EXPLORATION OF ETHICS AND THE ELDERLY

A PRACTICAL CONTEXT

1. Protection of many of our Elderly is Needed: Unfortunately, the abuse of the elderly is on the rise. Which one of us has not received a phone call, purportedly from the IRS “criminal division” wanting us to call back immediately with our social security number? Or which of us has not received an email from another country indicating our “winnings” are being paid any minute, as soon as a small fee is received? If we are receiving these inquiries, how much more so are our elderly being targeted? Sometimes the abuse is blatant, as when an elderly person spends millions on an international lottery. Sometimes the abuse is insidious and subtle, like the daughter who puts glasses just out of reach and “handles everything for mom,” by isolating her or having mom support a lifestyle the daughter herself could not maintain. (Mom bought 10 cuts of prime rib and a case of expensive wine at Costco). Caregiver abuse continues to be a concern, and secret “marriages” between caregivers and the elderly appears to be on the rise. Many times, we, the professionals, are the only firewall between a frail elderly person and certain abuse. However, we simply lack the tools to properly assess someone and fall back on presumptions of capacity and hope for the best.
2. On the other Hand – Preservation of Autonomy and Preservation of Dignity is on the Rise. Assume Nothing! Don’t assume just because someone is older that they are somehow impaired. Talk to the person, not their children or other assistants. Believe me, the “assistants” will chime in without prompting. Ascertain under your own ethical standards whether other people should be allowed in the room, and whether that compromises confidentiality, your ability to assess free will, or attorney-client privilege. For example, suppose you are an attorney, and a financial planner asks to be included in the meeting? The person’s financial planner will not thank you when he or she is deposed because they were in a planning meeting, nor will your client. Treat everyone with kindness and respect – make direct eye contact and be patient, and make sure the level of your communication is appropriate.
3. Practical Considerations: Face to Face vs. Zoom meetings.
   1. Face to Face if Possible: Many of us are far too busy to make house calls but consider whether a house call might be better in most situations. If you insist all clients come to your office, and if your client has problems ambulating, and is frail physically, how is he or she likely to present by the time the client arrives at your office? Compound this with the stress of seeing a professional or talking about unpleasant topics such as selling their home, future care, taxes, finances, death and incapacity. If the client is coming into the office, make sure he or she knows precisely how to find your office, where to park. Inquire whether the client will need handicapped parking and provide that information, or even send a staff member to meet the client in the parking area and bring the client into the office. Talk to the client about times of the day which are best for him or her and accommodate your schedule accordingly. An elderly person may have a better time of the day to follow complex discussions.
      1. Zoom calls. If you decide to allow zoom calls, ask the client who is in the room with them. Many elderly folks are very candid and will identify everyone. It is impossible to ascertain who is actually in the room on a zoom call, as the person who is elderly could be subject to undue influence. Be aware that many of our elderly have no idea how to operate this level of technology. Again, have your staff speak to them early to make sure of proper installation. Have your staff make a trial run and try an early zoom call.
4. Trust your Spidey senses. If something is tingling that the situation is off somehow, the situation is most likely off. If appropriate provide practical barriers if the planning seems concerning, such as needing an assessment by a physician to bolster the plan in your file, before proceeding. Keep it client focused and you will rarely have trouble, such as “I don’t want your plan to be challenged or overturned, as that process is very expensive. I am sure you will pass any assessment now, so let’s document that fact.
5. Be patient and allow enough time for the situation and story to unfold. As one ages, the brain slows down, even in those who have capacity. It is simply a natural progression of aging. Time must be given for an older client to process, think and express himself or herself clearly and fully. Also, the person you are helping may be lonely. Your demeanor should be friendly and non-threatening. Access to the office should be easy and the office should not be too cold. If the office is kept cold, a heater may be provided and a warm drink. Time should be spent reminiscing. It builds trust and establishes a baseline of historic recall. Hearing aids may be provided. Sensitive inquiries should be made about whether the client as hearing or sight impairments. Medications should be reviewed in a manner to ascertain whether the medication are impairing the person in any way.
6. Ethical Considerations for Attorneys may serve as a guide for Other Professions:
   1. The ACTEC Commentaries on Model Rules of Professional Contact Provide:
      1. MRPC 1:14 Client with Diminished Capacity
         1. When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
         2. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. \*\*
         3. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 (Rules on Confidentiality of Information). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests. \*\*
         4. \*\* Not the rule in California, California attorneys may only report suspected risk against their clients with the express permission of their clients.
      2. Normal Client Relationship: The attorney should, as far as possible accord the represented person the status of client, particularly in communication. The lawyer must be loyal to the client and keep the client’s interests in mind foremost. The lawyer should rely on the client’s directions. The lawyer may want to involve family members if the client needs assistance, but if the lawyer is getting direction from the family which is inconsistent to contrary to the client’s instructions, the lawyer should rely on the client’s direction. Consider impact on the attorney client evidentiary privilege when others are allowed in the discussion.
      3. California Relevant Opinions
         1. Cal. Formal Op. 1989-112 (1989) Without the consent of the client, a lawyer may not initiate conservatorship proceedings on the client’s behalf, even though the lawyer has concluded it is in the best interests of the client. Initiation of the proceeding would breech confidences of the client and constitute a conflict of interest.
         2. L.A. Op. 450 (1988) Initiating a conservatorship proceeding for a present or former client without the client’s authorization involves an impermissible conflict of interest.
         3. San Diego Op. 1990-3 (1990) The portion of this opinion dealing with the capacity of a client advised that, “a lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence.” The opinion continues, suggesting that once the issue of capacity is raised in the attorney’s mind it must be resolved. “The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. If the lawyer is not satisfied that the client has sufficient capacity and is free from undue influence and fraud, no will should be prepared. The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship.
         4. S.F. Op. 99-2 (1999) Criticizing the result reached in California Formal Opinion 1989-112 (1989), supra, this opinion concludes, after careful analysis:
            1. “An attorney who reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, may, but is not required to, take protective action with respect to the client’s person or property. Such action may include recommending appointment of a trustee, conservator, or guardian ad litem. The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client.
   2. Third Parties in Meetings
      1. To the extent possible, children or other helpers should NOT be involved in the meeting. However, sometimes your elderly client or client with diminished capacity, will insist and be quite agitated without the presence of the trusted person. (This is a red flag for capacity and/or undue influence, so be cautious if this is the case). In such cases, the professional should involve others in the conversation only when the elderly person has been interviewed first and the professional has satisfied himself or herself that the requisite capacity exists to do the planning and that no undue influence is being exerted, and even then, only upon full disclosure to the client, preferably in writing.
      2. Be mindful that others in the room (1) can cause the issue of undue influence to be raised later; (2) can waive the attorney client privilege at to all matters discussed in the presence of a third party; (3) can muddle an assessment of the requisite capacity, or (4) can compromise the representation in a multitude of ways. For example, the family members may have a blatant conflict of interest (“my brother is a spendthrift and mom only wants to give him an annuity which pays no more than $500 a month.)
      3. A professional should exert control over the situation, and should use common sense. If the client has one daughter, she is successful in her own right, and she is present because she is helping mom carry her things, that paints a very different picture than the daughter who has a drug history, has been living with mom, and is insisting on being in the meeting, because “mom can’t tell you she wants me to get everything, and she wants to leave my other sister out.”
      4. Track who calls to schedule the appointment, who brings the client to the office, who is present in any meeting and for how long, and when and for how long the client was spoken to completely alone. The safest course of action is to speak to the client alone without anyone else present. However, from a practical standpoint, capacity assessments sometimes require verification of facts, and the professional will have to get permission to speak with others in this regard.
      5. If others are present, and the client has properly waived confidentiality and attorney client privilege, the attorney should require others in the room to sign a disclosure indicating they understand the attorney is speaking to them at the client’s request, and that the attorney does not, in any way, represent them or their interests. This is keep the attorney from being put in the position of the family believing the attorney represents “the family.”
      6. Also, waivers of confidentiality need to be specific (for one meeting only or ongoing?) This will be important when the child calls the attorney a week later to ask a follow up question.
   3. Declining Representation
      1. How does an attorney kindly tell a client he or she cannot represent the client, due to the belief the client lacks capacity or is being influenced? This is a very difficult conversation. Many prospective clients don’t understand that attorneys are not like short order cooks (they pay the money, order the thing and then get it delivered). .Here are several suggestions:
         1. Write down professional and aspirational standards in laymen’s terms, have client sign as part of the intake that he or she understands you do not take on all representation, and acceptance or declination of the matter is not a personal commentary on that person’s situation. When you do have to turn down the matter, it will be less of a surprise.
         2. Be direct and simply explain your concerns, calmly and kindly. Indicate you will not be able to represent the person, and why, and stick to your guns.
         3. In more borderline cases, tell the person you will only be able to prepare the documents if the person is willing to be assessed more fully by their doctor or geriatric psychiatrist. More about this later.
         4. Although we are limited in our abilities to protect our clients, if we do turn down representation of a client whom we believe is being abused, or unduly influenced, talk frankly with the prospective client about the problem, and find out if you can get his or her permission for him or her to consult with a care manager, trained senior social worker, or report the matter to the police or APS (Adult Protective Services). If the client indicates he or she would like to see the care manager or social worker, query whether it is incumbent upon you to tell the client that the care manger or social worker is a mandatory reporter. Also, consider involving a private professional fiduciary, or senior bill payer or other assistance. Bear in mind the private professional could also have a social worker license and could be a mandatory reporter as well.
         5. Strive to do no harm, respect autonomy, be just and faithful, accord dignity, and treat others with care and compassion. Balance this with ethical considerations and be firm in your convictions. END OF PAGE
         6. My client has Dementia! More and more expertise is being needed to determine what that means. There are between 85 to 95 types of dementia, each one of which was unique and needed different skills to understand and manage. Teepa trains caregivers and professionals about the importance of identifying, understanding, and managing dementia with a positive approach. We, as professionals have an ethical obligation to assess whether our client has the requisite capacity to execute the documents we have drafted, or perform a particular task. This may or may not include identifying dementia. Dementia is defined as having a chronic deficit in at least two areas. It is not a mental illness. Also note that having dementia is not necessarily indicative of lacking legal capacity to perform a certain act under the law. Likewise, not having been diagnosed with dementia does not mean with certainty that the person has legal capacity. Moreover, having capacity does not mean the individual was not subject to undue influence. Mini Mental State Examination (MMSE) The Mini Mental State Examination (the familiar test where patients score a numerical amount out of 30 possible) has been a tool used for many years to assess mental status. However, using such test alone as an indicator of dementia has been called into question. The biggest concern tends to be that such screenings are not indicative alone of memory impairment or diagnosis, but rather may indicate a condition which needs further evaluation. A full work up should be done, including imaging (PET scans) and lab tests in order to achieve an accurate diagnosis. This is necessary if the person is going to be medically treated, if possible, and cared for in an appropriate way, and in order to educate caregivers. PET scans (Positron Emission Tomography) can help predict whether the memory lapses being identified will progress into dementia. The concern is, many times it is very difficult to get insurance to pay for such a diagnostic work up. Because there is no cure for dementia, medications are still of limited use, and surgery does not provide an answer (in most cases), the medical community involves itself only tangentially with dementia. Be aware that your clients, even if healthy and well, may benefit from a baseline memory test. Attached as Exhibits “A,” “B” and “C” are tests commonly administered. Query whether it will benefit your clients to pin down a particular diagnosis, considering the common types of dementia set forth below.
   4. Early warning signs of dementia
      1. Repeating or losing new information
      2. Putting things in strange places (i.e., keys in the freezer)
      3. Difficulty driving, managing medications.
      4. Confusing time and place
      5. Getting lost
      6. Missing appointments
      7. Problems finding words, misnaming things.
      8. Difficulty problem solving - can’t work this darn remote.
      9. Changes in personality, mood and behavior
      10. Loss of inhibitions
      11. Impulsive action with lack of judgment
      12. Look for Changes! In other words, if the person was always bad at directions, getting lost will not necessarily be an indicator of dementia.
      13. Some people will be aware of the problem and face it, some will be aware and hide it, and some will be completely unaware and hostile towards assistance. Many types of dementia exist. Best practice is to get a full work up to identify whether there is a dementia, identify what the person can do and enjoy, and focus on ability rather than loss of ability. The family needs to recognize the situation too and not be in denial. It’s a relief to the family to find out mom is not just “being mean.” Be aware that some medications can help and, while life is not lengthened with our current medications, significant symptom control can occur.
   5. Normal Aging vs. Not So Normal Aging. Normal Aging includes thinking through things more slowly, hesitating, pausing to find words, being able to identify people but not names, losing their car in a parking lot, and so on. Not So Normal Aging includes significantly losing the ability to do something (i.e., used to be able to work the remote and now cannot), an inability to make a decision, impulsivity with a lack of judgment, and an inability to place people or find words. It is important to understand that this is a brain problem and connections are not working properly. 50% of those over 85 have some form of dementia, and of that, half will be self-aware.
   6. Common Types of Dementia and Symptoms
7. Alzheimer’s Disease (Young Onset and Late Live Onset)
8. Memory loss that affects daily life
9. Challenges in planning and solving daily tasks
10. Difficulty completing familiar tasks
11. Confusion with time or place
12. Trouble understanding visual input or spatial relationships
13. New problems with words, speaking or writing
14. Misplacing things and losing ability to retrace steps
15. Decreased or poor judgment
16. Withdrawal from work and social activities
17. Changes in mood or personality
18. Vascular Dementia (Multi infarct)
    1. Vascular dementia symptoms vary, depending on the part of the brain where blood flow is impaired. Can be result of stroke.
    2. Confusion
    3. Trouble paying attention and concentrating
    4. Reduced ability to organize thoughts or actions
    5. Decline in ability to analyze a situation, develop an effective plan and communicate that plan to others
    6. Difficulty deciding what to do next
    7. Problems with memory
    8. Restlessness and agitation
    9. Unsteady gait
    10. Sudden or frequent urge to urinate or inability to control passing urine
    11. Depression
19. Lewy Body Dementia
20. Changes in thinking and reasoning
21. Confusion and alertness that varies significantly from one time of day to another or from one day to the next
22. Parkinson's symptoms, such as a hunched posture, balance problems and rigid muscles
23. Visual hallucinations
24. Delusions
25. Trouble interpreting visual information
26. Acting out dreams, sometimes violently, a problem known as rapid eye movement (REM) sleep disorder
27. Malfunctions of the "automatic" (autonomic) nervous system
28. Memory loss that may be significant but less prominent than in Alzheimer's
29. Fronto-Temporal Lobe Dementia
    1. Some people with fronto-temporal dementia undergo dramatic changes in their personality and become socially inappropriate, impulsive or emotionally indifferent, while others lose the ability to use language.
    2. Frontotemporal dementia is often misdiagnosed as a psychiatric problem or as Alzheimer's disease.
    3. Increasingly inappropriate actions
    4. Loss of empathy and other interpersonal skills
    5. Lack of judgment and inhibition
    6. Apathy
    7. Repetitive compulsive behavior
    8. A decline in personal hygiene
    9. Changes in eating habits, predominantly overeating
    10. Lack of awareness of thinking or behavioral changes
    11. Primary progressive aphasia, one subtype, is characterized by an increasing difficulty in using and understanding written and spoken language. For example, people may have trouble finding the right word to use in speech or naming objects.
    12. People with another subtype, semantic dementia, utter grammatically correct speech that has no relevance to the conversation at hand. They may have difficulty understanding written or spoken language, or they may have difficulty recalling the words for common objects.
    13. People with logopenic phonological aphasia talk slowly and have difficulty finding the right word to use or naming objects. They may have memory difficulties as well.
30. Other Dementias – Some examples
    1. Genetic syndromes
    2. Metabolic pxs
    3. Alcohol related
    4. Drugs/toxin exposure
    5. White Matter diseases
    6. Mass effects
    7. Depression or other Mental Conditions
    8. Infections
    9. Parkinson’s Disease

V. Capacity Standards:

* + 1. The Umbrella of the Due Process in Competence Determinations Act. The Due Process in Competence Determinations Act is like the Force. It surrounds and binds all capacity determinations. Many of our presumptions flow from this Act (“DPCDA”). This Act is codified as Probate Codes §§ 810, 811(b), (d) and 812.

1. Presumption of Capacity: Probate Code § 810(a) states “for the purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have capacity to make decisions and to be responsible for their acts or decisions.” Note under new Welfare and Institutions Code Section 21000, in determining capacity, the capacity of an individual should factor in any supported decision making that the person is using or could use in making a determination of capacity.
2. Mental or Physical Disorder Alone Not Enough: Probate Code § 810(b) states that having a mental or physical disorder alone does not affect the presumption of capacity.
3. Diagnosis Alone Not Enough: Probate Code § 810(c) states that a determination of incapacity must be based on “evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.” Probate Code 811(d) also states “mere diagnosis is not sufficient to support a determination a person is of unsound mind or lacks capacity for a specific act.”
4. Deficit Must Be a Significant Impairment: Probate Code § 811(b) states deficit in mental function may only be considered if it “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision.”
5. Must be Able to Communicate: Probate Code § 812 states the person lacks capacity to make a decision if the person cannot communicate the decision (whether verbally or by any other means).
   * 1. The person needs to be able to communicate by some means, show understanding both in speech and written documents, and appreciate the consequences of the decision (good and bad)
   1. Determine if there is an impairment or deficit.
6. Identify any impairments obvious from the meeting with the client. Alertness and attention, including:
   * + - 1. Level of arousal or consciousness
         2. Oriented as to time, place, person and situation; and
         3. Ability to attend and concentrate.
7. Information processing, including:
   * + 1. Short term and long-term memory, including immediate recall (working memory) and delayed recall (remote memory)
       2. Ability to understand or communicate with others, whether verbally or otherwise
       3. Recognition of familiar objects and persons.
       4. Ability to understand and appreciate quantities which may include the ability to perform simple calculations.
       5. Ability to reason abstractly and to plan, organize and carry out actions in one’s own rational self-interest; and
       6. Ability to reason logically.
8. Thought processes, as demonstrated by
9. Severely disorganized thinking
10. Hallucinations
11. Delusions; or
12. Uncontrollable, repetitive or intrusive thoughts
13. Ability to modulate mood and affect.
14. Persistent euphoria, anger, anxiety, fear, panic, depression, hopelessness, despair, helplessness, apathy, or indifference that is inappropriate in degree to the set of circumstances.
    1. Determine if the impairment or deficit affects the capacity required.
15. There must be a correlation between the deficit and capacity required for the specific act. Probate Code § 811(a)
16. Must significantly impair the person’s ability to understand and appreciate the consequences of his or her actions.
17. Court may consider the frequency, severity and duration of the impairment. Probate Code § 811(c ).
18. Deficits in alertness and attention or in the ability to understand or communicate with others may indicate the person lacks the ability to communicate the decisions and understand and appreciate the rights, duties, and reasonable alternatives involved in the decisions, See Probate Code § 812.
19. Geriatric Psychiatrist may be essential to linking the deficit to whether the ability related to the act contemplated is affected.
20. Capacity Issues which Arise in Conservatorship Context:
    1. DPCDA applies in determining whether or not to grant a Conservatorship.
       1. All persons are presumed to have capacity to make decisions about their personal, financial and medical matters. Probate Code 810(a).
       2. If a conservatorship is to be granted, the proposed Conservatee must be found to lack capacity either to provide for personal needs, manage financial resources or resist undue influence. Probate Code § 1801(a)(b).
       3. In addition, the Court has to find that there are no suitable alternatives to establishing the conservatorship.
          1. Supportive Decision Making is a less restrictive alternative.
             1. New AB 1663 – New Probate Code Section 1836 Conservatorship Alternatives Program, purpose – to reduce the number of people who lose their rights in conservatorship.
             2. Supported Decision making allows individuals to make choices about their own lives with the support of a team of people they know and trust, as an alternative to conservatorship
             3. AB 1663 amended 416.7 and 416.19 of Health and Safety Code, Probate Code Sections 1456, 1800, 1800.3, 1812, 1821, 1835, 1850, 1860.5, 1863, 2113, and adds Probate Code Sections 1835.5, 1836, and 1861.5 and Division 11.5 commencing with Section 210000 to the Welfare and Institutions Code.
             4. All aimed at considering not only the best interests of the proposed conservatee but the expressed wishes also, and to ensure, to the greatest extent possible the conservatee is able to understand, make and communicate their own informed choices while under conservatorship.
             5. Supportive decision making (“SDM”) is an alternative which must be considered and tried in lieu of conservatorship, and the attempts, length and duration must be plead as well as why it didn’t work.
             6. Also rules on setting termination hearing if the court is made aware the Conservatee wishes to terminate the conservatorship (PC 1861.5)
             7. Supportive decision making should be encouraged for all life decisions. Should be done without impeding self-determination of the adult.

Medical, psychological, financial, educational, living arrangements, access to home and community-based services, social, sexual, religious and occupational.

SDM Agreement must be voluntary, written, plain language, may be revoked orally or in writing, and may be in writing, in images, read aloud or be video or audio recorded.

People who are ineligible supporters, those against whom an allegation of elder abuse, restraining order or criminally or civilly liable for abuse, neglect, mistreatment, coercion or fraud.

* + 1. Must have evidence of deficits in behavior, understanding, or memory linked to inability to carry out particular functions. Probate Code § 811. Capacity Declaration completed by physician, psychologist or religious health practitioner is required. If refused, Petitioner may be able to compel physical or mental examination using the provisions of California Civil Procedure §§ 2032.010-2032.650. Note that either side may not be present, but parties may request audio recording.
    2. Legislative intent was for the Conservatee to use the abilities he or she have to whatever degree possible. The Conservator should focus on ways to enhance and improve Conservatee’s functional abilities.

VIII. Capacity to Contract.

1. All persons are presumed capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. Civil Code § 1556.
2. A person entirely without understanding has no power to make a contract of any kind. Civil Code § 38. There is a rebuttable presumption affecting the burden of proof that a person is of unsound mind if he or she is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Civil Code § 38(b).
3. A conveyance or contract made by a person of unsound mind, but not entirely without understanding, made before the person’s incapacity has been judicially determined, is subject to rescission. Civil Code § 39(a)
4. The term “conveyance” includes gifts. See Stafford v. Groff (1950) 99 CA2d 67.
5. Standard under case law (prior to enactment of DPCDA
   * 1. Burgess v. Security-First National Bank (1941) 44 CA2d808, 816, Probate Code §§ 810(c ), 812.

Was the person mentally competent to deal with the subject at hand with full understanding of his or her rights; and

Understood the nature, purpose and effect of the transaction.

* + 1. DPCDA test:

1. Is there a mental function deficit? Probate Code 811(a)
2. Is there a correlation between the deficit and the contract, conveyance, or agency appointment in question? Probate Code §
3. Does the deficit significantly impair the person’s ability to understand and appreciate the consequences of his or her actions with regard to the contract, conveyance or agency appointment in question? Probate Code § 811(b).

X Undue Influence:

1. Undue influence is particularly insidious. It is a form of financial elder abuse.
2. A person can still have the requisite capacity for a specific act and be subject to undue influence. Many elders do not have significant cognitive impairment but are highly susceptible to being taking advantage of by someone trusted.
3. Modern life has many pressures. It is our job as the legal community to determine when that pressure becomes so excessive that it is exploitive.
4. New Undue Influence Law (Effective January 2014) is defined as “excessive persuasion” that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. Welfare and Institutions Code § 15610.70(a). The new law also states that “the intent of the Legislature is that this § supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.”
5. California Welfare and Institutions Code § 15610.70(a) defines undue influence generally as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” California Welfare and Institutions Code §§15610.70(a)(1)-(4) lists factors to be considered. They include:
   1. The victim’s vulnerability, evidence of which may include “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.”
   2. The influencer’s apparent authority, evidence of which may include “status as a fiduciary, family member, care provider, healthcare professional, legal professional, spiritual advisor, expert, or other qualification.”
   3. The influencer’s conduct, evidence of which may include “(a) controlling necessaries 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.”
   4. The equity of the challenged result, evidence of which may include “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 value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.”
   5. Evidence of an inequitable result, without more, is not sufficient to prove undue influence.
6. This definition, coupled with the provisions of Welfare and Institutions Code § 15610.30, which defines financial abuse of an elder or dependent adult will assist in identifying and prosecuting these cases. Welfare and Institutions Code § 15610.30(a) provides: “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:
   1. Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
   2. Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
   3. Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in § 15610.70.
7. The property may be held by the elder or dependent adult directly or a representative (conservator, trustee, attorney in fact, or other representative of the estate). The standard is the person knew or should have known the conduct is likely to be harmful to an elder or dependent adult.
8. *Lintz v. Lintz* (2014) 222 Cal. App. 4th 1346: The Court found the third wife of decedent had exerted undue influence over the decedent, even though decedent was found to have testamentary capacity. The Court found the wife had procured the estate plan by undue influence and the Court invalidated the documents.
9. Note that an inequitable result alone is not sufficient. Circumstantial evidence may be used to prove undue influence, because by the nature of undue influence it is difficult to obtain direct evidence. Many times the abuser isolates the elder and tightly controls the situation. Much of this abuse happens behind closed doors.
10. Presumptions of Undue Influence will arise in some confidential relationships or sensitive relationships:
    1. Marital relationship. The old “good faith” standards has been heightened to “confidential duty” and “fiduciary duty’ standards. Under current law, the duties owed between spouses are the same highest duties owed by parties to a fiduciary relationship. Family Code Sec. 721(b).
    2. Caregiver: Historical Disqualified Person Statutes: The prior disqualified person statutes (Probate Code §21350, et. seq.) would invalidate provisions found in deeds, wills, trusts and other donative instruments that purport to make a transfer to a caregiver, family member or drafter unless one of the exceptions set forth in Probate Code §21351 applied.
       * 1. *Bernard v. Foley* (2005, Cal App 2d Dist) 130 Cal. App. 4th 1109, 30 Cal. Rptr. 3d 716, broadened the application of the disqualified persons definition. Also, there was a conflict among the lower courts about the definition of caregiver, which was settled by this case and included any person providing health services or social services to an elderly person or dependent adult.
         2. The Court adopted the definition of care custodian found in California Welfare and Institutions Code §15610.17, which listed categories and specific language in sub§ (y) which defined a caregiver as : “any other person providing health services or social services to elders or dependent adults.” As a result of this case, and the statute, gifts to “caregivers” were presumptively barred even if there was an ongoing and long term friendship. There was no preexisting friendship exception. The gift was subject to a rebuttable presumption of fraud, undue influence, menace and duress, overcome only by clear and convincing evidence, and could not be based solely on the testimony of the disqualified person. This created significant drafting issues and a trap for the unwary.
         3. New Law: Probate Code §21380, et seq. as of January 1, 2011.Probate Code §21380 restates former §21350(a) with some exceptions:
       1. Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.
       2. Subdivision (a)(6) generalizes the reference to a “law partnership or law corporation” in former § 21350(a)(3), to include any law firm, regardless of how it is organized.
       3. Subdivision (a)(6) generalizes the rule creating a presumption of fraud or undue influence when a gift is made to the law firm of the drafter of a donative instrument, so that it also applies to a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.
       4. Subdivision (b) restates the substance of the first sentence of former § 21351(d), with two exceptions:
          * 1. The former limitation on proof by the testimony of the beneficiary is not continued.
            2. The presumption of menace and duress is not continued.
       5. Subdivision (c) continues the substance of former § 21351(e) (1), and expands the rule to apply to gifts to specified relatives and associates of the drafter of a donative instrument.
       6. Subdivision (d) restates the substance of the second sentence of former § 21351(d). §21380(d) and provides that if a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney fees. Representing beneficiaries of proposed transfers that fall within the gambit of 21380 can be tricky, and the careful advocate will warn his/her client in writing of the possible consequences of a failed attempt to validate the gift by means of clear and convincing evidence. However,“[t]he burden of establishing the facts that give rise to the presumption under subdivision (a) is borne by the person who contests the validity of a donative transfer under this §. See Evid. Code § 500 (general rule on burden of proof).” This is undoubtedly because gifts are presumed to be valid, unless and until there is sufficient evidence to give rise for the application of the 21380 presumption of fraud or undue influence.
       7. In § 21384(c), an attorney who drafts an instrument can review and certify the same instrument but only as to a gift to a care custodian.
       8. In §21350, a certificate of independent review was required for all transfers to disqualified persons. The Certificate of Independent Review (“CIR”) was a method to avoid the presumptions of invalidity found in §21380, and § 21384(a) sets forth the wording of the certificate.
       9. Careful practitioners will want to create a declaration in support of the CIR. The declaration of the drafting attorney helps to make sure that all of the requirements of a valid CIR are met. .
       10. *Estate of Winans* (2010), 183 Cal.App.4th102.discusses the duties of an attorney who provides a CIR under the old §21351(b). The issues surrounding the statutory scheme of disqualification of specified people under §21380 are not affected by the application of the common law governing menace, duress, fraud and undue influence. See *Bernard v. Foley*, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).
           1. Exceptions:
              1. Probate Code § 21382 Excludes certain persons from the disqualifying statute (or certain gifts). Such excluded persons are:

A donative transfer to a person related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.

An instrument that is approved pursuant to an order under Article 10 (commencing with § 2580) of Chapter 6 of Part 4 (petition for substituted judgment), after full disclosure of the relationships of the persons involved.

A donative transfer to a charity or trust for that charity.

A donative transfer of property valued at five thousand dollars ($5,000) or less, if the total value of the transferor’s estate equals or exceeds the amount stated in § 13100 (i.e. presently $150,000 in value).

An instrument executed outside of California by a non California resident when the instrument was executed.

Probate Code §21384 provides that a gift may be made to a disqualified donee. if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor’s heirs and on any beneficiary of a prior donative instrument, and attempts to determine if the attended transfer is a result of fraud or undue influence, and signs and delivers a certificate of independent review in the form set forth in Probate Code 21384.

It is incredibly important, as a mechanism of protection, that the attorney creating the certificate of independent review be well versed in issues of diminished capacity, ethics, and the elements of undue influence. That attorney, by his or her records, memorandums, interview of the client, and other evidence is insuring, to the best of his or her ability, that undue influence is not in play.

I had the opportunity to give testimony as an expert witness related to the standards of undue influence wherein two separate attorneys had provided certificates of independent review to bolster a gift to a caregiver, and to name the caregiver as trustee. During that litigation the trial court determined that the certificates of independent review were inadequate.

If an attorney is enlisted to prepare a certificate of independent review, he or she should follow the following best practices:

Consider who made the contact to schedule the appointment. Was it the drafting attorney? Does this have implications for the independent nature of the review? Was it the alleged influencer? Or the client himself? (Do not create a certificate of independent review for your friends.)

Take adequate time to interview the client thoroughly and patiently. Identify any capacity deficits, and whether such capacity deficits have a correlation to the capacity required.

Consider asking your client whether you can speak to collateral sources such as his or her accountant, physician, or appropriate family members. In my case, the caregiver had only been working for the donor for one month. When she was interviewed by the certifying attorney, she indicated she had known the caregiver for a long time and they were best friends. Consider whether, and how best to verify such important facts.

Even if no capacity deficits exist, explore carefully the possibility of undue influence. Review and ask questions related to the factors of undue influence set forth in Welfare and Institutions Code §§15610.70(a)(1)(4).

Create a declaration which sets forth your reasoning for executing a certificate of independent review (or not doing so if you decline).

Don’t shy from involving other professionals, if the determination is ambiguous. Sometimes it is appropriate to involve a geriatric psychiatrist or other professional to help with these assessments.

Charge appropriately for your time, expertise, and the level of research/analysis you will have to engage in to properly discharge your duty to your client.