

Advanced Elder Abuse: The Impact of Undue Influence

LORI A. STIEGEL, SENIOR ATTORNEY, AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, WASHINGTON, DC

MARY JOY QUINN, DIRECTOR (RET.), PROBATE, SAN FRANCISCO SUPERIOR COURT, SAN FRANCISCO, CALIFORNIA

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American Bar Association Commission on Law and Aging

The American Bar Association 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.

Introduction

1. Undue influence is a psychological process that may be used to commit two forms of elder abuse: financial exploitation or sexual abuse.
2. Undue influence is also a legal concept. It undermines self-determination and may justify reversal of decisions made by the victim.
3. Legal and aging network services can make a significant difference to clients vulnerable to or experiencing undue influence by recognizing, mitigating, and remedying it.
4. A new screening tool developed for California's Adult Protective Services (APS) staff may be useful to APS in other states, and to legal and aging network services professionals in all states.

Section 1

DEFINING UNDUE INFLUENCE

Section 1

Dr. Margaret Singer's Psychological Definition of Undue Influence

1. Use of power and control
2. Exploit trust, dependency and fear
3. Substitution of one person's will for the true desires of another
4. Purpose: deceptively gaining control

Section 1 (continued)

Undue Influence is a Method for Committing:

- Financial exploitation
- Sexual abuse

Psychological Tactics of Undue Influence are Comparable to:

- Cults
- Brainwashing, e.g., as in hostage or prisoner of war situations
- Domestic violence dynamics
- Grooming for sexual abuse

Section 1 (continued)

Legal Definitions of Undue Influence

- Federal laws – Elder Justice Act and Older Americans Act – do not define undue influence or include the term in their definitions of financial exploitation or abuse
- State statutes that may define undue influence or include it as part of another definition:
 - APS
 - Business
 - Probate
- State courts commonly define undue influence in wills and other property transfer cases

Section 1 (continued)

Possible Perpetrators of Undue Influence:

- Family members, trusted friends, or others
- Caregivers
- Fiduciary gained elder's trust/confidence
- Opportunists, e.g., “new best friend,” telemarketers
- Career criminals

Section 2

KEY CONCEPTS OF UNDUE INFLUENCE

Section 2

Anyone – even someone with capacity – can be a victim of undue influence

Vulnerability is enhanced by:

- Bereavement
- Cognitive impairment
- Dependence on others
- Diminished capacity
- Fearfulness
- Illness
- Loneliness
- Substance abuse

Section 2 (continued)

Adults' right of self-determination may be undermined by:

- Incapacity
- Undue influence

Generally, to give legal consent an individual must :

- Have decision-making capacity
- Have knowledge of true nature of act
- Act freely and voluntarily

Deceptive control and manipulation exerted through undue influence prevent the subject from knowing the true nature of the act and from acting freely and voluntarily

Section 3

RECOGNIZING, PREVENTING, AND MITIGATING UNDUE INFLUENCE

Section 3

Recognizing Undue Influence

- Usually a long-term process
- Pattern of tactics akin to cults, brainwashing, domestic violence, & grooming for sexual abuse
- More than persuasion, high-pressure salesmanship, fraud, misrepresentation
- Means to an end: financial exploitation or sexual abuse
- Can happen to an adult who has capacity, but diminished capacity enhances vulnerability
- Victim usually doesn't recognize what is happening
- Victim often identifies with perpetrator

Section 3 (continued)

Prevention

- Provide public and professional education
- Counsel clients
- Recommend steps to diminish vulnerability

Detection

- Learn about vulnerability and indicators
- Conduct universal screening
- Carefully assess who is client and to whom ethical duties are owed

Section 3 (continued)

Protection

- Recommend steps to prevent an influencer from exerting legal control or to break the influencer's control:
 - Limitations on joint bank accounts;
 - Oversight provisions in powers of attorney, supported decision-making agreements, trusts;
 - Revising or revoking existing documents;
 - Obtaining an annulment, separation, or divorce;
 - Obtaining a protection order;
 - Evicting or removing the influencer from the victim's home;
 - Seeking, opposing, limiting, or terminating guardianship or conservatorship; mental health commitment; habeas corpus.

Redress

- Obtaining accountings
- Recover assets by rescinding transfers or voiding documents

Section 4

CALIFORNIA'S NEW UNDUE INFLUENCE SCREENING TOOL FOR APS

Section 4

Mary Joy Quinn, Eileen Goldman, Lisa Nerenberg, & Deana Piazza, *Undue Influence: Definitions and Applications*, (March 2010), <http://www.courts.ca.gov/documents/UndueInfluence.pdf>

- Funded by the Borchard Foundation Center on Law and Aging
- Several elements
 - Conservatorship case reviews (25)
 - Review of California statutory law and case law
 - Review of other state laws on undue influence
 - Literature review of social services literature
 - Focus groups of professionals

Section 4 (continued)

Common Characteristics Between the Psychological and Legal Perspectives

- Victim characteristics
- Influencers' power
- Improper actions or tactics
- Unfair, improper, “unnatural” or unethical transactions or outcomes

Section 4 (continued)

California's legislature established a new definition of undue influence in 2014

- “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.”
- The definition is provided in Probate Code §86 and in Welfare and Institutions Code §15610.70.

Section 4 (continued)

The California law requires judges to consider four elements in cases alleging undue influence and provides examples of each:

- “Vulnerability of the victim”
- “Influencers’ apparent authority”
- “Actions or tactics used by the influencer”
- “Equity of the result”

The law provides that “evidence of an inequitable result, without more, is not sufficient to prove elder abuse.”

Section 4 (continued)

Reasons for developing the California Undue Influence Screening Tool (CUIST) for APS:

1. The 2010 study calls attention to the need for a screening tool,
2. The 2014 legislation made it feasible, and
3. APS sees the most undue influence cases.

Section 4 (continued)

Steps in Developing CUIST:

- Conducting four focus groups with APS personnel
- Reviewing literature
- Drafting undue influence tool
- Field-testing draft tool with APS
- Reviewing draft tool by experts
- Creating CUIST with Instructions

Section 4 (continued)

APS Field-Testing of the Draft Tool

- Asked Focus Groups participants to complete the draft tool
- Nineteen people could potentially complete the survey: they had caseloads
- Of that number 58% (n=11) completed the survey for a total of 15 cases
- Provided comments

Section 4 (continued)

The CUIST

- Guides the user in identifying examples or indicators of the four elements in the law
- Allows room for the user to add examples or comments
- Does not currently provide scoring or weighting of those examples
- Is accompanied by a page of instructions

Section 4 (continued)

California Undue Influence Screening Tool (CUIST)¹

Client's Name: _____

Date: _____

The purpose of CUIST is to aid Adult Protective Service personnel screen for suspected undue influence. 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.² CUIST is divided four categories: Client Vulnerability, Influencer's Authority/Power, Actions/Tactics, and Unfair/Improper Outcomes. Check all the factors that apply to the victim's circumstances and provide examples. For more details and examples, see *Instructions for Completing California Undue Influence Screening Tool (CUIST)*.

Client's Vulnerability	Examples/ Comments
<ul style="list-style-type: none"> <input type="checkbox"/> Poor or declining health or physical disability <input type="checkbox"/> Depends on others for help or care <input type="checkbox"/> Problems with hearing, vision, or speaking <input type="checkbox"/> Problems with memory <input type="checkbox"/> Problems communicating and understanding <input type="checkbox"/> Does not understand consequences of decisions <input type="checkbox"/> Developmental disability <input type="checkbox"/> Dependent or passive behavior <input type="checkbox"/> Emotional distress (e.g., grief, anxiety, fear, depression) <input type="checkbox"/> Language/literacy barriers <input type="checkbox"/> Isolated from others <input type="checkbox"/> Lives in chaotic or dysfunctional environment <input type="checkbox"/> Influencer knew or should have known of person's vulnerability <input type="checkbox"/> Other (please specify) _____ <input type="checkbox"/> No apparent vulnerability 	

Section 4 (continued)

Actions or Tactics	Examples/ Comments
<ul style="list-style-type: none"> <input type="checkbox"/> Manipulates or controls the client's access to food, sleep, medication or personal care <input type="checkbox"/> Makes promises to help the client get rich <input type="checkbox"/> Makes false claims or promises, or misrepresents self (e.g. claims to be an expert) <input type="checkbox"/> Professionals or paid caregivers involve clients in their personal lives or ask for gifts/loans <input type="checkbox"/> Controls access to information <input type="checkbox"/> Isolates from visitors, telephone/computer, or mail <input type="checkbox"/> Instills distrust and fear (e.g., nursing home placement, abandonment, threats of violence, "poisons relationships") <input type="checkbox"/> Moves into client's residence or changes their residence <input type="checkbox"/> Changes clients's usual providers (e.g. physicians, lawyers, bankers, accountants) <input type="checkbox"/> Makes frequent/repeated requests that benefit the influencer <input type="checkbox"/> Pressures during periods of distress, illness, transition <input type="checkbox"/> Uses affection, sex, intimidation or coercion <input type="checkbox"/> Rushes client to make decisions secretly and at inappropriate times and places <input type="checkbox"/> Solicits or encourages gifts, loans, bequests, or cash <input type="checkbox"/> Other (Please specify) _____ <input type="checkbox"/> No apparent use of actions or tactics described above 	

Section 4 (continued)

The CUIST offers the following benefits:

1. Enhances communication by creating a common language and approach to undue influence for legal practitioners and community-based organizations
2. Assists APS personnel to more clearly identify undue influence processes with their clients
3. Provides a screening tool for practitioners in addition to APS

Conclusion

- Undue influence is a psychological process to manipulate and control a person's decision-making.
- Undue influence undermines self-determination and may provide legal justification for voiding documents or transactions.
- Undue influence is difficult to detect as it transpires, and persons subject to it often side with the influencers.
- Learning the signs of undue influence is crucial to competently and safely provide services.
- The new California Undue Influence Screening Tool will likely be useful to APS, lawyers, and other professionals – in California and other states.

Additional Resources

Lori Stiegel, lori.stiegel@americanbar.org

Mary Joy Quinn, maryjoyquinn@gmail.com

Key Resources on Undue Influence

- CUIST: California Undue Influence Screening Tool (May 16, 2016), http://www.elderjusticecal.org/docs/UI_screening_tool.pdf
- Instructions for Completing California Undue Influence Screening Tool (CUIST), http://www.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), http://www.elderjusticecal.org/docs/developing_UI.pdf
- Sally M. Wagley, *Maine's Improvident Transfers Act: A Unique Approach to Protecting Exploited Elders*, 36 *Bifocal* 1 (Oct. 2014), https://www.americanbar.org/publications/bifocal/vol_36/issue_1_october2014/maines_improvident_transfers_act.html
- 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).

Additional Resources (continued)

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

Select National Entities Providing Additional Resources

- American Bar Association Commission on Law and Aging www.americanbar.org/aging
- National Center on Elder Abuse www.ncea.acl.gov

Additional Resources (continued)

Key Federal Agencies Addressing Elder Abuse

- Administration for Community Living, U.S. Department of Health and Human Services www.aoa.acl.gov
- Consumer Financial Protection Bureau www.consumerfinance.gov/older-americans
- U.S. Department of Justice
 - Elder Justice Initiative www.justice.gov/elderjustice
 - National Institute of Justice www.nij.gov/topics/crime/elder-abuse/pages/welcome.aspx
 - Office for Victims of Crime www.ojp.usdoj.gov/ovc
 - Office on Violence Against Women www.justice.gov/ovw

Case Consultation

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact the National Center on Law and Elder Rights (NCLER) at NCLER@JusticeinAging.org