

## DEFINITION OF UNDUE INFLUENCE

### Probate Code §86 and Welfare and Institutions Code §15410.70\*

“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. In determining whether a result was produced by undue influence, all of the following shall be considered\*\*:

<b>Vulnerability of the victim</b>	<b>Influencer’s apparent authority</b>	<b>Actions or tactics used by the influencer</b>	<b>Equity of the result</b>
Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.	Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.	Evidence of actions or tactics used may include, but is not limited to, all of the following: a. Controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep. b. Use of affection, intimidation, or coercion. c. Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.	Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the appropriateness of the change in light of the length and nature of the relationship. b. Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

\*Probate Code §86 states that “undue influence” has the same meaning as defined in Section 15610.70 of the Welfare and Institutions code. The actual language contained in the chart can be found in that Welfare and Institutions code.

\*\*Not all four categories are required for a judicial determination of “undue influence”

**NOTE:** The law was put into chart format for your convenience.



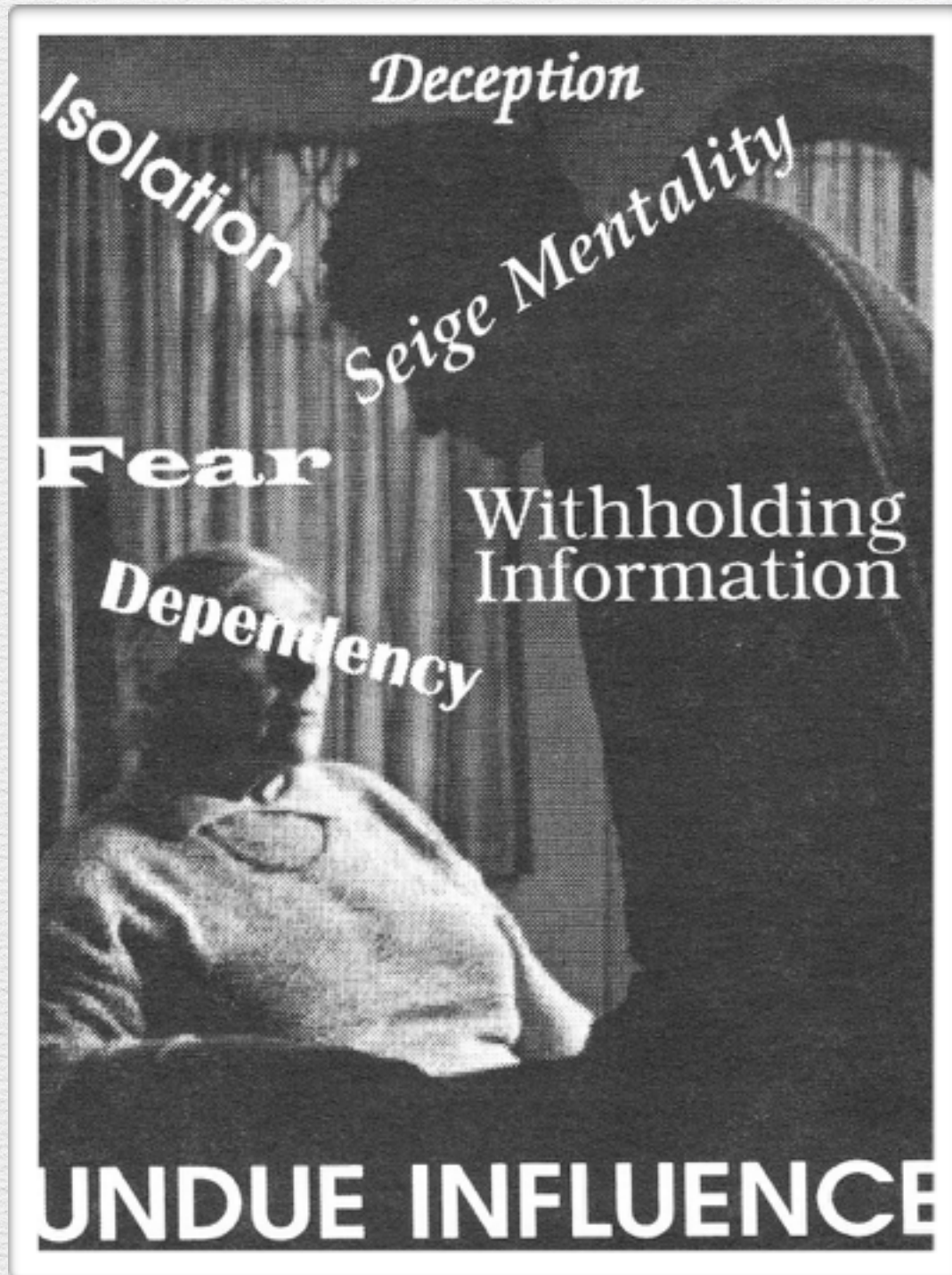
# Screening for Undue Influence: When Does Influence become “Undue?”



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# Exploring Undue Influence

- 2010 Study: Undue Influence: Definitions and Applications  
[www.courts.ca.gov/documents/UndueInfluence.pdf](http://www.courts.ca.gov/documents/UndueInfluence.pdf)
- Funded by the Borchard Foundation Center on Law and Aging
- Several elements
  - Conservatorship case reviews (25)
  - Law review of California statutory law and case law on undue influence
  - Review of other state laws on undue influence
  - Literature review of social services literature
  - Focus groups of professionals





# Social and Psychological Literature Perspective

- Coercive persuasion
- Totalitarian regimens
- Prisoners of war
- Cults
- Domestic Violence
- Caregiver
- Hostage situations
- Professionals who exploit
- Con Artists





# Common Characteristics

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





# 2014 California Legislation

New definition of undue influence January 1, 2014

Probate Code §86 and Welfare and Institutions Code § 15610.70

“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.”

Four factors: victim, influencer authority, tactics, outcome





# Developing an Undue Influence Screening Tool

- The 2010 study calls attention to the need for a screening tool.
- The 2014 legislation made it possible to consider developing a screening tool because it spelled out specific factors and behaviors.
- Adult Protective Services (APS) sees the most undue influence cases.
- We prepared received a grant from Borchard Foundation Center on Law and Aging again to develop an undue influence screening tool for APS.





# Elements of Study

- Focus Groups with APS Personnel (4)
- Literature Review
- Draft undue influence tool
- Field testing of draft tool with APS
- Review of draft tool by experts
- Creation of California Undue Influence Screening Tool (CUIST) with Instructions



# Focus Groups

*“the tool would help a lot to organize our thinking and documentation for presenting to the public guardian or to somebody else.*

*“It would be great if we had a tool for undue influence that we could fill out for every client that gave us a score or language suggesting the need to ask specific questions.”*

*“...there’s more of a uniform language that we use, that would be very helpful.”*

*“We already have what we call a RAT, a risk assessment tool, that we use and I can just see it as a part of that tool.”*

*“[A] tool that triggers people documenting these four [categories] would be really helpful, I think in the long run in terms of taking to law enforcement, taking it to your supervisor, explaining why it’s undue influence.”*

*“To get people to start ... documenting something in each of the four categories would be helpful...”*

*What’s challenging is getting other authorities...to actually recognize why it’s such a problem. If there’s some threshold that can be shown .., then maybe law enforcement will say, this is important*



# Literature Review

- Draws from earlier study, California's new statute, other California statutes, and case law to identify relevant components for a Screening Tool.
- Provides overview of APS practice and screening tools currently used by APS, highlighting their relevance to undue influence (including tools that assess for elder financial abuse, cognitive capacity for financial decisions).
- Reviewed UI screening tools and models used in other settings, including (SODR)\* and guidelines by the International Psychogeriatric Association Task Force on Testamentary Capacity and Undue Influence, British Columbia Law Institute.
- Provides a rationale for the development of a UI screening tool for APS.

\* SODR, used primarily in contract law, stands for **S**usceptibility of the supposed victim, **O**pportunity for the exertion of undue influence, **D**isposition to exert undue influence, and 4) **R**esult of the undue influence)



# Literature Review Conclusions

A Tool is needed that:

- Reflects APS mandates and roles (referrals to PG's, attorneys, police, professional associations, and LTC Ombudsman).
- Reflects new statutory definitions of UI in California.
- Reflects other statutory definitions and criteria suggestive of UI, (e.g. California Probate Code §811 (2-4) that address deficits in information processing, reasoning, and ability to modulate mood.
- Considers criteria contained in California Jury Instruction (CALJIC) No 1.23 for instructing jurors in criminal cases about “consent.”





# 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





# Comments from Experts & APS Administrators

- “I wish I’d had this tool 20 years ago when I was first starting.”
- “The content is “spot on” as to what I see.”
- “Even if you don’t find UI, (the tool) may get people thinking about undue influence.”
- “I would absolutely use the tool as evidence in criminal cases—it would strengthen the case.”
- “Really interesting. There will be broad interest in the field of aging.”
- “(The tool) puts parameters on an issue we all need to know more about”.
- “The categories make sense given the literature on undue influence. They are clear. Everything is there. Succinct. “
- “(It would) help attorneys present cases by giving them categories to work from.”



# Concerns of Experts

- Terminology may not be understood by all APS workers, leading to errors and inaccuracies in conclusions.
- How will the tool be used (can it be subpoenaed or submitted to courts in petitions for conservatorship)?
- Unsubstantiated conclusions may negatively impact outcomes and reflect poorly on workers & their agencies.
- Rating scales based on workers' impressions may vary, as appraisals of situations vary.
- Further research needed on reliability/validity and extent to which tool reflects current understanding of undue influence by professional understanding, courts, and researchers.



# Other Groups That Can Benefit

- Public officials, including city attorneys, public defenders, district attorneys, public guardians, and probate court investigators
- Private attorneys can use in estate planning
- Law enforcement personnel, including police detectives who investigate crimes with an eye towards prosecution
- Undue influence is not defined in California criminal code, although “UI-like” elements are found in jury instruction (CALJIC) No 1.23, which pertains to consent.

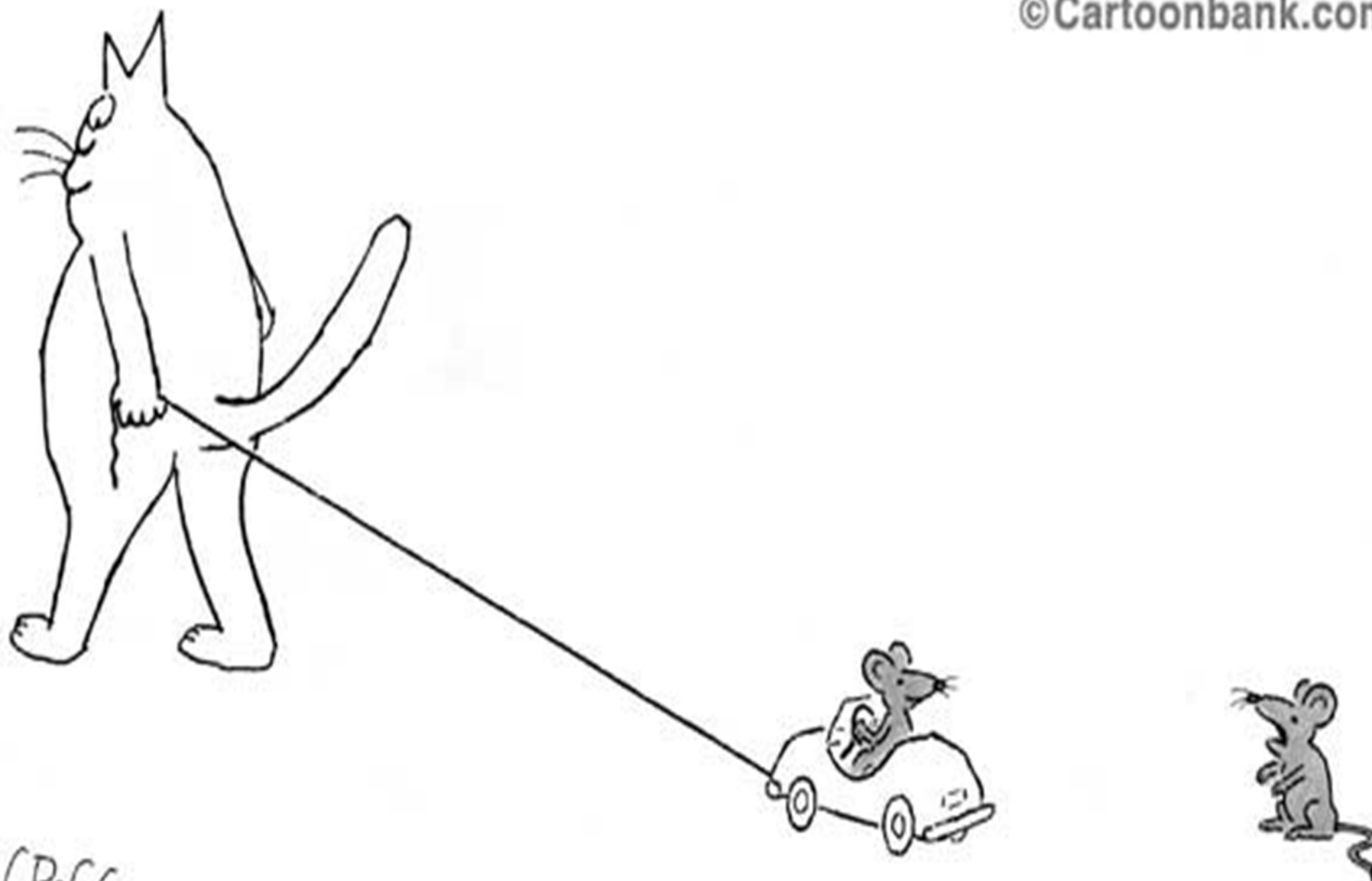




# Conclusions

- Research:
  - Need additional field testing of tool for reliability/ validity, comprehension by APS
- Practice:
  - Need to develop protocols, forms, & policies by APS managers & administrators
- Education:
  - Training for APS personnel which takes into account different educational levels. Instructional materials need to be developed.
- Legislation:
  - Conservator of person
  - Include in California criminal code





S. GROSS

*"For God's sake, think! Why is he being so nice to you?"*



# Mrs. D

Mrs. D is a 93-year old, eccentric self-made millionaire who owns several homes and commercial properties. She has few friends and family but was friendly with two younger men with whom she'd had prior business dealings (an accountant and a real estate agent). They encouraged her to finance their investments, sell some of her property, and make loans to them that they didn't pay back (Mrs. D had been frugal in past).

As her health declined, two of the "friends" moved into one of her homes and confined her to one room behind the garage. They blocked her view to the streets and convinced her that the noises she heard from outside were the sounds of drug dealers and that it was dangerous to go out or answer the door. They told callers that Mrs. D was asleep or unavailable and convinced her that she'd been abandoned by family. They tape recorded all visitor conversations with Mrs. D.

When a niece visited and learned what was happening, she filed for conservatorship and made a police report. As the investigations proceeded, the younger men prepped her for mental status exams and eventually took her to Reno, where she married one of them. The justice of the peace testified that Mrs. D understood what she was doing.

Use CUIST to look for factors suggestive of undue Influence in each of the 4 categories. What evidence and information is needed to complete the screening tool?