



# Capacity and Consent: Key Concepts for Law Enforcement Investigations Part 2: Consent and Undue Influence

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# APSIL

This webinar is sponsored by the Adult Protective Services Program at the Illinois Department on Aging under a grant awarded by the Administration on Community Living.

Trained case workers at local provider agencies conduct investigations and provide support in resolving reports of abuse, neglect, financial exploitation, or self-neglect involving adults with disabilities (age 18 – 59) and other older adults (age 60+) living in community-based (non-institutional settings).



# Disclaimer

- This presentation is provided for general information purposes only and does not constitute legal or professional advice.
- The views expressed in this presentation are those of the speaker and may not necessarily represent the policy interpretations and procedures issued by the Adult Protective Services Program at the Department on Aging.

# Session Objectives

- Describe how capacity affects consent
- Learn about undue influence



# Anticipate Possible Legal Defenses

## Innocence

- Deny allegation(s)
- Mistaken identity
- False accusation
- Accident
- Victim consent

## Legal Challenges

- Consider defendant's beliefs/mental state at time act committed
- Lack of capacity
- Lack of requisite intent (ordinary carelessness versus criminal neglect)
- Lack of sufficient evidence

## Justification

- Consider events at time act committed
- Authority as agent under POA
- Coercion
- Duress
- Good faith reliance on what defendant believed was consent by victim



# Consent

- Free and voluntary agreement given based on accurate information without coercion, duress, threats, violence, deception, fraud, manipulation, or undue influence
  - No single legal definition
- Important in determining whether an act is considered a crime
  - Common defense in caregiver neglect, financial exploitation, and sexual assault cases
- **Elements of Consent:**
  - Decision-making capacity;
  - Understanding about the true nature of decision or action at issue (i.e., person is not deceived or misled and critical information is shared); and
  - Free and voluntary agreement

# Exploring Capacity to Give Consent (1)

## **Age:**

Is the person at or above the age of consent in the state?

## **Capacity:**

- Does the person have any permanent or temporary medical or mental condition that interferes with decision-making ability?
  - For example: developmental or intellectual disability, dementias, traumatic brain injury, delirium, infection, intoxication, over- or under-medication

# Exploring Capacity to Give Consent (2)

## **Capacity (continued):**

- Can the person:
  - understand the act or decision?
  - weigh benefits and risks?
  - reason through alternatives?
  - state a choice and explain why their rationale?
- If the person has a condition that interferes with decision-making ability, is it obvious to or known by the perpetrator?



# Exploring Capacity to Give Consent (3)

## **Voluntary or Involuntary:**

Is consent offered as an expression of own free will, without being induced by coercion, duress, threats, violence, deception, fraud, manipulation, or undue influence?

## **Expression of Choice:**

- Did the person make any affirmative or implied statements regarding the act or decision?
- Silence is not consent and “no” or resistance is indicated through more than just words, including signs of fear, fight or flight, and freeze reactions from the victim.

# Undue Influence (1)

- The substitution of one person's will for the true desires of another. (Nerenberg, 1996; American Bar Association, 2021)
- It occurs when a person uses their role and power to exploit the trust, dependency, and fear of another. (Quinn, 2001; American Bar Association, 2021)
- Fraud, duress, threats, or other types of pressure is often used. (Quinn, 2001; Nerenberg, 2010; American Bar Association, 2021)
- A claim of consent may be overcome by proof that undue influence was used.

# Undue Influence (2)

Pattern of manipulative behaviors by a perpetrator for varied purposes, including domestic violence, financial exploitation, neglect, and sexual abuse

- Designed to obtain a victim's "consent" to turn over assets and/or give control to a perpetrator in financial abuse cases
- May involve "grooming" involving victims who often have some degree of diminished capacity
- Less likely to be identified, investigated, or handled as a criminal matter

# Undue Influence Wheel – Perpetrator Tactics



(c) YWCA, Omaha, 2006.

# Suspicious Circumstances (1)

- Isolation of victim (e.g., withholding mail, limiting telephone access, or limiting privacy/visitation with others)
- Active involvement in obtaining legal counsel for execution of legal document bestowing authority and/or benefits to perpetrator (e.g., change in account holders/beneficiaries; new advance directive, will, or trust; etc.)
- Lack of independent advice by a neutral third party relating to new legal document
- Discrepancies with previously expressed intentions of the victim

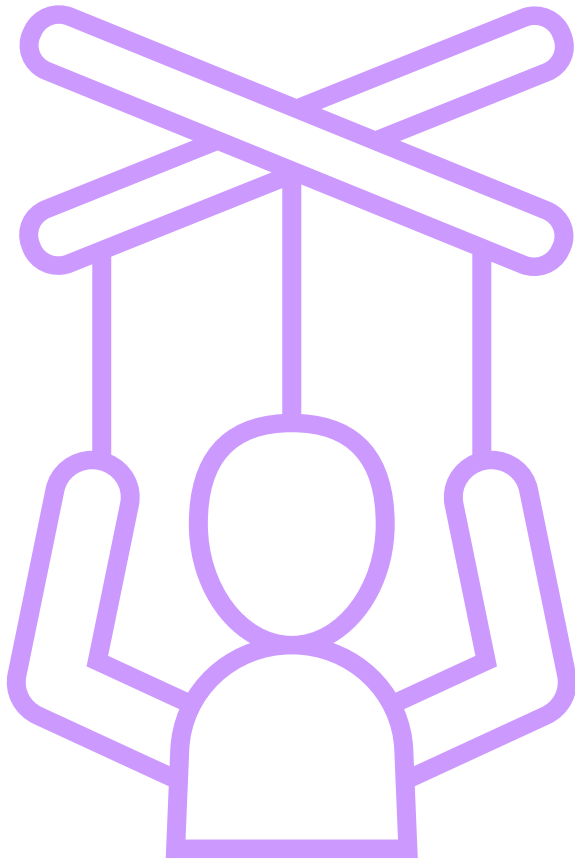


## Suspicious Circumstances (2)

- Secrecy concerning the existence of the transaction or legal changes
- Excessive pressure on victim to quickly take action or make decision
- Discussions at inappropriate times and places
- Changes in spending patterns showing use of victim's assets for benefit of others while ceasing support for pre-existing needs



# Undue Influence – Financial Exploitation



## Common Method:

- Abuse of confidential, fiduciary, legal, or other trusted relationships
- Examples: agents under a Power of Attorney; guardians; other trusted advisors and supporters, including caregivers and relatives. See 720 ILCS 5/17-56.

## Affected Decisions:

- Contractual Capacity (contracting)
- Donative Capacity (gifting)
- Executing a Power of Attorney (delegating authority)
- Testamentary Capacity (estate planning and naming beneficiaries)
- Transferring Property

# Relevant Illinois Statutory Provisions

## Criminal Code of 2012 / Deception Offenses

- 720 ILCS 5/17-56, Financial exploitation of an elderly person or a person with a disability.
- Illegal use of assets or resources by a person standing in a position of trust and confidence (e.g., misappropriation by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or usage in manner contrary to law.
- Consent is not a defense if the accused knew or had reason to know that victim lacked capacity.
- Felony offense



# Victims of Undue Influence

- Abuse cases are complex.
- Law enforcement alone cannot meet all needs of a victim.
  - For example: protect remaining assets, revoke powers of attorney , change caregiving and housing arrangements, open new bank accounts, and perhaps, as last resort, obtain a guardianship
- Law enforcement will be more effective if there is consistent collaboration with APS provider agencies.
- APS provider agencies can explain options to victims and help with referrals to other services, including benefit counseling, civil legal aid, housing, medical care/counseling, etc.



## Summary Points

- The most common defense in financial exploitation cases is consent
- Recognize that cognitive abilities to make decisions affect whether a victim can give legal consent
- When it appears that there may be consent, consider if undue influence was a factor

# Additional Resources (1)

- [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2011\\_agin\\_g\\_arta2251\\_undueflu\\_tb.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_agin_g_arta2251_undueflu_tb.authcheckdam.pdf)
- [https://www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment/](https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/)
- <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>
- <https://apstarc.acl.gov/getattachment/Education/Briefs/CapacityScreeningBrief.pdf.aspx?lang=en-US>

# Additional Resources (2)

- [https://ncea.acl.gov/NCEA/media/Publication/NCEA\\_DecisionMaking.pdf](https://ncea.acl.gov/NCEA/media/Publication/NCEA_DecisionMaking.pdf)
- [https://ncler.acl.gov/getattachment/Legal-Training/upcoming\\_event/Identifying-Undue-Influence-Ch-Summary.pdf.aspx?lang=en-US](https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Identifying-Undue-Influence-Ch-Summary.pdf.aspx?lang=en-US)
- [https://ncler.acl.gov/getattachment/Legal-Training/upcoming\\_event/Undue-Influence-Slides.pdf.aspx?lang=en-US](https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Undue-Influence-Slides.pdf.aspx?lang=en-US)
- <https://www.justice.gov/file/1517976/download>

# Other Presentations

- Segments on:
- Abuse, Neglect, and Exploitation of Older Adults and Adults with Disabilities
- Tips for Interviewing Older Adults and Adults with Disabilities:  
Overview and Rapport Building
- Medical Issues in Abuse/Neglect:  
Bruising and Medications, Pressure Ulcers, and Strangulation and Suffocation
- Powers of Attorney
- Abuse Investigation Case Study



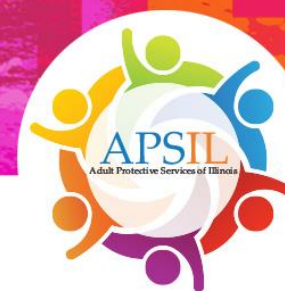
# For More Information

To report abuse, call:

**1-866-800-1409**, Adult Protective Services Hotline (24-Hour)

Additional Resources:

- <https://www2.illinois.gov/aging/ProtectionAdvocacy/Pages/abuse.aspx>
- <https://www2.illinois.gov/aging/Engage/Pages/default.aspx>



**Thank you for the work you do  
to investigate allegations of  
abuse to protect older adults  
and adults with disabilities!**