

# The Role of Undue Influence in Elder Abuse

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Sponsorship for this Webinar is provided by the National Consumer Law Center,  
American Bar Association Commission on Law and Aging, and a grant from the Administration on Aging.

**June 8, 2011**

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# Presenter – Lori Stiegel



- Senior Attorney, joined the American Bar Association Commission on Law and Aging staff in 1989. Since that time she has, among other things, developed and directed all of the Commission’s work on elder abuse. She is the author or a co-author of numerous books, manuals, curricula, and articles including:
  - *Elder Abuse Detection and Intervention: A Collaborative Approach* (Springer, 2007);
  - “Undue Influence: The Criminal Justice Response” (YWCA of Omaha, 2006);
  - *Elder Abuse Fatality Review Teams: A Replication Manual* (ABA 2005);
  - “Elder Abuse in the State Courts -- Three Curricula for Judges and Court Staff” (ABA, 1997); and
  - *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* (ABA 1995).
- Stiegel was a member of the National Academy of Sciences Study Panel on the Risk and Prevalence of Elder Abuse and contributed to the panel’s groundbreaking report: *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (National Research Council 2003).

# Moderator – Erica F. Wood

- Assistant Director of the American Bar Association Commission on Law and Aging.
- She has been associated with the Commission since 1980, where she has worked primarily on issues concerning adult guardianship, legal services delivery, dispute resolution, health care, long-term care and access to court.
- She has participated in national studies on public guardianship and guardianship monitoring; and has written extensively on guardianship and capacity issues.
- Prior to 1980, she served as staff attorney at Legal Research and Services for the Elderly at the National Council of Senior Citizens.
- She was appointed by the Governor as a member of the Virginia Public Guardian and Conservator Advisory Board.

# The Role of Undue Influence in Elder Abuse

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# Overview of Topics

- Concept & its role in elder abuse cases
- Intervention perspectives
- Victim & perpetrator characteristics
- Tactics & process
- Capacity & consent
- Legal remedies
- Case realities
- Identification & investigation
- Resources

# Self-Determination

- Adults' have right of self-determination
- Balanced by societal interests
  - Protection of others
  - Protection from self
  - Protection from others
- Self-determination may be undermined by:
  - Incapacity
  - Undue influence

# Poll #1

- Have you seen an UI case?
  - Yes
  - No
  - Not sure

# Psychological Definition

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

Source: Margaret Singer

# Role of UI in Elder Abuse

- Method to commit financial exploitation or sexual abuse
- Can happen to adult of any age
- More than persuasion, high-pressure salesmanship, fraud, misrepresentation
- Pattern of tactics akin to cults, brainwashing, domestic violence dynamics, & grooming for sexual abuse
- Victim doesn't recognize what is happening
- Victim identifies with perpetrator
- Case examples

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Intervention Perspectives

- APS/LTCOP/Law Enforcement/Others: investigate, protect/prevent
- Prosecutors: investigate, prove lack of/challenge defense of consent
- Civil Lawyer: undo actions, protect/prevent
- Psychologists/Others: assess capacity
- Judges: undo actions, protect/prevent

???

# Victims: Vulnerability

- Anyone can be a victim of UI
- Vulnerability enhanced by being:
  - Lonely/isolated
  - Unsophisticated, uninformed
  - Ill or cognitively impaired
  - Drugged, drunk/alcoholic
  - Fatigued, exhausted, distracted
  - Frightened
  - Dependent

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Perpetrators

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

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# UI: Common Tactics



# Other Models

- Courts: SODR
- Margaret Singer's CULT model
- Bennett Blum's IDEAL model
- Susan Bernatz's SCAM model

# SODR Model: How ND & Other Courts Define UI

- S -- Victim subject to UI
- O -- Opportunity existed to exercise UI
- D -- Disposition to exercise UI
- R -- Result appears to be effect of UI

# How IL Courts Define UI – Rebuttable Presumption

- Fiduciary relationship between V and person receiving substantial benefit
- V in dependent situation in which substantial beneficiaries are in dominant roles
- V reposed trust & confidence in such beneficiaries
- Document prepared or procured and executed in circumstances wherein such beneficiaries were instrumental or participated

In re Estate of Kline, 245 Ill App 3d 413, 613 NE 2d 1329, 1337 (3d D 1993)

## Poll #2

- A person who completely lacks decision-making capacity can be a victim of UI
  - True
  - False
  - Not Sure

# Relationship of Consent & Capacity

- Definition of Consent
  - Victim must:
    - Have decision-making capacity
    - Have knowledge of true nature of act
    - Act freely and voluntarily
  - UI Negates Consent

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Consent #1 -- Capacity

- Persons with capacity can be UI victims
- ↓ capacity = ↑ vulnerability
  - ↓ ability to make good decisions
  - ↓ ability to recognize UI tactics
  - ↓ ability to resist control
  - ↑ dependence

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Consent #2 -- Knowledge of Act's True Nature

- Suspect's tactics prevent such knowledge
  - Isolate from others and information
  - Keep unaware
  - Create lack of faith in own abilities
  - Create dependency
  - Prey on vulnerabilities
  - Create fear

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Consent #3 -- Act Freely and Voluntarily

- Suspect substitutes own will for victim's true desires
  - Create dependency
  - Prey on vulnerabilities
  - Create fear
  - Isolate from others and information
  - Keep unaware
  - Create lack of faith in own abilities

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

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# Legal Remedies

- Breaking the suspect's control
  - Guardianship/conservatorship (but capacity?)
  - Mental health commitment
  - Writ of habeas corpus?
- Undoing actions
  - Set aside deeds, gifts, etc.
- Prove lack of/challenge defense of consent in criminal actions

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# UI Case Realities

- UI is difficult to understand and prove
  - States may have limited case law and little or no statutory law
  - Rebuttable presumptions (IL) help but not all states have them
  - Concept recently applied to elder abuse
  - Concept even more recently applied to criminal law
- Raise UI in court only when necessary
  - Can't show lack of consent or of capacity in any other way
  - Can't explain what happened in any other way, e.g., fraud

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Identifying & Proving Undue Influence

- Evidence about Victim's
  - Health
  - Personal and financial losses
  - Behavior patterns
  - Education, language
  - Isolation
  - Opportunities to obtain independent advice

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Identifying & Proving Undue Influence

- Evidence about Recent Changes in Victim's Circumstances
  - Death of a spouse
  - Diagnosis of serious medical condition
  - Loss of assets
  - New “best friend”
  - Activities
  - Visits with family, friends

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Identifying & Proving Undue Influence

- Evidence about Suspect's Situation
  - Can suspect survive without victim's assets?
  - Knowledge of victim's abilities and limitations?
  - What financial decisions does suspect make?
  - What financial tasks does suspect handle?
  - Misrepresentations by suspect?
  - Interactions between suspect and victim?

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

# Identifying & Proving Undue Influence

- Evidence of Parties' Relationship
  - How long?
  - Is this an unlikely pairing?
  - How dependent is victim on suspect?
  - Does victim have family, friends, neighbors?
  - Openness of victim's & suspect's relationship
  - Misrepresentations regarding the relationship

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

## Poll #3

- Has listening to this Webinar caused you to change your mind about whether you have seen an UI case?
  - Yes, seen
  - Yes, not seen
  - No, no change
  - Still not sure
  - More unsure now than before

# Selected Resources

- *Gaslight* (1944 version, Warner Home Video)
- Brandl, Heisler, Stiegel, *Undue Influence: The Criminal Justice Response* (YWCA Omaha, 2006), available from NCALL, [www.ncall.us/justice/undue-influence](http://www.ncall.us/justice/undue-influence)
- Brandl, Heisler, Stiegel, “The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault,” Journal of Elder Abuse and Neglect, Vol. 17, No. 3 (2005)

# Selected Resources

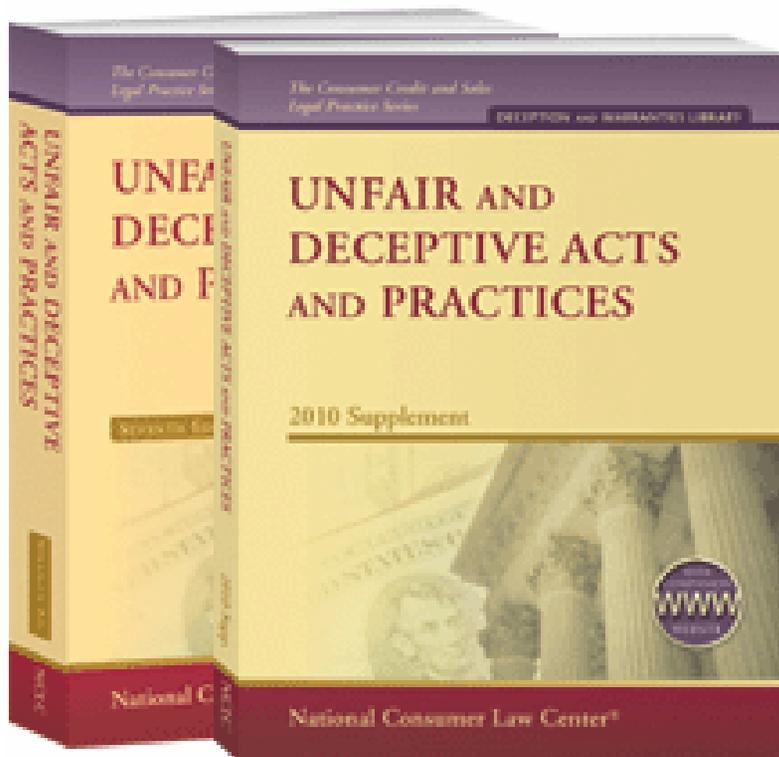
- Nievod, “Undue Influence in Contract & Probate Law,” Cultic Studies Journal (1993)  
[http://www.icsahome.com/infoserv\\_articles/nievod\\_a\\_braham\\_undue\\_influence\\_law.htm](http://www.icsahome.com/infoserv_articles/nievod_a_braham_undue_influence_law.htm)
- Quinn, Goldman, Nerenberg, Piazza, “Undue Influence: Definitions & Applications” – which includes Lisa Nerenberg’s excellent literature review: [www.courts.ca.gov/UndueInfluence.pdf](http://www.courts.ca.gov/UndueInfluence.pdf)
- Quinn, “Undoing Undue Influence,” Generations, Vol. 19, No. 11 (Summer 2000)

# Selected Resources

- Bennett Blum's UI Web page:  
[http://www.bennettblummd.com/undue\\_influence.html](http://www.bennettblummd.com/undue_influence.html)
- NCEA Web page: [www.ncea.aoa.gov/](http://www.ncea.aoa.gov/) (search: UI)
- NCEA/ABA charts on APS laws (includes UI):  
[http://www.americanbar.org/groups/law\\_aging/resources/elder\\_abuse.html](http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html)
- ABA/APA manuals on capacity assessment:  
[http://www.americanbar.org/groups/law\\_aging/publications.html](http://www.americanbar.org/groups/law_aging/publications.html)



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