

UNDUE INFLUENCE

Recognition & Prevention

A Reference Aid

This Reference Aid is intended to assist legal professionals to recognize potential undue influence and prevent successful challenges based on undue influence to the estate and personal planning documents they prepare. It summarizes the recommended practices explained in greater depth in the BCLI publication *Undue Influence Recognition and Prevention: A Guide for Legal Practitioners* ("BCLI Guide"). The contents of both this Reference Aid and the BCLI Guide reflect the work of an interdisciplinary project committee.

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For more information, see the BCLI Guide available on the BCLI website at bcli.org.

CHECKLIST OF RECOMMENDED PRACTICES

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The practices in the checklist below are recommended for use by legal practitioners if they suspect that a client is susceptible to undue influence or that a client's instructions do not reflect the client's genuine wishes. Note also the list of "Red Flags to Watch For" that follows the Recommended Practices.

See the BCLI publication *Undue Influence Recognition and Prevention: A Guide for Legal Practitioners* ("BCLI Guide") for further information.

YES N/A

1. Interview client alone (Basic Rule).

Rationale:

- Ensure it is clear that practitioner is acting for client exclusively.
- Practitioner needs to avoid appearance of a joint retainer.
- Confidentiality of solicitor/client communications.
- Practitioner needs to be satisfied that client has mental capacity to give instructions and execute document in question with legal effect.

Exceptions for taking instructions from another person (A):

- A is disinterested and is acting as an interpreter (no kinship, financial interest, or social connection).
- Including A (a relative or interested person) is unavoidable. Remain alert.
- A is client's spouse. Remain alert. If any concerns that spouse is not speaking accurately for client, meet with client alone.

YES N/A

2. Ask non-leading, open ended questions to determine factors operating on client's mind.

Examples:

- How/why did you decide to divide your estate this way?
- What was important to you in deciding to divide your estate this way?
- Why did you choose [proposed executor] as executor of your will?

YES N/A

3. Explore whether client is in a relationship of dependency, domination or special confidence or trust.

See examples of open-ended probing questions in BCLI Guide, pp 49-50. Sample questions to consider:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?
- Does anyone help you more than others? Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

YES N/A

4. Explore whether client is a victim of abuse or neglect in other contexts.

Sample questions to consider (note need for tact, discretion and awareness for client's physical safety; refer to community resources if and when appropriate):

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone scolded or threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

YES N/A

5. Obtain relevant information from third parties when possible and if the client consents.

YES N/A

6. Obtain medical assessment if client's mental capacity is in question, but remember that mental capacity to validly execute a personal or estate planning document is ultimately a legal test.

YES N/A

7. Compile list of events or circumstances indicating undue influence.

See list of "Red Flags of Undue Influence to Watch For" on the following page.

YES N/A

8. Make and retain appropriate records whenever red flags are present.

Detailed notes; checklist recommended; information supporting practitioner's conclusions and ultimate decision should include: red flags identified, inquiry pursued, information obtained, memoranda to record reasoning for conclusion

YES N/A

9. If convinced after reasonable investigation that drafting instructions are product of undue influence, decline retainer to prepare document. If suspicions remain, exercise professional judgment whether to proceed. In either case, document file thoroughly regarding basis for decision.

RED FLAGS TO WATCH FOR

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The red flags listed below MAY indicate the presence of undue influence on a client. This list is not necessarily complete or definitive. It is an aid to practitioners to identify potential undue influence and provide an “index of suspicion” so that they will be alerted to carry out the necessary inquiries before preparing a personal or estate planning document for execution.

See the BCLI Guide for more detailed discussion.

YES N/A

1. Client invests **significant trust and confidence** in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new “suitor” or partner).

YES N/A

2. **Isolation** of client resulting in dependence on another for physical, emotional, financial or other needs.

YES N/A

3. **Physical, psychological and behavioural** characteristics of client.

Examples:

- **Dependence on beneficiary** due to sight, hearing, mobility, speech disability, illness, language barriers, illiteracy, immigration sponsorship.
- **Signs of neglect/self neglect** (emaciation, inappropriate clothing, bruising, untreated injuries).
- In **state of shock** after stressful situations (e.g. bad news; death of close person).
- Non-specific factors (e.g. loneliness, sexual bargaining, end of life issues).
- **Cultural influences/conditioned responses** (e.g. subservience to traditional authority in extended family; yielding to pressure for fear of revealing family conflicts leading to loss of face in community).
- **Impaired mental function** from a psychiatric condition or a non-psychiatric cause (e.g. trauma or stroke).

Signs include (see BCLI Guide, pp 34 – 35):

- Sudden onset of confusion.
- Short term memory problems, disorientations, difficulty with finances.
- Signs of depression (e.g. irritable, agitated, difficulty making decisions, sad face, bowed head, general lethargy).
- Delusions.
- Extreme sense of well-being, continuous speech, inability to concentrate, poor judgment.
- Apprehensive or appearance of being worried, distressed, overwhelmed.
- Client is intoxicated/other signs of substance abuse.
- Down’s syndrome, autism or other developmental disorder.
- Inability to answer open-ended questions.

YES N/A

4. Circumstances related to **creation of the personal or estate planning document and/or the terms.**

Examples:

- **Unusual gifts; sudden change** for no apparent reason; frequent changes.
- **Marked change** in instructions from prior will, power of attorney, etc.
- **3rd party initiates** instructions which also benefit 3rd party; **3rd party speaks** for client; **3rd party offers** to pay for new planning document; **client relies exclusively/unusually on notes** to give instructions.
- **Spouses:** joint retainer but one spouse provides instructions while **other remains silent.**
- **Recent death of a family member** and other family appear to influence changing existing document.

YES N/A

5. **Characteristics of influencer** in client’s family or circle of acquaintance.

Examples:

- **Overly helpful.**
- **Insists on being present** during interview with practitioner.
- **Contacts practitioner persistently** after instructions are taken.
- Person is **known to practitioner to have history of abuse, including violence.**
- Practitioner **observes negative and/or controlling** attitude to client.
- Practitioner is aware **that influencer is in difficult financial circumstances and/or engages in substance abuse.**

YES N/A

6. Practitioner’s **“gut feeling”.**

Examples:

- **Body language** of client indicates fear, anxiety, insecurity, embarrassment etc.
- “Influencer” is **off putting or difficult** to deal with at appointment.
- “Influencer” is **rude to staff** in office or on telephone; or is **overly solicitous.**

FLOW CHART OF RECOMMENDED PRACTICES

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