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Friendly Persuasion, Good Salesmanship, or Undue Influence

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By Mary Joy Quinn

When does persuasion become undue influence? How about a good sales pitch? We all admire a clever sales pitch. We are persuaded to do things all the time, frequently to our benefit. How do sales techniques and persuasion differ from undue influence? Is there such a thing as undue influence, or is a charge of undue influence made only when family members have lost their inheritance to a housekeeper? Or when one family member is favored over another in a will?¹

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What is undue influence anyway? How does it relate to elder abuse and neglect?

Undue influence is the substitution of one person's will for the true desires of another. Unlike common persuasion and sales techniques, fraud, duress, threats, or other deceits are often features of undue influence. Undue influence takes place when one person uses his or her role and power to exploit the trust, dependency, and fear of another.² This power is used to gain psychological control over the decision making of a weaker person, usually for financial gain. Dependent and impaired people are particularly susceptible, but it can happen to anyone who would otherwise be considered capable and competent.³ The current interest in undue influence represents a coming together of three major forces: current and historical legal concepts, the study of domestic violence (specifically in the field of elder abuse and neglect), and the distillation of relevant psychological processes.

Legal Concepts

Undue influence as a legal concept is found in both criminal and civil courts. The American concept of undue influence goes back centuries, derived from English law. One aim of the English courts was to regulate the pressures that could be wielded upon those who were physically, mentally, or emotionally disadvantaged. The court examined the *motives* of the person who seemed to have more power and authority in the relationship, who apparently had *control* over the elder or enjoyed a position of *trust*, and who had the *means* and *opportunity* to exercise improper persuasion.⁴ Not only were the motives of the stronger person subject to examination, so were the *results* of the pressure. For instance, did the weaker person give the stronger person gifts and

assets that he or she always intended to give to someone else? Were changes made in the long-stated wishes of the elder? Did the stronger person's will and desires dominate over the weaker person's?

Criminal Courts

In general, civil courts deal with financial restoration and criminal courts deal with punishment through physical deprivation of liberty. In a criminal context, undue influence involves such crimes as simple theft, forgery, false impersonation, embezzlement, and misrepresentation. However, the use of threats, force, or duress must be present to prove undue influence.⁵ The following examples show some common instances of undue influence: "You have to sign the house over to me, or the government will take it away from you through taxes." Or, "If you want to be fed, sign the contract." Or even, "Give me the money or I'll beat you up." If challenged by others, the abuser typically will say that the asset was a gift from the elder. To prove theft, the alleged abuser must have taken the property without consent. In order to consent to an act or transaction, a person must act freely, voluntarily, and without the influence of threats, force, or duress. In addition, the person must have knowledge of the true nature of the act or transaction and possess sufficient mental capacity to make an intelligent and free choice. Mere passivity does not constitute consent.⁶

Typically, the victim of an abusive act will not want to testify in a criminal action. Victims will be concerned about the well-being of the abuser, a person to whom they may feel deeply bonded. Or, they may fear retribution from the abuser. Even so, criminal courts may proceed on the basis that it is a crime against the people. Over the last ten years, prosecutors have become increasingly concerned with elder mistreatment and have creatively developed strategies to bring charges against and successfully prosecute people who abuse older people. Adult protective services workers, medical practitioners, and case managers are forming alliances with the criminal justice system so that abusers will be charged. Various remedies besides jail time can be instituted for the abuser such as stay-away orders, orders for substance abuse treatment, and restitution to the victim for medical care and loss or destruction of property.⁷ Some jurisdictions are creating specialized police and prosecutor teams to deal with elder abuse. Impeccable documentation and medical assessments

including neurological examinations are critical in order for prosecutors to do their work.

To date, there is no one mental status examination tool that enables practitioners to determine if an elder is subject to undue influence. However, sophisticated neuropsychological examinations combined with an understanding of the individual's health status, financial habits, and the elder's relationship with an alleged abuser can be definitive in determining if an individual has been subject to undue influence.

Civil Courts

Historically, civil courts have been involved in undue influence when a will contest was filed. In those cases, the court considers if the parties had an ongoing confidential relationship, if the alleged abuser was active in the procurement or preparation of the will, and if the alleged abuser unduly profited by the terms of the will to the exclusion of others who could reasonably be expected to inherit.⁸ The court also examines evidence of the physical and mental impairment of the alleged victim. Finally, the court considers whether the terms of the will are different than the intentions that the person expressed before and after the execution of the will.⁹ If the court finds that these factors exist, the burden to prove there was *not* undue influence shifts to the alleged abuser in many states. The courts, typically probate courts, also consider medical records that show the testator's physical health and state of the mind at the time the will was executed. A court may also consider any audio or videotapes that were made of the elder in connection with the signing of the will. In some instances, if a court finds undue influence, the judge may rule, if state law permits, that the alleged abuser is not entitled to inherit from the elder's estate.¹⁰

These considerations are now being applied while the elder is still living. Many states, such as California, include undue influence as a criterion of conservatorship and/or guardianship laws.¹¹ A major concern, of course, is that the elder not be deprived of assets that are needed for the activities of daily living. Practitioners are becoming increasingly sophisticated in performing assessments and investigations and bringing situations possibly involving undue influence to the attention of the court when petitions for conservatorship/guardianship are filed. In some instances, the court may intervene to stop

the undue influence and/or remove the abuser from power over the elder. In other instances, the court may order the abuser to return property and assets and perhaps order the abuser to stay away from the victim.

Elder Abuse and Undue Influence

While undue influence has long been recognized in the legal system, it is new to the field of elder abuse and neglect. The abuse and neglect of children had come to the nation's attention in the 1960s, and within a decade, the issue of battered women emerged and was termed domestic violence. The field of elder abuse and neglect first emerged in the late 1970s and its findings were startling all those concerned about older people.¹² The initial focus of studies in the field of elder abuse and neglect centered on its frequency, the varieties of abuse and neglect, the profiles of victims and abusers, and intervention strategies based on protecting the victim. Over the years, methods of addressing those concerns have developed and have been refined. More recently, newer issues have emerged, including the relationship of elder abuse and neglect to domestic violence and to battered women in late life, and the forms of elder abuse and neglect within different cultural and ethnic groups.¹³ Still another new issue is the phenomenon of undue influence as a psychological form of abuse that is coupled with financial abuse.

Investigators and practitioners who work with elders have long recognized signs and symptoms of undue influence in their cases. The following statements made by practitioners illustrate situations that could signal the presence of undue influence:

- "The longer I talked to her, the more I knew I could have gotten her to do anything I wanted."
- "He let me in the door without even knowing who I was. Then, when I talked to him about his proposed conservator, he asked me to take over handling his affairs."
- "I could tell she had been brainwashed. A woman of her age and temperament would not have used the words she used. The way she said things made it clear she was mouthing someone else's statements. She even seemed frightened and kept looking at the caregiver."
- "The family told me that since this young woman has come on the scene, their father is suspicious of them and accuses them of wanting to put him

in a nursing home. He never said that before. The family was very close but now the father is not permitted to see a family member without the woman being in the room. The father has stopped confiding in family members, especially about money."

Psychological Concepts in Undue Influence

The work of Dr. Margaret Singer has been helpful in understanding the psychological processes of undue influence with the elderly. Dr. Singer, a psychologist, has studied and published articles on the subjects of thought reform, brainwashing, prisoner-of-war syndrome, and cult behavior. Dr. Singer notes that undue influence may occur in a number of situations including those in which people would be seen as competent.¹⁴ She outlines a pattern that assists practitioners in understanding how alleged abusers create undue influence in close and trusting relationships. Dr. Singer identifies the following six factors that are present in relationships marked by undue influences and notes that they may be sequential:

1. Creating isolation;
2. Fostering a siege mentality;
3. Inducing dependence;
4. Promoting a sense of powerlessness;
5. Manipulating existing fears and/or instilling new ones to create or enhance vulnerability; and
6. Keeping the victim unaware and uninformed of the creation of this pseudoworld.

According to Dr. Singer, the process is deliberate and begins with *isolation* of the victim. All avenues of communication to and from the victim are controlled. In practical terms this means monitoring and manipulating phone calls, visits, and mail. The abuser may tell family and friends that the victim is too busy, too tired, or too sick to see visitors. Phone calls are monitored or not relayed to the victim. Mail is censored or the victim may be told there is no mail. The victim comes to think that no one cares.

Once the isolation is in place, Dr. Singer explains that the abuser may create a siege mentality by telling the elder that no one cares about him or her and that the outside world is a dangerous place. Doctors, social workers, relatives, and neighbors may be portrayed as threatening and menacing. The elder is led to believe that only the abuser can keep him safe. Relatives are portrayed as cold and

uncaring, as wanting only to put the elder in a nursing home and take his assets.

Inducing *dependency* comes next. The elder is led to believe that he or she is alone and that no one is available to help except the abuser. The elder may be confined to bed “for your own good.” Medication and food may be administered in ways that further weaken the elder. Withholding liquids may induce dehydration. The abuser may harp on the victim’s poor memory thus making it worse.

Next the elder feels a sense of *powerlessness*. According to Dr. Singer, this feeling is the result of the “engineered isolation, the fostered dependence, and the siege mentality.”¹⁵ The elder believes that only the abuser has the power to change anything.

The process then includes *exploiting fears* that the elder may have and even creating new fears. Among the common fears of elders is losing independence, being abandoned, having assets drained by others, and being moved to a nursing home. The abuser may actively and repeatedly hammer home the point that she will take care of the elder and that no one else will. Finally, Dr. Singer explains that the victim is *kept unaware* of the false world that has carefully been created by the abuser. As a result of this process, the manipulated elder forms a strong bond with the person who is literally his captor, a bond similar to those of hostages, incest victims, abused children, prostitutes with pimps, and prisoners of war.¹⁶ The abuser’s goal in exercising undue influence is usually to gain access to the elder’s assets and real property. This can be accomplished once the elder victim is under the influence of the abuser. Assets including real property are appropriated during the elder’s lifetime and/or following death through a will or testamentary.

Common Undue Influence Situations

Undue influence occurs in a variety of situations. Under the right circumstances, we are all susceptible to undue influence. Our vulnerability is increased when we are lonely, very young, unsophisticated, ill, brain-damaged, drugged, drunk/alcoholic, fatigued, frightened, very dependent, exhausted, rushed, stressed, uncertain, needy, indifferent, uninformed, or distracted.¹⁷ Our vulnerability is heightened when we are recently widowed, when we have cognitive impairments, or when we are physically ill.¹⁸ While undue influence situations vary widely, many of the dynamics are the same, perhaps with a slightly

different twist. Examining various undue influence situations will aid the practitioner in identifying whether an undue influence situation has occurred, is occurring, or is likely to occur in the future. While undue influence operates in cults and other one-time events, it is most common in relationships that are built on trust and confidence.¹⁹ Close and trusting relationships may be of long duration or may be cultivated by opportunistic people who earn their living by exercising undue influence.

Profiles in Close and Trusting Relationships

Elders may be more vulnerable to undue influence than any other age group because a number of factors may be occurring at the same time, for example, cognitive problems, especially with memory, drastic changes in life circumstances, and physical health problems. Elders are likely targets because they have financial accounts or own homes that have increased greatly in value over the decades. The bank robber, Willie Sutton, was supposedly asked why he robbed banks. Reportedly he said, “[B]ecause that is where the money is.” People over the age of fifty control at least seventy percent of the nation’s household net worth, thereby making them frequent targets for people who would want their assets.²⁰

The close and trusting relationship that involves undue influence may be with someone who has a financial duty to the elder such as a trustee, a guardian, an executor, an attorney, or accountant. Or, it could be with people who do not have a financial duty to the elder but are in a position of trust such as a clergy member, a housekeeper or caregiver, or a physician. More likely, it is a family member.

Family Member Manipulators

Most elder financial abuse in the United States is committed by a family member.²¹ Elderly family members use undue influence to financially abuse other family members as the following case history illustrates.

In one instance, a blind 86-year old woman, with the help of her daughter, took advantage of her 83-year-old sister shortly after the younger woman’s husband died. The younger sister had severe memory problems. She was incontinent and unaware of her medical problems or her medications. Her older sister convinced her to write checks for large amounts of money, in one instance, \$18,000 in a one-week period. She also

convinced her sister to sell \$20,000 worth of stocks and then kept the proceeds for herself. The older woman said she cooperated because her sister had told her that her money would be safer if a family member took care of it.

The abuser may live with the victim. Frequently, the abuser is the adult child who never left home or who failed to establish himself or herself outside the parents' home, and who then returns home to live. That adult child assumes a disproportionately larger role in the parent's life and consequently gains more authority as the elder becomes more impaired and dependent. The adult child is then able to manipulate the assets of the parent and use a variety of reasons to isolate the parent from other adult children.

Non-Family Manipulators

Elders may become isolated from their families and friends for many reasons. Perhaps family ties have always been weak or perhaps the adult children live a great distance away. In those instances, the abuser can manipulate whole families. Such abuse occurred in the Anne Morrow Lindbergh case.²² In non-family cases, a live-in nurse or roommate may do the influencing. The elder may or may not be a difficult, powerful, or controlling person. The rest of the family may be fearful of countering the elder or not know how to confront the abuser. Perhaps the family feels the elder is being well-cared for and therefore feel that they should not disrupt the deep and precious relationship the elder has with the caregiver. Family members may also be naive and unaware of the actual relationship between their loved one and the manipulator. Consequently, they are also manipulated and unduly influenced.

For instance, one man, who was considered to be competent, bought a horse farm within a year after his wife died. Neighbors, who were later tried and convicted of using undue influence, told the man it was a good investment. They encouraged him to think of it as a silent investment. The neighbors arranged for the purchase using their realtor and the man's money. When a nephew/lawyer pointed out to his uncle that the property was not in his name, the neighbors changed the title to joint tenancy thereby ensuring their possession of the property, buildings, and horses upon the 86-

year-old man's death. The man never had an interest in horses prior to becoming involved with his new neighbors.

Those who prey on older people find ways to meet them in a variety of situations. Certain manipulators are skilled in spotting vulnerable elders with assets either by going door to door in neighborhoods or by meeting the elder in a public place such a park, the supermarket, or outside a bank. Then, they strike up a conversation in a variety of ways and begin to cultivate a relationship. Using various ploys, they ascertain if the elder lives alone, is lonely, or is alienated from family.

As one example, a taxi driver was called to give an elderly woman a ride home from the supermarket. He helped her carry her groceries into her extremely modest house. The woman, who would be considered mentally competent, bragged that the house was paid for. The taxi driver later brought over his girlfriend and the two proceeded to develop a relationship with the woman. After taking her out to a few dinners, they suggested that the woman sign her house over to them in exchange for promises of life-long care. When they began to pressure her, she became frightened and confided in the manager of her senior nutrition program. He, in turn, with her permission, filed for conservatorship so that she would not have to deal with the abusers again.

Undue influence may be overt or covert. *The Talented Mr. Ripley*, a work of fiction, sets out the details of the process of undue influence in exquisite detail.²³ It illustrates that even younger people can be subject to undue influence under the right circumstances. The character Thomas Ripley subtly and over a period of time cultivates the close friendship of Dickie Greenleaf who is very wealthy and isolated from his family. He becomes Greenleaf's constant companion, gradually and carefully shutting out his close friends. Over time, he assumes Greenleaf's identity by first trying on and then wearing his clothing. Ripley finally murders Greenleaf when his desire to become Greenleaf triumphs. He arranges to receive all of Greenleaf's assets by producing a fake will. He feels no guilt, only concern about being caught. Ripley falls into the category of abusers who are psychopathic. He has superficial charm, a grandiose sense of his self-worth,

a parasitic lifestyle, and no realistic, long-term goals. He also fails to accept responsibility for his actions. Such abusers do not have concern for their victims. When the current victim is dead or no longer useful, they merely begin the search for another victim.

Groups that are involved in exploiting the elderly may also use undue influence. For instance, extended family groups composed of itinerate or semi-itinerate members may be involved in these activities. Many people in these groups earn their living by committing criminal acts that involve gaining the trust and confidence of elders and then financially exploiting them as illustrated in the following case history.

In one instance, an attractive young woman struck up a conversation in a coffee shop with an 83-year-old man whose wife had died a few months previously. She had her daughter with her, an appealing 7-year-old child. After a few encounters with the lonely and confused man, the young woman related a sad tale. Her daughter desperately needed surgery, and she had no health insurance or money to pay for the operation. The elderly man, now entranced by the mother and child, began giving money to them. Fortunately, the elderly man's housekeeper caught onto what was happening and called adult protective services. The financial abuse was stopped but not before the elderly man had given \$13,000 to his new friend. Police later discovered that the woman had befriended other older men and then complained to them that her daughter needed surgery and that she had no money. Other women in her family had the same history of exploiting elderly men.

A particular feature of the criminal element of some of these groups is the seeming fearlessness of the authorities. In fact, one person in the group may tell police or an adult protective service worker that he wants to "cooperate" with authorities to get rid of the "bad" people in his extended family. Attempts may even be made to ingratiate the practitioner by including her in social functions such as weddings.²⁴

As illustrated above, these extended family groups commonly prey on the elderly. The groups are culturally distinct from each other, as well as maintaining an identity separate from mainstream American culture. The criminal elements in each group specialize in specific crimes.²⁵

Signs and Symptoms

The following guidelines will serve to aid the practitioner in identifying if an undue influence situation has occurred or is in the process of occurring.

1. The elder signs documents and takes actions that run counter to his or her previous long-time values and beliefs.
2. Sudden changes occur in regard to the elder's financial management (e.g., cashing in insurance policies or changing titles on bank accounts or real property).
3. The elder changes a will and previous disposition of assets.
4. The elder may hire new practitioners who are different than those he or she has always trusted (e.g., bankers, stockbrokers, attorneys, physicians, or realtor).
5. The elder becomes systematically isolated from those who are involved in the elder's care or activities.
6. The elder suddenly moves into someone else's home under the guise of providing better care, or someone moves into the elder's home.
7. Someone attempts to get the elder's income checks directed differently than under the usual arrangement.
8. The elder suddenly and frequently signs documents as he or she is nearing death.
9. The elder places unusual trust in newfound acquaintances when there is a history of mistrust in the family, especially with financial affairs.
10. Someone makes promises of life-long care in exchange for property upon the elder's death.
11. The statements of the elder and the alleged abuser vary regarding the conduct of elder's affairs and/or disposition of assets.
12. Imbalances of power are evident in the elder's transactions with others (e.g., finances or health).
13. The elder is treated unfairly in transactions as a weaker party, and the stronger party unduly benefits by the transaction.
14. The elder is never left alone with anyone. No one ever speaks to the elder without the manipulator's discovery of the conversation.
15. Unusual patterns in the elder's finances become apparent. For instance, the elder writes numerous checks out to "Cash," always in round numbers, and frequently in large amounts.
16. The elder reports meeting a "wonderful new

friend who makes me feel young again.” The elder then becomes suspicious of family and declines invitations to family gatherings.

17. The elder is pressed into a transaction and not given time to reflect or contact trusted advisors.

Countering Undue Influence

Dealing with undue influence can be very difficult for practitioners. Usually, the victim is too closely bonded to the abuser to be very helpful to the practitioner. The victim may deny the abuse and even put up roadblocks in the investigation. This is to be expected. The victim has been “brainwashed” and, in effect, has been living in a cult, albeit one with very few members.

The victim may deny that any abuse has ever occurred and defend the abuser. The victim may never accept that the person that he or she has come to depend upon defrauded them. Even if the victim has some awareness of the abuse, it may be too shameful for him to fully realize that he may not have used good judgment. It becomes impossible to face the facts. The savvy practitioner will not confront the elder with the gory details of the abuse. Knowing that the elder is bonded to the abuser, the practitioner may even acknowledge the positive characteristics of the abuser to the elder while working in the background to protect the elder from further harm.²⁶ The work of the practitioner will include investigating and assessing the alleged abuse situation, keeping in mind the guidelines for undue influence. The practitioner must be alert to the need for immediate action, which might include a temporary guardianship or conservatorship to safeguard the elder’s assets or property or person. Those situations would occur when the alleged abuser is actively draining a bank account, taking actions to divest the elder of assets or property, or placing the elder in physical danger.

The assessment should include a review of the elder’s history of handling money. The practitioner will need to evaluate the changes that happened after the alleged abuser came on the scene. Further, a neuropsychological examination will establish the mental functioning of the elder including the ability to make judgments, the status of the memory functions, and the ability of the elder to handle finances. A medical examination will reveal the presence of conditions that may be impinging on the elder’s ability to act with full knowledge and independently. Finally, the interview with the elder and the alleged

abuser are paramount and will require the practitioner to follow a protocol such as the one developed at the Harborview Medical Center.²⁷

The quickest and most effective means of combating undue influence is to bring in an agency or individual who is willing to assume control of the situation. Frequently, this will mean gaining legal control over the elder’s resources. The process usually involves petitioning for an emergency, as well as permanent conservatorship or guardianship. Some elders readily accept this intervention and others retain attorneys in order to object to the potential loss of control of their assets. The alleged abusers may also object under the guise of supporting the elder’s wishes.

If the abuse is not severe and there is a possibility that the abuser may cooperate, the practitioner may find it workable to have a face-to-face discussion with the alleged abuser. In those instances, such a discussion may result in so-called gifts or loans being returned to the elder. It may also deter further inappropriate actions. If needed, an attorney could be present. If the abuser is a family member, a family conference mediated by a professional may resolve the issue. A letter from an attorney to an alleged abuser may work wonders.

The relationship between the elder and the alleged abuser must be carefully and respectfully considered. If the abuse is not severe and the two people desire contact, it may continue if it is monitored. Where the abuse is egregious or life threatening, and where there are criminal convictions, it may be impossible to permit the relationship to continue. In those instances, the elder will likely experience a severe sense of loss and may grieve deeply. The loss needs to be addressed. A new caregiver who is trustworthy may help to fill the void. Many elders, even those who are impaired, have the ability to establish new relationships if the situation is handled tactfully and gently.²⁸

Summary

Undue influence has long been recognized within the legal profession and the courts, usually within the context of will contests. The field of elder abuse and neglect is now beginning to focus on the issue as practitioners try to understand the actions of elders who are competent and capable as well as the actions of those who are impaired. Undue influence frequently accompanies other types of elder abuse

and neglect, usually occurring when a close personal relationship exists. Intervention involves careful and thoughtful assessments.

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