the disposition of their estate.

Additional Resources

- NCLER: [Elder Justice Toolkit](#)
- ABA Commission on Law and Aging: [Definitions of Undue Influence in Statute or Case Law](#)
- [Undue Influence and Vulnerable Adults](#), Sandra Glazier, Thomas Dixon, Thomas Sweeney, American Bar Association
- [National Center on Elder Abuse](#)
- Department of Justice: [Elder Justice Initiative](#)
- Department of Justice: [Civil and Criminal Statutes on Financial Exploitation](#)
- [Elder Justice Coordinating Council](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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