

VII. Undue Influence

To this point, the handbook has focused on a conceptual framework and assessment tools for understanding decisional capacity. Psychologists working with older adults may come across a related but distinct area of law, that of undue influence. In Chapter 2, relevant legal definitions are given to describe undue influence. The goal of the current chapter is to review critical elements of the legal definitions, further describe the dynamic of undue influence, introduce clinical frameworks for thinking about undue influence, provide suggestions for assessment, and give a clinical case example. It should be noted that little empirical research exists to guide clinicians in their assessment of undue influence. At present a number of theoretical frameworks are used to understand undue influence and to present the data in court. We will begin by briefly reviewing relevant legal definitions.

Legal Standards of Undue Influence

The *Restatement of Contracts*, an authoritative secondary legal source, defines undue influence as follows:

Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare (“Restatement (Second) of Contracts,” 1981).

The doctrine is akin to doctrines of fraud and duress and may be alleged in legal transactions, such as executing a will, entering a contract, or conveying property to another, as well as cases of financial abuse, sexual abuse, and even homicide. Other definitions stress the psychological component of undue influence, the intentional and improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective.

Consent to a contract, transaction, or relationship, or to conduct, is voidable if the

consent is obtained through undue influence (Black’s Law Dictionary, 2004). While diminished capacity may make one more vulnerable to undue influence, it is not a necessary component of the dynamic. Therefore, undue influence can be present even when the victim clearly possesses mental capacity. Much of the law of undue influence is forged in state-specific case law that exhibits a great deal of variability in defining undue influence, so the law of each state must be consulted.

Evaluations to examine the potential presence of undue influence require knowledge of several concepts:

Capacity: Broadly refers to an individual’s ability to receive and evaluate information and make and express a decision.

Financial Exploitation: A type of elder abuse, involving the improper use or theft of another’s assets.

Undue Influence: When exploiters, whether family, acquaintances, or strangers, use their power to *deceptively* gain control over the decision making of a victim. Often involves financial exploitation.

Undue Influence in Relationships Based on Trust and Confidence

Keeping in mind the wide variability across states, courts often require two elements to be proven in a case of undue influence involving a contract: (1) a special relationship between the parties based on confidence and trust; and (2) intentional and improper influence or persuasion of the weaker party by the stronger.

Psychologists performing assessments of undue influence must therefore determine if a confidential relationship exists that would provide the opportunity for undue influence to occur. More descriptively, undue influence occurs when a person uses his or her role and power to exploit the trust, dependency, and fear of another. Perpetrators of undue influence use

this power to deceptively gain control over the decision making of the second person (Singer, 1993). Psychologists working with the older adults on cases regarding financial capacity need to be knowledgeable about undue influence and integrate that knowledge into every stage of the assessment process.

Psychological Frameworks for Understanding Undue Influence

Undue influence is an emerging area of study for psychologists and, to date, there is little published research to draw upon. Here we introduce several models, but draw upon common elements in our discussion. We present four models that have been used to understand undue influence in older adults. Margaret Singer, PhD, an early noted expert in this field originally developed her model regarding undue influence out of her work with cult victims. Subsequent clinical models, such as the Brandle/Heisler/Steigel Model, Blum's "IDEAL" model, and Bernatz's "SCAM" model draw heavily on the work of Singer and her collaborator, Abraham Nievod, PhD, JD.

Singer's framework emphasized social influence conditions that the suspect crafts unknowingly to the victim. These conditions included creating isolation, fostering a siege mentality, inducing dependency, promoting a sense of powerlessness, manipulating fears and vulnerabilities, and keeping the victim unaware and uninformed.

Undue Influence "IDEAL" Protocol
Isolation
Dependency
Emotional manipulation and/or
Exploitation of a vulnerability
Acquiescence; and
Loss

Bennett Blum, MD, a psychiatrist, expanded on Singer's model to create a model to understand undue influence emphasizing the

social conditions prevalent in cases of undue influence situations. Dr. Blum's "IDEAL" model is organized around five main categorical headings and several subdivisions. These headings include isolation from family and friends; dependency on the perpetrator; emotional manipulation of the victim; acquiescence of the victim due to the previous factors; and financial loss. Dr. Blum created a practical and qualitative tool, the "Undue Influence Worksheet," used by some lawyers, court investigators, law enforcement personnel and adult protective services workers. The Blum Worksheet is essentially a data collection tool, organized around the five main categorical headings and several subdivisions. Its aim is to help clarify for the user whether excessive manipulation is present. The data then must be evaluated in light of local statutes and case law defining undue influence.

A third clinical framework has been developed by clinical and forensic psychologist Susan I. Bernatz, PhD. The "SCAM" model builds on Singer's and Blum's work in which social influence conditions are emphasized, yet also includes factors that contribute to the victim's "susceptibility" and addresses the perpetrators "active procurement" of the legal or financial transaction(s). The "SCAM" model views undue influence as an inter-relational concept between the victim and the perpetrator and incorporates four main categories that include: susceptibility factors of the victim; a confidential and trusting relationship between the victim and perpetrator; active procurement of the legal and financial transactions by the perpetrator; and, monetary loss of the victim. There are additional subcategories for susceptibility and confidential relationship. Additional factors that fall under the susceptibility category include: medical and psychological factors that contribute to impaired cognition and lack of capacity of the victim; dependency on the perpetrator, which is often a by-product of impaired functional ability and capacity of the victim; isolation of the victim, which includes physical or emotional isolation; and, the victim's knowledge and previous habits.

Undue Influence SCAM Model

Susceptibility
Confidential Relationship
Active Procurement
Monetary Loss

Undue influence is a type of elder abuse. Older women who are White and live alone are often considered to be the most likely victims of financial elder abuse that is reported (National Center for Elder Abuse, 1998). A widely-cited profile of a target for financial abuse is generally a White woman over 75 years of age who is living alone (Rush & Lank, 2000; Tueth, 2000). Additionally, the victim's ability to resist undue influence has been noted to be lessened when the person or victim is dependent on the caretaker or influencer. Spar et al., (1992) noted that any debilitating mental or physical illness resulting in dependence on caretakers will increase susceptibility to undue influence. Dependence can include physical dependence, such as food preparation, assistance with medications, helping with bill paying, checkbook management, reading bank statements, or taking the victim to the physician's office. Emotional dependence can include emotional support and encouragement, and information dependence can include dependence on information, such as financial or legal advice.

In the SCAM model the vulnerable or susceptible individual also develops a confidential and trusting relationship with the perpetrator. The victim's trust is gained through various tactics of persuasion, manipulation, and deception. Some of these tactics come in the form of social influence techniques, such as liking and reciprocity (Regan et al., 1971), and authority (Milgram, 1963), and at other times the strategy may be to just keep the victim unaware and uninformed about the legal or financial transactions. These weapons of influence are utilized by the perpetrator to heighten the victim's reliance and dependence on the perpetrator. For example, a common method of

persuasion that a suspect may exploit is that of reciprocity. The suspect may perform caretaking duties for the victim, such as driving to doctors' appointments, filling prescriptions, or cooking meals. The victim often feels that he or she "owes" the perpetrator something. The victim is, thus, often taken advantage of by the person who gains from the victim's indebtedness. Influence becomes "undue" when the perpetrator exploits the victim's dependency and trust for personal financial gain. It is this trust and dependency that gives the perpetrator the ability to steal the victim's assets.

There are many potential "indicators" of undue influence to bear in mind. These factors include both demographics that increase risk and behavior changes such as: White women over the age of 75 years of age, recently widowed men and women, individuals who are geographically isolated, and individuals who have had a significant or unexplained emotional change, such as a marked depression and or insidious memory loss or other cognitive deficits. In terms of behavioral changes, a comparison of the victim's past spending habits with current habits is critical to assess. For example, the victim that has lived modestly throughout life but now begins to make large purchases and/or give large amounts of money and gifts to a new "best friend" may be a victim of undue influence. Financial transactions that are uncharacteristic of the victim may be another marker of undue influence. For example, bank records indicating many ATM transactions that are not possible for a homebound older adult could be suspect, as would be an older adult allegedly performing on-line bank transactions but who does not own a computer. The purpose of these transactions may be to transfer funds into "joint-accounts" that the victim and suspect are both signors on, but is controlled by the alleged influencer. Additional indicators may include changes in the victim's will or trust that are not consistent with a previous disposition, and the absence of any third party advisers. Upon questioning the victim it is often determined that the suspect has been initiating all of the aspects of the financial and or legal transactions, including providing transportation to the bank, hiring a notary or an attorney,

printing out forms, etc. This type of active procurement can be used as evidence of undue influence.

Summary of Clinical Models

In Chapter 2, we provide a summary of

Summary of Undue Influence Models			
Singer/Nievod Model	Blum IDEAL Model	Bernatz SCAM Model	Brandle/Heisler/Stiegel Model
<p><i>Factors:</i></p> <ol style="list-style-type: none"> 1. Isolation 2. Dependency 3. Creating Siege Mentality 4. Sense of Powerlessness 5. Sense of Fear/Vulnerability 6. Staying Unaware 	<p><i>Factors:</i></p> <ol style="list-style-type: none"> 1. Isolation 2. Dependency 3. Emotional manipulation and/or Exploitation of a vulnerability 4. Acquiescence 5. Loss 	<p><i>Elements:</i></p> <ol style="list-style-type: none"> 1. Susceptibility 2. Confidential Relationship 3. Active Procurement 4. Monetary Loss 	<p><i>Goal:</i></p> <ul style="list-style-type: none"> • Financial Exploitation <p><i>Typical Perpetrator</i></p> <p><i>Tactics:</i></p> <ol style="list-style-type: none"> 1. Isolate from others and information 2. Create fear 3. Prey on vulnerabilities 4. Create dependency 5. Create lack of faith in own abilities 6. Induce shame and secrecy 7. Perform intermittent acts of kindness 8. Keep unaware

The Brandle/Heisler/Stiegel model describes perpetrator behavior in cases of undue influence. Although psychologists will primarily be asked to assess older victims, knowledge regarding the alleged influencer can be useful in determining the potential presence of undue influence. The influencer is often in the home close to the victim and may even be interviewed by the psychologist as a collateral source.

In the Brandle/Heisler/Stiegel model, the influencer is described as a predator who targets isolated elders, often in places such as supermarkets and drug stores, and “grooms” the person through an initial show of friendship and caring. Once trust has been established, the influencer will use a variety of tactics to increase their power and control and diminish the control of the older adults, including isolation, fear, shame, with intermittent acts of kindness. At the same time, the alleged influencer will work to keep the victim unaware of their intent and the loss of assets.

potential risk factors identified by the courts in cases of undue influence, including opportunity, motive, unnaturalness of transaction, susceptibility, and the use of unnatural devices. In this chapter, we have emphasized clinical factors that psychologists can assess and potentially describe in a report provided to the courts as evidence. The frameworks presented differ in their specifics, but there are some important common elements to keep in mind while conducting an assessment. These include factors that increase susceptibility of the victim, the presence of a confidential relationship, a mechanism for fraud to occur, and monetary transfers that benefit the alleged influencer.

Writing About Undue Influence in Your Report

Undue influence evaluations include all of the information that goes into a capacity assessment (purpose of evaluation, history of problem, medical, social, occupational history, neuropsychological testing, discussion of results, and financial capacity findings), as well as a