

Elder Abuse: The Impact of Undue Influence

ISSUE BRIEF • JUNE 2017

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The American Bar Association Commission on Law and Aging (ABA COLA) 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.

Introduction

Undue influence is a psychological process that may be used against an older person as a means of committing two forms of elder abuse: financial exploitation or sexual abuse. Undue influence is also a legal concept. Case law and statutes recognize that undue influence can undermine an individual's self-determination. Civil lawsuits may result in reversal of decisions made by the individual subjected to the influence. Legal and aging network services professionals can make a significant difference to clients who are vulnerable to or who may be experiencing undue influence by recognizing it, mitigating it, and remedying it. A new screening tool developed for California's Adult Protective Services (APS) staff may be useful to APS staff in other states, and also to legal and other aging network services professionals in all states.

Defining Undue Influence

Psychological definition

Psychologist Margaret Singer was one of the first researchers to connect elder abuse to undue influence, which she defined as “(w)hen people use their role and power to exploit the trust, dependency, and fear of others. They use this power to deceptively gain control over the decision making of the second person.”¹ The psychological tactics of undue influence have been likened to tactics used by cults, in brainwashing, by sexual abusers who “groom” their victims, and by perpetrators of domestic violence.

Legal definitions

In the context of elder abuse, the types of decisions that may be controlled through undue influence include financial transactions and consent to sexual activity. In other words, undue influence may be used to commit financial exploitation or sexual abuse.

Both the federal Older Americans Act (OAA) and Elder Justice Act (EJA) define “exploitation” or “financial exploitation” as “the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an [older individual][elder] for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets.”²

The OAA and the EJA define “abuse” as “the knowing infliction of physical or psychological harm or

the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.”³ This definition of abuse encompasses sexual abuse.

These are national, general definitions. Your state likely has different definitions of exploitation/financial exploitation or sexual abuse. If your state has case law or statutes that define undue influence, it is also likely that any definitions will differ from Dr. Singer’s. Research on state laws indicates that most statutes governing probate and APS laws fail to define undue influence clearly or at all, and that most statutory definitions of the concept can be found in state business codes.⁴

Who commits undue influence

The psychological definition of undue influence implies that the influencer is someone the older adult knows and with whom the older adult already has a relationship of trust or who intentionally develops and then takes advantage of a relationship of trust with the older adult. The term “relationship of trust” is commonly used to describe the relationship an older adult has with intimate partners, relatives, paid or unpaid caregivers, friends, neighbors, clergy, and fiduciaries such as agents under a power of attorney, trustees, guardians, or conservators. The nature of the relationship between the alleged influencer and the alleged victim is, generally, crucial to assessing and proving whether undue influence has occurred.

Key Concepts for Understanding Undue Influence

Vulnerability to undue influence

Any adult—even one who has decision-making capacity—can be a victim of undue influence. Certain conditions or situations can increase vulnerability, however. These may include but are not limited to: bereavement, cognitive impairments, dependence on others, diminished capacity, fearfulness, illness, isolation, loneliness, and substance abuse.

Capacity

The standard of capacity for legal transactions varies with the nature of the transaction. For example, the standard of capacity for making a will is lower than the standard of capacity for entering into a contract. State laws establish standards for determining whether diminished capacity necessitates the court appointment of a guardian or conservator.

Consent

The standard of consent for decisions also varies with the nature of the decision. Generally, to give legal consent an individual must (a) have decision-making capacity, (b) have knowledge of the true nature of the action, and (c) act freely and voluntarily. Individuals subject to undue influence, however, experience deceptive control and manipulation of their decision-making that prevents them from understanding the true nature of the action and from acting freely and voluntarily.

Recognizing, Preventing, and Mitigating Undue Influence

Victim identification with influencer

As a result of this deceptive control and manipulation, a person subjected to undue influence will rarely understand what is happening and will very likely identify with—and may even seek to protect—the influencer. This dynamic has significant implications to lawyers, APS staff, aging network service providers, law enforcement officers, and others who interact with older adults who may be experiencing undue influence. The tactics and process of undue influence may seem obvious to someone who understands the phenomenon and is scrutinizing the totality of the circumstances retrospectively, but they can be far more difficult to detect as they transpire.

Prevention

Legal and aging network services professionals can help prevent undue influence. Prevention activities include educating older adults and other professionals about undue influence and its signs through presentations and materials; counseling clients about vulnerability; and recommending that clients remain socially active to the extent possible, as isolation and loneliness greatly increase vulnerability to undue influence.

Detection

For many years, the ABA Commission on Law and Aging has urged lawyers to screen all older adults for elder abuse during initial interviews (“universal screening”), whether by telephone or in-person. Learning about risk factors and indicators of undue influence is necessary to screen effectively and provide competent services. Concerns about possible undue influence should affect a lawyer’s determination of who is the client, how to communicate with the client, and what advice and counsel should be provided. Case law recognizes that a key factor in assessing undue influence is whether the alleged victim truly had independent counsel.

Protection

Bearing in mind the earlier caution that a victim of undue influence may side with and even protect the influencer, legal steps to prevent or mitigate undue influence may include limiting the use of joint bank accounts; including oversight provisions in powers of attorney, supported decision-making agreements, or trusts; revising or revoking existing legal documents; obtaining an annulment, separation, or divorce; obtaining a protection order; bringing eviction or other removal proceedings against an influencer; petitioning for, opposing, limiting, or terminating appointment of a guardian or conservator; mental health commitment; habeas corpus.

Redress

Actions to remedy undue influence may include seeking accountings and recovering assets by rescinding transfers or voiding documents.

California’s New Undue Influence Screening Tool for Adult Protective Services

Development of a statutory definition

A team of California experts on elder abuse and undue influence received support from the Borchard Foundation Center on Law and Aging to conduct two projects. In the first, the team examined the literature on undue influence as well as the statutory definitions (but not the case law) of undue influence in all fifty states. That study served as the foundation for California’s 2014 enactment of a new statutory definition of undue influence for its Probate Code and also its Welfare & Institutions Code governing APS programs: “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.”⁵ The law also *requires judges to consider* (emphasis added) four elements in cases alleging undue influence: “vulnerability of the victim,” “influencers’ apparent authority,” “actions or tactics used by the influencer,” and “equity of the result” and provides examples for each element; however, the law provides that “evidence of an inequitable result, without more, is not sufficient to prove elder abuse.”⁶

Development of a screening tool

In the second project, the team built on the first and the new statutory language to draft, conduct APS focus groups and pilot tests, obtain expert review of, refine, and publish a screening tool for California’s APS staff. The tool, named the California Undue Influence Screening Tool (CUIST), is five pages, with an additional page of instructions for completing it. The tool guides the user in identifying examples or indicators of the four elements listed earlier, and allows room for the user to add examples or comments. It does not currently provide scoring or weighting of those examples.

The project team suggests that CUIST offers the following benefits: “(1) creating a common language and approach to undue influence for legal practitioners and community-based organizations for enhanced communication, (2) assisting APS personnel to more clearly identify undue influence processes with their clients, and (3) providing a screening tool for practitioners other than APS.”⁷

Conclusion

Undue influence is a psychological process intended to manipulate and control a person’s decision-making. The law recognizes the process as undermining self-determination and, under certain circumstances set forth in case law or statute, legal documents or transactions made by a subject of undue influence may be voided. Undue influence is difficult to detect as it transpires, and persons subject to it often fail to recognize that it is occurring and side with the influencers, posing challenges to civil lawyers, APS and aging network providers, and law enforcement officers and prosecutors who seek to help the influenced person or to hold influencers accountable. Learning the signs of undue influence can help lawyers and other professionals to competently and safely provide services. The new California Undue Influence Screening Tool seems likely to be very useful not only to California’s APS professionals—for whom it was developed—but also for lawyers and other professionals in California and across the United States.

Additional Resources

- Lori Stiegel, lori.stiegel@americanbar.org
- Mary Joy Quinn, maryjoyquinn@gmail.com
- Additional Key Resources on Undue Influence
 - » Sally M. Wagley, *Maine’s Improvident Transfers Act: A Unique Approach to Protecting Exploited Elders*, 36 *Bifocal* 1 (Oct. 2014), americanbar.org/publications/bifocal/vol_36/issue_1_october2014/maines_improvident_transfers_act.html
 - » CUIST: California Undue Influence Screening Tool (May 16, 2016), elderjusticecal.org/docs/UI_screening_tool.pdf
 - » Instructions for Completing California Undue Influence Screening Tool (CUIST), elderjusticecal.org/docs/CUIST_instructions.pdf (last visited 5/31/17).
 - » Mary Joy Quinn, Lisa Nerenberg, Adria E. Navarro, Kathleen H. Wilber & Jeanine Yonashiro-Cho, *Developing an Undue Influence Screening Tool for Adult Protective Services: Final Report to the Borchard Foundation Center on Law and Aging*, (May 27, 2016), elderjusticecal.org/docs/developing_UI.pdf
 - » Bonnie Brandl, Candace J. Heisler, & Lori A. Stiegel, *The Parallels Between Undue Influence, Domestic Violence, Stalking, and Assault*, 17(3) *J Elder Abuse Negl.*, 37 (2005).
 - » Mary Joy Quinn, *Undoing Undue Influence*, 24 *Generations* 65 (2000).
 - » The Bernatz SCAM Model, bernatzexperts.com/areas-of-expertise/scam%E2%84%A2-model (last visited 5/31/17).
 - » Bennett Blum, *Undue influence-Behavioral Models*, bennettblummd.com/undue_influence_models.html (last visited 5/31/17).
- Key Statutes Governing Elder Abuse
 - » Elder Justice Act, 42 U.S.C. § 1397j *et seq.* and 42 U.S.C. § 1320b-25
 - » Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 *et seq.*
 - » State Adult Protective Services Laws

- Key Federal Agencies Addressing Elder Abuse
 - » Administration for Community Living, U.S. Department of Health and Human Services, [acl.gov](https://www.acl.gov)
 - » Consumer Financial Protection Bureau, [consumerfinance.gov/older-americans](https://www.consumerfinance.gov/older-americans)
 - » U.S. Department of Justice
 - » Elder Justice Initiative, [justice.gov/elderjustice](https://www.justice.gov/elderjustice)
 - » National Institute of Justice, [nij.gov/topics/crime/elder-abuse/pages/welcome.aspx](https://www.nij.gov/topics/crime/elder-abuse/pages/welcome.aspx)
 - » Office for Victims of Crime, [ojp.usdoj.gov/ovc](https://www.ojp.usdoj.gov/ovc)
 - » Office on Violence Against Women, [justice.gov/ovw](https://www.justice.gov/ovw)
- Select National Entities Providing Additional Resources
 - » American Bar Association Commission on Law and Aging, [americanbar.org/aging](https://www.americanbar.org/aging)
 - » National Center on Elder Abuse, [ncea.acl.gov](https://www.ncea.acl.gov)

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

This Issue Brief was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.

Endnotes

- 1 Hornswoggled: *An Interview with Margaret Singer on Undue Influence*, 2(1) Nexus (March 1996), [preventelderabuse.org/nexus/singer.html](https://www.preventelderabuse.org/nexus/singer.html) (last accessed 5-30-17).
- 2 Older Americans Act of 1965, as amended, 42 U.S.C. 3002(18)(A), Elder Justice Act, 42 U.S.C. § 1397j(8)
- 3 Older Americans Act of 1965, as amended, 42 U.S.C. 3002(1), Elder Justice Act, 42 U.S.C. § 1397j(1)
- 4 Mary Joy Quinn, Eileen Goldman, Lisa Nerenberg, & Deana Piazza, *Undue Influence: Definitions and Applications*, (March 2010), [courts.ca.gov/documents/UndueInfluence.pdf](https://www.courts.ca.gov/documents/UndueInfluence.pdf); Lori Stiegel & Ellen Klem, *Undue Influence: Context, Provisions, and Citations in Adult Protective Services Laws, by State* [americanbar.org/content/dam/aba/administrative/law_aging/Undue_Influence_Context_Provisions_and_Citations_Chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/Undue_Influence_Context_Provisions_and_Citations_Chart.authcheckdam.pdf) (last visited 5/31/17).
- 5 California Prob. Code § 86; California Welf. & Inst. Code § 15610.70
- 6 California Welf. & Inst. Code § 15610.70
- 7 Mary Joy Quinn, Lisa Nerenberg, Adria E. Navarro, & Kathleen H. Wilber, *Developing an Undue Influence Screening Tool for Adult Protective Services*, 29(2-3) J Elder Abuse Negl. 157, 160 (2017).