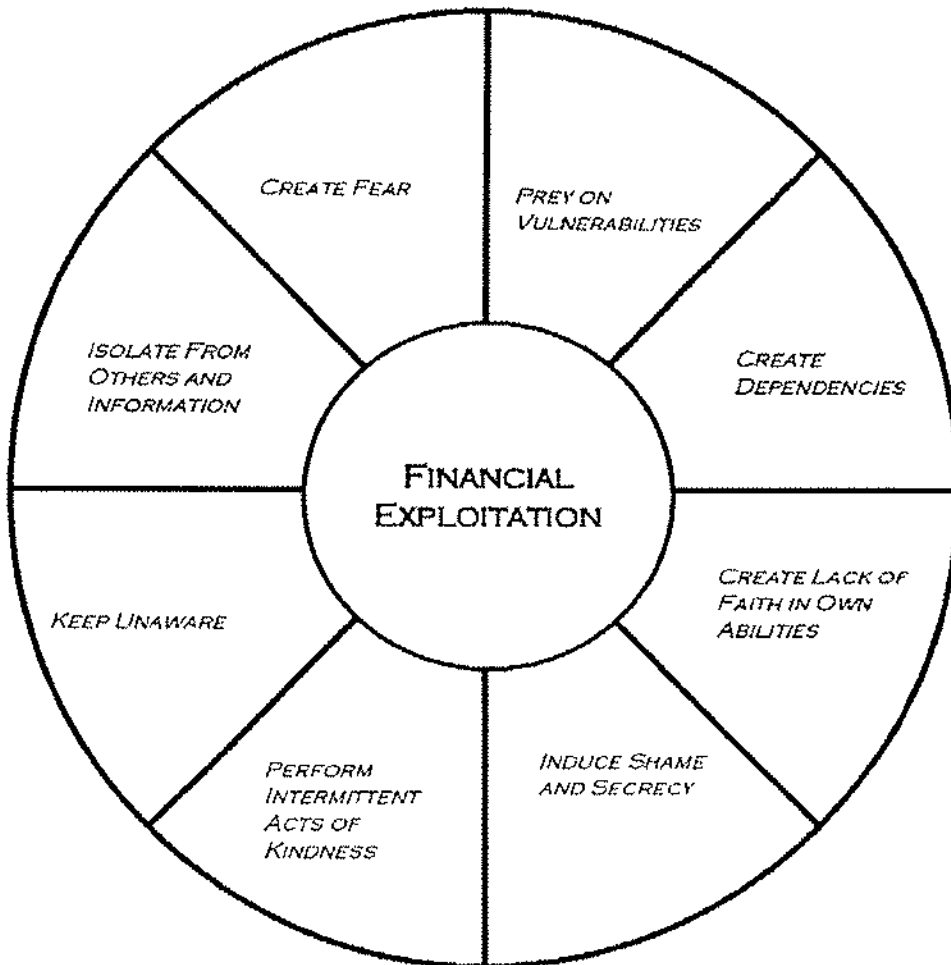


UNDUE INFLUENCE COMMON TACTICS



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CASES OF UNDUE INFLUENCE (UI)

Unfortunately, too many older individuals are being financially exploited. Often the exploiter is someone known to the victim, such as a family member or caregiver. In other circumstances, an exploiter targets a vulnerable victim, builds a relationship with the older individual, and begins to steal money and/or possessions.

Some cases of financial exploitation involve undue influence (UI). Undue influence occurs when people use their role and power to exploit the trust, dependency, and fear of others (Singer, 1996; Quinn, 2001). Exploiters use this power to *deceptively* gain control over the decision making of their victim (Singer, 1996). Undue influence is a pattern of manipulative behaviors that enable an exploiter to get a victim to do what the exploiter wants, even when the victim's behaviors are contrary to his or her previous beliefs, wishes, and actions. These tactics are similar to those used by cults and hostage takers and in brainwashing.

The tactics used in UI also have striking similarities to the strategies used in domestic violence, stalking and grooming, which occurs in some sexual abuse cases. In these situations, the exploiter uses a pattern of tactics in combination to get his or her desired goal. In cases of financial exploitation, the goal is obtaining the victim's money or possessions. When law enforcement investigates these cases, officers need to look beyond the presenting incident and explore the tactics a suspect may have used to financially exploit the older person. If officers focus exclusively on the presenting incident, they may miss the pattern of behaviors that led to UI and financial exploitation. Through their investigation, officers may discover criminal behavior that could justify arrest and prosecution of the exploiter. Otherwise, they may view the problem as exclusively a social services or civil matter.

In addition, victim behaviors in UI cases may be similar to those demonstrated by victims of domestic violence, stalking, or sexual abuse. Older victims may appear to be willing participants in activities that are not in their best interest and that run counter to belief systems they have held for many years. They may protect the suspect. Some older victims impede the investigation by not providing information or giving inaccurate information. Some victims later recant.

The goal of the exploiter is to take over the will of the target, he or she must have a relationship in which the victim has faith and trust in the exploiter. In some situations, the relationship is well established, such as that between a long-time friend and confidant, a family member, a caregiver, or a person with legal or financial authority to make decisions for the older person (Singer, 1998; Quinn, 2001). If there is no existing trusted relationship, the suspect may rekindle an old friendship or establish a new one.

The existence of a relationship involving trust can complicate an investigation. As in many domestic violence cases, the victim may be more interested in protecting the abuser/exploiter than assisting the investigator. Victims may recant or refuse to participate in an investigation. Exploiters who have an ongoing relationship with the victim may use that connection to continue to manipulate and pressure the victim to minimize or deny what has happened.

- Exploiters often target and groom their victims
- Exploiters use a stealth campaign of tactics to unduly influence and financially

- Exploit their victims exploiters are often charming manipulators
- Exploiters justify their actions through various excuses
- Victims often appear as willing participants in activities that may counter their beliefs or best interest
- Victims often have trauma reactions and may respond to professionals in ways that impede an investigation

Understanding the parallels between UI and domestic violence, stalking, and the targeting and grooming behaviors of some sexual predators' helps professionals recognize the process and pattern of tactics often used in financial exploitation cases involving UI. In many cases, what appeared to be consent really was only "apparent" consent; financial exploitation using UI had actually occurred. Criminal justice professionals can employ investigation strategies commonly used with battered women and victims of stalking and sexual assault to build financial exploitation cases.

This adapted from Undue Influence: The Criminal Justice Response, Copyright 2006 YWCA Omaha

POWERS OF ATTORNEY AND GUARDIANSHIPS/CONSERVATORSHIPS

Powers of Attorney, Guardianships/Conservatorships are legal mechanisms describing the appointment of another person to take over decision making for someone else. These are **not licenses to steal**.

Power of Attorney (POA): An instrument by which one person (the principal) transfers authority to make decisions such as medical care, end of life decisions, or financial management to another (the attorney in fact). The authority must be created while the principal has mental capacity and can be revoked at any time while having capacity. There is no court oversight of POAs.

Guardianship/Conservatorship: A mechanism by which a court grants certain powers to a family member, other individual, governmental agency, or institution to control the affairs of a person (ward) who is incapable of managing for him or herself. Courts generally require medical reports about the mental capacity of the proposed ward before appointing a guardian.

In evaluating any legal instrument, law enforcement should consider:

- What does this document authorize?
 - What are the limitations on authority?
 - When does it become effective?
 - Who has the authority to act?
 - Does it authorize gifts or loans to the person with decision making authority?

- When it was created?
 - Who created it?
 - What was the older adult's cognitive function?
 - If created by the older adult, What was the older adult's understanding of what s/he was doing? What were the surrounding circumstances?

Problems with Powers of Attorney (POA) or Guardianships that Law Enforcement May Encounter in Elder Abuse Cases

- The requirements for signing are not met (e.g. victim's lack sufficient mental capacity, state requirements for witnesses are not met, etc.).
- Victims are coerced or tricked into signing.
- Legal powers used after they have terminated.
- Legal powers used for purposes other than those for which they were intended.
- Property transferred to guardian or person with POA without authorization to do so.
- POAs or guardians use powers to give themselves gifts.
- POAs or guardians fail to carry out responsibilities (e.g. pay bills).

Investigating Financial Exploitation by Powers of Attorney and Guardianships/ Conservatorships

- While most guardians and attorneys in fact carefully and properly execute their responsibilities, some are abusers.
- Presence of such instruments as Powers of Attorney or Guardianships/Conservatorships does not make the activity merely civil.
- Officers should conduct an investigation to determine if criminal financial exploitation has occurred.
- An elder law attorney or accountant may be able to review the documents and help law enforcement understand what can and cannot be done.

Ohio is a mandatory reporting state; therefore it is likely that APS must be notified. Even if you are not mandated, consider making a voluntary report to APS – staff may be able to assist with the investigation or have expertise in understanding various documents.

EVIDENCE BASE PROSECUTION

Complex issues commonly arising in elder abuse cases are

- Capacity – is the cluster of mental skill that adults' uses daily, it can fluctuate over time and can differ depending in the situation or task.
- Consent – is the agreement to engage in an act or transaction given by one either sufficient mental capacity to understand the true nature of what he/she is agreeing to, and is acting freely and voluntarily.
- Competency - a judicial determination. All adults are presumed to be competent to testify in court.
- Undue influence - the abuse of one's role and power to exploit the trust, dependence and fear of another to deceptively gain control over that person's decision making and/or assets. It may vitiate consent when it involves deceit or the use or threatened use of force.

Successful prosecutions - Evidence Based Prosecution

- "Victimless prosecution" – no cooperation from the victim
- Introduction of reliable evidence without the victim's in-court testimony
- To maintain the victim's safety and avoid re-traumatizing the victim

When is Evidence-Based Prosecution Used?

- Domestic violence
- Elder abuse
- Child abuse
- Any time the victim is not available
 - Non-cooperation
 - Intimidation
 - Absence

Evidence-Based Prosecution is effective when

- Family violence is a societal harm
- Victim's initial description of the event is often the best
- Give credence to reports, where consistent with other evidence, even if victim does not participate
- Protect the victim from future harm

Evidence Rules

Hearsay Exceptions:

- Present sense impression - Evid. R. 803(1)
 - Excited utterance - Evid. R. 803(2)
 - Existing mental, emotional or physical condition - Evid. R. 803(4)
 - Statements to medical personnel - Evid. R. 803(4)

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. - Evid. R. 801(C)

- Not including admission by a party opponent - Evid. R. 801(D)(2)

- **Present Sense Impression** - A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.
- **Excited Utterance** - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- **Existing, Mental, Emotional, or Physical Condition** - A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.
- **Corroboration**
 - Photographs
 - Other acts – Evid. R. 404(B)
 - Witnesses
 - Condition of the scene
 - Anything that corroborates the content of the victim's statement such as bar bills, hotel receipts, work records, etc.

Sixth Amendment Confrontation Clause - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Crawford v. Washington

- *Crawford* held that the Confrontation Clause bars "admission of **testimonial statements** of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."
- In *Davis v. Washington*, the statements found to be testimonial were only those in which "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Forfeiture by Wrongdoing - A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement. Evid. R. 804(B)(6)

Prosecuting Elder Abuse Cases Basic Tools and Strategies, National Center for State Courts (NCSC), WWWNCSC.org

EXPERT CONSULTANT ASSESSMENT CHECK LIST

Please Note: The checklist can be used to identify expert consultants who may be able to assist the prosecution's case. An expert consultant witness is an individual with expertise in a particular subject matter that is not associated with the particular criminal case about which you are inquiring. For example, the victim's primary care physician would not be included as an expert consultant. But a geriatrician who has not treated the victim and has expertise on a particular topic would be considered an expert witness. The expert may provide advice and assistance outside of courtroom testimony.

Expert	Purpose
Medical Experts	<ul style="list-style-type: none"> ▪ Identify/describe injury and degree of harm/pain ▪ Identify cause of injury ▪ Document disease symptoms and progression ▪ Describe appropriate course of treatment ▪ Describe medication interactions and effects ▪ Discuss proper wound care ▪ Review medical records ▪ Discuss evidence of improper or inadequate care ▪ Identify care instructions given to and referrals made for caregiver ▪ Describe standard of care for treatment of specific injuries, condition or illnesses ▪ Stage pressure sores and explain causation and standard of care
Sexual Assault Experts	<ul style="list-style-type: none"> ▪ Discuss the standards in examination and collection of evidence ▪ Explain findings ▪ Discuss the absence or presence of injuries that may confound fact finders ▪ Provide empirical information on typical victim behavior in context of sexual assault ▪ Offer expertise on how prior interactions/relationships between suspect and victim may influence reporting behavior
Mental Health Experts	<ul style="list-style-type: none"> ▪ Assess victim's mental capacity to consent ▪ Determine the victim's level of social functioning ▪ Assess victim's susceptibility to undue influence ▪ Assess victim's competency to testify ▪ Document victim's mental health disorder
Financial Experts	<ul style="list-style-type: none"> ▪ Consult on and testify to suspect's fiduciary duty to victim ▪ Conduct accounting and financial analysis of victim's/suspect's finances ▪ Create a financial timeline and comparison of wealth of suspect and victim and how it changed during the course of events

	<ul style="list-style-type: none">▪ Document standards of accounting practices▪ Provide information on the impact of financial issues and gifts/loans on tax laws Medicare eligibility▪ Discuss the function of powers of attorney, guardianships and conservatorships in relation to financial obligations▪ Provide information on the role of undue influence in elder financial exploitation cases
Adult Protective Services (APS)	<ul style="list-style-type: none">▪ Describe local APS laws and regulations▪ APS processes and typical responses▪ Describe APS role in determining mental capacity▪ Describe Court Petitions and case criteria
Elder Abuse Experts	<ul style="list-style-type: none">▪ Explain elder abuse dynamics▪ Explain dynamics of domestic violence and abuse in later life▪ Discuss links between animal abuse and elder abuse
Facilities Experts	<ul style="list-style-type: none">▪ Describe the standards of care▪ Discuss the facility's history of improper care▪ Locate and interpret relevant records and documents

EVIDENCE COLLECTION CHECKLIST

PART I: TESTIMONY AND BACKGROUND EVIDENCE

- Psychological/psychiatric evaluation of victim (when consent, undue influence, or capacity may be an issue)
- Victim testimony or deposition with full-cross examination, as soon as possible after charging (*Crawford v. Washington*)
- Videotape the victim at the early stage of the investigation, including the following:
- Orientation—victim's perception of time, place, and person

FACTS:

- Consent
- Identity of suspect
- Review documents/evidence. Have victim sign his or her name in video to compare to signature on questioned documents.
- Impact of crime, include a walk-through video of a neglect or abuse crime scene if possible

MEDICAL EVIDENCE, INCLUDING:

- Medications - Include actual bottles/containers for prescriptions to show physician and pharmacy, possession and full/empty status given recommended dosage over time from the date of the last refill.
- Medical records of current and underlying conditions (*Sources of Information*)
- Emergency Room
- Nursing facilities
- Dentists
- Treating physicians
- Pharmacy
- Other, list _____

Specific Types of Documents to Request:

- Lab reports
- X-rays
- Nurse's notes
- Social workers' notes
- Adult Protective Services (APS) records of current and prior contacts
- All law enforcement contacts with involved parties and witnesses, including:
 - 911 tapes
 - Jail records
 - Arrest reports
 - Criminal histories
 - Phone calls
 - Visitors logs by or on behalf of suspects

Financial Records

- Credits cards records
- Credits reports
- Victim's bank records
- Investment account records
- Suspect's bank records
- Checkbook registers

Legal Documentations

- Power of attorneys
- Court/protection orders
- Property deeds
- Advanced care directives/living wills
- Prior civil cases
- Wills and trusts
- Conveyances
- Guardianship/conservatorship

Consultation/Experts

- Handwriting analysts
- Wound care experts
- Forensic accountant
- Civil attorneys
- Geriatricians
- Geriatric psychologists
- Geriatric psychiatrists
- Medical examiner

PART II: INTERVIEWS AND PHYSICAL EVIDENCE**INTERVIEWS**

Witnesses, who can describe the victim's condition such as the activities, level of functioning and interaction with the defendant at the time of incident and before the incident.

Include a description of changes over time.

Possible witnesses:

- Family and friends
- Banking/financial
- Hair stylists/barbers
- Local businesses
- Adult day care services
- Adult Protective Services
- Acquaintances/social
- Medical providers (past and current)
- Faith community
- Neighbors
- Social services (Meals on Wheels, etc.)
- Civil attorneys
- Payees for expenses the suspect paid with attorneys the victim's money

Various community "gatekeepers":

- Delivery personnel
- Meter readers
- Postal carriers
- Other, list _____

PHYSICAL EVIDENCE - include an inventory**Photo and video documentation**

- Crime scene, including, if relevant:
- Contents of refrigerator, cupboards, medicine cabinets (*include actual bottles/containers for prescriptions to show physician and pharmacy, possession and full/empty status given recommended dosage over time from the date of the last refill*).
- Suspect's living area
- Victim's living area
- Major new purchases made by the suspect
- Victim's body
- Injuries over time
- Clothing victim was wearing at time of incident (include adult diapers if applicable)
- Bedding
- Writings/journals/letters
- Address books and calendars
- Defendant's computer, flash drives, etc.
- Legal file from victim's civil attorney
- Nutritional supplements
- Other signs of neglect
- Locks on outside doors
- Photos and videos related to conduct
- Defendant's and victim's ISP records
- Medications and medical supplies
- Receipts for purchases
- Assistive devices (or lack thereof)

Adapted from Prosecuting Elder Abuse Cases Basic Tools and Strategies, National Center for State Courts (NCSC), WWWNCSC.org

RESOURCES AND WEBSITES

National Adult Protective Services Administration (NAPSA)

960 Lincoln Place
Boulder, CO 80302
(630) 510-1192
www.apsnetwork.org

National Center on Elder Abuse (NCEA)

Center for Community Research and Services
University of Delaware
297 Graham Hall
Newark, DE 19716
(302) 831-3252
www.ncea.aoa.gov

National Clearinghouse on Abuse in Later Life (NCALL)

307 S Paterson Street, Suite 1
Madison, WI 53703
(608) 255-0539
www.ncall.us

National Coalition Against Domestic Violence (NCADV)

PO Box 18749
Denver, CO 80218-0749
(303) 839-1852 / (303) 839-8459 (TTY)
www.ncadv.org

National Committee for the Prevention of Elder Abuse (NCPEA)

1612 K Street, NW
Washington, DC 20006
(202) 682-4140
www.preventelderabuse.org

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1612 K Street, NW
Washington, DC 20006
(202) 682-4140
www.preventelderabuse.org

National Domestic Violence Hotline

(800) 799-7233; (800) 787-3224 TTY
www.ndvh.org/index.htm

National Institute on Aging

Building 31, Rm 5C27
31 Center Dr., MSC 2292
Bethesda, MD 20892
(301) 496-1752 / (800) 222-4225 (TTY)
www.nia.nih.gov

National Long Term Care Ombudsman Resource Center

1828 L Street, NW, Suite 801

Washington, DC 20036
(202) 332-2275
www.ltombudsman.org

National Organization for Victim Assistance

510 King Street, Suite 424
Alexandria, VA 22314
(800) 879-6682
www.trynova.org

National Resource Center on Domestic Violence

6400 Flank Drive, Suite 1300
Harrisburg, PA 17112
(800) 537-2238
www.nrcdv.org

National Sexual Violence Resource Center (NSVRC)

123 N. Enola Dr. Enola, PA 17025
(877) 739-3895
www.nsvrc.org

Elder Justice Initiative

Consumer Protection Section
Ohio Attorney General Office
30 E Broad St., 14th Floor
Columbus Ohio 43215
(800) 282-0515

<http://www.ohioattorneygeneral.gov/Individuals-and-Families/Seniors/Elder-Abuse>

For more information on the handbook or to request an elder fraud/financial exploitation training for staff,
contact Attorney General Mike DeWine's office at

<http://www.ohioattorneygeneral.gov/Individuals-and-Families/Seniors/Elder-Abuse>
www.OhioAttorneyGeneral.gov or call 800-282-0515

For TTY, please call Relay Ohio at 800-750-0750