Assessing Undue Influence

Daniel A. Plotkin, MD, MPH, PhD, James E. Spar, MD, and Howard L. Horwitz, JD

A claim of undue influence (UI) often figures prominently in will and trust contests and in other legal matters. Mental health professionals (MHPs) are frequently asked to provide expert opinions on UI, but the task is challenging, because of the lack of a clear definition of UI, and conflicting and contradictory recommendations in the literature on the specific conduct of the MHP in rendering opinions on UI. Recently, however, a California statutory scheme on UI applicable in will, trust, conservatorship, and financial elder abuse cases was adopted, bringing greater clarity to the meaning of the construct. The clarification provides an opportunity to review the concern, and to recommend a set of principles to guide MHPs in the role of expert in such litigation.

J Am Acad Psychiatry Law 44:344–51, 2016

The growing number of older Americans, the prevalence of cognitive disorders associated with aging, the concentration of wealth in older adults, and the complexity of modern families is likely to lead to an increase in will and trust contests, entailing allegations of lack of testamentary capacity and of undue influence (UI).

Undue influence is also alleged in connection with contracts, financial elder abuse, and gifts. One of the grounds on which wills, trusts, and similar legal instruments may be challenged is that the person creating the instrument was subject to UI from another person with an interest in the instrument's terms. Susceptibility to UI is also one of the criteria for establishment of a conservatorship of an estate in California and some other states. The underlying question of voluntariness is also relevant to providing informed consent for medical care[1] or participation as a subject in clinical research.[2] Clearly, it can be expected that mental health providers (MHPs) will be called on with greater frequency to render expert opinions in these matters.

Standards for expert testimony are set forth by statute or in case law. In *Daubert v. Merrell Dow Pharms, Inc.* (1993) 509 U.S. 579, 113 S. Ct. 2786,[3] the U.S. Supreme Court held that Rule 702 of the Federal Rules of Evidence[4] had supplanted the common law *Frye* rule[5] for use in federal courts. Although *Daubert* has influenced the law in many states, some continue to follow *Frye*. Rule 702 provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[4]

In *Daubert*[3] the Supreme Court held that federal judges are to serve as "gatekeepers" to screen expert scientific testimony, with respect to relevance and reliability. The legacy of *Daubert*[3] is both a process and a collection of factors that trial judges are to apply in determining whether particular proposed expert opinion testimony should be received. In *People v. Kelly*, (1976) 17 Cal.3d24,[6] the California Supreme Court endorsed the *Frye* rule, holding that expert opinion based on new scientific techniques is admissible only if it has gained general acceptance in the particular field in which the technique is offered. Under California law, therefore, the standard required for expert mental health testimony to be admissible is determined by its acceptance in the field of mental health.

Our focus is on the possible presence of UI in the context of testamentary instruments. Testamentary capacity is the legal term to describe a person's mental ability to make or alter a valid will. In general, the

Dr. Plotkin is Clinical Professor (Voluntary) and Dr. Spar is Professor, Department of Psychiatry and Biobehavioral Sciences, David Geffen School of Medicine, UCLA, Los Angeles, CA. Mr. Horowitz is an attorney in Beverly Hills, CA. Address correspondence to: Daniel A. Plotkin, MD, MPH, PhD, 1823 Sawtelle Blvd, Los Angeles, CA 90025. E-mail: dplotkin@sbcglobal.net.

Disclosures of financial or other potential conflicts of interest: None.

law provides that capacities are task specific, as opposed to being determined by global mental status or psychiatric diagnosis. The requirements for testamentary capacity are minimal, and adults are presumed to have the ability to make a will. California Probate Code section 6100.5 provides in pertinent part:

> (a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:
>
> (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.
>
> (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done [Ref. 7].

Litigation about testamentary capacity typically centers on charges that the testator, by virtue of senility, dementia, or insanity, lacked the mental capacity to make a will, and if the testator retained the mental capacity to make the will, then the will was the product of UI and should be deemed invalid. In this sense, UI has been described as a "safety valve" that allows courts to invalidate wills while permitting a low standard of testamentary capacity.[8]

In the law, the question of UI in a testamentary context often is addressed by the "will substitution test"; that is, was the testator's mind so controlled by another person that his free will was replaced by the will of the other? Case law suggests that this "will substitution" may require an element of "coercion, compulsion, or restraint" and that "mere appeals or arguments, or influence resulting from gratitude or affection, even if the acts creating these feelings were performed selfishly and were designed to affect the testamentary act, do not constitute undue influence" (Ref. 9, p 170).

The construct of UI seems to be more complex and nuanced the closer one looks. In some jurisdictions, the mere existence of a confidential and trusting relationship, such as that between an elderly patient with mental illness and his primary caregiver, may be enough to give rise to a "presumption" of UI, if the alleged influencer played an active part in the procurement of the will and benefitted from it. This presumption will shift the burden of proof to the proponent of the instrument in question, who then must prove that the instrument was not the product of UI.

The claim of UI is strengthened by a set of factors that are widely regarded as the "indicia" of UI (that is, they serve to strengthen a claim of UI but do not, by themselves, establish a presumption). These have (in the past) included unnatural provisions in the will, provisions in the will that are inconsistent with prior or subsequent expressions of the testator's intentions, the existence of a relationship between the testator and the beneficiary that creates an opportunity to control the testamentary act, and evidence that the victim was mentally "weak." Although a diagnosis of mental illness or developmental disorder is generally adequate to support a claim of "mental weakness," UI may apply, even if the victim has no mental disorder or mental "defect." In some cases, evidence that the proposed victim is passive or vulnerable to manipulation will suffice.[9] Experience with cults reminds us that anyone, regardless of mental status, can become a victim of UI in the right circumstances.

The MHP asked to consult on UI may have difficulty determining what principles and methods to use in forming an opinion. This difficulty may be compounded by UI's historically elusive definition. Since antiquity, when Roman praetors struggled to decide whether to deny probate to last wills executed under suspicious circumstances, jurists and legislators have wrestled with similar questions. Some may believe that UI has a commonsense "I know it when I see it" meaning (referencing Supreme Court Justice Potter Stewart's comments on obscenity in *Jacobellis v. Ohio*, 1964[10]), yet it historically has been a complex and poorly defined legal concept, one that remains difficult to translate into clinical or scientific terms.[11] Despite this complexity, or perhaps because of it, attorneys and courts continue to seek the input of experts. In one study, 84 percent of 119 probate judges from around the country reported that expert MHP testimony on undue influence was somewhat or extremely influential.[12]

The common-law doctrine of UI is about 400 years old; it derives from an English court case involving Sir Francis Bacon (Chancellor Bacon found that a married woman who "worked on the simplicity and weakness" of an elderly man had used undue influence to induce him to give her a deed of land and to leave her a large estate).[13] In California, the definition of undue influ-

ence dates to 1872 and is codified in California Civil Code § 1575 with respect to contracts:

> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or, (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress.[14]

Until recently, there was no statutory definition of UI in California's Probate Code applying to testamentary instruments and other matters, such as conservatorships, financial elder abuse. The lack of clarity regarding UI's meaning for purposes of the Probate Code led to a project to study UI and to make recommendations for a definition. An anticipated outcome was a list of assessment measures that would establish benchmarks or a rating system for determining whether UI had occurred or was likely to occur in the immediate future. In their literature review, Quinn *et al.*[15] found that, despite wide variations in the contexts and circumstances in which UI and coercive persuasion in general have been explored, the elements of UI are remarkably similar in each and can be reduced to four salient factors: susceptibility (of the victim), opportunity (of the influencer), disposition (of the influencer), and result. Quinn has used these findings to develop a model of assessment for UI, the SODR, incorporating the four factors by the first letter of each.

The study's findings led to changes in California law: California Assembly Bill 140 (AB 140)[16,17] created two new code sections, one in the Welfare and Institutions Code (WIC, section 15610.70) and the other in the Probate Code (section 86) to provide a clarification of the law governing UI in California that applies to testamentary instruments and other matters, such as conservatorships.[18] In addition, the bill amended an existing WIC section (15610.30) to apply the new clarification of UI to financial elder abuse. The new clarification was effective January 1, 2014. WIC Section 15610.70 now reads as follows

> a. "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:
>
> 1. The vulnerability of the victim. 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.
>
> 2. The influencer's apparent authority. 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.
>
> 3. The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
>
> 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 result. 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 value of any services or consideration received, or 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 [Ref. 14].

Section (a) of this statute contains both a definition of UI and a list of factors (1–4) that "shall be considered" in determining whether a result is the product of UI. It is notable that there is no requirement that any or all of the four factors be present for a court to make a determination of UI. Accordingly, the main effect of the factors is to govern the admissibility of evidence bearing on UI.[18] Even with the definition and clarification, a recent California appeals court ruling (*Lintz v. Lintz* 222 CA4th 1346 (2014)[19] commented, "Although the new reference to 'excessive persuasion' may not be entirely clear, perhaps calling to mind Aristophanes' *Lysistrata*, the Legislature declared that the newly applied definition is not intended to supersede or interfere with the common law meaning of undue influence." (In *Lysistrata*, women of ancient Greece withhold sexual privileges to persuade their husbands and lovers to negotiate peace). Still, these factors provide a frame of reference for a review of the literature and a discussion concerning the proper role of the MHP.

Efforts to Clarify the MHP's Role

Various organizations have convened panels or committees on the subject of UI, resulting in a confusing and inconsistent set of recommendations for the MHP. Consider, for example, The International

Psychogeriatric Association (IPA) Task Force on Testamentary Capacity and Undue Influence. A subcommittee of the Task Force undertook to establish consensus on the definition of UI and provide guidelines for assessment of risk factors for UI.[20] Despite differences in legal systems of different countries, the subcommittee identified common themes and "red flags" regarding UI (similar to the findings of Quinn *et al.*[14]). Comparison of the new California clarification to the subcommittee's red flags demonstrates the complexity and potential confusion involved (Table 1):

The precise role of the MHP evaluator was not a focus of the IPA Task Force paper, but the paper does state that an assessment should include aspects of personal history, "preferably corroborated by third parties."(Ref. 20, p 13). This should include an account of the "nature and history of relationships with family and significant others" and of "will-making patterns, and if relevant, the history of execution of other documents such as powers of attorney."(Ref. 20, p 14). These seem to cover all four factors in the California statute. However, the authors ultimately acknowledged that "the contribution of the expert most often lies in addressing the question of the testator's vulnerability to undue influence" (Ref. 20, p 10).

Table 1 Comparison of IPA Red Flags and California WIC Risk Factors

IPA Red Flags Risk Factors	Corresponding Factor in WIC Section 15610.70
#1 Relationship	#2 Influencer's apparent authority
#2 Social or environmental	#1 Victim vulnerability and #3 influencer tactics
#3 Psychological and physical	#1 Victim vulnerability and #3 influencer tactics
#4 Legal	#3 Influencer tactics and #4 equity of result

From 2005 to 2008, the American Bar Association Commission on Law and Aging, and the American Psychological Association collaborated to publish three handbooks, one for lawyers, one for judges, and one for psychologists. The handbook for psychologists, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*,[21] is ambitious in its recommendations, encouraging the consulting psychologist to cover a broad range of subjects. For example, in cases in which family members may have opposing positions, the handbook states that "it is the clinician's role to ascertain the motives of the family members involved in the case and the implications for the collateral data" (Ref. 21, p 43). Regarding UI, the handbook states: "although psychologists will primarily be asked to assess older victims, knowledge regarding the alleged influencer can be useful in determining the potential presence of undue influence" (Ref. 21, p 117). A case example contains conclusions about the alleged influencer's state of mind, factual events of transferring assets into accounts, and even clinical treatment recommendations for the apparent victim (Ref. 21, p 120). Still, it provides that: "in stating clinical findings and judgments, the clinician should be careful to not invade the province of the court, and to clearly identify his/her decision and findings as clinical and not legal capacity matters" (Ref. 21, p 44).

Others have weighed in on various questions related to the scope of the MHP's focus in UI assessments. A recent paper emphasized "an important but limited role" (Ref. 22, p 583) for forensic psychiatrists, but overall, the trend is to recommend a broad reach, with examples of MHPs venturing into territory usually addressed by the trier of fact. One paper provides case examples in which the MHP assesses "legal risk factors" (Ref. 22, pp 56, 57) and reviews financial records. Another emphasizes the need for the MHP to distinguish "due influence" ("the natural favoritism or special devotion to particular heirs that is seen in all families") from UI (Ref. 24, p 515).

Also, there is a tendency to refer to the examiner as a clinician and not to make a clear distinction between clinical (possibly the treating) professional and independent expert. Some physicians make explicit recommendations for a dual role: Jacoby and Steer, in their paper on the assessment of testamentary capacity, reference the "golden rule" (Ref. 25, p 156) (i.e., that the testamentary act should be witnessed or approved by a medical practitioner, including the treating clinician). Widera *et al.*[26] suggest an active role for the primary care clinician in dealing with financial capacity in older patients with cognitive impairment, including educating patients and their families about the need for advance financial planning, assessing financial deficiencies in cognitively impaired adults, recommending interventions to help patients maintain financial independence, and knowing when and to whom to make medical and legal referrals.

Some authors have focused on the subjectivity and bias of the evaluator in the probate setting,[27] a common theme in the criminal proceedings.[28] A recent paper focused on potential bias in judicial decision-making, related to the gender of the testator and the judge.[29] Moye and Marson noted that "capacity assessments are ultimately human judgments occurring in a social context" (Ref. 30, p 95). To minimize subjectivity and bias, there is a frequent call for the development of assessment instruments. A recent review of the broad area of capacity assessment focuses less on UI than it does on "capacity science" (Ref. 31, p 159), noting "capacity issues now permeate the fabric of everyday life, whether in the form of guardianship petitions, questions of capacity to consent to treatment, the ability to make a new will, or participation in human research" (Ref. 31, p 158). It should be noted that there is currently no empirical validation for any instrument that measures UI or vulnerability to UI. Likewise, there is no known brain region that is associated with vulnerability to UI.

Recommendations

In light of the literature and our experience, we provide specific recommendations regarding the role of the MHP in each of the four areas outlined by WIC §15610.70, followed by some general recommendations.

The Vulnerability of the Victim

This is the concern on which MHPs have the best claim to expertise. It focuses on the mental and emotional status of the alleged victim and on identification of mental deficits and states of mind that may have rendered the victim susceptible to UI. Even though this factor is squarely in the domain of the MHP, it is not without challenge and complexity. For example, decision-making capacity (and, presumably, vulnerability to UI) can be impaired in older adults with no apparent cognitive impairment.[32,33] Indeed, a fundamental goal of California's new legislation was to reject the suggestion in case law that, to support a finding of UI, mental deficit in some form must be shown.[18]

Nevertheless, when mental deficits are evident, a simple rule of thumb is that vulnerability to manipulation and undue influence increases with the severity of these deficits. In the authors' experience, cognitive impairment, as is seen in dementia and delirium, is the most common form of mental impairment rendering potential victims susceptible to undue influence. Deficits in attention and concentration, memory, and frontal executive function may reduce the victim's ability to act according to long-held values and goals, and to accurately assess the sincerity, honesty, and motivation of individuals in a position to exert influence.[34] Some of these deficits can be measured, in the contemporaneous situation, using commonly available standardized instruments (e.g., the Folstein Mini-Mental State Examination[35] and the Montreal Cognitive Assessment[36]), and the results of such appraisals can support the expert's assessment of the degree of vulnerability. An important caveat is that "cognitive tests are not diagnostic of dementia and cannot be used as a measure of capacity" (Ref. 37, p 726).

In retrospective evaluations, medical records rarely contain reports of assessments performed at or around the time a disputed document was executed; the consulting expert nonetheless must attempt to ascertain, based on such documentation as is available, the decedent's decisional capacity at the crucial time. The precise conduct of this retrospective assessment is beyond the scope of this article, but some guidelines can be found in Shulman *et al.*,[38] and in Streisand and Spar.[34]

Dependency is the other main factor affecting the vulnerability of the victim. Like mental impairment, it is reasonable to assume that the more dependent the victim is on the alleged influencer, the greater his vulnerability to UI. Physical dependency, like cognitive impairment, can also be assessed or measured (contemporaneously and retrospectively), using widely available instruments that rate the victim's ability to perform basic and instrumental activities of daily living.[39] Emotional dependency is more difficult to assess, but no less important (as discussed in the next section).

The last clause in WIC Section 15610.70 item #1 Vulnerability of the Victim, notes that evidence of vulnerability may include "whether the influencer knew or should have known of the alleged victim's vulnerability." We think that this aspect actually belongs in the section that focuses on the influencer's actions or tactics.[16]

The Influencer's Apparent Authority

The factual status of an alleged influencer is easily ascertained. The subjective perspective and experi-

ence of the alleged victim (with regard to the apparent authority of the alleged influencer) is more nuanced and may require an MHP's expertise to assess. In the most common situation, the influencer is someone upon whom the victim is dependent (e.g., a caregiver). The caregiver may not have any formal authority over a victim, but if the victim believes that the services provided by the caregiver are critical and cannot be replaced (a perception enhanced by the frontal executive dysfunction often seen in dementia), the caregiver may acquire power and authority out of proportion to their actual status.

The key for the expert is to understand the mind of the victim in the context of the relationship. For example, can the individual say "no" to the alleged influencer? Hall *et al*.[40] suggested that experts focus on whether there was an emotional connection between the alleged victim and the alleged influencer at the time the will or other document was executed. Spaulding *et al*. urged courts to consider the "psychological family" (Ref. 41, p 113) of the alleged victim (not limited to the persons identified as family members in intestacy statutes). Because of the subjectivity of this assessment, it is particularly sensitive to timing (whether the evaluation is contemporaneous[42] or retrospective) and to any bias of the assessor.[27]

The Influencer's Actions or Tactics

The influencer's actions are the matters of fact at the heart of a dispute over testamentary capacity and UI. Their investigation is, for the most part, outside of the range of expertise of the MHP. However, the MHP's expertise may allow him to offer useful opinions about the victim's likely emotional reactions to the alleged influencer's actions or tactics. Also, the MHP's observations and opinions may be relevant to the question of whether the influencer knew or should have known about the victim's vulnerability.

The Equity of the Result

Assessment of this factor includes matters of fact and opinion that are generally outside the range of expertise of the MHP. In the financial elder abuse setting, the equity of the result often may be reduced to comparing the value of whatever might have been received by the elder with the elder's cost. In will contests, a result will be considered equitable, regardless of whether it might disparately affect the elder's family or others, so long as it is consistent with the elderly person's desires.[14]

Conclusion

Increasingly, MHPs are called upon to render opinions regarding UI, especially in the testamentary context. A review of the literature reveals inconsistent and sometimes contradictory recommendations for the conduct of MHP's in the assessment of UI.

New language in the California WIC and Probate Code defining UI and identifying factors that courts must consider in the adjudication of cases of UI informed this review of the MHP's role and undergird the recommendations we offer for the conduct of the MHP based on widely accepted standards for testimony by expert witnesses. Specifically, we recommend a gradient for MHP expert input on undue influence: MHPs have the most to say about focus #1 (victim's vulnerability), with less to say about #2 (the influencer's apparent authority), and then #3 (the influencer's actions), and nothing to say about #4 (the equity of the result).

Thus, our main recommendation is that the MHP should focus his opinions on the victim's vulnerability to UI (i.e., mental impairment and dependency, as potentially amplified by the perceived authority of the alleged influencer and the victim's likely response to the alleged influencer's tactics), and refrain from opining on the state of mind or actions of the alleged influencer (except as to how such actions may affect the victim emotionally, and whether the influencer knew or should have known of the victim's vulnerability) or on the equity of the result. Likewise, subject to a possible exception below, the MHP should not opine on the presence or absence of undue influence, *per se*. This recommendation is not based on the principle that experts should refrain from opining on the "ultimate issue." Indeed, although courts retain the judicial authority to prohibit such testimony (on the theory that to give such opinions is, in effect, to render a legal judgment and thereby usurp the role of the trier of fact), the trend in recent years has been to follow rule 704(a) of the Federal Rules of Evidence, which states, in part, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact" (Ref. 43). This position is also consistent with the "helpfulness standard" in Rule 702,[4] discussed above, which essentially allows experts to provide any testimony within their range of expertise that will "aid the trier of fact in his search for the truth" (Ref. 9, p 174). Rather, our recommendation is based on the fact that several

of the factors that must be considered are outside of the range of expertise of the MHP. A possible exception to this recommendation is where the MHP has had the opportunity to assess the living alleged victim at or around the time of the testamentary act and is able to observe sufficient indicia of UI to form a reliable opinion that the proposed testamentary act does not represent the free will of the alleged victim.

We disagree with the IPA Task Force recommendation to assess areas outside of the expertise of MHPs, such as will-making patterns of the alleged victim. Likewise, we disagree with the American Bar Association/American Psychological Association's 2008 recommendation to focus on the motives of family members.[21] Indeed, it is difficult enough to assess whether a potential victim is vulnerable to UI, particularly if the assessment is made retrospectively. It is another thing entirely to ascertain the mind sets of various family members or possible perpetrators of undue influence. We also take issue with the "golden rule" cited above.[25] Having the treating MHP routinely present at the signing of the document at issue creates a significant additional expense that, in many situations where a future challenge is anticipated, does not obviate the need for a contemporaneous evaluation by an expert MHP.

Important questions and concerns remain and will benefit from further examination and discussion. For example, the optimal use of collateral information should be clarified. It is proper and necessary for the MHP to use collateral information in assessing the potential victim's vulnerability. Its use is no different from that in other contexts in which forensic evaluations are conducted (e.g., collateral information about a person's circumstances to better assess the person's suicidality or risk of violence to others). Still, the use of informants can be fraught with risk[44] and should not be undertaken indiscriminately.

Another question is whether a treating clinician should provide expert opinions in cases in which subjects are still living. (This, of course, assumes that the clinician has the expertise to make the determination; if not, it is clearly not appropriate). MHPs are particularly likely to become involved in UI challenges in the clinical setting when a patient is believed by friends, family members, and medical providers to be vulnerable to exploitation, and a conservatorship or guardianship of the estate is under consideration. The temptation to help a patient may lead to a dual role, but the mixing of ongoing clinical treatment and forensic assessment risks a compromise of both.[45]

Other considerations may apply. For example, it is not always feasible to have the forensic assessment be performed by an expert who is not a treating clinician, for various reasons (e.g., lack of available mental health professionals). In most circumstances, however, a treating clinician should not take on the role of expert while the patient is still living. On the other hand, the MHP who was clinically involved with a decedent who is alleged to have been subjected to UI may have privileged information and opinions that could be of great value to the trier of fact and should not be withheld.

Undue influence remains a complex problem, subject to ambiguities and nuances, even with the recent clarifications in California law. We have highlighted the need for standardized assessments or guidelines on UI for MHPs serving as experts. Our recommendations are consistent with the rule that experts should opine only on matters that require their expertise and are not matters of common sense or common knowledge. Sometimes, as here, the law invites MHPs to transcend the bounds of their expertise, but we think it is particularly important for MHPs to recognize their boundaries and not conflate the role as expert with that of the trier of fact. Attempts to delve into areas outside of the MHP's expertise will only serve to dilute the value of the expert in the courtroom. We hope that this article provides an opportunity to sharpen the focus and enhance the value of the mental health expert in this important area.

References

1. Sessums LL, Zembrzuska H, Jackson JL: Does this patient have medical decision-making capacity? JAMA 306:420–7, 2011
2. Klitzman R: How IRBs view and make decisions about coercion and undue influence. Med Ethics 39:224–9, 2013
3. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)
4. Fed. R. Evid. 702
5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)
6. People v. Kelly, 549 P.2d 1240 (Cal. 1976)
7. Cal. Prob. Code § 6100.5 (2016)
8. Frolik LA: The strange interplay of testamentary capacity and the doctrine of undue influence: are we protecting older testators or overriding individual preferences? Int'l J Law Psychiatry 24:253–66, 2001
9. Spar JE, Garb AS. Assessing competency to make a will. Am J Psychiatry 149:169–74, 1992
10. *Jacobellis v. Ohio,* 378 U.S. 184 (1964)
11. Moye J, Marson DC: Assessment of decision-making capacity in older adults: an emerging area of practice and research. J Gerontol B Psychol Sci Soc Sci 62:P3–P11, 2007

12. Spar JE, Hankin M, Stodden AB: Assessing mental capacity and susceptibility to undue influence. Behav Sci & L 13:391–403, 1995
13. Nievod A: Undue influence and contract law. Cult Stud J 10:1–18, 1993
14. Cal. Civil Code § 1575 (1872)
15. Quinn MJ, Goldman E, Nerenberg L, *et al*: Undue Influence: Definitions and Applications. Salt Lake City, UT: The Borchard Foundation Center on Law and Aging, March 2010
16. Cal. Assembly Bill 140
17. Cal. Assembly Bill 140
18. Horwitz HL: California's new statutory definition of undue influence – modernization or game changer? Cal Trusts Estates Q 19:11–18, 2013
19. *Lintz v. Lintz* , 167 Cal. Rptr. 3d 50 (Cal. Ct. App. 2014)
20. Peisah C, Finkel S, Shulman K, *et al*: The International Psychogeriatric Association Task Force on Wills and Undue Influence. The wills of older people: risk factors for undue influence. Int Psychogeriatr 21:7–15, 2009
21. American Bar Association and American Psychological Association: Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists. Washington, DC, American Bar Association (Commission on Law and Aging) and American Psychological Association, 2008
22. Soliman S: Undue influence: untangling the web. J Am Acad Psychiatry Law 41:581–3, 2013
23. Wood S, Liu P-J: Undue influence and financial capacity: a clinical perspective. J Am Soc Aging 36:53–8, 2012
24. Gutheil TG: Common pitfalls in the evaluation of testamentary capacity J Am Acad Psychiatry Law 35:514–17, 2007
25. Jacoby R, Steer P: How to assess capacity to make a will. BMJ 334:155–7, 2007
26. Widera E, Steenpass V, Marson D, *et al*: Finances in the older patient with cognitive impairment: "He didn't want me to take over." JAMA 16;305:698–706, 2011
27. Baron JB: Empathy, subjectivity, and testamentary capacity. San Diego L Rev 41043–80, 1987
28. Fox PK: Commentary: biases that affect the decision to conditionally release an insanity acquittee. J Am Acad Psychiatry Law 36: 337–339, 2008
29. Recupero PR, Christopher PP, Strong DR, *et al*: Gender bias and judicial decisions of undue influence in testamentary challenges. J Am Acad Psychiatry Law 43:60–8, 2015
30. Moye J, Marson DC: Assessment of decision-making capacity in older adults: an emerging area of practice and research. J Gerontol. B Psychol Sci Soc Sci 62:P3–P11, 2007
31. Moye J, Marson DC, Edelstein B: Assessment of capacity in an aging society. Am Psychol 68:158–71, 2013
32. Boyle PA, Wilson RS, Yu L, *et al*: Poor decision making is associated with an increased risk of mortality among community-dwelling older persons without dementia. Neuroepidemiology 40:247–52, 2013
33. Denburg NL, Tranel D, Bechara A: The ability to decide advantageously declines prematurely in some normal older persons. Neuropsychologia 43:1099–1106, 2005
34. Streisand AF, Spar JE Mental disorders that erode capacity. ABA Trusts and Investments November/December 2009, pp 1–6
35. Folstein MF, Folstein SE, McHugh PR: "Mini mental state": a practical method for grading the cognitive state of patients for the clinician. J Psychiatr Res 12:189–98, 1975
36. Nasreddine ZS, Phillips NA, Bédirian V, *et al*: The Montreal Cognitive Assessment, MoCA: a brief screening tool for mild cognitive impairment. J Am Geriatr Soc 53:695–9, 2005
37. Shulman KI, Cohen CA, Kirsh FC, *et al*: Assessment of testamentary capacity and vulnerability to undue influence. Am J Psychiatry 164:722–7, 2007
38. Shulman KI, Cohen CA, Hull I: Psychiatric issues in retrospective challenges of testamentary capacity. Int J Geriatr Psychiatry 20: 63–9, 2005
39. Gerrard P, Luce J, *et al*: Benchmarking functional status in older adults. Arch Phy Med Rehabil 95:2264–71, 2014
40. Hall RCW, Hall RCW, Myers WC, *et al*: Testamentary capacity: history, physicians' role, requirements, and why wills are challenged. Clin Geriatr 18–24, 2009
41. Spaulding WJ: Testamentary competency: reconciling doctrine with the role of the expert witness. Law & Hum Behav 9:113–39, 1985
42. Shulman KI, Peisah C, Jacoby R, *et al*: Contemporaneous assessment of testamentary capacity. Int Psychogeriatr 21:433–9, 2009
43. Fed. R. Evid. 704(a)
44. Okonkwo OC, Wadley VG, *et al*: Awareness of deficits in financial abilities in patients with mild cognitive impairment: going beyond self-informant discrepancy. Am J Geriatr Psychiatry 16: 650–9, 2008
45. Strasburger LH, Gutheil TG, Brodsky A: On wearing two hats: role conflict in serving as both psychotherapist and expert witness. Am J Psychiatry 154:448–56, 1997