

THE PROSECUTORS' RESOURCE

Elder Abuse

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A NOTE ON NAVIGATING THIS RESOURCE

The various sections of this *Resource* are hyperlinked, through the Table of Contents and within the document, for easier navigation. The Table of Contents will link the reader to specific sections, and at the conclusion of each lettered section, there will be a link back to the Table of Contents. Additionally, there are multiple cross-references with links throughout that allow for jumping between sections.

SUPPORT

This *Prosecutors' Resource* was written by the following AEquitas staff members: Jane Anderson, Teresa Garvey, and Viktoria Kristiansson, Attorney Advisors, and Charlene Whitman-Barr, Associate Attorney Advisor along with Candace Heisler, JD, Retired Assistant District Attorney, San Francisco. The authors would like to thank Jennifer G. Long, CEO and John Wilkinson, Attorney Advisor at AEquitas as well as Ann Laatsch, J.D., Justice System Coordinator, National Clearinghouse on Abuse in Later Life (NCALL); Bonnie Brandl, MSW, Director, NCALL; Debbie Feinstein, Senior Assistant State's Attorney, Co-Chief, Crimes Against Senior and Vulnerable Adults Unit, Chief of our Special Victims Division, Montgomery County, Maryland; Tovah Kasdin, Director, ElderSAFE Center at Charles E. Smith Life Communities; Trisha A. Gerard, Principal Attorney, Elder Abuse Unit and Domestic Violence Unit, Wayne County Prosecutor's Office, for their contributions to this *Resource*.

INTRODUCTION

Elder abuse cases often call on prosecutors to utilize investigative and prosecutorial skills that cross over many areas of specialty, including fraud and other financial crimes, child abuse and neglect, domestic violence, and sexual abuse. Crimes of elder abuse often co-occur, so it is not uncommon for a case to include theft crimes along with abuse and/or neglect as well as infliction of emotional or psychological abuse. In some cases, financial exploitation may be the motive for other forms of abuse or neglect. Understanding the potential connections between forms of abuse may help prosecutors create stronger, more comprehensive cases, and also address the full spectrum of perpetrators' behaviors.¹ As a result, prosecutors must not only be alert to indications of all forms of abuse that may be part of an overall pattern of abuse or neglect, but must also collaborate with other prosecutors and professionals who have expertise in relevant areas. Elder abuse cases are different from other kinds of cases in their complexities and frequent recurring issues, including: dynamics between the parties; commission by multiple perpetrators, settings of abuse; issues of health and mortality; current and prior decisional capacity; types of evidence; establishing causation; dealing with elderly defendants, and ageism. Many outside entities, such as Adult Protective Services (APS), the Long-Term Care Ombudsman (LTCO), aging services, and licensing and regulatory agencies, may conduct separate concurrent investigations; interview victims, perpetrators, and witnesses; collect evidence; or initiate cases.

This *Prosecutors' Resource* is designed to assist with investigating and prosecuting cases involving abuse, neglect, and financial exploitation of an older victim. Due to the prevalence of elder abuse committed by individuals known to the victim who are often in a position or relationship of trust, this *Resource* will focus on cases involving nonstranger perpetrators.² Additionally, this *Resource* will briefly address abuse committed in facility settings but will focus primarily on abuse committed within the community where older adults reside and abuse most often occurs. Much of the information, however, is applicable to cases no matter the setting.³

This *Resource* will define and identify elder abuse and will provide strategies and tools for prosecutors to assist in evaluating, investigating, charging, prosecuting, and resolving cases intended to protect victims from further harm and hold offenders appropriately accountable. **It is divided into two parts:**

Part One: Overview of Elder Abuse provides foundational knowledge needed to handle an elder abuse case. It begins by defining elder abuse, including the various forms and co-occurrence of crimes. Part One further discusses the characteristics of elder abuse victims and perpetrators, the aging body, and issues of competency and capacity that will all inform prosecutors' decision-making in cases and interactions with victims.

Part Two: Prosecuting Elder Abuse discusses strategies for working with older victims in elder abuse cases and addresses the individual steps and considerations for **prosecuting** elder abuse cases, beginning with the initial interview and investigation (including strategies for charging) through sentencing.

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- 1 For example, a beneficiary under a will may act to hasten the victim's death, or a theft of assets could leave the victim with insufficient funds to pay for food, medicine, or utilities.
- 2 "[S]trangers accounted for only about 8% of recent emotional mistreatment episodes, compared to 25% by romantic partners/ex partners, and 18% by children or grandchildren and the rest by acquaintances;" family members accounted for 76% of the physical abuse committed against older adults; "family members accounted for 52% of the most recent [sexual] assaults (spouses 40%), and strangers accounted for only 3%." Ron Acierno, et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100(2) AM. J. PUB. HEALTH 292-97 (2010).
- 3 Abuse committed within a facility can be perpetrated by family, friends of the victim who visit, or by those associated with the facility—staff, volunteers, and other residents.

PART ONE: OVERVIEW OF ELDER ABUSE

A. DEFINING ELDER ABUSE

Elder abuse has been defined as “physical, sexual or psychological abuse, as well as neglect, abandonment and financial exploitation of an older⁴ person by another person or entity, that occurs in any setting, either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability.”⁵ This definition distinguishes between illegal acts that happened to be committed against older persons and those where there is a unique relationship or dynamic between victims and their abusers or where an older person is targeted.

Elder abuse occurs in a variety of forms and acts, committed against older adults, by one or more individuals, corporations, and other entities, in any location in which the elder may be located, including the elder’s home, community setting, or a facility. Perpetrators may commit abuse:

- In a relationship in which there is a societal expectation of trust, such as caregivers, family, intimate partners, fiduciaries, faith community members; and/or
- When the elder is targeted because of a real or perceived vulnerability, such as frailty, cognitive impairment, or physical disability (and therefore less likely to report, fight back, understand what has happened, or be a credible witness). This category includes some scams where there is proof the victim was targeted because of these characteristics.

This *Prosecutors’ Resource* uses the term “elder abuse,” but some jurisdictions categorize these cases as those involving “vulnerable, dependent, or impaired” adults.⁶ Individual jurisdictions define elder abuse quite differently; some do not have a specific crime of elder abuse, while others consider all crimes against elders to be “elder abuse,” irrespective of the relationship between victim and suspect.

The following forms of abuse will be addressed throughout this *Resource*:

- Physical abuse
- Sexual abuse

4 MARIE THERESE CONNOLLY, BONNIE BRANDL & RISA BRECKMAN, THE ELDER JUSTICE ROADMAP: A STAKEHOLDER INITIATIVE TO RESPOND TO AN EMERGING HEALTH, JUSTICE, FINANCIAL AND SOCIAL CRISIS 3 (2013), <https://www.justice.gov/file/852856/download> [*hereinafter* Elder Justice Roadmap]. The Roadmap definition does not define a specific age for when a person becomes “elderly.” Federal law, however, uses several different ages for “elder” status; for example, The Older Americans Act uses age 60; Social Security uses age 65; the Office on Violence Against Women’s Later Life grants program uses age 50. 42 U.S.C.A. § 3002; 42 U.S.C.A. § 1396d; *Grant Programs*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/grant-programs> (last visited Aug. 10, 2016). United States jurisdictions and tribes use a variety of ages for their laws as well, and still some jurisdictions do not use an age-based definition at all for crimes and reporting laws. Instead, these jurisdictions use a “vulnerable adult” standard for all adults age 18 and older. Vulnerable adult (also called at-risk; dependent, and impaired adult) statutes typically apply when the person has a significant developmental, cognitive, or physical disability which affects the person’s ability to meet basic needs and/or protect legal rights. Still others may require age 60 or older *and* vulnerability. *See, e.g.*, N.Y. PENAL LAW § 260.31; WASH. REV. CODE ANN. § 9A.44.010; TENN. CODE ANN. § 39-14-111.

5 ELDER JUSTICE ROADMAP, *supra* note 4. This Roadmap definition is not a legal definition but a framework for understanding and differentiating elder abuse from all crimes committed against older persons.

6 Definitions vary across jurisdictions and prosecutors should review statutes in their jurisdiction. *See, e.g.*, ALA.CODE § 13A-6-191, CONN. GEN. STAT. ANN. § 53a-320, FL. STAT. ANN. 825.101, 720 ILL. COMP. STAT. ANN. 5/17-56 (defining elderly, elder, or older as person/adult as someone who is 60 years of age or older); CAL. PENAL CODE § 11174.4, GA. CODE ANN. § 16-5-100, N.C. GEN. STAT. ANN. § 14-32.3, TEX. PENAL CODE ANN. § 22.04 (defining elderly, elder, or older as person/adult as someone who is 65 years of age or older); ALASKA STAT. § 11.51.220, D.C. CODE § 22-932, IDAHO CODE ANN. § 18-1505, MINN. STAT. ANN. 609.232, WASH. REV. CODE ANN. § 609.232 (defining vulnerable adult, generally, as someone who is 18 years or older and who, because of a physical or mental impairment, requires assistance). Prosecutors should also look to mental condition, emotional frailty/stability, physical status, financial situation and level of dependence, access to medical care, living situation, provider of food and daily needs, etc.

- Emotional/psychological abuse
- Neglect
- Abandonment
- Financial exploitation

Because of the complexity and challenges involved in financial exploitation, those cases will be discussed in more detail in the next section as well as throughout this *Resource*. Domestic abuse in later life frequently occurs and may incorporate all of the forms of abuse listed above. It will be discussed throughout this *Resource*. Prosecutors should remember that elder abuse can be perpetrated by an intimate partner, family member, or third party.

1. Financial Exploitation

Financial exploitation, also referred to as financial abuse, is defined as the “illegal or improper use of an elder’s funds, property, or assets.”⁷ It includes acts or a taking for which the victim is unable to give legal consent or of which the victim is unaware; abuse of a fiduciary relationship; and situations in which a victim’s consent is the result of fraud or deceit, coercion, threats or violence, manipulation, subterfuge, duress, or undue influence.⁸ Financial exploitation typically includes a process consisting of a series of events rather than a single incident. When there is not an existing relationship of trust between the victim and suspect, there may be a period of “grooming” prior to the taking (*e.g.*, “sweetheart scams”). Other forms of abuse may include specific methods used (*e.g.*, use of physical abuse to accomplish the taking or obtaining of the victim’s “consent”) or outcomes (*e.g.*, caregiver takes victim’s money and neglects victim by not providing needed medications or medical care). Financial abuse frequently co-occurs with other forms of elder abuse, making it critical to screen for other crimes and forms of elder abuse.

Jurisdictions vary considerably in how they criminalize financial exploitation crimes. Some states have enacted specific financial exploitation crimes for acts against elder or vulnerable adults.⁹ Other states have created sentence enhancements or aggravators that increase sentences when financial crimes are committed against elders and/or vulnerable adults.¹⁰ Whether special crimes or enhancements have been enacted, financial exploitation crimes can usually be prosecuted under a state’s various theft crimes.¹¹

Financial exploitation is the most common form of elder abuse¹² and can involve many kinds of conduct committed by a wide array of offenders. The United States Government Accountability Office has suggested the categories in *Table 1* to illustrate the breadth of financial abuse.¹³

7 *Types of Abuse*, NATIONAL CENTER ON ELDER ABUSE, <https://ncea.acl.gov/FAQ/abusetypes.html> (last visited Aug. 3, 2016).

8 Candace J. Heisler, *Elder Abuse*, in VICTIMS OF CRIME 161 (R. C. Davis, A.J. Lurigio, & S. Herman eds., 2013).

9 *See, e.g.*, ALA. CODE ANN. § 13A-6-195; IDAHO CODE ANN. § 18-1505; 720 ILL. COMP. STAT. ANN. 5/17-56.

10 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-702; NEV. REV. STAT. § 193.167; *see also* Carolyn Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?* 34 MCGEORGE L. REV. 267, 289 (Winter 2003).

11 Margaret M. Landrey & Monique C.M. Leahy, *Proof of Elder Abuse in Civil and Criminal Actions*, 118 AM. JUR. PROOF OF FACTS 3D 297, §18 (Aug. 2016).

12 SHELLY L. JACKSON & THOMAS L. HAFEMEISTER, UNIVERSITY OF VIRGINIA, FINANCIAL ABUSE OF ELDERLY PEOPLE VS. OTHER FORMS OF ELDER ABUSE: ASSESSING THEIR DYNAMICS, RISK FACTORS, AND SOCIETY’S RESPONSE (Aug. 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf>.

13 U.S. GOVERNMENT ACCOUNTABILITY OFFICE NATIONAL STRATEGY NEEDED TO EFFECTIVELY COMBAT ELDER FINANCIAL EXPLOITATION (Nov. 2012), <http://www.gao.gov/assets/660/650074.pdf>. This *Resource* primarily focuses on the first type of offender: family members, friends, in-home caregivers, legal guardians, representatives, payees, etc. For additional information on financial abuse committed by financial service providers and strangers, please see Appendix C. Additional Resources.



TABLE 1. *United States Government Accountability Office, Examples of Forms of Elder Financial Exploitation by Type of Perpetrator*

TYPE OF PERPETRATOR	METHOD OF TAKING
Family members, friends, in-home caregivers, legal guardians, representative payees, etc.	<ul style="list-style-type: none"> • Theft of cash or other valuables • Withdrawals from bank accounts or use of credit cards • Transfer of deeds • Misuse of an older adult's power of attorney • Misappropriation of an incapacitated older adult's income or assets • Identity theft
Financial services providers (brokers, financial advisors, insurance agents, or others in the financial services industry)	<ul style="list-style-type: none"> • Sale of fraudulent investments (Ponzi or pyramid schemes) • Sale of financial products or services unsuitable for an older adult's circumstances, such as long-term annuities
Strangers	<ul style="list-style-type: none"> • Lottery, mail, telephone, or Internet scams • Door-to-door home repair scams • Identity theft

A study conducted by Shelly Jackson and Thomas Hafemeister divided elder financial abuse into two categories: “pure” and “hybrid.”¹⁴ In “pure” financial abuse cases, only financial abuse occurs. Perpetrators are more likely to be non-relatives who are not financially dependent on the elderly victim. Victims often are physically healthy, the acts occur over a shorter duration, the conduct is primarily fraud, and there is a lower dollar loss per case. These matters are often prosecuted as fraud and theft cases.

In contrast, “hybrid” cases involve financial abuse that co-occurs with physical abuse and/or neglect. Perpetrators are more likely to be relatives who are financially dependent on the elderly victim. The victim is typically financially independent but physically dependent on the perpetrator, the acts occur over a longer period of time and primarily involve theft, and victims typically sustain a greater dollar loss per case. These cases are complicated by family dynamics, interpersonal relationships, and greater difficulty obtaining restitution.

2. Settings Where Abuse Occurs

Elder abuse commonly occurs within community settings, including the victim’s home.¹⁵ A smaller percentage occurs in care settings such as skilled nursing facilities, residential care homes, foster care, and other board and care facilities. Victims who reside in residential care settings are more likely to have significant physical and cognitive impairments than those in community settings. That said, not all residents permanently live in facilities. Some are temporarily there to recover from illness or surgery, regain strength and functional abilities, and then return home. The condition or impairment that may have existed at the time of the victimization may be gone by the time the case is reported or prosecuted.

14 Shelly L. Jackson & Thomas L. Hafemeister, *Elder Financial Exploitation vs. Hybrid Financial Exploitation Co-Occurring with Physical Abuse and/or Neglect*, 2(3) *PSYCHOLOGY VIOLENCE* 285-96 (2012).

15 BONNIE BRANDL, ET AL., *ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH* 33, 41 (Springer Publishing Company 2007);

Settings are also important because of the different kinds of evidence that may exist and which agencies may have jurisdictional authority to investigate and prosecute. In facility cases, local prosecutors may share jurisdiction with the state's Attorney General's Office Medicaid Fraud Control Unit or jurisdiction may rest with the Attorney General. If abuse occurs in multiple counties, parishes, or regions, there may be distinct advantages to statewide jurisdiction. In addition, state offices may have resources that local jurisdictions lack, such as accountants and nurses to review medical records.

In terms of evidence, a facility, if licensed, must maintain staffing level standards and meet educational requirements for professional staff. Certain functions, such as administering medications to residents, can only be performed by certain professionals. There are documentation requirements for patient care and mandatory reporting responsibilities for staff. A staff doctor must see every resident at prescribed intervals. Each resident must have a care plan that must be followed and compliance documented.

Specific kinds of records must be maintained, including an initial evaluation called a "Minimum Data Set." Other useful records include staff schedules, sign-in sheets, training records, facility policy and procedure manuals, complaint logs, nursing notes, prescription logs, dietary logs, and therapy logs (*e.g.*, physical and occupational). Medicare billing records can be obtained and compared with facility records to identify patterns of overbilling, improper billing, what services were billed for versus what was actually provided, and how long a doctor spent with a patient (*e.g.*, records showing the facility billed Medicare for 30 patient visits by the same doctor in a three-hour period). The LTCO can provide insights into how the facility actually operates; how it generally deals with complaints; and, with individual resident consent, information about specific complaints, including the identity of victims.

Prosecutors should note that some of these records are also available if the elder is receiving in-home care, depending on the source of funding and whether the caregiver is attached to an agency.

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B. Characteristics of Elder Abuse Victims

There are more older adults living in the United States today than at any earlier point in time, with about one in seven Americans being at least 65 years old.¹⁶ The population is extraordinarily heterogeneous and diverse and includes at least four decades of age (60 to well over 100). The elderly come from every racial, ethnic, socio-economic, and cultural background, and may or may not be or identify as lesbian, gay, bisexual, transgender, or gender nonconforming individuals.¹⁷ They vary widely from those who are independent, in good health, and employed, to those who have significant physical and cognitive disabilities and are dependent on others for every aspect of care and survival. Because of these variations, an elder's ability to report, be interviewed, give credible testimony, and otherwise participate in the criminal process should never be assumed or discounted based on age or presentation during a relatively brief interaction with law enforcement. Even a diagnosis of dementia by itself should not be the basis for making decisions

¹⁶ In 2012, persons 65 and older were 13.7% of the population; in 2040 they will constitute 21%. In 2012, persons 65 years or older numbered 43.1 million; by 2040 they will number nearly 79.7 million. The fastest growing segment of the elderly population, those aged 85 and older, will increase from 5.9 million in 2012 to 14.1 million by 2040. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR COMMUNITY LIVING, ADMINISTRATION ON AGING, A PROFILE OF OLDER AMERICANS: 2013 (2014), available at http://www.aoa.acl.gov/Aging_Statistics/Profile/2013/index.aspx [*hereinafter* A Profile of Older Americans].

¹⁷ "More than 39 million people in the U.S. are age 65 years or older including 1.5 million people who identify as lesbian, gay, bisexual or transgender (LGBT)." , <http://www.apa.org/pi/lgbt/resources/aging.aspx> (last visited Sept. 29, 2016); see also NATIONAL CENTER ON ELDER ABUSE, MISTREATMENT OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) ELDERS, http://www.lgbtagingcenter.org/resources/pdfs/Research-Brief_LGBT_Elders_508web.pdf.

about charging, witness credibility, and ability to testify, as a diagnosis cannot provide important information about functional ability. In short, dementia alone does not establish incompetency to testify.¹⁸

Many older adults have *no* cognitive difficulties but the likelihood of developing dementia increases with age.¹⁹ By age 85, many older adults have significantly greater rates of chronic health problems, dementia, and functional limitations, which require more health and supportive care²⁰ and which increase the likelihood of dependence on others for assistance.

Approximately 2.9% of people aged 65-74 have Alzheimer's disease, the most common form of dementia. This percentage increases with age. Studies have found rates of abuse by caregivers of persons with dementia to be between 34% and 62%.²¹ Dementia increases the need for assistance from others and the likelihood of placement in a long-term care facility where the disease may cause aggressive and other problematic behaviors. Dependency on others and the behaviors associated with dementia and nursing home placement are all risk factors for abuse.²²

Members of racial and ethnic minority communities are also aging.²³ This is relevant, as cultural beliefs and perceptions may affect what conduct is viewed as abuse. For example, in some tribal and other communities, it is common to share resources and medications amongst family members. The line between culturally accepted practice and exploitation is sometimes difficult to draw, and some communities have added the category of spiritual or ritual abuse to forms of elder abuse.²⁴ Cultural values and practices may also affect gender and familial roles, hierarchies, religious practices, communication, language, ability to contact "outsiders," feelings about law enforcement, and appropriateness of seeking care or services outside the group.

In elder abuse cases, women appear to be victimized more frequently than men. Women are victims in about two-thirds of elder abuse cases and are more likely to be victims of physical and sexual abuse, neglect, financial, and emotional/psychological abuse than men.²⁵ Men are more likely to be abandoned.²⁶ In sexual assault cases, victims are more often women but male victims have been identified.²⁷ Sadly, in elder abuse cases generally, male victims are taken less seriously by law enforcement, health care, and social workers and offered less follow-up or services.²⁸

18 See *infra* Defense Challenges to Victim Competency and Elderly Defendants: Accommodations and Competency.

19 It is estimated that 32-50% of persons age 85 and older have Alzheimer's Dementia. B.L. Plassman, et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 (1-2) *NEUROEPIDEMIOLOGY* 125-32 (2007); Alzheimer's Association, *2016 Alzheimer's Disease Facts and Figures*, 12(4) *ALZHEIMER'S & DEMENTIA* 17 (2016), https://www.alz.org/documents_custom/2016-facts-and-figures.pdf.

20 CAL. DEP'T OF AGING, STATE PLAN ON AGING 2013-2017 9 (2013), available at http://www.aging.ca.gov/data_and_statistics/#State.

21 K. BURNIGHT & L. MOSQUEDA, THEORETICAL MODEL DEVELOPMENT IN ELDER MISTREATMENT (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/234488.pdf>; C. Cooney, R. Howard, & B. Lawlor, *Abuse of Vulnerable People with Dementia by Their Carers: Can We Identify Those Most at Risk?*, 21 *INT'L J. GERIATRIC PSYCHIATRY* 564 (2006); C. Cooper, A. Selwood, & G. Livingston, *The Prevalence of Elder Abuse and Neglect: A Systematic Review*, 37(2) *AGE AGEING* 151 (2008); E. Yan & T. Kwok, *Abuse of Older Chinese With Dementia By Family Caregivers: An Inquiry Into the Role of Caregiver Burden*, 26(5) *INT'L J. GERIATRIC PSYCHIATRY* 527 (2010).

22 C. Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 446-500 (R. J. Bonnie & R. B. Wallace eds., 2003); K.A. Pillemer & Bachman-Prehn, *Helping and Hurting: Predictors of Maltreatment of Patients in Nursing Homes*, 13 *RESEARCH ON AGING* 74 (1991).

23 A PROFILE OF OLDER AMERICANS, *supra* note 16 (Racial and ethnic minority populations have increased from 6.1 million in 2002 (17% of the elderly population) to 8.9 million in 2012 (21% of the elderly population) to an estimated nearly 20.2 million (28% of the elderly) by 2030. While the older white, non-Hispanic population will increase by 54% by 2030, the older racial and ethnic minority populations will increase by 126%.

24 A.S. BROWN, PERCEPTIONS AND ATTITUDES TOWARD MISTREATMENT AND REPORTING: A MULTICULTURAL STUDY (1998) (an analysis of the Native American data); THE ELDER ABUSE TASK FORCE, USING YOUR TRIBAL VALUES TO DEVELOP AN ELDER PROTECTION CODE, FIRST EDITION (2008), <http://nicoa.org/wp-content/uploads/2014/05/Elder-Protection-Workbook-Final.pdf>.

25 TEASTER, ET AL., *supra* note 15.

26 THE NATIONAL CENTER ON ELDER ABUSE, NATIONAL ELDER ABUSE INCIDENCE STUDY (1998), http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf.

27 A. Burgess & P. Clements, *Information Processing of Sexual Abuse in Elders*, 2 *J. FORENSIC NURSING* 113-20 (2006).

28 M.J. Yaffe, et al., *Detection and Prevalence of Abuse of Older Males: Perspectives from Family Practice*, 19(1/2) *J. ELDER ABUSE & NEGLECT* 47-60

Whether or not the victim is in good health, elder abuse will exact a significant cost. For some, victimization can be the “tipping point” that pushes the victim into poorer health. The victim’s quality of life “can be jeopardized [by] declining functional abilities, progressive dependency, a sense of helplessness, social isolation, and a cycle of worsening stress and psychological decline.”²⁹ Financial abuse can result in losses of personal relationships, self-sufficiency, and trust in others, leading to psychological conditions including depression. Financial losses may be impossible to recoup, leaving the older victim unable to afford prescriptions, medical care, supportive care or living, and nutrition to sustain life. Victims of elder abuse suffer increased levels of emotional and psychological distress,³⁰ including disturbed eating and sleeping, non-compliance with medical treatment, declining functional abilities, progressive dependency, a sense of helplessness, social isolation, stress, withdrawal, psychological decline, and depression.³¹ Polyvictimization is associated with greater and more complex trauma and dire consequences including significant risk of hospitalization.³²

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PRACTICE NOTE: EARLY CONSIDERATIONS

Because of aging demographics, the special needs of many victims, and complex defenses, prosecutors will necessarily need to ask and answer many questions early on in the case and simultaneously employ strategies to help proactively address issues related to victim interactions, case decisions, and trial tactics. For example:

- Can the victim be interviewed at all? If so, what time of day is best?
- Is the victim capable of giving legal consent? Who can make this determination?
- Did the victim’s physical or cognitive limitation make her/him a “target” for the perpetrator (*e.g.*, was it easier to convince, confuse, or deceive the victim or allow the perpetrator to continue her/his pattern of abusive tactics and evade detection)?
- Is the victim legally competent to testify?
- Can the victim get to court to give testimony?
- Can the case be proven without the victim giving testimony?
- What accommodations will the victim need in order to participate in the criminal justice process?
- Is there a need to preserve the victim’s testimony early in the process?
- What protections, orders, and support should be in place to assist the victim during and after the investigation and prosecution?

Prosecutors should consider the benefits of interviewing the older adult separately to ensure that his/her answers are not skewed as a result of fear or manipulation of the abuser, or other persons.

(2007); E.H. Thompson, et. al., *Gendered Policies and Practices that Increase Older Men’s Risk of Elder Mistreatment*, 19(1/2) J. ELDER ABUSE & NEGLECT 129-151 (2007).

29 X. Dong, *Medical Implications of Elder Abuse and Neglect*, 21(2) CLINICS GERIATRIC MED. 293, 293 (2005).

30 H.C. Comijs, et. al., *Psychological Distress in Victims of Elder Mistreatment: The Effects of Social Support and Coping*, 54B J. GERONTOLOGY: PSYCHOLOGICAL SCIENCES 240-45 (1999).

31 DONG, *supra* note 29.

32 Polyvictimization is defined as “when a person aged 60+ is harmed through multiple co-occurring or sequential types of elder abuse by one or more perpetrators, or when an older adult experiences one type of abuse perpetrated by multiple others with whom the older adult has a personal, professional or care recipient relationship in which there is a societal expectation of trust.” Holly Ramsey-Klawnsnick & Candace Heisler, *Polyvictimization in Later Life*, 17(1) VICTIMIZATION OF THE ELDERLY AND DISABLED (May/June 2014), available at http://www.civicsresearchinstitute.com/online/article_abstract.php?pid=17&iid=921&aid=6032. See also X. Dong & Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173(10) JAMA INTERNAL MED. 911-17 (2013); Holly Ramsey-Klawnsnick, *Interviewing Suspected Victims*, 7(3) VICTIMIZATION OF THE ELDERLY AND DISABLED 35-36, 48 (2004). For more information on polyvictimization, see Screening for Co-Occurring Crimes and Intimidation.

C. Characteristics of Elder Abuse Perpetrators

There is no single profile of an abuser. While most are younger than their victims, some are themselves elderly. For most forms of abuse (except neglect), perpetrators are more likely to be male than female.³³ They may be predators, desperate, or opportunists, and they may be individuals or businesses such as financial institutions or care facilities. In the case of facilities, abusers may be staff members, administrators, or managers, residents, volunteers, and visitors.³⁴ Most are people known and trusted by the victim.³⁵ Given the complex nature of abuse, dynamics between the parties, and abuser motivations, some perpetrators may be crossover offenders (*i.e.*, may fit into multiple categories).

Sexual assaulters may be predators who locate and stalk elderly communities or seek employment in settings where they have access to frail and vulnerable adults, such as skilled nursing facilities or senior centers.³⁶ They range in age from juveniles to other older adults and generally fall into one of five groups:

- (1) Strangers or acquaintances,
- (2) Unrelated caregivers,
- (3) Incestuous abusers (including abuse perpetrated by adult children, other relatives, and quasi-relatives),
- (4) Marital or partner abusers, and
- (5) Residents in short- or long-term care settings.

Sexual abusers engage in three kinds of acts: hands-on; hands-off (*e.g.*, forced watching of pornography or unwanted sex acts between others); and harmful genital practices (*i.e.*, contacts with the victim's genitalia which are unnecessary, intrusive, obsessive, or painful, and are not part of a victim's care plan such as insertion of fingers, creams, enemas, soap or wash clothes into the victim's rectum or vagina and use of alcohol to clean vaginal areas). Perpetrators of sexual abuse are typically caregivers who explain their actions as medically necessary and misinterpreted by the victim.³⁷ Regarding marital or partner abuse the sexual abuse may be part of a history of reported or unreported domestic violence.

Perpetrators of physical abuse are more likely to be related to and live with the victim, have legal problems, and substance abuse and/or mental health problems.³⁸ Most abusers were not abused as children and did not grow up with family violence.³⁹

Financial abusers, especially family members, are often dependent on their victim for housing, transportation, and sometimes, care; have financial problems, and may be unemployed or underemployed; have substance abuse problems, and mental health problems including gambling addictions. Other financial abusers may be advisors, fiduciaries, faith leaders, persons hired by the victim or her/his family to provide at-home care. Another common financial abuser

33 Krienert et al., *Elderly in America: A Descriptive Study of Elder Abuse Examining National Incident-Based Reporting System (NIBRS) Data: 2000–2005*, 21(4) J. ELDER ABUSE & NEGLECT 325–45 (2009); P.B. TEASTER, NAT'L CTR. ON ELDER ABUSE, *A RESPONSE TO THE ABUSE OF VULNERABLE ADULTS: THE 2000 SURVEY OF STATE ADULT PROTECTIVE SERVICES* (2003), <https://www.ncea.acl.gov/resources/doc/archive/2000-St-APS-Survey-Results-2003.pdf>; TEASTER, ET AL., *supra* note 15.

34 ELDER JUSTICE ROADMAP, *supra* note 4 at 44.

35 KRIENERT ET AL., *supra* note 33.

36 HEISLER, *supra* note 8.

37 Holly Ramsey-Klawnsnik, *Assessing Physical and Sexual Abuse in Health Care Settings in ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PERSONS: STRATEGIES FOR ASSESSMENT AND INTERVENTION* (Baumhover & Beall eds., 1996).

38 A.B. Amstadler et al, *Do Incident and Perpetrator Characteristics of Elder Mistreatment Differ by Gender of the Victim? Results from the National Elder Abuse Mistreatment Study*, 23(1) J. ELDER ABUSE & NEGLECT 43-57 (2011).

39 G.J. Anetzberger, *Psychological Abuse and Neglect: A Cross-Cultural Concern to Older Americans*, in UNDERSTANDING AND COMBATING ELDER ABUSE IN MINORITY COMMUNITIES 141-51 (A. Foundation ed.,1998).

may be someone who betrays the trust of an individual after posing as a companion or offering a romantic relationship in order to gain access to the victim's bank accounts and finances.

Within long-term care facilities, resident-on-resident abuse (RRA) regularly occurs. Perpetrators engage in behaviors from verbal aggression to physical and sexual abuse. Their characteristics include wandering, moderate functional dependency, and cognitive impairment. While RRA most often occurs in resident's rooms, it also occurs in common areas of facilities.⁴⁰

RRA cases may be committed by elderly patients who have some form of dementia and who may have difficulty controlling their behavior causing them to act out or lash out at other residents. Some RRA perpetrators are younger, often psychiatric, patients housed in the same facilities as frail residents with physical and cognitive impairments.⁴¹ Perpetrators are able to inflict serious injury on their victims.⁴² Lastly, there are elderly sexual offenders who have been released from prison to care facilities and abuse other residents.⁴³

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D. The Aging Body

Changes to the body occur with normal aging. Because of the diversity of the older population, there is wide physiological variability in the extent and rate of these changes. Illness and disease can increase the risk of injury to older persons and can complicate the identification of abuse, make it more difficult to distinguish abuse from other causation, and give rise to defense challenges. These complexities can lead to false negatives and false positives. Abuse may be attributed to illness and normal aging and therefore missed, or conditions associated with illness and normal aging may be misidentified as abuse.⁴⁴

There is no "gold standard" test for abuse or neglect, and there is often considerable overlap among the markers of disease and neglect and abuse.⁴⁵ Many elders have medical problems, psychological and cognitive problems, or other conditions that are associated with physical frailty.⁴⁶ In addition, homeostenosis, a geriatric concept referring to the progressive reduction of reserves due to aging that occurs in every organ system, decreases the ability to return to what had been the elder's medical and functional state after an illness or injury.⁴⁷ Elders may lack the ability to tolerate injuries and illnesses so that falls, infections, and injuries are more likely to result in death.⁴⁸ Recovery time is also longer than in younger years, and the elder may never return to her/his previous higher level of function.

40 T. Rosen, K. Pillemer & M. Lachs, *Resident-to-Resident Aggression in Long-Term Care Facilities: An Understudied Problem*, 13(2) AGGRESSION VIOLENT BEHAVIOR 77 (2008).

41 L.L. Jervis, *An Imperfect Refuge: Life in an 'Old Folk's Home for Younger Residents with Psychiatric Disorders*, 54(1) SOC. SCI. & MED. 79-91(2002).

42 U.S. GOV'T ACCOUNTING OFFICE, *LONG-TERM CARE FACILITIES: INFORMATION ON RESIDENTS WHO ARE REGISTERED SEX OFFENDERS OR ARE PAROLED FOR OTHER CRIMES* (Mar. 2006); see also Tobin A. Sparling, *Preventing Resident-to-Resident Abuse in Long-Term Care: Targeting Sex Offenders but Missing the Mark*, 15 MARQ. ELDER'S ADVISOR 55 (2013), <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1386&context=elders>.

43 *Id.*

44 Burnett et al., *Forensic Markers Associated with Elder Mistreatment and Self-Neglect: A Case-Control Study*, 3(4) ACAD. FORENSIC PATHOLOGY 458 (2013); J. Burnett, W.A. Achenbaum & K.P. Murphy, *Prevention and Early Identification of Elder Abuse*, 30 CLINICS GERIATRIC MED. 743 (2014).

45 C. Dyer, M. Connolly & P. McFeeley, *The Clinical and Medical Forensics of Elder Abuse and Neglect*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 339-81 (R. J. Bonnie & R. B. Wallace eds., 2003).

46 DYER, CONNOLLY & MCFEELEY, *supra* note 46; M.R. Hansberry, E. Chen, & M.J. Gorbien, *Dementia and Elder Abuse*, 21 CLINICS GERIATRIC MED. 315 (2005).

47 Davao Del Sur, *Homeostenosis*, WALKING ON WATER (Oct. 7, 2008), <http://nomorewhitecoats.blogspot.com/2008/10/homeostenosis.html> (last visited Aug. 4, 2016).

48 Personal Communication with C.B. Dyer (Apr. 10, 2016).

Every bodily system is affected by aging. **Skin** thins and loses collagen and elasticity, resulting in loss of the ability to fight diseases, changes in skin tone and elasticity, and the development of wrinkles. These changes increase the risk of bruising, skin tears, and pressure ulcers.⁴⁹ Skin tears often appear on the forearms and sometimes the legs, and are associated with bumping into objects, falls, and wheelchairs. They can also be caused by improper or rough handling of an older person and by abuse.⁵⁰

Bones decline in mineral density, resulting in increased fragility and risk of fractures. Joints become brittle, and tendons and ligaments stiffen,⁵¹ which results in decreased range of motion.⁵² **Muscles** lose strength due to loss of muscle mass and increase in body fat. These changes affect the way some drugs (*e.g.*, fat soluble medications) are metabolized.⁵³

As individuals age, **the heart** increases in size, and valves thicken and calcify, increasing the risk of high blood pressure and atrial fibrillation. The maximum heart rate decreases with activity, and reserves are reduced. The **chest** wall becomes stiffer and recoil action decreases, and the cough weakens increasing the risk of pneumonia and other disease.⁵⁴

Changes in **sensory systems** affect hearing and vision (though many are correctable), and balance and proprioception. Proprioception means an “awareness of the position in space, and of the relation to the rest of the body, of any body part. Proprioceptive information is essential to the normal functioning of the body’s mechanical control system and is normally acquired unconsciously from sense receptors in the muscles, joints, tendons, and the balance organ of the inner ear.⁵⁵ Sensory changes may affect sensitivity to touch and pain, and may increase susceptibility to hypothermia and hyperthermia, heat stroke, and heat exhaustion. They may affect the older adult’s ability to see or hear her/his assailant, read critical documents, maintain balance, or steady her/himself as s/he begins to fall.

The **female reproductive system** produces less estrogen, contributing to vaginal atrophy and atrophic vaginitis in vaginal dryness. In addition, the labia thins, the vagina shortens, and the vaginal mucosa atrophy, all of which can make penetration more painful and result in tissue trauma.⁵⁶ Changes to the **gastrointestinal tract** include a reduction in gastric secretions and slowing absorption and metabolism of food and medications. Age-related changes to the **central nervous system** result in decreased ability to regulate thirst and temperature.⁵⁷ Cognitive aging is a process of gradual, ongoing, and variable changes in cognitive function; it is not a disease.⁵⁸ The **brain’s** physical structures change, atrophy, and lose white matter.⁵⁹ Processing time is slower, but the ability to engage in complex thinking is preserved.

There are many diseases more common in old age. These include: hypertension, diabetes, cancer, stroke, heart disease, osteoporosis, and neurocognitive disorders. Age-related changes and common diseases increase the risk of falls, bruising, and medication side-effects.⁶⁰

49 D. Homeier, *Aging: Physiology, Disease and Abuse*, 30 CLINICS GERIATRIC MED., 671-86 (2014).

50 DYER, CONNOLLY & MCFEELEY, *supra* note 46.

51 HOMEIER, *supra* note 50.

52 Personal Communication with C.B. Dyer (Apr. 10, 2016).

53 HOMEIER, *supra* note 50. Personal Communication with C.B. Dyer (Apr. 10, 2016).

54 *Id.*

55 ROBERT M. YOUNGSON, COLLINS DICTIONARY OF MEDICINE (2004, 2005).

56 Maire B. Mac Bride, Deborah J. Rhodes, and Lynne T. Shuster, *Vulvovaginal Atrophy*, 85(1) MAYO CLIN. PROC. 87-94 (Jan. 2010). Personal Communication with C.B. Dyer (Apr. 10, 2016).

57 *Id.*

58 J.E. Birren, *Toward an Experimental Psychology of Aging*, 25(2) AM. PSYCHOLOGIST 124-35 (1970).

59 HOMEIER, *supra* note 50.

60 *Id.*

Medical/Forensic Markers to Distinguish Abuse and Neglect from Other Causation

Distinguishing abuse from other medical explanations requires consideration of multiple factors, including physiology, pathophysiology, medical history and function, and the mechanism of injury. Evaluation of the older person's functional abilities is often essential in determining whether abuse has occurred. Understanding what an elderly person can and cannot do for her/himself may be key to determining accidental versus intentional injuries.⁶¹

Where abuse is suspected, bruises and other findings should be evaluated and corroborated by clinical findings and historical information.⁶² Such corroboration could include medical and laboratory markers such as indicators of malnutrition, dehydration, changes in status of chronic illness, hypothermia/hyperthermia, rhabdomyolysis⁶³, toxicology findings, and postmortem biochemical values.⁶⁴

Prosecutors should look to supporting research on patterns of abuse and neglect. The location of a bruise is more suggestive of abuse than any other factor.⁶⁵ The leading study of geriatric patients with bruises from abuse found that bruises from physical abuse are greater than 5 cm and are found on the face, lateral aspect of the right arm, and posterior chest, back, lumbar and gluteal regions.⁶⁶ By contrast, a 2005 study evaluated accidental bruising in the elderly and found that approximately 90% of accidental bruises occurred on the extremities, with no accidental bruising on the neck, ears, genitalia, buttocks, or soles.⁶⁷

The accidental bruising study mentioned above⁶⁸ found that many bruises did not follow the standardly accepted notions of color progression, in which, as the hemoglobin is broken down, the color of the bruising changes from red to blue and purple and then yellow and green.⁶⁹ This negatively affects the ability to date any bruise. The study also found that while anticoagulant medications increased the number of bruises, they resolved at the same rate as for persons not taking such medications.⁷⁰

Elderly victims of **sexual abuse** sustain significant injury to non-genital parts of their bodies, most often the head, legs, chest, and abdomen.⁷¹ Normal age-related changes to the body including loss of tissue elasticity, lack of estrogen, and decreased subcutaneous fat help explain why there is often injury to genital region tissue.⁷² Age-related changes and fear related to the attack result in an absence of adequate lubrication, which increases the likelihood of tears and other injuries

61 L.M. Gibbs, *Understanding the Medical Markers of Elder Abuse and Neglect: Physical Examination Findings*, 30 CLINICS GERIATRIC MED. 687-712 (2014).

62 M.S. Lachs & K.A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947 (2015); J.S. Powers, *Common Presentations of Elder Abuse in Health Care Settings*, 30 CLINICS GERIATRIC MED. 729-41 (2014).

63 A rare, potentially life-threatening condition where there is breakdown of muscle tissue that leads to the release of muscle fiber contents into the blood. These substances are harmful to the kidney and often cause kidney damage. It is often seen in persons who have suffered major injuries or trauma. See Shawn Bishop, *Variety of Causes Can Be at Root of Rhabdomyolysis*, MAYO CLINIC (Oct. 21, 2011), <http://newsnetwork.mayoclinic.org/discussion/variety-of-causes-can-be-at-root-of-rhabdomyolysis/>.

64 V.M. LoFaso & T. Rosen, *Medical and Laboratory Indicators of Elder Abuse and Neglect*, 30 CLINICS GERIATRIC MED. 713 (2014); Power, *supra* note 63.

65 L. Mosqueda, K. Burnight & S. Liao, *The Life Cycle of Bruises in Older Adults*, 53 J. AM. GERIATRIC SOC. 1339-43 (2005).

66 A. Wigglesworth et al., *Bruising as a Marker of Physical Elder Abuse*, 57 J. AM. GERIATRIC SOC. 1191-96 (2009).

67 GIBBS, *supra* note 62.

68 *Id.*

69 *Id.*

70 *Id.*

71 A.W. Burgess, N.P. Hanrahan & T. Baker, *Forensic Markers in Elder Female Sexual Abuse Cases*, 21 CLIN. GERIATR. MED. 399-412 (2005).

72 D.J. Hicks & D.M. Moon, *Sexual Assault of the Older Woman*, in VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN AND MEN 48 (I.R. Stewart and J.G. Greer eds., 1974).

and infections.⁷³ Several studies have found a relatively low percentage of cases in which sperm have been found. For example, a 2005 study conducted by Burgess et al.⁷⁴ conducted a review of 125 cases of elder sexual assault. While forensic data was only available in 46 of those cases, of the 46 that had data, 16 cases (35%) had positive evidence of sperm. In another study, 28% of victims had positive findings of the presence of sperm.⁷⁵ Motile sperm were only found when the forensic examination was conducted within 6 hours of the assault (compared to 24 hours in younger population studies).⁷⁶

Fractures in the elderly that result from bone disease (such as osteoporosis), or injury, such as an accidental fall, commonly occur in the vertebrae and hips for women over age 75 and wrists for women under age 75.⁷⁷ Fractures of the head, cervical spine, and trunk are more likely to result from physical assault than fractures to limbs.⁷⁸ Spiral fractures of the large bones of the limbs and fractures with a rotational component are more diagnostic of physical abuse.⁷⁹ Fractures at locations other than the hip, wrist, or vertebrae should raise suspicion, with a possible exception for when the patient is an alcoholic.⁸⁰

Forty (40) to 70% of **burns** in older adults are linked to elder abuse.⁸¹ Some child abuse burn injury findings seem to be applicable to elderly victims, including hot water scalds with or without the presence of splash marks. If the victim is able to struggle, burns may include splash marks.⁸² Conversely, if the victim is immobile and therefore unable to struggle, (e.g., movement disorders or contractures) splash marks may not be present. Uniformity of depth throughout the injury is believed to indicate that the victim was held still in the water. Bilateral, or stocking and glove injuries, suggest forcible immersion of the victim. Skin sparing with a surrounding burn area may be evident in flexed surfaces, palms, soles of the feet, or buttocks when in contact with a surface, such as a bath or sink. Burns from objects may leave recognizable pattern injuries.⁸³

Pressure ulcers (also called pressure sores and bedsores) may be used as evidence of neglect but may be due to an underlying medical condition or immobility, and can occur even with good medical care. Pressure ulcers cannot be aged reliably and the time to develop from stage one to four varies considerably.⁸⁴ When evaluating neglect cases with pressure ulcers, attention should be paid to whether medical care was promptly sought, signs of healing, provision of devices to assist with positioning and turning, and use of mattresses and clothing to reduce pressure. Other signs of neglect include malnutrition, dehydration, poor hygiene, and inadequate or inappropriate clothing.⁸⁵

Causation is often an issue in elder physical abuse and neglect cases. Medical findings used by the prosecution to prove guilt may be challenged as being due to other causes including normal aging, skin breakdown, or accident. This section has provided some information to help differentiate abuse from non-criminal causes.

73 *Id.*

74 BURGESS, HANRAHAN & BAKER, *supra* note 72.

75 S.M. Ramin, et al., *Sexual Assault in Postmenopausal Women*, 80(5) OBSTETRICS & GYNECOLOGY 860-64 (1992).

76 *Id.*

77 DYER, CONNOLLY & MCFEELEY, *supra* note 46.

78 *Id.*

79 *Id.*

80 *Id.*

81 M.L. Bowden et al., *The Elderly, Disabled and Handicapped Adult Burned Through Abuse and Neglect*, 14(6) BURNS INCLUDING THERMAL INJURIES 447-50 (1988).

82 A.R. Greenbaum, et al., *Intentional Burn Injury: An Evidence-Based, Clinical and Forensic Review*, 30(7) BURNS. 628-42 (2004).

83 GIBBS, *supra* note 62.

84 *Id.*

85 T. Del Carmen & V.M. LoFaso, *Elder Neglect*, 30 CLINICS GERIATR MED 769-77 (2014). *See also* Medical/Forensic Markers to Distinguish Abuse and Neglect from Other Causation.

When handling a case with medical findings such as the ones mentioned here, it is helpful to work with a medical expert familiar with geriatrics and to assure that relevant medical, laboratory, and toxicology records have been collected and evaluated, and that witness and suspect interviews include questions that probe for information that bears on proving causation.⁸⁶ Prosecutors should consult with experts early in the case and can look to their multidisciplinary team for recommendations.

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E. Competency and Capacity

Few issues are more important in elder abuse cases than competency and capacity. Case theory, the ability of the victim and sometimes other witnesses to testify, and the defendant's ability to stand trial all turn on assessments of competency and capacity. These terms are separate and distinct.

"Competency" is a legal determination of a witness's ability to understand their duty to tell the truth, to distinguish truth from fantasy, and to communicate information so as to be understood, as determined by the trial court.⁸⁷ Competency is an "all or none" decision by the court.⁸⁸ Witness (including the victim) competency to testify requires a minimal ability to observe, recollect, and communicate information and understand the duty to tell the truth.⁸⁹ A defendant's competency refers to her/his current ability to understand the nature of the charges and assist in her/his defense; to understand and waive legal rights such as *Miranda* warnings, counsel, jury trial; and to knowingly and voluntarily enter a guilty plea.⁹⁰ All adults are presumed competent to testify; the court may hear from the witness and other witnesses, including an expert who has evaluated the witness, in making a determination of competency.⁹¹

"Capacity" is a clinical term that focuses on a person's functional ability to do a relevant task.⁹² Unlike competency to testify, there can be degrees of capacity. A person can have the capacity to do some things but not others. A person may be unable to manage finances, but may be able to direct someone else to handle those matters. **A person may have deficits relating to functional capacity, but still be competent to testify.**⁹³ **A person may have certain functional capacities, but be found legally incompetent to testify or stand trial.**⁹⁴

There are many types of capacity, including:

- Contractual (capacity to enter into a contract and other financial transactions)
- Donative (make a gift)
- Testamentary (make or change a will)

86 HOMEIER, *supra* note 50. For a list of commonly prescribed drugs for older persons, see LAURA MOSQUEDA, ET AL, GERIATRIC POCKET DOC: A RESOURCE FOR NON-PHYSICIANS (Program in Geriatrics, 2d ed. 2013) (Section V).

87 See, e.g., Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27 (2003).

88 E. Falk & N. Hoffman, The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships, 30 CLINICS IN GERIATR MED, 851-68 (2014).

89 See, e.g., FED. R. EVID. 601; see also, Michael H. Graham, 4 HANDBOOK OF FED. EVID. § 601:1 (7th ed.) (2015). Competency to Testify in General; an Overview.

90 See, e.g., KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE (6th ed., West Publishing 2006).

91 See, e.g., FED. R. EVID. 601.

92 FALK & HOFFMAN, *supra* note 92.

93 For example, a person may be unable to prepare meals or drive but still be able to testify as the underlying abilities related to cooking and driving are distinct from those required to testify.

94 For example, a person may not be able to understand the duty to tell the truth or be able to communicate due to a mental health condition but still be able to dress and feed her/himself.

- Decisional (powers of attorney, trusts, and advance directives)
- Medical (consent to treatment)

Capacity should be evaluated by a practitioner or expert in two ways: (1) can the person *make* a decision (decisional capacity) and (2) can a person *implement* a decision (executorial capacity). An older adult may understand what a bill is and that it needs to be paid but be completely unable to execute the steps to do so. In financial abuse cases, an APS worker's examination of the older person's check book or check register, ability to make change, or recognize coins or bills may provide valuable insight into the elder's executorial capacity.

Decisional capacity is determined by the ability to understand the basic facts about a decision; to appreciate how the decision relates to one's personal situation, including one's strengths and limitations; to be able to reason, rationally evaluate, and compare options and the consequences of alternative choices; and to be able to make an informed decision.⁹⁵

Executorial capacity requires that the person be able to formulate a plan, make changes in response to novel or changing conditions, and delegate tasks to appropriate others when personally unable to implement the plan.⁹⁶

Capacity, whether decisional or executorial is task-specific, not global, and may vary over time. Because capacity is situational, a person's health, mental state, nutritional status, alcohol and other drugs, and medications can affect whether that person is capable of making a particular kind of decision at a specific time. It can fluctuate by time of day, medical diagnosis, and feelings such as grief and loneliness.

Capacity is contextual and varies by the complexity of the task to be completed or the decision to be made. The more significant the decision and its consequences, the higher the level of capacity required. For example, a decision to decline life-saving medical treatment requires a higher level of decisional capacity than a decision to give a modest gift to a beloved grandchild.

Mental capacity requires the ability to think clearly, recall accurately, organize thoughts, communicate thoughts, and plan and execute actions, *i.e.*, "executive function." Executive function is the ability to plan, consider, evaluate alternatives, and develop, and carry out a plan. It is a higher mental function requiring sequencing of multiple steps, which are especially critical in financial decision-making. Specific parts of the brain (*e.g.*, hippocampus controls memory; prefrontal cortex involved in many tasks of executive function) control aspects of mental functioning and different tests assess what is occurring in different parts of the brain.⁹⁷ A person can have deficits in executive function without having dementia or memory impairment.⁹⁸

⁹⁵ FALK & HOFFMAN, *supra* note 92.

⁹⁶ A.D. Naik, et al., *Assessing Capacity in Suspected Cases of Self-Neglect*, GERIATRIC, 24-31 (2008); FALK & HOFFMAN, *supra* note 92.

⁹⁷ INSTITUTE OF MEDICINE, COGNITIVE AGING: PROGRESS IN UNDERSTANDING AND OPPORTUNITIES FOR ACTION (Dan Blazer, Kristine Yaffe & Catharyn Liverman, eds. 2015), available at <http://www.nap.edu/catalog/21693/cognitive-aging-progress-in-understanding-and-opportunities-for-action>.

⁹⁸ *Id.*; C.B. Dyer, et al., *Characterizing Self-Neglect: A Report of Over 500 Cases of Self-Neglect Seen by A Geriatric Medicine Team*, 97 AM J PUBLIC HEALTH, 1671-76. (2007).

1. “Financial Decision-Making Capacity”

Financial decision-making capacity is “the capacity to manage money and financial assets in ways that meet a person’s needs and which are consistent with her/his values and self-interest.”⁹⁹ Financial decision-making requires executive function. Financial literacy may decline in later life and be reflected in increasingly rash and irrational financial decision-making.¹⁰⁰

Decline in an older person’s financial skills can be a warning sign of mild cognitive impairment (MCI) and an early warning sign of impending Alzheimer’s disease.¹⁰¹ Such signs include:

- Forgetting recent financial or legal transactions
- Problems keeping track of checks or bills
- Forgetting to pay bills or paying bills more than once
- Being newly overwhelmed by financial matters
- Making math and counting errors
- Inability to make change
- Engaging in risky behaviors and interest in/gullibility for “get-rich quick” schemes

Understanding some of these warning signs may assist the prosecutor in evaluating the need to consult with an expert, identifying significant findings in medical records, and cross-examining defense witnesses, including experts, about the defendant’s awareness of the victim’s financial difficulties and lack of understanding of financial matters.

2. Screening and Assessing Capacity

Prosecutors may be presented with evidence of a victim’s financial decisional capacity from a screening tool or an assessment. A **screening tool** can be administered fairly quickly and is often done in the field, by an APS worker or other professional. Its purpose is to provide a quick overview of the person’s cognitive function. Screening is like taking a person’s temperature; by itself, it offers clues into a person’s cognitive function, but is not sufficient for a diagnosis. Given the limited utility of a screening tool, it is suggested that a prosecutor not rely exclusively on a screening tool when formulating a theory of the case or evaluating critical issues such as a victim’s credibility, capacity to consent to sexual activity or to engage in financial transactions, or competency to testify.

In contrast, an **assessment** is more comprehensive. It is detailed and involves a variety of evaluations of mental and functional skills, and may involve a home visit, a medical evaluation, a review of medical records, and the administration of multiple psychological tests. An assessment can provide valuable, reliable evidence of a person’s capacity and functional abilities at the time of the assessment, and, sometimes, at earlier times when critical events occurred and when documents were executed. A diagnosis may serve as a framework for understanding the limitations of a person with declining cognitive skills, but, alone, is insufficient for a determination of an individual’s actual capacity.¹⁰²

99 D.C. Marson, K. Heber, & A. Solomon, *Assessing Civil Competencies in Older Adults with Dementia: Consent Capacity, Financial Capacity, and Testamentary Capacity*, in FORENSIC NEUROPATHOLOGY: A SCIENTIFIC APPROACH 401-37 (G.J. Larrabee ed. 2d ed. Oxford Univ. Press).

100 A. Lusardi, *Financial Literacy and Financial Decision-Making in Older Adults*, 36(2) GENERATIONS 25-31(2012).

101 D.C. Marson & C.P. Sabatino, *Financial Capacity in an Aging Society*, 36(2) GENERATIONS 6-11 (Summer 2012); K.L. Triebel & D.C. Marson, *The Warning Signs of Diminished Financial Capacity in Older Adults*, 36(2) GENERATIONS 39-45 (2012).

102 AMERICAN BAR ASSOCIATION AND AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>; Falk & Hoffman, *supra* note 92.

PRACTICE NOTE: ASSESSING CAPACITY

Capacity assessments can also guide law enforcement and protective services in determining how much a victim may be able to participate in an investigation or legal process. In many types of neurocognitive disorders, particularly Alzheimer dementia, verbal and social skills may remain intact when memory and other cognitive domains are compromised. This situation may make it difficult to assess the accuracy of a person's report of abuse, and a capacity evaluation may help quantify the nature and extent of the person's cognitive deficits to assist investigators. In another example, a capacity evaluation that identifies that an adult has a neurodevelopmental disorder (formerly called mental retardation) and was not able to understand the implications of signing over the deed to a home his mother left him, can assist prosecutors in charging the case under elder abuse/dependent adult statutes and in understanding his strengths and challenges as a witness.¹⁰³

E. Falk & N. Hoffman, *The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships*, 30 CLINICS GERIATRIC MED. 851-68, 863 (2014).

For more information on assessing capacity, see:

- AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HAND-BOOK FOR PSYCHOLOGISTS (2008) <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>.
- AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASSOCIATION. ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

Prosecutor familiarity with common **screening tools**, their purposes, strengths, and limitations is important in analyzing an elder abuse case. Key questions include:

- What particular functional capacity is the tool evaluating? Is the tool intended for such a purpose?
- For what purpose was the tool administered?
- What is the screener's training in the administration and scoring of the tool?
- What was the individual's situation when the tool was used? For example, was the individual ill, not taking needed medications, frightened?
- What was the individual told before the tool was administered?
- How long did the evaluation last?
- How were the results documented?
- Is the tool validated for the particular individual's background?
 - If the person's native language is not English or s/he learned English later in life, does the scoring accommodate for that?
 - If the person is an American Indian or Alaska Native, are culturally-validated tools used?¹⁰⁴
 - If the person is highly educated, does the tool accurately reflect the person's true level of impairment?
- Did the person who administered the tool do anything that confirms or raises questions about the reported results?¹⁰⁵

¹⁰³ FALK & HOFFMAN, *supra* note 92.

¹⁰⁴ *Website & Tools*, NATIONAL INDIGENOUS ELDER JUSTICE INITIATIVE, <https://www.nieji.org/tools> (last visited Aug. 17. 2016).

¹⁰⁵ AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS (2008), <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>.

There are many different screening tools, and each has its limitations. Some of the most commonly used screening tools include:

- Mini Mental State Examination (MMSE), a 30-point screening test that measures orientation, attention, and calculation; short term memory; and visual construction (it does not measure executive function)
- CLOCK test which can detect mild cognitive impairment (MCI) and dementia
- Montreal Cognitive Assessment (MoCA) which has been validated for identifying MCI and mild Alzheimer's disease¹⁰⁶
- St. Louis University Mental Status Examination (SLUMS) **which can detect MCI and early stage dementia**¹⁰⁷

None of these tests, by themselves, should be used to diagnose a cognitive disease. New screening and assessment testing instruments continue to be developed and validated.¹⁰⁸

3. Locating and Working with Experts

A variety of professionals may be able to offer sound consultation as to capacity.¹⁰⁹ In deciding with whom to consult, the assessor's qualifications, rather than her/his professional discipline, are paramount.¹¹⁰ Most front-line clinicians are not experienced or knowledgeable in capacity assessment and are not qualified to offer judgments of the type that should be relied upon by families, financial institutions, and legal professionals.¹¹¹ Geriatricians, gero-psychologists, neuropsychologists, gero-psychiatrists, social workers, and therapists may be able to conduct tests using validated instruments, with results that will be reviewable for accuracy and reliability between evaluators.

Assessments need to be conducted by qualified experts. Sources for finding such experts include:

- APS for local experts to assess capacity
- Local mental and behavioral health agencies
- Probate Courts referral lists
- Local medical school faculty
- Graduate school programs' psychology faculty
- Health care providers, including hospitals
- Geriatric medical and mental health practices
- Offices of the Public Guardian and elder law attorneys may have also worked with qualified experts in civil cases

Prosecutors should identify the precise issue they need to address and clearly communicate that issue to the expert. A general request to "assess the victim's capacity" is vague and will result in extra costs, as the expert will not have a clear idea what needs to be evaluated. The request should include the specific task at issue (*e.g.*, is the victim currently competent to testify; would the victim have had the capacity to understand the contract they allegedly signed on a particular date; would the victim's inability to understand a document have been evident to the defendant?).

¹⁰⁶ Z.S. Nasreddine, et al., *The Montreal Cognitive Assessment, MoCA: A Brief Screening Tool for Mild Cognitive Impairment*, 53(4) J AM GERIATR SOC. 695-99 (2005).

¹⁰⁷ For other common tests, see AMERICAN BAR ASSOCIATION, *supra* note 109 at 48.

¹⁰⁸ SIDNEY M. STAHL, BUILDING CONSENSUS ON RESEARCH PRIORITIES IN ELDER MISTREATMENT (July 2015), https://www.justice.gov/elderjustice/research/resources/Building_Consensus_On_Research_Priorities_In_Elder_Mistreatment.pdf (**addressing recommendations for enhancing the assessment of capacity**).

¹⁰⁹ See Appendix A for types of experts based on abuse experienced.

¹¹⁰ D.C. MARSON, *Clinical and Ethical Aspects of Financial Capacity in Dementia: A Commentary*, 21(4) AM J GERIATR PSYCHIATRY, 382-90 (2013).

¹¹¹ AMERICAN BAR ASSOCIATION, *supra* note 109; MARSON, *supra* note 114.

Relevant case information, including medical records and documents, should be provided to the expert. In some cases, an expert may be able to assess a deceased victim's capacity at a particular time by examining records and investigative interviews.

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F. Community Partners for Prosecution

Elder abuse and neglect cases can come to the attention of local law enforcement through many different channels. Cases may come into the criminal justice system through a 911 call, request for a “welfare check,” by family members, religious community members, financial institution employees, notification from emergency medical personnel, mandated cross-report from APS, or referral for investigation from APS.¹¹² In every state, except New York, certain persons are mandated reporters of elder or vulnerable adult abuse. In some states, everyone is a mandated reporter. While there is variation across jurisdictions as to which professionals are mandated reporters, physicians, healthcare workers, mental health professionals, licensed therapists, employees of agencies serving older persons, and law enforcement are typically included.¹¹³ There is considerable variation in what must be reported – although every state includes “physical abuse” – and about whom a report is required. In some states, abuse against all persons over age 60 or 65 must be reported. In others, reporting is required for persons with a mental or physical limitation sufficient to limit the person's ability to meet basic needs and/or protect legal rights. Some states require a report for suspected abuse of victims age 60 or 65 who have a disability. There is also variability in where reports should be made, the timeline for reporting, and penalties for failure to report.

Mandated reporters may be the first to notice signs or receive reports of elder abuse. Their reports may provide valuable insights into case facts, observations, and additional witnesses. Investigators and prosecutors will want to follow up with mandated reporters. Prosecutors should know their own reporting and confidentiality laws, because in most states the identity of the mandated reporter may be confidential, requiring either a court order or a subpoena to obtain this information.

1. Adult Protective Services

Adult Protective Services (APS) is the state or county agency typically charged with investigating reports of abuse, neglect, emotional abuse, self-neglect (a situation in which an older person cannot or does not care for her/himself), and exploitation. APS must respond to abuse, neglect, and exploitation reports within a relatively short timeframe (hours or days, depending upon the risk of danger to the older person). Where legally allowed, information in the possession of APS should be made available for law enforcement purposes. Due to the fact that APS may be the first to hear about elder abuse and/or may be the first to respond to what is then identified as a crime scene, or may possess other important case information, close cooperation is important in any criminal case in which the agency has had involvement.

¹¹² “Adult Protective Services (APS) is a social services program provided by state and local governments nationwide serving seniors and adults with disabilities who are in need of assistance. APS workers frequently serve as first responders in cases of abuse, neglect, or exploitation, working closely with a wide variety of allied professionals such as physicians, nurses, paramedics, firefighters, and law enforcement officers.” *Get Help*, NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, <http://www.napsa-now.org/get-help/how-aps-helps/> (last visited Aug. 11, 2016). For additional information on APS and/or mandatory reporting, see NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, NAPSA ELDER FINANCIAL EXPLOITATION ADVISORY BOARD, 2013 NATIONWIDE SURVEY OF MANDATORY REPORTING REQUIREMENTS FOR ELDERLY AND/OR VULNERABLE PERSONS (Aug. 2013), <http://www.napsa-now.org/wp-content/uploads/2014/11/Mandatory-Reporting-Chart-Updated-FINAL.pdf>; STETSON UNIVERSITY LAW SCHOOL, GUIDE ON US STATE AND TERRITORY MANDATORY REPORTING STATUTES, <http://www.stetson.edu/law/academics/elder/ecpp/media/Guide%20on%20US%20State%20and%20Territory%20Mandatory%20Reporting%20Statutes.pdf>.

¹¹³ Each state defines certain professionals—and sometimes non-professionals—as mandatory reporters of suspected abuse, neglect, and exploitation of older people. Professionals will most often report directly to APS, while others may report to APS or to law enforcement.

Depending on state law, and eligibility requirements, APS may be mandated to conduct an investigation to determine if the allegation is supported by evidence, with the standard typically being a preponderance. If the allegation is proven, then APS can offer services and establish a case plan. An APS core principle is that competent older adults have rights to autonomy and self-determination. An elder with decision making capacity can refuse services. APS cannot compel a person, even one with significant cognitive limitations, to accept services, but can work with other agencies and entities to bring such a case to Probate Court for appointment of a guardian or conservator.

In most jurisdictions, APS is authorized to investigate allegations of abuse whether they occurred in the victim's home in the community or in a facility, but that is not universally the case. In a few states, APS cannot investigate cases involving staff members or residents of long-term care facilities.¹¹⁴ In these states, the Long-term Care Ombudsman (LTCO) is tasked with facility investigations. See below for additional information on LTCOs.

It is important to note that APS investigations differ in focus and depth from a criminal investigation, so it is rare that the APS investigation, by itself, will establish all the elements of a criminal case at a level of guilt beyond a reasonable doubt. The APS case worker can still be an important source of information. S/he may have identified witnesses and even collected certain records, and s/he can also bring a particular level of expertise to a criminal case. APS will also be familiar with community services for older adults, may be able to arrange for an expert to conduct a capacity/competency evaluation of a victim, and may have had historical contact with the victim and perpetrator. Once a case is filed, some APS case workers will continue to work with their client to provide services or may create a case plan, which is then managed by a community agency case worker. In other jurisdictions, APS may close its case once the criminal case is filed. Regardless, APS case workers can be important witnesses in criminal prosecutions.

APS may be required to refer cases to law enforcement (or occasionally, the prosecutor's office) for investigation if it appears that a crime has been committed. Some states maintain abuse registries for healthcare providers and others found to have committed acts of abuse, neglect, or exploitation of older victims or other vulnerable adults.¹¹⁵ Even where not required, there is benefit to receiving notification about APS investigations—such collaboration allows prosecutors to engage early in the process and identify cases that merit criminal prosecution.

2. Long-Term Care Ombudsman (LTCO) Program

The federal Older Americans Act mandates that each state establish an LTCO program, an office that is typically located in a different state agency from the one that controls APS.¹¹⁶ The LTCO's role is akin to that of a confidential advocate acting on behalf of the older adult who resides in a long-term care facility (in some states, this includes assisted-living facilities or home health care services).¹¹⁷

In a few states, the LTCO, rather than APS, is mandated to investigate allegations of resident abuse, neglect, and exploitation. This duty is difficult given that LTCO advocates are not trained as investigators and many are volunteers. Because federal law requires the LTCO to maintain a patient's confidentiality,¹¹⁸ the LTCO generally cannot proceed with an investigation, resolve a problem, or a report to APS or law enforcement without the consent of the

¹¹⁴ See, e.g., S.C. CODE ANN. § 43-35-15.

¹¹⁵ See, e.g. TEASTER, ET AL., *supra* note 15 at 20.

¹¹⁶ 42 U.S.C. § 3058g (2016). State Long-Term Care Ombudsman Program.

¹¹⁷ See, e.g., CAL.WELF. & INST.CODE § 9725. Records and files of office; confidentiality; OR REV. STAT. § 441.407. Confidentiality; procedures; see also Valerie L. Corzine, *Long-Term Care Ombudsman Records: Confidentiality for the Frail and Vulnerable*, 31-NOV COLO. LAW. 73 (2002).

¹¹⁸ 42 U.S.C. § 3058g(5)(D)(iii).

patient or the patient's representative.

Under federal law, the LTCO must be permitted access to facilities and to their residents to offer any assistance needed in resolving complaints or problems that residents experience within the facility.¹¹⁹ Although those may include abuse, neglect, or exploitation, they may also include resolving issues such as roommate problems, quality of life concerns, or complaints about services within the facility.

With the consent of the resident or the resident's legal representative, the LTCO will have access to patient records. The LTCO may, however, encourage patients and their families to make a report or to allow the LTCO to make a report. With the consent of the patient, or the patient's representative, the LTCO may be able to provide information and evidence that will assist in the prosecution of a criminal case of abuse, neglect, or exploitation. LTCO staff can provide valuable information about how a particular facility operates, the identity of key staff, and what records should be/are maintained.

3. The National Aging Services Network

The National Aging Services Network¹²⁰ is composed of those community-based organizations that provide safety, support, and care to older adults so they can live independently in their homes for as long as possible. Examples of services that may be provided include in-home care, assistance with transportation, nutrition services, and health, prevention, and wellness programs.¹²¹ APS may refer clients to them for delivery of agreed-upon services. Victim-witness advocates may work with them to assist victims. Staff members of these organizations may observe signs or indicators and receive disclosures of abuse from clients.

Aging services providers may assist victims with the support they need throughout the criminal justice process. Victims may already be receiving services or treatment from a community partner organization, and those organizations may be able to provide more intensive or supplemental support, as needed.¹²²

Beyond the individual cases being worked, prosecutors can and should also collaborate with these community advocates and partners to educate them and the larger community about elder abuse, neglect, and exploitation—how to prevent, recognize, and report it.

4. Community-Based Domestic Violence and Sexual Assault Advocates

Older victims of domestic violence or sexual violence are eligible to receive the same services from community-based advocates as other victims of those crimes. Advocates provide a consistent point of contact for the victim and provide continued support throughout the criminal justice process, which can often be long and arduous. They provide invaluable assistance with shelter, counseling, safety planning, assistance in obtaining orders for protec-

119 42 U.S.C. § 3058g(b).

120 *The Aging Network*, ELDER CARE LOCATOR, http://www.eldercare.gov/ELDERCARE.NET/Public/About/Aging_Network/Index.aspx (last visited Aug. 18, 2016); CAROL V. O'SHAUGHNESSY, *THE AGING SERVICES NETWORK: SERVING A VULNERABLE AND GROWING POPULATION IN TOUGH ECONOMIC TIMES* (Dec. 2011), http://www.nhpf.org/library/background-papers/BP83_AgingServices_12-13-11.pdf.

121 NATIONAL CENTER ON ELDER ABUSE, <https://ncea.acl.gov>.

122 For information on resources in your area, see *Get Help*, NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, <http://www.napsa-now.org/get-help/help-in-your-area/> (last visited Aug. 11, 2016); THE NATIONAL LONG-TERM CARE OMBUDSMAN RESOURCE CENTER, <http://ltcombudsman.org> (last visited June 17, 2015).

tion, and other services immediately after the crime, throughout the criminal proceedings, and beyond. Community-based programs offering services to elder abuse victims should assure that their services are tailored to the needs and experiences of older adults.¹²³ Community-based advocates, operating outside the prosecutor's office, often have a statutorily privileged relationship with the victim-clients they serve,¹²⁴ a relationship based on rapport and trust. Thus, they will be unable to provide law enforcement or prosecutors with information unless the client consents. Prosecutors and police should make every effort to honor and protect the confidentiality and privilege of the relationship between victims and these advocates.

5. Multidisciplinary Approach

A multidisciplinary approach is essential in cases involving older victims, many of whom may present with a multitude of needs that can be best met by a number of agencies working together.¹²⁵ The outcome of cases, and the well-being of victims, will benefit from the prosecutor collaborating with other professionals, such as police officers, medical and mental health professionals, social workers, advocates, financial services professionals, and APS workers.¹²⁶ Older victims may also receive ongoing treatment or assistance from other professionals, including a family doctor or specialist, nursing home or residential facility staff, an LTCO, in-home caregivers, non-offending family members, staff at the local senior services center, financial professionals (*e.g.*, banker, financial planner, tax accountant), or a civil attorney. These professionals may have highly relevant information pertaining to the victim's physical, mental/emotional, or financial condition at the time of the offense, although some, such as the LTCO or attorney, may be subject to confidentiality rules limiting their ability to share information. An Elder Abuse Multidisciplinary Team can facilitate the effective disposition of cases by sharing anonymized information and by cross-training the various represented disciplines so that each participant is familiar with the role and services offered by the others.¹²⁷

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PART TWO: PROSECUTING ELDER ABUSE

Part One of this *Resource* provided foundational information about some of the unique aspects of elder abuse cases and common issues that arise in these situations. The remainder of this *Resource* will focus on what to do when handling an elder abuse case, from initial contact through sentencing.

When elder abuse cases are referred to the prosecutor's office, whether pre-charging or for filing, the initial assessment must focus on whether a crime has been committed and whether there is sufficient evidence to prove the criminal elements. Prosecutors may work with law enforcement at the investigative stage to build a strong case and may be involved in issuing subpoenas, preparing warrants, conducting interviews, and collaborating with other agencies. Following the

¹²³ See *infra* for more information on Working with Experts.

¹²⁴ Viktoria Kristiansson, *Walking A Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions: Parts I & II*, 9-10 STRATEGIES (May 2013), available at www.aequitasresource.org/library.cfm; see also, AEQUITAS, VICTIM PRIVILEGE BY PRACTITIONER (Oct. 2011) (available upon request).

¹²⁵ See, *e.g.*, Pamela B. Teaster, Lisa Nerenberg & Kim L. Stansberry, *A National Look at Elder Abuse Multidisciplinary Teams*, 15 JOURNAL OF ELDER ABUSE & NEGLECT 91-107 (2003). Georgia J. Anetzberger, *The Evolution of a Multidisciplinary Response to Elder Abuse*, 13(1) MARQUETTE ELDER'S ADVISOR 107-28 (2011), <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1005&context=elders>; BRANDL, *supra* note 15; M.S. Twomey, et al., *The Successes and Challenges of Seven Multidisciplinary Teams*, 22(3/4) JOURNAL OF ELDER ABUSE AND NEGLECT 291-305 (2010).

¹²⁶ See, *e.g.*, LISA NERENBERG, MULTIDISCIPLINARY ELDER ABUSE PREVENTION TEAMS: A NEW GENERATION 4-6 (Sept. 2003).

¹²⁷ *Id.* Additionally, some jurisdictions have developed and adopted memoranda of understanding to share information, meet regularly to review procedures, and discuss cases and outcomes.

initial assessment, prosecutors can determine whether the case should be filed and whether prosecution is in the interests of justice. In elder abuse cases, prosecutors should note that there may be ways to achieve justice other than going to trial. Collaboration with multidisciplinary partners will help the prosecutor to fully appreciate case factors, and to consider the rights and well-being of victims, and perpetrators.

Elder abuse cases present a variety of situations, dynamics, perpetrator and victim characteristics, and motivations. To the extent these are known, each should be considered when deciding how to handle a case. Like all cases, each should be considered individually, taking into account such factors as the seriousness of the harm or risk of harm to the victim, the need to punish or deter the perpetrator, the need to deter others from similar conduct, the wishes of the victim, the criminal history or history of unreported acts by the perpetrator, the perpetrator's health status, the motive or reason for the act of abuse or neglect, and the availability of other remedies or services that will protect the victim from further harm or prevent further acts of violence or neglect by the perpetrator.¹²⁸ The victim's ongoing safety and quality of life should always be the paramount consideration.

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A. Working with Older Victims

Depending on the specific victim and case facts, working with older victims who do not have a cognitive impairment may appear to be the same as working with any other witness, with a few caveats. While many older victims have no memory or physical limitations and require no special accommodations, others have a variety of underlying cognitive and medical conditions, hearing loss, low vision or blindness, and mobility issues. The presence of these conditions may affect memory, endurance, ability to travel, and ability to understand and effectively respond to questions. As with any witness, it is important to consider that person's educational background, cultural references, and other factors that can affect a witness's ability to participate in the criminal justice system. For example, if the elder has received little education, s/he may be illiterate or be unable to understand complex language or transactions, raising potential questions about her/his ability to consent to certain transactions. Whatever the victim's situation, all interactions between prosecutors and older adult victims should demonstrate respect for the victim as a person and as an adult.

This section will discuss resources and considerations for prosecutors working with older victims, including the importance of building rapport from first contact, and how to best prepare older victims for trial and case disposition.

1. Working with Systems-Based Advocates/Coordinators and Related Entities

Systems-based advocates, such as victim-witness coordinators within the law enforcement agency or prosecutor's office, are a valuable resource for facilitating communication between the prosecutor and victim. By ensuring that the victim understands the process and has all of his/her questions answered, a reliable point of contact, and an opportunity to view the courtroom in advance of trial, the coordinator can make the trial process far less frightening and difficult for the victim. As agents of the criminal justice system, systems-based advocates do not enjoy the same confidentiality and privilege as community-based advocates. Nevertheless, they play an important role in easing

¹²⁸ Many jurisdictions have diversion programs for certain kinds of crimes and offenders that may be an alternative when appropriate conditions are imposed and other services can assure the victim's safety and address underlying perpetrator characteristics. Because of the many kinds of elder abuse cases, the underlying conduct should be evaluated for diversion program eligibility. Conditions, depending on case facts, perpetrator needs, and victim desires, could include some or all of these: no contact or supervised contact with the victim (unless the victim requests otherwise, and the defendant appears not to pose an ongoing danger to the victim), close supervision, mental health or substance abuse evaluation and/or treatment, restitution, batterers' intervention treatment (if APS or other agencies are assisting the victim).

the victim's concerns about the legal process. It is important, however, that the victim understand the coordinator's role and the absence of confidentiality.

Additionally, Family Justice Centers across the United States have partnered with APS and other elder service providers to better meet the needs of elder abuse victims. APS and various community agencies may be co-located at Family Justice Centers, along with elder abuse prosecutors, law enforcement, and system-based advocates. Some Centers may employ a specially trained elder advocate or an elder navigator to connect elder abuse victims with needed services and Center partners.

Some communities have also created Forensic Centers. While these do not provide victim services, they bring together professionals including law enforcement, prosecutors, APS, mental health and health care providers, and others to evaluate cases and support evidence collection, case development, and prosecution in appropriate cases. Team members may conduct home visits and assessments, provide consultation, accept referrals for services, and testify in legal proceedings.¹²⁹

2. Interviewing Victims and Witnesses

In most situations, the prosecutor and advocate should meet with the victim early in the case. This preliminary interview serves several purposes. Engaging with the victim promptly, and maintaining regular contact throughout the proceedings, will build trust with the prosecutor and encourage the victim to participate in the criminal justice process to the maximum extent possible. The victim will have an opportunity to voice her/his concerns, fears, questions, and desired outcome. Prosecutors and advocates can answer questions, explain what to expect as the case moves forward, and provide reassurance that the victim's safety and other practical concerns will be considered throughout the process. This initial meeting will also provide an opportunity to determine, at least tentatively, whether the victim will be able to testify in court and whether a competency assessment is needed.

The prosecutor can use the initial interview to gain insights into the elder's interests, life story, capacities, ability to testify, and needs (including safety concerns) if the case goes to court. Take time to get to know the victim as a person, not just a victim or other witness. Interview him/her with respect and avoid condescension or assumptions based upon age. Direct your questions or statements to the victim rather than a family member, support person, or caregiver. This will help build rapport and will teach you valuable things about the victim and her/his life. Do not turn to details of the crime too soon. In some cases, it may be preferable to cover case details in a second meeting.¹³⁰ This will allow the prosecutor not only to gain the victim's trust and cooperation, but also by to gain a deeper understanding and context of the criminal act. Further, the prosecutor can gain insight into the life of the victim prior to and after the crime. These details of which can be used to introduce the victim to the jurors as a person, and not merely a crime victim.¹³¹ Learning more about the victim's life details such as patterns of giving, the nature of their

129 See, e.g., A.E. Navarro, et al., *Do We Really Need Another Meeting? Lessons from the Los Angeles County Elder Abuse Forensic Center*, 50(5) GERONTOLOGIST, 702-11 (2010) (A review of the Los Angeles Forensic Center revealed that cases handled by the forensic center were significantly more likely to be submitted to the district attorney for prosecutions than ones only handled by APS and then referred to the district attorney. In this study, every case referred to the district attorney by the forensic center was charged, and the recurrence of elder abuse was significantly reduced in Forensic Center cases (from 42.7% to 24.6%). By contrast, usual care APS cases actually showed a small but nonsignificant increase in recurrence (from 16.7% to 20.3%). See also, L. Nerenberg, M. Davies & A. Navarro, *In Pursuit of a Useful Framework to Champion Elder Justice*, 36(3) GENERATIONS 89-96 (Fall 2012).

130 If there are specific details that need to be clarified, or additional information important to the case to be discussed, bring an investigator who can serve as a witness to the interview and who will write a report documenting any new information.

131 Examples may include being able to show the jury that the victim is a veteran of World War II who worked all his life, and finally retired at age 70 after raising 2 sons, or that the victim is a person beloved in her neighborhood for "mothering" all the children in the neighborhood when they came home from school.

relationships with family and friends, or other behaviors or habits that make certain defenses about the consensual nature of financial gifting less probable.¹³²

During this first meeting, and in all subsequent meetings, the prosecutor must be trauma-informed, taking care to minimize any re-traumatization of the victim and recognizing that this process may trigger significant emotional challenges for the victim.¹³³ A trauma-informed approach requires an understanding that every decision made about a case and every contact with a victim deeply affects that victim in innumerable ways. Prosecutors should work on gaining trust and building rapport with the victim, including for some elderly victims, observing appropriate etiquette and showing customary respect. It is generally preferable to address an older person by her/his surname and title (*e.g.*, Mr., Ms., Mrs., or Dr.). Allow the older adult to suggest whether, and when, s/he is comfortable being addressed by first name. If the victim has dementia¹³⁴ and significant memory loss, use of title and surname will be familiar as this is likely the way the person was raised and taught from childhood and such memories are remembered longer than recently learned information. Infantilizing by use of “baby-talk,” over-enunciating, talking about and not to the older person, or using endearments, such as dear, honey, etc., is inappropriate.

The setting for the interview should be the location where the victim feels safest, most comfortable, and freest to speak.¹³⁵ If the victim requires oxygen or has underlying medical conditions, it is worth considering interviewing the victim in her/his residential setting, especially if the victim cannot travel or would have to travel by ambulance or other medical transport. If the victim requires oxygen or medical care, consider whether the interview could occur at the victim’s location and whether medical personnel will need to be in attendance.¹³⁶ If the victim will travel to the prosecutor’s office, it is important that all needed medications, food, assistive devices, and oxygen are brought as well. If the victim will have to wait, a quiet, private, and safe waiting area should be provided. Prosecutors should have such discussions with victims early on to determine if and how accommodations can be made. An advocate or other support person can make the victim comfortable, educate her/him about the process, and reduce fear and anxiety.

As a part of normal aging, it will take longer for many victims to respond to questions. The aging (but normal) brain takes longer to process and retrieve information. If one thinks of the brain as a filing cabinet, over time more and more information is stored, and the retrieval of stored information may require more time to process and sort, before it can be retrieved, but that information is no less accurate. While the older adult is thinking and preparing to respond, avoid interrupting, rephrasing, or asking another question. Do not equate delay with guessing. A delay in responding may also be the result of trauma, which is common in victims of every age.

¹³² Prosecutors may want to challenge a defense by showing, for example, the victim was always careful about her money and is suddenly spending large sums on someone she recently met and the defense is “she wanted me to have it.” Another example may be a lonely older man who always planned to leave his home to his two children has suddenly executed a new will in favor of his neighbor and has left nothing to his children. In these examples, the prosecution theory would be financial exploitation using undue influence and the defense would be consent.

¹³³ See, *e.g.*, Viktoria Kristiansson & Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGES (Feb. 2015), available at www.aequitasresource.org/library.cfm; see also Viktoria Kristiansson & Olga Trujillo, *Integrating a Trauma-Informed Response*, AEQUITAS <http://www.aequitasresource.org/trainingDetail.cfm?id=112> (last visited Aug. 15, 2016).

¹³⁴ With dementia, “last in, first out” applies so the most recent content is lost while the earliest learned remain intact the longest.

¹³⁵ The setting could be a special interview room at the prosecutor’s office, special law enforcement unit, or at the Child Advocacy Center or other local victim-centered office. If the victim’s home is an appropriate setting, meeting her/him there will give you a better opportunity to see how the victim responds and behaves in everyday life than would an interview in the prosecutor’s office or other “official” setting.

¹³⁶ See, *e.g.*, SUSAN KEILITZ, ET AL., NATIONAL CENTER FOR STATE COURTS, PROSECUTION GUIDE TO EFFECTIVE COLLABORATION ON ELDER ABUSE (2012), <https://www.bja.gov/Publications/NCSC-Prosecution-Guide-to-Effective-Collaboration-on-Elder-Abuse.pdf>. If there are procedures available to memorialize the older person’s testimony such as depositions or conditional examinations, it is often helpful to schedule them early in the case. If such procedures are not available, then the prosecutor should consider if there are ways to expedite the case and resist requests for continuances. See section, *infra* for information on Preserving Witness Testimony.

Anticipate that some older persons may become fatigued during a long interview. It may be prudent to break the interview into separate meetings over time if the victim has physical, medical, or cognitive conditions. The prosecutor may need to build in breaks during the interview and may need to consider what time of day is best for the interview to be conducted.

Interpersonal relationships between the victim and suspect/defendant may also affect the interview. Elder abuse most often involves people in trusted, loving, and on-going relationships. If the elder victim is related to the suspect/defendant, there may be a natural love and desire to protect that perpetrator. There may also be disbelief that the abuse has occurred or a minimizing of the conduct. Shame, guilt, and self-blame may make disclosures difficult where the victim may have raised the abuser. This dynamic may be similar to that seen in domestic violence cases. It is valuable for the prosecutor to ask about the nature of the relationship, what the elder likes about it, and what s/he does not like. Other valuable insights may be gained by asking what the elder has been told will happen if there is a criminal investigation and by whom, and asking what s/he would like to see happen and what would make him/her feel safe or help him/her recover from the situation. In many instances, this kind of information will disclose misstatements and misunderstandings that the victim has about the goal of the prosecution, provide information about how the prosecution may address the victim's desires and concerns, and can clarify that the victim is not responsible for the defendant's choices or actions or those of the prosecutor. Such information may provide important information about the victim's needs. For example, the victim may be facing foreclosure or financial ruin and what is most important is prompt restitution. Such information may be helpful when thinking about case resolution (e.g., significant restitution at time of sentencing in return for recommendation of no prison or reduced term).

When discussing the victim's relationship to the offender, ask general, non-judgmental questions about the offender. Focus on the conduct and not the qualities of the person who engaged in the conduct. Discuss with the victim any fears the victim may have, including safety, which should require careful planning with an advocate or other professional. Often, especially when the perpetrator is a spouse or family member, the victim simply wants the abuse to stop, and for the perpetrator to "get help." The victim may be fearful of being abandoned or moved to a residential facility if the abuser goes to jail, or may feel responsible for causing trouble for the abuser or the rest of the family. If the victim does have these fears, prosecutors should reassure the victim that her/his wishes will be seriously considered. If a custodial sentence is the likely outcome, the prosecutor can explain that although prosecutorial responsibilities may require seeking a jail or prison sentence, the victim will have the right to appear in court and share her/his wishes with the judge. Prosecutors can explain what resources can be made available to help the victim if the perpetrator does go to prison. This is also a good opportunity to discuss intimidation and manipulation, which is not uncommon when abuse is perpetrated by an intimate partner, family or household member, or trusted caregiver.¹³⁷

3. Screening for Co-Occurring Crimes and Intimidation

As mentioned above, crimes against elders often co-occur. Prosecutors should proactively ask about common incidents and dynamics when interviewing victims and witnesses to ensure that offenders are being held accountable – through the introduction of other evidence in the current case or through the charging of other crimes – for the full range of their criminal behavior.

Interviewers responding to a reported act of abuse or neglect should screen for possible financial exploitation.¹³⁸

¹³⁷ See, e.g., *Improving the Justice System Response to Witness Intimidation*, AEQUITAS, <http://www.aequitasresource.org/Improving-the-Justice-System-Response-to-Witness-Intimidation.cfm> (last visited Aug. 15, 2016).

¹³⁸ Kendon Conrad et al., *Self-Report Measure of Financial Exploitation of Older Adults*, 50(6) GERONTOLOGIST 758-73 (2010); *Screening and Assess-*

Neglected victims whose condition is not consistent with their income and assets may be victims of exploitation that is draining their finances. Valuable information can be gathered by asking who pays the bills, and how her/his finances are managed. Has the victim noticed any missing money from bank or brokerage accounts? Received any bills for goods or services s/he did not order? Is the victim confused about her/his financial situation? Have caregivers made recent large purchases inconsistent with their apparent sources of income? Is there a recent, new acquaintance who has moved in with the victim? Did that person do so to gain access to the victim's finances? The "friend's" criminal history should be examined for theft, fraud, and drug offenses.

When responding to reports of sexual abuse of older victims, interviews should be conducted in private and, if possible, by an interviewer of the same gender as the victim. Older victims are far more likely to make disclosures of sexual abuse if they are specifically asked about it, but the questioning should be respectful of the victim's feelings about the offender and the discomfort the victim is likely to have about discussing such matters.¹³⁹ Once it is apparent that a crime of sexual violence has been committed, further interviewing about that aspect of the case should be conducted, if possible, by a trained sexual assault investigator, using trauma-informed interviewing techniques and conducted in a way that accommodates the needs of the older victim.¹⁴⁰ The victim should be offered a sexual assault forensic examination, where appropriate, conducted by a sexual assault nurse examiner (SANE), preferably one experienced in examination of older patients.¹⁴¹

Witness intimidation may be part of any pattern of abuse or neglect. Cases involving abuse by intimate partners and other family and household members based upon power and control dynamics are likely to involve intimidation and emotional manipulation both before and after the crime.¹⁴² Intimidation is a significant factor in the failure of victims to report the crimes, their reluctance to participate in the criminal justice process, and recantation.

Victims may be isolated by the abuser, and be subjected to threats of abandonment or further violence if they tell anyone, or made to feel guilty for "making" the abuser hurt them. Emotional manipulation, especially common in elder abuse cases, is also an effective means of silencing victims, who may believe they are responsible for the abuse, may be made to feel guilty or disloyal about reporting it, and may have been told they would be abandoned or placed in an institutional setting if they complained.¹⁴³

Victims should be asked, as part of the initial interview, what they have been led to believe would happen if they told anyone about the abuse. At subsequent interviews, it is important to ask whether they have been in contact with the abuser, and what was discussed. There may be letters, emails, or phone calls from abusers who are in jail awaiting

ment, DEP'T OF JUSTICE, <https://www.justice.gov/elderjustice/research/screening-and-assessment.html> (last visited Aug. 17, 2016) ("[The] Older Adult Financial Exploitation Measure (OAFEM) ... is a 30-item self-report measure of financial exploitation designed for use by practitioners and researchers. Psychometrics associated with the instrument indicates high internal consistency and item reliability. This appears to be the only measure that exclusively measures financial exploitation, but adequate cognitive capacity is required to complete the OAFEM."). See also CONSUMER FINANCIAL PROTECTION BUREAU, RECOMMENDATIONS AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING AND RESPONDING TO ELDER FINANCIAL EXPLOITATION (Mar. 2016), http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf.

139 Holly Ramsey-Klawnsnik, *Sexual Abuse in Later Life*, 12(6) SEXUAL ASSAULT REPORT 81, 83-85, 91-93 (July/Aug. 2009), <http://www.ncall.us/sites/ncall.us/files/resources/SAR1206-SA2-SexualAbuseLaterinLife.pdf>.

140 KRISTIANSOON & WHITMAN-BARR, *supra* note 139; KRISTIANSOON & TRUJILLO, *supra* note 139.

141 See generally INTERNATIONAL ASSOCIATION OF FORENSIC NURSES, www.iafn.org (last visited Aug. 16, 2016).

142 NATIONAL CLEARING HOUSE ON ABUSE IN LATER LIFE, ABUSE IN LATER LIFE WHEEL (2006), <http://www.thelodgemiami.org/downloads/Later-Life.pdf>

143 JACKSON & HAFEMEISTER, *supra* note 12 at 113, 131.

trial, asking the victims to recant their statements or playing on the victim's fears or sense of guilt.¹⁴⁴

Evidence of witness intimidation¹⁴⁵ should be considered as a basis for additional criminal charges; as evidence offered to explain a victim's recantation, refusal to testify, or testimony in support of the abuser; as a basis for introducing a victim's hearsay statements under the doctrine of forfeiture by wrongdoing (if the victim is unavailable to testify due to the offender's wrongful conduct); and as an aggravating factor at sentencing.¹⁴⁶

As with all cases should new information be received such as a victim's recantation or failure to appear, prosecutors should also consider if there is evidence of new crimes (*e.g.*, criminal coercion, witness intimidation or interference, threats, and/or assaults). If there are multiple incidents involving a course of conduct of intimidation, assault, or sexual abuse, consideration of whether the elements of stalking are present may be appropriate.

4. Interviewing Victims with Apparent/Confirmed Cognitive Limitations

Some older victims may have apparent or confirmed cognitive limitations. The existence of a cognitive limitation, including a diagnosis of dementia, does not necessarily preclude that person from providing relevant and credible information or from testifying. It is helpful to know what the person's functional ability is and what the person recalls. It may be that corroborating evidence and witnesses can provide additional information such as dates, who was present, statements that were made, and other details. An interview or meeting with the victim should still be attempted. Questions may need to be rephrased or simplified. Pacing may be slower. Expect that long-term memories may well be retained so events that may have happened years earlier may be recalled while more recent events are less clear or forgotten.

Prosecutors should remember that medications, time of day, medical intervention, and other circumstances can affect cognition. For example, an elder who is or was hospitalized may be disoriented by her/his surroundings or change in routine but her/his cognition may improve once returned to a normal routine.

The victim may be more relaxed and less stressed if accompanied by an advocate the victim has met prior to the interview, or a trusted non-offending support person. If the person is a support person unaccustomed to the criminal process, clarify that the support person's role is to support and not to interrupt, offer her/his perspective, or speak for the victim. Throughout the interview, speak directly to the victim. Even if the victim ultimately is unable to participate in an interview, the contact provides valuable insight into the elder's ability to understand and communicate, behaviors, and daily life. Such information may be relevant to the extent of the victim's disability and how apparent the disability would have been to someone like the defendant who may claim the victim consented to conduct, a transaction, or a gift.

An individual victim's education level may impact how s/he communicates during an interview and/or trial. Screening test scores for highly educated victims may underestimate the degree of cognitive impairment, making it more difficult to prove lack of capacity or to prove the offender's awareness of lack of capacity. Illiteracy, more common among the older population, may be relevant to the victim's ability to understand financial transactions or contracts.¹⁴⁷

Consider the victim's ability to speak and understand English. Victims with dementia who are not native speakers

144 See Amy E. Bonomi, et al., *Meet Me at the Hill Where We Used to Park*, 73 SOCIAL SCIENCE & MEDICINE, 1054-61 (2011).

145 Where appropriate, prosecutors may want to obtain jail call records which can provide valuable evidence of intimidation.

146 For more information on witness intimidation, see AEQUITAS, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION (Mar. 2014), available at www.aequitasresource.org/library.cfm; see also Forfeiture by Wrongdoing, *infra*; see also *Giles v. California*, 554 U.S. 353 (2008).

147 Sid E. O'Bryant, et al., *Detecting Dementia with the Mini-Mental State Examination (MMSE) in Highly Educated Individuals*, 65(7) ARCH NEUROL 963-67 (2008).

of English may have lost their ability to communicate in English, though they may retain the ability to communicate reliably in an interview conducted in their native language. These considerations are also relevant to providing services and resource materials to the victim in the appropriate language.

Prosecutors should be aware of and consider the impact of sundowning. "Sundowning" is a state of confusion affecting persons with dementia. It usually occurs at the end of the day and causes behaviors such as confusion, pacing and wandering, anxiety, and/or aggression. The cause is unknown. Confusion may be related to "fatigue, low lighting, increased shadows, disruption of the body's internal clock, and difficulty separating reality from dreams."¹⁴⁸ For example, if the elder has dementia, s/he may experience sundowning later in the afternoon. An elder with a traumatic brain condition may be more alert in the later afternoon. Family members, caregivers, APS workers, or facility staff may provide information about when the elder functions at her/his best.¹⁴⁹

Questions may need to be modified if the victim has dementia. Questions may need to be simplified or asked in multiple ways to be fully understood by the victim. If open-ended questions cannot be understood, it may be necessary to ask leading questions. If so, consider asking the same questions in multiple ways to confirm that the answer remains consistent.

When working with law enforcement or investigators who are conducting victim interviews in which there is a concern about, or a clear indication of, significant cognitive incapacity, and some likelihood that the victim will be deemed incompetent to testify, consider suggesting that the interview be done in three parts:

- Part one should focus on asking general questions to establish the victim's orientation, degree of memory loss, and other cognitive impairment;
- Part two should address the impact of the crime on the victim and will likely only be used at sentencing; and
- Part three should address the facts of the crime and case.

By separating the questions into these categories, the court, if asked to exclude the statement, may find it easier to exclude certain parts rather than the entire statement. The prosecutor may find it easier to decide what topics and substance to offer and when. The information established in part one questions may be admissible not for their truth, but to show the victim's condition, how apparent the victim's incapacity was to people interacting with the victim, and the reasonableness of the defendant's belief in the victim's ability to consent or understand certain transactions.

Even if the victim is fully competent and there are no issues of competency, using this interview approach will assist the prosecutor in separating any statements that may be admissible from others that are not.

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¹⁴⁸ *Sundowning: Late-day Confusion*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/alzheimers-disease/expert-answers/sundowning/faq-20058511> (last visited Aug. 16, 2016).

¹⁴⁹ The prosecutor should also determine at what time of day did important events occur. Did the exploiter present a complex document to the elder when he or she was least likely to understand it? Did the defendant choose a time when the elder was not at their best to commit certain acts to take advantage of their weariness or confusion? Also consider what time did other interviews (*e.g.*, law enforcement, APS) take place and if there are inconsistencies, can they be explained by time of day?

B. Charging Decisions

Charging decisions must be supported by probable cause and strategically serve the overall theory of the case. Because cases involving older victims often involve multiple forms of abuse, initial charges should include all criminal acts for which there is probable cause, including any previous, uncharged incidents within the applicable limitations period.¹⁵⁰ Consideration should be given to specific elder or vulnerable adult statutes as well as other common law or statutory crimes.

In deciding what, if any, charges can be filed, it is important to consider the victim's ability to participate in the case, in both competency and capacity, and *Crawford* issues. Some cases will require the testimony (or at least some minimal testimony) of the victim. Others can be filed because the victim clearly lacked decision making capacity and cannot meet the competency standard to testify. Others fall somewhere between these two situations. If the victim is not able to testify or may not be available to testify, evaluate whether there is sufficient other evidence to prove the case. If the victim's testimony will be needed, think about ways to memorialize the elder victim's testimony early in the legal process to anticipate and overcome challenges under *Crawford v. Washington* and its progeny.¹⁵¹

The prosecutor should include any charges and case-specific sentencing enhancements or aggravators in the charging document. These could include, for example: crimes against vulnerable adults, crimes against older adults, where the victim is especially vulnerable, where the defendant took advantage of trust reposed in her/him, where the victim is over the age of 60 or 65, where there is infliction of great bodily injury or death; in the case of excessive taking (property crime), cases involving a family member, or involving a physically or intellectually disabled individual.¹⁵² Some of these enhanced-penalty crimes may require the prosecutor to provide written notice to the defense within a specified time frame.

If authorized by local law, in financial abuse cases, the prosecutor should consider filing a parallel civil action to "freeze and seize" assets in the defendant's possession to be made available later for payment of restitution if the case results in a conviction.¹⁵³ If these actions are handled by someone other than the criminal case prosecutor, it is important that actions be coordinated. Such actions may be filed and heard by the criminal court judge assigned to the criminal matter or may be assigned to a civil court department. If possible, these civil actions should be heard by the same judge as the criminal case.

In evaluating cases, prosecutors should always be aware of the often complex interpersonal dynamics between victim and perpetrator. Depending on the victim-offender relationship and the type of abuse, elder abuse may resemble domestic violence, child abuse, or fraud, or it may be unique in light of the complexity of the relationships, individual vulnerabilities, and contexts in which it occurs.¹⁵⁴ One victim may have been preyed upon by multiple perpetrators. In

¹⁵⁰ This may include physical harm to the victim, emotional abuse, multiple forms of abuse, and/or multiple or ongoing incidents. If there are acts outside the statute of limitations that might show common scheme and design or lack of an accident, or history as a perpetrator, consider introducing those as other acts evidence under FED. R. EVID. 404(b) or its equivalent. For any charge made, determine what critical documentary evidence is available.

¹⁵¹ If a witness will definitely be unavailable for trial (as in the case of a deceased witness or one who has clearly gone into hiding or adamantly refuses to testify), only out-of-court statements of the witness that are nontestimonial, or statements that are testimonial but subject to prior opportunity for cross-examination, will be admissible, unless a motion to admit evidence under the doctrine of forfeiture by wrongdoing is successful. *Crawford v. Washington*, 541 U.S. 36 (2004). See also AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (Oct. 2012), available at www.aequitasresource.org/library.cfm; *Davis v. Washington*, 547 U.S. 813 (2006); and *Michigan v. Bryant*, 562 U.S. 344 (2011). Forfeiture by wrongdoing is codified at Fed. R. Evid. 804(b)(6), and in the rules of evidence in many states. In other states, the doctrine is recognized in the state case law. AEQUITAS has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request. See also *infra* sections on Pretrial Motions and Victims and Witnesses Unavailable for Trial (for further discussion of *Crawford* issues and forfeiture by wrongdoing).

¹⁵² See, e.g., *Crawford and Its Application in Elder Abuse, infra*.

¹⁵³ See, e.g., CAL.PENAL CODE § 186.12; TENN. CODE ANN. § 39-14-111; 18 U.S.C.A. § 981.

¹⁵⁴ K.L. AMENDOLA, ET AL., THE COURSE OF DOMESTIC ABUSE AMONG CHICAGO'S ELDERLY: PROTECTIVE BEHAVIORS, RISK FACTORS, AND POLICE INTERVENTION 2 (Dec. 2010), <http://www.ncjrs.gov/pdffiles1/nij/grants/232623.pdf>.

cases involving financial abuse, sexual abuse, and neglect, evaluation of a potential consent defense and the perpetrator's use of undue influence should be anticipated.¹⁵⁵

If the perpetrator is a child or grandchild, the bonds of love, duty, and loyalty may be even greater than for a spouse. Victims face difficult emotions of guilt, embarrassment, and protectiveness, and are unlikely to want to see the perpetrator held accountable. Victims often ignore their needs in favor of meeting the perpetrator's needs or desires. In such situations, the family may unite behind the perpetrator leaving the victim entirely alone and isolated. Many victims want to continue to have contact with the perpetrator and will do what is necessary to maintain the relationship. Prosecutors should understand that victims may continue to live with and/or have contact with their abusers, even after the abuse has been disclosed and the prosecution is under way. For more information and strategies to respond in this situation, see Arraignment and Bail Considerations, *infra*. This can be due to many factors, including:

- The abuser's need for shelter and support
- The abuser's dependency on the victim for care
- The victim lacks funds or options to live elsewhere
- The victim is dependent on the abuser for care or emotional support
- Cultural or religious values
- Threats to lose contact with children or grandchildren
- Fear of retaliation
- Fear of starting over

1. Older Perpetrators

Most older defendants are not demented and do not have other underlying medical conditions that make them unable to understand the charges or participate in the defense or control their behavior. Some are long-term abusers, sexual offenders, or exploiters. If an older person is charged, it is likely that there will be an effort made to have him/her immediately or quickly released from custody or treated differently from a younger offender who engaged in the same conduct.

In cases involving older perpetrators, consideration should be specifically given to the requisite mental state required to prove charged crimes and whether there is credible evidence to suggest that the elderly defendant, because of an underlying condition, was unable to form that intent. The prosecutor should not assume that because of advanced age a perpetrator lacked the ability to form intent or was demented and unable to control her/his actions. When such information is known, it may be prudent to consult an appropriate expert to evaluate the known evidence.

Where the perpetrator has been diagnosed with a medical condition where s/he cannot reliably control behavior, even with a history of domestic or other violent or aggressive acts, it may be appropriate to consider a mental health, probate, or health-based response (*e.g.*, perpetrator with moderate stage Alzheimer's Disease is acting aggressively to everyone around him; on this occasion he strikes his wife with his cane, causing injury, or a situation in which an elderly and demented man living in a nursing home believes that a woman in another room is his wife and has sexual contact with her, but she is also demented and unable to give legal consent). Alternatives to prosecution could include an involuntary mental health commitment or appointment of a guardian or conservator to place the perpetrator in a setting that is safe for both the victim and the perpetrator, etc.

¹⁵⁵ See Overcoming Defenses, *infra*.

2. Intimate Partner Violence

Prosecutions are typically brought in abuse cases in which there is a history of power and control dynamics by the defendant; cases where the abuse is part of a history of polyvictimization with co-occurring financial or other abuse; and cases where the conduct is part of a series of acts targeting elders or vulnerable adults. That said, there may be unusual cases where other dynamics exist.

Power and control dynamics occur across the lifespan most often between intimate partners. Absent some unusual circumstance, the same considerations used in deciding whether and how to handle a case involving a younger couple should be considered when the parties are elderly. If the perpetrator has specific care needs, many victims feel obligated to provide that care and are likely to attribute the abuse to the disease, whether that is true or not. As a result, out of a sense of duty to the abuser, victims may not report or speak with investigators when others reveal the abuse.

In addition, the medical and emotional toll a case will predictably take on the older victim should also be considered. Most older victims have few options to start again, and personal, cultural, and religious values around marriage may make divorce difficult or unacceptable. Family members may turn away from victims denying them access to children and grandchildren. Local domestic violence shelters may not be available for older victims or programs may not have appropriate services tailored to assist an older victim. Financial constraints may leave an individual without resources and a place to live. These realities underscore the need for a coordinated response within each community and to develop a social service network for appropriate community-based service providers.

3. Neglect, Sexual Abuse, and Emotional Psychological Abuse

In neglect cases, unlike most every other kind of case, the prosecution must prove a failure to act when there was a duty to act. The failure to provide care must be more than mere negligence and may require criminal negligence or recklessness. In deciding whether to charge such cases, consideration should be given to the nature of the proof of a legal duty to provide care, which may result from a legal relationship, a contract, or the voluntary assumption of caregiving. There is considerable variation in how states define who has a legal duty of care, especially with adult children and their elderly parents, the so-called "filial duty."¹⁵⁶ In evaluating a neglect case, consideration should be given to whether the suspect was offered help with caregiving, the presence of a financial motive, any care instructions the suspect was given and ignored or declined, the perpetrator's level of functioning, any training or experience with caregiving, and choices the perpetrator made other than to provide proper care.

PRACTICE NOTE: DIMINISHED CAPACITY OF PERPETRATOR

In a criminal neglect case, if the perpetrator is unable to provide needed care because of her/his own physical or mental health, or cognitive status, then prosecution may not be warranted. Consider the following two examples:

- A 78-year-old woman with arthritis is trying to turn her bedbound husband and is unable to so do, and, as a result, he develops pressure ulcers.
- A son with a significant intellectual disability is caring for his elderly mother and is providing the best care he can, but it is inadequate and she becomes dehydrated and malnourished.

¹⁵⁶ Matthew Pakula, *The Legal Responsibilities of Adult Children to Care for Indigent Parents*, NATIONAL CENTER FOR POLICY ANALYSIS (July 12, 2005), <http://www.ncpa.org/pub/ba521/>. See also, e.g., *People v. Heitzmann*, 9 Cal.4th 189 (1994).

Neglect cases often present with pressure ulcers. There is a paucity of medical research on the time required to form a pressure ulcer or to progress from redness to an open wound.¹⁵⁷ In addition, there is medical evidence that pressure ulcers can develop even with good medical care, so their presence alone does not prove that neglect has occurred.¹⁵⁸ Other evidence, including whether care was provided for the pressure ulcer, use of pressure-reducing mattresses, bedding, and clothing, procedures and timeliness of turning a bedbound victim, and presence of other signs of neglect such as dehydration and malnutrition, infection, and poor skin care, can all be helpful in proving neglect. For further information, please refer to *Medical/Forensic Markers to Distinguish Abuse and Neglect from Causation*, *supra*. Because of age-related changes and underlying medical conditions experienced by elder adults, a variety of medical findings may be discounted as the result of changes in the skin, presence of osteoporosis, and medications and skin breakdown. It is helpful to have clear medical findings and diagnoses and experts who can distinguish abuse or neglect from other non-abusive explanations.

Proof of infliction of mental suffering¹⁵⁹ (*i.e.*, emotional abuse) can be difficult. Not every state criminalizes the intentional infliction of emotional abuse, other than as stalking, harassment, threats, animal abuse, and/or vandalism/destruction of property. Emotional abuse may be difficult to describe, and proof of causation can be challenging. Prosecutors should consider what level of harm is required and what kinds of acts can be charged.

Some acts are so personal that older victims often will not discuss them with anyone. Sexual abuse, including so-called “hands-off” acts¹⁶⁰ (forced watching of sex acts engaged in by others or forced watching of pornography) may be experienced as degrading and disgusting and something an elder does not want to speak about, especially in a public setting like a courtroom. When the acts are committed by a family member or trusted caregiver, many victims will not speak about what happened due to fear of not being believed or being accused of fantasizing.

4. Financial Abuse

Financial elder abuse cases are often difficult and intricate and can include determining and proving the nature of the taking, knowledge of the victim’s status, capacity of the victim when critical transactions occurred, legal authority of surrogate decision-makers, consent, and undue influence. Each of these is discussed below.

a. Nature of the Taking

Most state statutes criminalize larceny or theft in a variety of ways, such as larceny or theft by taking, larceny or theft by deception, false promises, false pretenses, and embezzlement. While all forms involve a taking, there are legal differences in the elements for each theory. These include:

- When the intent to take was formed;
- Whether the initial acquisition of the asset was legal; and
- Whether the suspect made false statements to the victim to induce her/him to turn over assets.

¹⁵⁷ See, e.g., Amit Gefen, *How Much Time Does it Take to Get a Pressure Ulcer? Integrated Evidence from Human, Animal, and In Vitro Studies*, 54(10) OSTOMY WOUND MANAGE 26-35 (2008).

¹⁵⁸ See, e.g., Gibbs, *supra* note 62; DYER, CONNOLLY & MCFEELEY, *supra* note 46; D.R. Berlowitz, et al., *Evaluation of a Risk-Adjustment Model for Pressure Ulcer Development Using the Minimum Data Set*, 49(7) J. AM. GERIATRICS SOC., 872-76 (2001).

¹⁵⁹ “Mental suffering” means fear, agitation, confusion, severe depression, or other forms of serious emotional distress brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder. See, e.g., CAL. PENAL CODE § 368; CAL.WELF. & INST.CODE § 15610.53;

¹⁶⁰ RAMSEY-KLAWNSNIK, *supra* note 37.

Prior to charging, prosecutors must evaluate which forms of theft/larceny are supported by the facts. When the evidence supports multiple theories, it is proper to charge multiple forms of theft.¹⁶¹ The prosecutor should always evaluate evidence to determine if other statutory crimes (*e.g.*, forgery, credit card theft, identity theft) have also been committed and should also be charged.

b. Knowledge of Victim's Status

Many statutes require that the prosecutor prove that the suspect knew or reasonably should have known that the victim was an elder or vulnerable adult.¹⁶² Knowledge may be relatively easy to establish when there is a familial or other long-standing personal relationship, when the suspect is a care provider, or when the suspect is a trusted advisor/fiduciary. It may be more difficult, or may not be possible, to show when the parties are strangers or when there is a distant relationship with little contact. If evidence of knowledge is of concern, the prosecutor should consider charging any related crimes that do not include a knowledge element.

PRACTICE NOTE: INVESTIGATION

Law enforcement should be reminded to look for evidence of the suspect's knowledge of the victim's status as an elder or vulnerable adult throughout the investigation. While the list of what might be relevant is lengthy, it may include:

- Current photos of the victim;
- The victim's voice, tone, and speed/nature of speech;
- The victim's use of assistive devices such as walkers or canes;
- Evidence of the suspect picking up the elder's medications for dementia or other serious medical conditions;
- Conversations that suspect had with victim's medical providers about the victim's care needs;
- The suspect completing applications for Medicare or Social Security for victim; or
- The suspect cashing the victim's social security, disability, or supplemental security income checks.

c. Capacity of the Victim

The prosecutor's case theory may well be determined by the findings of a capacity assessment.¹⁶³ An older adult with late-stage Alzheimer's Disease who currently lacks decision-making capacity is likely to have had somewhat similar deficits six months earlier. For example, if the case turns on whether the victim gave consent to the transaction, the following analysis may be helpful for the prosecutor evaluating the case:

¹⁶¹ See, *e.g.*, *People v. Bailey*, 409 Ill.App.3d 574, 595 (Ill. App. Ct. 2011) ("Where a defendant has committed multiple acts ... the State can charge defendant either for each separate act or for the cumulative effect of the acts under multiple theories of the offense." In *Bailey*, the defendant was charged with multiple counts of theft and financial exploitation. The court held that the State did not have sufficient evidence to convict separately on all charges and that some should have been merged).

¹⁶² See, *e.g.*, CAL. PENAL CODE § 243.25; DEL. CODE ANN. § 1105; VT. STAT. ANN. § 1376.

¹⁶³ For more information on assessing current and prior capacity, please refer to Screening and Assessing Capacity.

Figure 1. Prosecutorial Evaluation of Victim's Decision-Making Capacity



d. Legal Authority of Surrogate Decision-Makers

Many financial abuse cases involve persons with legal authority to act on the victim's behalf, including (but not limited to) conservators/guardians and agents/attorneys-in-fact under a power of attorney. The prosecutor must understand the authorizing legal document (*e.g.*, power of attorney, or guardian or conservator's letter of appointment) and exactly what powers have been conveyed to the decision-maker.

Powers of attorney, guardianships,¹⁶⁴ and conservatorships all convey a legal duty to act as a fiduciary for the older adult. A fiduciary is required to act in a trustworthy manner. Her/his decisions must be consistent with decisions the elder previously made or made in the elder's or vulnerable adult's best interests.¹⁶⁵ In short, a fiduciary does **not** have a license to steal or authority for self-dealing for personal benefit.

A conservator/guardian is usually court-appointed and supervised for persons who are found to lack decision-making capacity. Conservators/guardians may be appointed to provide for the elder's personal needs such as food, clothing, shelter, and medical care, finances, or both. In some states, persons who are responsible for both personal needs and finances are called conservators; in other states, they are called guardians; in still others, conservators handle financial matters and guardians handle personal needs. The authority given to the conservator/guardian is limited to the specific powers in the appointing document. The trend is to limit authority rather than to grant global authority.¹⁶⁶

An agent/attorney-in-fact under a power of attorney is given the authority to act on behalf of another (the principal). The authority is limited to what is included in the power of attorney, so it is critical to review the document to determine the agent's authority to make loans, gifts, investments, etc. Powers of attorney are typically created

¹⁶⁴ See, *e.g.*, NATIONAL GUARDIANSHIP ASSOCIATION, INC. NATIONAL GUARDIANSHIP ASSOCIATION STANDARDS OF PRACTICE (Fourth Ed. 2013), http://www.guardianship.org/documents/Standards_of_Practice.pdf.

¹⁶⁵ LORI STIEGEL & ELLEN KLEM, AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, UNDUE INFLUENCE: CONTEXT, PROVISIONS, AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE (2006), http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/Undue_Influence_Context_Provisions_and_Citations_Chart.authcheckdam.pdf.

¹⁶⁶ *Id.*

for health care decisions (may be called health care proxy) and/or financial decisions. The principal must have decision-making capacity when the power of attorney is executed. In most states, powers of attorney are not filed, registered, or supervised by courts, and they are an effective way to avoid a guardianship/conservatorship. In the wrong hands, however, powers of attorney are a powerful tool of exploitation and abuse.

There are typically two types of powers of attorney – durable and springing. Durable means they are effective when signed, though the principal can continue to make her/his decisions until s/he is unable. Springing means they come into effect when a particular event occurs, most often when two doctors agree that the principal lacks decisional capacity. Powers of attorney are valid until the principal revokes them (must have decision-making capacity) or dies.

e. Consent

The most common defense in financial exploitation cases is consent. Prosecutors should always anticipate that it will be argued. Usually it is raised through argument that the money or asset allegedly stolen was a gift, a loan, or payment for something. The elements of consent are typically described as: 1) decision-making capacity; 2) knowledge of the true nature of the act or transaction; and 3) free and voluntary giving of consent.¹⁶⁷ All claims of consent must be evaluated against proof of each of these elements. It is not sufficient to accept the victim or suspect's statement that "I or s/he" gave consent. Investigators must understand each of the elements and locate evidence as to each.

1) **Decision-making capacity** should be evaluated by a geriatric psychiatrist or psychologist when there is inadequate information about the victim's ability to meaningfully understand, evaluate, choose among options, and make or express a decision. If a victim has dementia, that alone is not dispositive. The stage of dementia, functional ability, and complexity of the decision are all relevant for the expert making the assessment. Even without a diagnosis of dementia, there may be mild cognitive impairment¹⁶⁸ or a developmental or intellectual disability that affects the victim's capacity to give consent.

Assessment of decision-making capacity is not simply the administration of a field screening test such as the Mini-Mental Status Exam (MMSE), a clock drawing test, or others. See *Screening and Assessing Capacity*, *supra*, for further discussion and locating experts. Assessment of decision-making capacity is a comprehensive analysis of memory, executive function, ability to manage money and other financial matters, and functional status. A prosecutor will need an expert's analysis when decision-making capacity is in issue, especially if the victim has some diminished capacity or where capacity is uncertain.

If the victim lacks decision-making capacity, s/he cannot give legal consent. That said, the prosecutor must also prove that the defendant knew or reasonably should have known that the victim lacked decision-making capacity. Information such as the nature and length of the relationship between the victim and defendant; what defendant did to assist the victim; statements defendant made about the victim's abilities; conversations defendant had with medical and other providers; and defendant's knowledge of victim's medical diagnosis, care needs, and medications may all provide valuable evidence of the defendant's knowledge.

2) **Knowledge of the true nature of the act** or transaction must be evaluated. Specifically, the prosecutor should determine what the elder was told about the transaction, whether misstatements or deceptive statements were made, and/or whether critical information was withheld from the victim when there was a responsibility or duty to provide that information.

¹⁶⁷ *Id.*

¹⁶⁸ See section on Interviewing Victims with Apparent/Confirmed Cognitive Limitations, *infra*, for a discussion of mild cognitive impairment.

3) To assess whether **consent was given freely and voluntarily**, the prosecutor should determine whether promises or threats were made (including placement in a nursing home), if tactics of manipulation were used, whether victim was given little time to decide (“rush to decide”), and/or whether the victim was denied access to family, friends, or longstanding advisors. Further, the prosecutor should consider the reasons the victim “agreed” to the transaction.

f. Undue Influence

A common tactic used by offenders to commit financial abuse is “undue influence,” which is both a legal and a psychological construct. From a psychological perspective, undue influence is described as the “concerted, deliberate effort to assume control over another’s decision-making” using psychological manipulation.¹⁶⁹ Tactics include sabotaging the elder’s relationships, promoting dependency on the exploiter, isolating the elder from friends, advisors, and information, and manipulation.¹⁷⁰ Legal definitions vary across the country but typically include the nature of the relationship between victim and exploiter; the victim’s vulnerability or susceptibility to undue influence; the defendant’s opportunity to gain and exercise undue influence; whether the victim’s decisions were the result of the undue influence;¹⁷¹ and financial loss.

Undue influence may be used against an elder whether the victim has full decision-making capacity or has diminished capacity. In such cases, the elder is unaware of the tactics and will, as a result of the manipulation, agree to various transactions, giving the appearance of consent. In civil law, proof of undue influence makes the transaction voidable or void, depending on local statutes. Undue influence in criminal cases should be considered when the prosecutor has concerns that consent was not given freely and voluntarily. In most jurisdictions, undue influence is not itself a crime but is a theory used by the prosecution to overcome a consent defense.¹⁷²

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C. Arraignment and Bail Considerations

While many state statutes and court rules provide that the primary purpose of bail is to ensure the defendant’s appearance at trial, many allow the court to also take into consideration the safety of the victim and of the public. In light of these concerns, the prosecutor may need to consider and argue:¹⁷³

- The absence of significant ties to the community if the ties are all through the victim
- When relevant, potential impact of defendant’s cognitive condition on her/his ability to follow the court’s orders
- Prior criminal history, including past failures to appear
- History of other abusive acts, especially to victim and similarly situated others
- Prior history of abuse in a caretaker relationship
- Any threats to the victim or others, both while the case is pending and in the past if the victim ever told anyone, including threats of abandonment, placement in a facility against the victim’s wishes, and harm

169 L. Nerenberg, *Forgotten Victims of Financial Crime and Abuse: Facing the Challenge*, 12(2) JOURNAL OF ELDER ABUSE AND NEGLECT, 49-73, 56 (2000).

170 HEISLER, *supra* note 8.

171 STIEGEL & KELEM, *supra* note 172.

172 *See, e.g.*, MARY JOY QUINN, ET AL., UNDUE INFLUENCE: DEFINITIONS AND APPLICATIONS (Mar. 2010), <http://www.courts.ca.gov/documents/UndueInfluence.pdf>; *Undue Influence*, NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE, <http://www.nccall.us/justice/undue-influence> (last visited Aug. 16, 2016); and STIEGEL & KELEM, *supra* note 172.

173 This list is not exhaustive. Please contact AEquitas for assistance with preparing.

- If the defendant has access to and control over victim's resources, including assets, property, income, health benefit
- Defendant's use of alcohol and controlled substances
- Defendant's use of a firearm or other deadly weapon
- History of violating restraining or other court orders

In preparing for the bail hearing, prosecutors should assess the danger the defendant poses to the victim. The prosecutor may want to cite research on elder abuse and danger, including that all forms of elder abuse can result in premature death,¹⁷⁴ increased likelihood of hospitalization,¹⁷⁵ increased risk of death as a result of the abuse.¹⁷⁶ While there are no studies that specifically address dangerousness in later life, defendant's age does not protect the victim from serious injury or death.

PRACTICE NOTE: ELDER DEFENDANTS

When the defendant in an elder abuse case is her/himself elderly, the prosecutor should anticipate that the defense will argue – and the custodial agency and the court may feel – a sense of urgency to release the defendant from custody because of her/his age and actual or perceived frailty. The custodial agency may express concerns that the defendant “will not thrive” in custody and/or liability concerns related to medical or medication needs, or costs of placement in a medical facility. It is not uncommon for court officials, jail officials, and the defense to minimize the danger posed by an elderly defendant.¹⁷⁷

There is also research on **homicide-suicide**, which has been studied since the late 1980s at the University of South Florida.¹⁷⁸ This study found that in a majority of homicide-suicide cases, the couples involved were elderly and that the perpetrator was nearly always male and often the spouse of the victim. The homicide-suicide was not the result of a “suicide pact,” or “mercy killing.” Most of the homicide-suicides studied involved the use of a firearm and many women were asleep or shot in the head and in some cases, the victim had defensive injuries. While most perpetrators were not demented, common features of perpetrators included: controlling, dominant personality of the man and the perpetrator's perception of separation such as hospitalization or need to move to a nursing home due to illness of either party. Finally, in the cases studied, separation was viewed by the perpetrator as a threat to the integrity of the relationship. The study revealed the following risk factors:

- Husband is caregiver;
- Advanced old age;
- Declining health of either party;
- Perpetrator has a controlling personality;
- Availability of a firearm;
- Pending hospitalization or institutionalization;
- History of domestic violence;
- Perpetrator is depressed or suicidal;

¹⁷⁴ M.S. Lachs, et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428–32 (1998).

¹⁷⁵ DONG & SIMON, *supra* note 32.

¹⁷⁶ DONG, *supra* note 29 at 293 (“[R]isk of death for elder abuse and neglect victims is three times higher than for non victims”).

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¹⁷⁸ D. Cohen, *Homicide-Suicide in Older Persons*, 155 AMERICAN JOURNAL OF PSYCHIATRY 390-96 (1993); D. Cohen, *An Update on Homicide-Suicide in Older Persons: 1995–2000*, 6(3) JOURNAL OF MENTAL HEALTH AND AGING 195–97 (2000); J.E. Malphurs & D. Cohen, *A State-wide Case Control Study of Spousal Homicide-Suicide in Older Persons*, 9(1) AMERICAN JOURNAL OF GERIATRIC PSYCHIATRY 49–57 (2001).

- Perpetrator is abusing alcohol or controlled substances; and
- Perpetrator's feeling of isolation, anger, hopelessness or loss of control.

Research on lethality and dangerousness led by Dr. Jacqueline Campbell is also relevant. While not focused on older adults, when the case involves domestic violence, the Danger Assessment risk factors¹⁷⁹ may be helpful to a court considering release on bail or own recognizance. These include:

- Defendant used or threatened victim with a weapon
- Defendant has threatened to kill victim
- Defendant tried to choke (strangle) victim
- Defendant violently and constantly jealous
- Victim forced to engage in unwanted sexual contact
- Gun in the house
- Physical violence has increased in severity
- Defendant controls most or all of victim's daily activities
- Physical violence has increased in frequency
- Defendant uses illicit drugs
- Victim believes defendant is capable of killing victim¹⁸⁰

If the court authorizes pretrial release, the prosecutor should request reasonable conditions such as issuance of a criminal court protective order, including (where appropriate) no-contact provisions¹⁸¹ and stay-away from specified locations,¹⁸² or where contact is allowed, an order that only peaceful contact is permitted,¹⁸³ firearms and ammunition prohibitions and removal when allowed under law; alcohol/drug treatment, testing and monitoring, refraining from alcohol consumption or from going to locations where alcohol is the chief item of sale; mental health treatment; and/or electronic monitoring.

If the defendant is to be released, prosecutors should argue for specific conditions of release to ensure that the defendant does not reside with the victim. Additionally, the court should know where the defendant will reside. Some courts may ask the prosecutor to help locate an appropriate housing option; if the defendant is elderly, it is helpful for the prosecutor to become familiar with such local options and/or to work with APS, pretrial services, charitable organizations that operate senior housing facilities, the Public Guardian's Office, and aging services programs in order to identify facilities able to provide safe housing with appropriate monitoring if ordered by the court.

The defense may ask that the defendant be allowed to return to the victim to perform her/his caregiving responsibilities. Even where the focus is on likelihood to appear, however, the court can usually impose any reasonable conditions necessary to protect the safety of the victim and of the public. In this case, prosecutors may want to argue to the court that having the defendant provide care to the victim while charges are pending is inappropriate and even dangerous. The argument should remain focused on the victim's safety, especially if the defendant has previously tried or has actually prevented the victim from reporting abuse or getting medical care, or exerted undue influence on the victim.¹⁸⁴

¹⁷⁹ DANGER ASSESSMENT, <https://www.dangerassessment.org> (last visited July 19, 2016).

¹⁸⁰ JACQUELYN C. CAMPBELL, ET AL., ASSESSING RISK FACTORS FOR INTIMATE PARTNER HOMICIDE (2003), <https://www.ncjrs.gov/pdffiles1/jr000250e.pdf>.

¹⁸¹ *E.g.*, stay away from specified persons (victim, others).

¹⁸² *E.g.*, residence, nursing home facility, medical facility, adult day health or other senior center.

¹⁸³ *E.g.*, not harass, strike, threaten, assault, follow, stalk, molest, destroy or damage personal or real property, disturb the peace, keep under surveillance, or block movements of the protected persons.

¹⁸⁴ DONG, *supra* note 29.

Prosecutors can work with community advocates and allied professionals to identify alternative options for the victim's care needs, including working with APS to identify other care providers.

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D. Victims and Witnesses Unavailable for Trial

Whether and how a case can be proved obviously depends on the available evidence. One of the critical questions in any case involving elder abuse or neglect is whether the victim, or any other witnesses, will be able and willing to testify in court about what happened. As people age, there is a greater possibility that a sudden medical event may befall them that would make them legally unavailable to testify by the time a case goes to trial. Some older victims or witnesses may be suffering from a progressive illness that will worsen over time, even if they receive the best of medical care. In addition to disease processes or injury (whether or not related to the abuse), normal aging may result in loss of vision or hearing, decreased mobility, and normal memory loss, which may make it more difficult for the victim to testify in court. An illness such as Alzheimer's may make a victim who is presently competent, at least so on an intermittent basis, incompetent by the time a case goes to trial. In addition, in cases where the perpetrator is a loved one, victims will likely have conflicted feelings about going forward with a prosecution. This may be due to trauma bonding, love, shame, embarrassment, hope that the perpetrator's behavior will change, or a combination. This dynamic is similar to other cases of domestic violence.

In elder abuse cases, it may be possible to expedite the criminal proceedings.¹⁸⁵ Some jurisdictions have established a specialty court for cases involving older victims, or may channel such cases to the same judge.¹⁸⁶ Such procedures help to ensure these cases—and their victims—receive the specialized attention and services necessary. If no special court or docket is in place, the prosecutor can move for expedited proceedings and priority calendaring to avoid unnecessary delay in the disposition of charges.¹⁸⁷

Regardless of efforts to expedite the proceedings, it may nevertheless be desirable to preserve the testimony of the victim or witness in a manner that will permit the preserved testimony to be admitted at trial if the witness becomes unavailable. In addition, when the witness's unavailability is due to wrongdoing on the part of the defendant (intimidation or homicide/injury caused by the defendant for the purpose of making the witness unavailable for trial), the unavailable witness's prior statements may be admissible under the doctrine of forfeiture by wrongdoing.

1. Crawford and Its Application in Elder Abuse Cases

When a victim or other witness is unavailable to testify in court, the ability of the prosecutor to introduce out-of-court statements of that witness will be constrained by the defendant's constitutional Sixth Amendment right to confront witnesses, as interpreted in *Crawford v. Washington*¹⁸⁸ and its progeny. *Crawford* held that "testimonial" hearsay statements (generally, more formal statements, usually made to a government agent such as a police officer or in a court proceeding) are inadmissible unless (a) the witness is testifying in court, subject to cross-examination or (b) the witness is "unavailable" (deceased, unable to be located, incompetent to testify, etc.) and the defendant had a prior opportunity to cross-examine the witness. In the case of "nontestimonial" hearsay statements, or where

¹⁸⁵ While there are legitimate reasons for necessary continuances on the part of either the State or the defense, prosecutors must remain mindful of the potentially dire consequences of delay in an elder abuse case. Prosecutors should seek (or consent to) only the most unavoidable delay.

Requests for continuances should be scrutinized for the possibility of tactical delay.

¹⁸⁶ LORI STEIGEL & PAMELA B. TEASTER, AMERICAN BAR ASSOCIATION, A MULTI-SITE ASSESSMENT OF FIVE COURT-FOCUSED ELDER ABUSE INITIATIVES, EXECUTIVE SUMMARY (Apr. 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/241707.pdf>.

¹⁸⁷ Contact AEquitas for assistance with arguments for expedition.

¹⁸⁸ *Crawford*, 541 U.S. 36.

the witness is available to testify in court subject to cross-examination, the only constraints on admissibility will be the jurisdiction's own rules against hearsay—to be admissible, the statement must fall within one of the jurisdiction's hearsay exceptions (*e.g.*, excited utterance, statement for purpose of medical diagnosis or treatment).¹⁸⁹

Much of the *Crawford* jurisprudence focuses on determining whether a particular hearsay statement will be considered testimonial or nontestimonial. As noted above, testimonial hearsay statements typically involve statements that are made to government agents, such as police officers or other official investigators, or statements made with some degree of formality (*e.g.*, courtroom testimony, deposition testimony, affidavits). Testimonial statements are those whose primary purpose is to relate facts or events potentially relevant to future prosecution. Nontestimonial hearsay are statements made for some other purpose and, most often, to individuals not connected with law enforcement. Statements to family, friends, or neighbors; statements to caregivers; statements to medical professionals for purposes of medical diagnosis or treatment; or statements to officers or other government agents for the purpose of enabling them to respond to an ongoing emergency situation (*e.g.*, 911 calls) are generally considered to be nontestimonial, and thus will be admissible even if the witness is unavailable to testify in court, provided that the statements fall within some recognized hearsay exception.

The most difficult *Crawford* issue is likely to arise with regard to statements made to professionals whose primary role is to offer protective services, assess risk, and enhance an elder or vulnerable adult's well-being and independence, or provide medical, or other care, but who may also have a secondary or adjunct duty to collect evidence they observe or provide reports or information to law enforcement in appropriate circumstances. Such professionals may include APS workers, social workers, and sexual assault nurse examiners (SANEs).¹⁹⁰ The United States Supreme Court has recently held that a professional's status as a "mandatory reporter" does not, in itself, make statements made to that professional testimonial.¹⁹¹ However, the factual scenarios presented can vary greatly, and the way such statements are analyzed under *Crawford* varies from one jurisdiction to another. Some additional *Crawford* challenges may arise where a victim calls Life Alert to indicate s/he is down and hurt after a beating by her/his son and Life Alert calls law enforcement and provides the victim's statement about the incident. If the victim is dependent on her/his son and refuses to testify, *Crawford* may be an issue. A final example may be where a bank calls a victim regarding suspicious checks, to which the victim is surprised and says s/he did not authorize the checks. The bank then tells her/him the checks were presented by victim's live-in caregiver and calls police. If the victim is interviewed by police and signs the bank's affidavit of forgery, but at trial says s/he loves her/his caregiver and does not want to get her in trouble, *Crawford* may be a challenge for the prosecutor to overcome. In such a case, the prosecutor may want to argue tactics of undue influence used by caregiver, including cutting off friends and family, sabotaging relationships, emotional and psychological manipulation, creating dependencies, etc.¹⁹²

189 The information contained in this *Resource* is an introduction of *Crawford* issues specifically relevant to elder abuse cases. For much more detailed information about meeting *Crawford* challenges, see AEQUITAS, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (Oct. 2012), available at www.aequitasresource.org/library.cfm.

190 Some jurisdictions may refer to SANEs or to sexual assault forensic examiners (FNEs). For the purposes of this publication, the authors have used the term SANE.

191 *Ohio v. Clark*, 135 S.Ct. 2173 (2015). In *Clark*, a preschool teacher asked her young pupil who it was that had inflicted the injuries she observed on the child's body. The Ohio Supreme Court had held that, because schoolteachers are mandatory reporters of child abuse, any statements made by a child in response to the teacher's questioning were akin to formal statements made by victims to police officers and therefore testimonial. *State v. Clark*, 999 N.E.2d 592 (Ohio 2013). The United States Supreme Court reversed, holding that status as a mandatory reporter did not make the teacher an agent of law enforcement, noting that the statements were elicited for the purpose of protecting the child (a form of ongoing emergency) and further observing that a very young child is unlikely to understand the concept of prosecution, meaning that statements by very young children would be nontestimonial in most circumstances. 135 S.Ct. at 2181-83.

192 Prosecutors can contact AEQUITAS 24/7 to discuss and strategize on *Crawford*-related issues.

It is important first to consult the relevant case law within a jurisdiction to learn whether and how courts have treated statements made in a specific type of situation. The factual context in which reported cases may have arisen, and the rationale for the court's decision admitting or excluding such statements, may make it possible to distinguish them and to argue for the admissibility of the statements in a particular case. Often, cases turn on the specific purpose of the statement or interview. For example, in a sexual abuse case, the victim may have already been examined and treated by a medical professional before arrangements can be made for a SANE examination with a rape kit. In those circumstances, the court may reason that the need for immediate medical treatment has passed, and the further examination with questions are for purposes of prosecution, rather than medical treatment. On the other hand, to the extent that a SANE is much more highly trained with regard to the identification and treatment of injuries specific to sexual assault, the court may decide that at least some of the questioning is primarily for purposes of medical diagnosis or treatment and admit some or all of the statements based upon that expertise. Prosecutors should recall that these initial treating medical providers, separate from *Crawford* issues, are important witnesses.¹⁹³

Medical professionals providing care to patients who are victims of sexual assault or abuse are generally trained to place the patient's health and safety at the forefront of their examinations and interviews, with any role in evidence collection secondary¹⁹⁴. The SANE will need to ask about the details of the assault in order to conduct a thorough examination for any injuries so that appropriate treatment can be provided. During the examination, a victim may make a statement to a SANE about the details of a sexual assault, including the fact that the assailant was an intimate partner, family member, or caregiver. The identity of the perpetrator—whether the assailant is a household member or caregiver, for example—is crucial to proper discharge planning.¹⁹⁵ Medical professionals do not wish to allow the person who assaulted the victim to be the one to take her/him home, nor do they want to allow a patient to return to a dangerous home environment.¹⁹⁶ They also want to be able to provide their patients with resources to help them, such as information about shelters or about available assistance for older people. Thus, statements made in this context may have a very definite medical purpose, and hence be considered nontestimonial under *Crawford*. Even when time has passed since the assault, the SANE may still need to ask about the details in order to conduct a thorough examination so that appropriate treatment can be provided. For example, statements to the SANE about whether a medical provider conducted appropriate testing such as an STD panel may be made for purposes of medical treatment.

Statements to an APS worker would likely be analyzed in a similar way. To the extent that the statement is made as part of an assessment of risk, client needs, eligibility for services, and cognitive abilities to determine whether a client is in need of protective services, it may be considered nontestimonial, similar to a statement to a police officer for the purpose of responding to an ongoing emergency. A statement may be considered nontestimonial even if it included discussion of the abuse and the identity of the abuser as part of the assessment of risk and safety and client needs. In contrast, a statement made to APS with a different focus and purpose might be considered testimonial and, thus, inadmissible under *Crawford* unless the victim testifies in court.

¹⁹³ See, e.g., *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).

¹⁹⁴ During witness preparation, prosecutors should take time to understand the medical professional or SANE's specific professional training and experience to determine their personal philosophy regarding the patient's health and safety and their ability to articulate this on the witness stand.

¹⁹⁵ See, e.g., *State v. Stahl*, 111 Ohio St.3d 186 (2006) (statements made by victim to SANE were nontestimonial where she was asked the identity where the identity was relevant to discharge and safety).

¹⁹⁶ The Supreme Court in *Clark*, for example, observed that the teacher was concerned about determining whether the injuries had been inflicted by the child's caregiver, so the child would not be returned to his abuser. 135 S.Ct. at 2181.

There is little in the way of case law regarding the testimonial/nontestimonial quality of statements made to APS workers. One case from California, *People v. Cooper*,¹⁹⁷ resulted in a conclusion that portions of the statements in two videotaped interviews with the victim (who was deceased at the time of trial) were testimonial, yet nevertheless admissible because they were not offered for the truth of the matter, but rather to demonstrate the mental capacity of the elderly theft victim. In *Cooper*, law enforcement and APS investigated reports of the possible exploitation of the victim by the defendant, who was her neighbor. Two videotaped interviews were conducted a few months apart. In the first, APS workers did most of the questioning; in the second, the detective conducted a taped interview with the victim, without the assistance of APS workers. Although the trial court excluded both statements in their entirety,¹⁹⁸ the appellate court concluded that it was error to exclude the statements completely because portions of the statements were for the purpose of evaluating the victim's mental status and her ability to care for herself, and some portions were, even if testimonial, relevant to a determination of the victim's capacity and were, therefore, not offered for their truth. The appellate court ultimately remanded the case for the trial court to determine, using the correct standards, which portions of the videotaped statements were nontestimonial or were admissible because they were not being admitted for the truth.

Where it appears that the trial court may be inclined to view part of a statement as testimonial (because, for example, the purpose is to gather information to be provided to law enforcement), it may be possible to argue that rather than excluding a statement in its entirety, the statement can be redacted to eliminate the testimonial hearsay while allowing the jury to consider the nontestimonial portion of the statement.¹⁹⁹ Prosecutors are advised to consider which portions of such a statement should be redacted and, where a testimonial statement is admissible because it is not offered for its truth, consider drafting a strongly-worded limiting instruction to ensure that the jury understands the limited purpose for which it is offered.

Prosecutors can meet *Crawford* challenges by identifying and preserving as many nontestimonial statements of the victim or witness as possible that come within a recognized hearsay exception. An "excited utterance" by a victim to a friend, neighbor, or relative, for example, should be admissible under *Crawford* even if the victim is not testifying at trial. Possible sources of nontestimonial hearsay include friends, family members, neighbors, caregivers, APS workers, senior center staff, or medical professionals. In addition to excited utterances and statements given for purposes of medical diagnosis and treatment, other common hearsay exceptions include statements of present sense impression and statements of a then-existing physical, mental, or emotional condition. Many nontestimonial hearsay statements of victims will fall within one or more of these categories.

2. Preserving Witness Testimony

When a case involves an elderly victim or witness, a prosecutor may wish to preserve the witness's testimony in case that witness becomes unavailable at or before trial. Where the defense has had a full and fair opportunity to cross-examine the witness, prior testimonial hearsay statements may be admissible under *Crawford*. The sections below explain in more detail how witness testimony may be preserved by having the witness testify, subject to cross-examination, at a preliminary/probable-cause hearing or at a deposition²⁰⁰ or conditional examination proceeding. Because cross-examination is essential for purposes of the Confrontation Clause, grand jury testimony of

¹⁹⁷ *People v. Cooper*, 56 Cal.Rptr.3d 6 (Cal. Ct. App. 2007).

¹⁹⁸ The prosecution had conceded that portions of the first interview were testimonial and had offered to redact the video to excise the testimonial portion.

¹⁹⁹ See, e.g., *Cooper*, 56 Cal.Rptr.3d 6.

²⁰⁰ Note that a discovery deposition may not satisfy the mandate in *Crawford v. Washington* that a defendant be given a prior opportunity to cross-examine a declarant of a testimonial statement. See, e.g., *Corona v. State*, 64 So. 3d 1232 (Fla. 2011).

an unavailable witness generally will not be admissible at trial.²⁰¹

It should be remembered that the strategy of preserving evidence at a proceeding where there is opportunity for cross-examination will be effective only if the victim or witness is *actually unavailable* at trial. The prosecutor cannot simply decide it would be better for the witness not to testify, either because it is difficult or inconvenient for the witness or because the prosecutor believes that s/he will make a poor witness at trial. If the witness is unavailable at the time of trial due to illness or incompetency, the State must prove that unavailability to the satisfaction of the court by a preponderance of the evidence.²⁰²

a. Preliminary/Probable Cause Hearing

When a victim or witness may become unavailable at trial, the preliminary hearing may be the only opportunity to obtain critical testimony.²⁰³ The prosecutor will need to prove much more than probable cause to be able to proceed to trial without the victim. Therefore, prosecutors should prepare the victim's testimony for the preliminary hearing as would be appropriate for trial. They should also ensure that relevant documents and exhibits for which the victim will need to testify to identify or lay a foundation for admissibility are prepared and used. If the court only permits testimony for the purpose of establishing probable cause, it may be necessary to file a motion for a deposition or conditional examination (discussed immediately below) to be heard at the preliminary hearing. That motion would also put the defense on notice that the hearing will cover more than that necessary to prove probable cause.

These preliminary hearings therefore present the opportunity to preserve the witness's testimony while the witness is still engaged and able to participate in the prosecution of the defendant. To assure the admissibility of such testimony at trial, provide all available discovery to defense counsel prior to the hearing, and do not object to any reasonable adjournments to enable defense counsel to prepare for effective cross-examination of the witness. It is generally preferable to keep objections to a minimum, other than to protect the victim/witness from harassment or intimidation, so that the trial court will be assured that the defendant had a full and fair opportunity to cross-examine.²⁰⁴ Doing so will reduce the likelihood that the statement will be ruled inadmissible at trial, since the defendant's right to confront the witness will have been satisfied. Videotaping of the testimony, where possible, will enable a jury to observe the witness's appearance and demeanor, which can be compelling in an elder abuse case.²⁰⁵

b. Deposition or Conditional Examination

Where the jurisdiction's rules permit, the prosecutor can also move for a deposition or conditional examination²⁰⁶ of the witness for the purpose of preserving the witness's testimony. The requirements for such preservation proceedings, and the rules governing their conduct, vary from one jurisdiction to another. Some states allow

201 Some jurisdictions also have provisions for depositions to preserve witness testimony when it is anticipated a witness may not be available for trial. *See, e.g.*, FED. R. CRIM. P. 15(a); *United States v. Yida*, 498 F.3d 945, 959-60 (9th Cir. 2007). The availability of such a deposition, and the procedures for conducting it, will vary from one state to another.

202 "Preponderance of the evidence" is usually the standard by which the court is to rule on the admissibility of evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Simply representing to the court that the witness is incompetent to testify will not be sufficient. FED. R. EVID. 804.

203 Some jurisdictions provide for depositions in criminal cases or will allow for depositions where a victim may become unavailable at trial. *See, e.g.*, FLA. R. CRIM. P. RULE 3.220. *But see also, Corona* 64 So. 3d 1232 where discovery deposition did not satisfy the mandate in *Crawford v. Washington* that a defendant be given a prior opportunity to cross-examine a declarant of a testimonial statement.

204 Prosecutors should be cautious of repeated defense requests for adjournments that may ultimately prevent the witness from testifying.

205 Prosecutors can consider videotaping the testimony in a courtroom and asking the judge to be present to rule on objections contemporaneously. The videotaped testimony could be redacted for trial if necessary, but it provided the jury the opportunity to view the body language and demeanor of the victim/witness. This would also allow the jury to see the elderly victim in these cases.

206 Certain jurisdictions refer to such proceedings as a "conditional examination" (*e.g.*, CAL.PENAL CODE § 1335; N.Y. PENAL LAW § 660.40).

for such proceedings to be conducted in a victim's home or the hospital, and by two-way video conference, if the victim is very ill and cannot get to court.²⁰⁷ The State may have to make a showing of good cause to believe the witness will be unavailable for trial, which may require evidence of the victim's physical or mental conditions before a deposition will be authorized. Again, videotaped depositions, where permitted and available, will provide the most compelling evidence.

3. Forfeiture by Wrongdoing

Another strategy for admitting an unavailable victim's hearsay statements, where the evidence will support it, is to seek to admit them under the doctrine of forfeiture by wrongdoing.²⁰⁸ Forfeiture by wrongdoing is an exception to the rule of confrontation where the defendant intentionally, through her/his own wrongful conduct, caused the witness to be unavailable for trial. Forfeiture by wrongdoing is codified as an exception to the rule against hearsay in many jurisdictions and recognized by the case law in many others. No jurisdiction has rejected the rule, although the requirements may vary from one jurisdiction to another in terms of what must be proved in order to invoke the rule. In most jurisdictions, to admit hearsay statements under forfeiture by wrongdoing, the prosecution must show, by a preponderance of the evidence,²⁰⁹ that:

- the defendant engaged in some form of wrongdoing (typically intimidation or emotional manipulation of the witness or intentionally causing the witness's injury or death),²¹⁰
- causing the witness to be "unavailable" to testify (*e.g.*, deceased, incapacitated, unable to be located, refusing to testify), *and*
- that the wrongdoing was intended to cause that result.

A finding of forfeiture by wrongdoing generally will permit *any* hearsay statements by the unavailable witness to be admitted at trial—not only those that fall within some other hearsay exception.²¹¹ It is therefore a very powerful tool when the evidence exists to support it.

As discussed previously in sections addressing common interpersonal dynamics in elder abuse cases and the tactics of abusers using undue influence and power and control, intimidation and manipulation of older victims and witnesses is common. Intimidation and manipulation are especially evident when the perpetrator is an intimate partner, family member, trusted caregiver, or fiduciary. A helpful practice for prosecutors in elder abuse cases is to create a "forfeiture file" section in the case file or trial notebook for any witness vulnerable to such wrongdoing. Into that file can go any evidence that would support a forfeiture motion, should that victim or witness refuse to testify at trial. Such evidence might include any witness statements or other evidence that would support a finding that the victim and defendant were in a "classic abusive relationship," which would allow the court to infer the intention of the defendant to prevent the victim from testifying.²¹² Although most of the case law on forfeiture that has inferred intent to prevent the witness from testifying is based upon the abusive nature of an intimate partner relationship, many of

207 *See, e.g.*, *People v. Ware*, 78 Cal. App. 3d 737 (Cal. Ct. App. 1978); CAL. PENAL CODE §1343.

208 Forfeiture applies only where the witness is actually unavailable to testify (*e.g.*, the witness is deceased, cannot be located, refuses to testify despite an order to do so), not in situations where the witness is simply reluctant, recanting, or testifying on behalf of the defendant.

209 In Washington, New York, and Maryland, the standard is "clear and convincing" evidence. MD. CODE ANN., CTS. & JUD. PROC. §10-901 (West 2011); *People v. Geraci*, 85 N.Y.2d 359, 649 (1995); *State v. Mason*, 160 Wash. 2d 910 (2007).

210 Case law suggests that selection of a vulnerable or incompetent victim, standing alone, is insufficient to constitute "wrongdoing" for the purpose of the forfeiture doctrine. *See, e.g.*, *State v. Henderson*, 160 P.3d 776, 793 (Kan. 2007). Thus, the fact that the defendant selected the victim believing that the victim would be too ill or incompetent to testify, or that the victim would be likely to die before trial, will probably not be enough to support a finding of forfeiture.

211 *See, e.g.*, *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999).

212 *Giles*, 554 U.S. 353.

the dynamics in elder abuse cases are similar. An expert on the dynamics of elder abuse (*e.g.*, an advocate, therapist, academic, law enforcement officer, or an APS worker) may be able to provide expert testimony in some elder abuse cases to support a similar inference in the elder abuse context.

A motion to admit hearsay statements under forfeiture by wrongdoing is usually made prior to trial, although a motion can be made during trial where the witness unexpectedly fails to appear or where the witness takes the stand but refuses to testify (or becomes too fearful to testify). Hearsay, including the hearsay statements of the unavailable witness that are the subject of the motion, will be admissible at the motion hearing. Details about admitting evidence under forfeiture by wrongdoing can be found in *The Prosecutors' Resource on Forfeiture by Wrongdoing*.²¹³ Where hearsay statements of an absent witness could be admitted *either* as nontestimonial hearsay (and therefore not subject to the confrontation requirement under *Crawford*) *or* under the doctrine of forfeiture by wrongdoing, it is best to argue in a pretrial motion both grounds in the alternative, and to seek a ruling from the court on both grounds. In this way, the trial court will have made the necessary findings on both theories, which may help to support a conviction on appeal if the appellate court rules that the evidence would be admissible under one theory but not the other.

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E. Working with Experts

It will often be helpful to consult with various experts as part of the case evaluation and preparation. Experts can help determine what evidence should be gathered and how that evidence should be interpreted. Experts can also help in identifying and suggesting ways to meet anticipated defenses, such as explaining whether a particular medication a victim was taking could have caused the type of bruising observed. Experts to consult early in the case may include mental health experts, geriatric psychologists or psychiatrists, the victim's treating medical professionals, a geriatrician (a physician specializing in treating older persons and their medical problems, including injuries), other medical professionals (medical specialists, wound care and other types of nurses, medical examiner, SANE, pharmacist), APS workers, therapists, advocates, and forensic or other type of accountants, and others.²¹⁴ Not all experts consulted will necessarily be called for trial, but identifying and consulting with them during case preparation will help to identify key issues with your case and determine what additional investigation may be helpful and what charges can be proved at trial.

At trial, it may be particularly important to present expert testimony to explain how injuries resulting from abuse can be distinguished from accidental injuries, the significance of certain injuries in sexual assault cases, how medical conditions due to neglect (*e.g.*, malnutrition or pressure ulcers) can be distinguished from conditions attributable to normal aging or underlying medical conditions, and the effects of disease processes and medications on an individual's mental capacity.²¹⁵ Pressure ulcers (also called pressure sores, bedsores, and decubitus ulcers) can occur in patients who are immobile for extended periods of time even with good care, but infected, untreated sores indicate a lack of care and are consistent with neglect. Because of changes to the skin and blood-thinning medications many older people take, they often bruise much more easily than younger people. Accidental bruises typically occur on the extremities on surfaces that are easily bumped.²¹⁶ Other studies of abuse-related bruises have found non-accidental

²¹³ AEQUITAS, *THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING* (Oct. 2012), available at www.aequitasresource.org/library.cfm.

²¹⁴ See Appendix A for a chart of possible experts, reprinted with permission from BRENDA K. UEKERT, ET AL., *NATIONAL CENTER FOR STATE COURTS, PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES* (2012), [HTTPS://WWW.BJA.GOV/PUBLICATIONS/NCSC-PROSECUTING-ELDER-ABUSE-CASES-BASIC-TOOLS-AND-STRATEGIES.PDF](https://www.bja.gov/publications/ncsc-prosecuting-elder-abuse-cases-basic-tools-and-strategies.pdf).

²¹⁵ See Medical/Forensic Markers to Distinguish Abuse and Neglect from Other Causation.

²¹⁶ MOSQUEDA, BURNIGHT & LIAO, *supra* note 66.

bruises on the lateral right arm, the head and neck, chest, abdomen, genitalia, buttocks, palms, soles, and ears.²¹⁷ Inflicted bruises are often larger than five centimeters in size.²¹⁸ Bruises in varying stages of healing are suggestive of abuse.²¹⁹ Abuse is a more likely cause when bruises are located on more than one side or plane of the body, patterned bruises, or when located in places not easily injured by accident. Ligature marks, indicating that the victim was restrained, are readily identifiable, as are bite marks and some signs of strangulation and suffocation.²²⁰

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F. Pretrial Motions

Cases involving older adults will often require the filing of pretrial motions, particularly motions to preserve witness testimony, motions for courtroom safety and accommodations, and motions to determine what evidence will be admissible at trial. Court rules, the rules of evidence, or even the preference of individual judges will frequently dictate the timing of such motions. The results of motions may sometimes facilitate resolution of cases, since both the State and the defendant will have a clearer idea about the likelihood of success at trial based upon what evidence will be admissible. Even where such motions cannot be determined well in advance of the trial date, it is best to seek a ruling before opening statements so both parties will know what anticipated evidence can be mentioned in their respective openings.

There are several types of pretrial motions that should be considered in cases of elder abuse and neglect, including motions to:

- Admit (or exclude) expert testimony; including testimony by experts on victim behavior and²²¹ elder abuse dynamics; mental health experts; DNA experts; medical experts; forensic expert on bruising, pressure ulcers, effects of medication, laboratory findings, forensic accounting, handwriting; or financial experts²²²
- Admit evidence of other crimes and bad acts to show a defendant's motive, opportunity, knowledge or intent, plan, or absence of mistake or accident²²³
- Admit evidence of nontestimonial hearsay statements of the victim or to admit testimonial hearsay statements of the victim where the s/he is unavailable and there was a prior opportunity for cross-examination
- Admit hearsay statements of an unavailable victim under the doctrine of forfeiture by wrongdoing²²⁴
- Litigate *Crawford* issues²²⁵
- Allow a courthouse dog to accompany the victim while testifying, or for other accommodation
- Permit a support person to accompany the elderly victim to the witness stand and sit by the victim during testimony or to sit within the well of the courtroom

²¹⁷ WIGLESWORTH, *supra* note 67; BURGESS, HANRAHAN & BAKER, *supra* note 72; DYER, CONNOLLY & MCFEELEY, *supra* note 46; J. Crane, *Injury Interpretation* in FORENSIC SCIENCE: A PHYSICIAN'S GUIDE TO CLINICAL FORENSIC MEDICINE (M.M. Stark, ed. 2000).

²¹⁸ *Id.*

²¹⁹ DYER, CONNOLLY & MCFEELEY, *supra* note 46; GIBBS, *supra* note 62.

²²⁰ TRAINING INSTITUTE ON STRANGULATION PREVENTION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE INVESTIGATION AND PROSECUTION OF STRANGULATION CASES (2013), http://www.strangulationtraininginstitute.com/wp-content/uploads/2015/07/California-Strangulation-Manual_web3.pdf.

²²¹ JENNIFER LONG, NAT'L DISTRICT ATTORNEYS ASSOCIATION, INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

²²² Contact AEquitas for additional information about prospective experts.

²²³ The Rule also permits prior acts to be admitted as proof of identity, although most jurisdictions limit that purpose to cases where identity is truly at issue and where the similarity of the offenses amounts to a virtual "signature" of the offender.

²²⁴ Contact AEquitas for sample motions on forfeiture by wrongdoing.

²²⁵ Although evidence rulings concerning such *Crawford* issues (other than motions to admit evidence under the forfeiture doctrine) may not require a pretrial motion, a motion *in limine* prior to trial is nevertheless good practice because it will clarify what evidence ultimately will be admissible.

- Allow a hospitalized victim to testify via closed-circuit television
- Provide for special examinations for a victim who is too ill to come to court
- To testify via closed circuit television.²²⁶

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G. Defense Challenges to Victim Competency

As discussed above, competency usually refers to a witness's ability to testify in court.²²⁷ Competency is a judicial determination, and the standards and procedures for determining competency to testify are generally prescribed by statute, court rule, or case law. Witness competency to testify is comprised of the ability of a witness to:

- Recall past events,²²⁸
- Communicate in an understandable way (with any assistance that might be necessary for the witness to be understood), and
- Comprehend the obligation to testify truthfully. Adults of any age are generally presumed competent to testify.²²⁹

In cases involving older adults, the defense may challenge the victim's competency to testify.²³⁰ In responding to a defense motion to challenge victim competency, it is worth recalling that advanced age, alone, is not a basis for challenging a witness's competency.²³¹ Because of the presumption of competency, the burden is on the party claiming that a witness is incompetent to prove it to the satisfaction of the trial court.²³² Even if the court finds that the witness is competent to testify, the witness's credibility is assessed by the trier of fact. Her/his testimony will be subject to cross-examination or impeachment with evidence that s/he has a poor memory or other cognitive deficits affecting credibility.²³³

Often an elderly witness's competency to testify in court will be evident, even to a non-expert. During an in-person interview with the victim, the prosecutor can assess competency by observing, and/or asking a law enforcement official or victim-witness advocate to observe, whether the victim recognizes loved ones or other familiar people,

²²⁶ In cases where a witness would suffer serious emotional harm as a result of testifying in the presence of the defendant, a motion to permit the witness to testify via closed-circuit television may be an appropriate solution. Expert testimony is necessary to establish the harm that the witness is likely to suffer if required to testify in the defendant's presence. If the court finds that the witness is likely to suffer such severe emotional harm, the attorneys may be permitted to conduct their examinations of the witness in a separate room, with a live video feed to the courtroom. Remote examinations of this type should not be conducted without a hearing as to the necessity of doing so. Confrontation via closed-circuit television pursuant to the rule set forth in *Maryland v. Craig*, 497 U.S. 397 (1990), continues to be acceptable after *Crawford*. See also *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005). Note that the circumstances permitting such alternative modes of testimony are strictly circumscribed, and the trial court must make explicit findings of necessity under the test set forth in *Craig*. *United States v. Yates*, 438 F.3d 1307, 1312-18 (11th Cir. 2006). See also J. Steven Beckett & Steven D. Stennett, *The Elder Witness – The Admissibility of Closed Circuit Television Testimony After Maryland v. Craig*, 7 ELDER L.J. 313 (2000).

²²⁷ Competency of a defendant to stand trial—an issue which may arise in cases involving older defendants—is a separate issue with a different standard. See section on Older Perpetrators, *supra*. See, e.g., FED. R. EVID. 601.

²²⁸ Most witnesses with a poor memory will still be competent to testify, although their lack of memory for specific events or facts may be used to impeach their testimony. See, e.g., Jonathan M. Purver, *Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility*, 44 A.L.R.3d 1203 (1972).

²²⁹ Fed. R. Evid. 601.

²³⁰ Prosecutors should note that this may also depend on the defense theory and emphasizes the importance of trial preparation. Please contact AEquitas to discuss specific cases and strategize about defense challenges to victim competence.

²³¹ See, e.g., Fed. R. Evid. Rule 601. Competency to Testify in General; see also Michael H. Graham, *Competency to Testify in General; An Overview*, 4 HANDBOOK OF FED. EVID. § 601:1 (7th ed. Nov. 2015).

²³² E.g., Victor James Gold, *Procedure to Determine Competency*, 27 FED. PRAC. & PROC. EVID. § 6010, n 11 (2d ed. 2016) (citing *State v. Thrasher*, 233 Kan. 1016, 666 P.2d 722 (1983) (the burden of establishing incompetency rests on the challenger); *People v. Farley*, 90 Cal.App.3d 851 (Cal. Ct. App. 1979) (objecting party must establish incompetency by a preponderance of the evidence)).

²³³ See PURVER, *supra* note 235.

suffers from obvious delusions, has no concept of time or place, or is incapable of providing responsive answers to questions. In some cases, a witness may be only *temporarily* incompetent due to a treatable medical condition (i.e., delirium) or the effects of medication, and will later be restored to competency when the underlying cause is properly addressed. It is therefore important to learn the cause of a witness's incompetency and whether the witness's condition may improve in the future.

If a victim or witness is deemed incompetent by the court, the prosecutor must determine whether the crime can be proven beyond a reasonable doubt without the victim's testimony. If so, the trial can proceed without calling the victim as a witness in the case. It may be possible for the parties to stipulate, on the record, that the victim is incompetent, that the prosecution will not be calling the victim for that reason, and that the jury will be so instructed to avoid any adverse inference as a result of the prosecution's failure to present the victim's testimony. In some cases, the prosecution may wish to introduce evidence at trial of statements made at a time when the victim *was* competent (such as a deposition or testimony from a pretrial probable cause hearing) whose admissibility depends upon the victim's "unavailability" (due to incompetency to testify).²³⁴ If there is a genuine dispute as to the victim's competency (and therefore availability as a witness), it may be necessary for the witness to be evaluated for competency.²³⁵

If the prosecutor anticipates a challenge to the victim's capacity, and if the witness is vital to proving the case, the prosecutor may want to have the victim promptly evaluated. If the victim is competent, the prosecutor may want to tell the victim why the evaluation is nevertheless needed and that the results will remove or undermine a potential defense challenge. Depending on the nature of the case (*e.g.*, sexual abuse by a family member), it may be important to have such expert testimony to overcome a jury member's disbelief that such incidents happen, and resultant discounting of the witness's account based on the nature of the crime.

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H. Elderly Defendants: Accommodations and Competency

Older adults may be perpetrators of abuse, neglect, or exploitation of an older intimate partner, other family member (either as part of a classic abusive/battering relationship or as a caregiver), or another resident of the same long-term care facility. Age, in and of itself, should not raise a presumption that the defendant is incompetent to stand trial, or that criminal conduct was caused by illness.

A defendant's advanced age may be accompanied by chronic medical conditions that affect mobility, hearing, speech production, vision, gait and station (standing and walking), and endurance. If present, cognitive and mental health conditions may affect mood, comprehension, and memory. Dementia is more common in older adults, especially in those 85 and older. Dementia is not a single illness but rather an umbrella term to describe a widely varied category of illnesses that affects memory, intellectual abilities, and function and is eventually fatal. Different dementia illnesses affect different parts of the brain. Depression is common in older adults and may co-occur with dementia, making the older adult appear more confused and demented. Similarly, illness, medication toxicity, dehydration, and malnutrition may cause delirium which may make the older adult appear more demented and incapacitated than he or she actually is.²³⁶

²³⁴ A more in depth discussion on *Crawford* considerations and strategies is discussed above.

²³⁵ At least one court has held that the prosecutor's representation that the victim was incompetent due to Alzheimer's was insufficient to establish the unavailability of the victim as a witness. *State v. Cannon*, 254 S.W.3d 287, 306 (Tenn. 2008). *See also*, David F. Binder, *Unavailability of Declarant*, HEARSAY HANDBOOK 4th § 7:4 (2015).

²³⁶ For more information, please consult LAURA MOSQUEDA, JUDICIAL COUNCIL OF CALIFORNIA, ELDER ABUSE POCKET REFERENCE: A MEDICAL/LEGAL RESOURCE FOR CALIFORNIA JUDICIAL OFFICERS (2012), <http://www.courts.ca.gov/documents/ElderAbusePDoc.pdf>.

A defendant with such conditions is entitled to needed accommodations just as a victim would be. This may mean that court proceedings are shorter, more breaks are taken, the defendant is brought to court in a wheelchair or gurney, etc. These are all needed to ensure that a defendant receives a fair trial.

Perpetrators suffering from dementia due to a condition such as Alzheimer's or long-term drug or alcohol abuse may contend they lack fitness to stand trial, or may assert a mental health defense such as insanity or diminished capacity, depending on the degree of impairment. Defendants may also claim that their conduct was the result of medication or an unexpected drug interaction. It is important to carefully evaluate the validity of such claims and defenses with the assistance of an expert.

Where the defendant claims incompetence to stand trial, statutes or court rules will set forth the standard for determining competency²³⁷ and the procedure to be followed. If the defense has conducted an evaluation of competency, the prosecution will usually be entitled to conduct an evaluation of its own. The court may also appoint its own, independent expert to evaluate the defendant's competency.

As with victims, the fact that a defendant has been diagnosed with a condition, or was taking medications that can adversely affect cognitive capacity, does not necessarily mean that the condition affected her/his capacity to a level rising to a defense (although it sometimes may be considered as a mitigating factor at sentencing). Many such conditions are progressive, or affect cognitive ability only intermittently. As with cases involving younger defendants who assert mental-health defenses, it is important to investigate the defendant's apparent level of functioning at or around the time of the crime. Did the defendant flee or try to conceal the crime? Was the defendant able to manage her/his own affairs and to carry on lucid conversations with others?

In situations where the investigation shows that the defendant's conduct was, in fact, the result of a medical or psychiatric condition, it may be possible to agree to civil commitment as an alternative to a criminal trial.

Perpetrators of physical abuse or sexual violence who are residents of long-term care facilities and lack the capacity to form the intent to commit the crime are most likely incompetent to stand trial as well. The remedy in those cases may be to move the perpetrator to a different facility or part of the facility that is more secure and more closely supervised.

When faced with a claim of defendant's inability to stand trial to testify, the prosecutor should seek any evidence of diagnosis or ongoing care through the case investigator, APS social worker, or victim and defendant's family. It is often the defendant's family that will alert the prosecutor that the offender is "sick." The family may well provide information about treating doctors, clinics, medications, and involved case managers or social workers. In addition, some defense counsel will provide information and agree to share relevant documentation with the prosecutor. Prosecutors may also want to consider subpoenaing medical records, where appropriate.

It may be helpful to check the court file to see if the custodial agency has asked the court for a medical evaluation. Custodial staff may provide helpful information about the defendant—housed in special unit, suicide watch, transferred to a medical facility or jail ward, write-ups, special instructions when transferring from jail to court, and personal interactions.

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²³⁷ Competency to stand trial generally requires that defendants understand the criminal charges they face; understand that they are in a court of law, that a judge or a jury will decide the issue of guilt, and that an attorney is defending them; and they must be capable of communicating with counsel to assist in their own defense.

I. Overcoming Defenses

Assessment of potential defenses or defense strategies should begin the moment the case is received. Often, a defendant's statement to police or investigators, or the facts and circumstances of the offense, in addition to conversations with defense counsel, will suggest what kinds of defenses may be asserted. Some defenses target the elements of the offense or are affirmative defenses permitted under the criminal code (*e.g.*, self-defense, consent, mistake or necessity). Other "defenses" (more properly, defense strategies) are not "legal" defenses at all, but rather assertions aimed at jury nullification or mitigation. These include strategies that focus on how "difficult" the victim was to care for or that are designed to garner sympathy for the defendant. Often these strategies rely heavily upon jurors' preconceived notions or common stereotypes about the elderly and the perceived difficulty of providing care for them. The most common defenses encountered in elder abuse cases are represented in Table 2 below.

Table 2. Common Defenses by Type of Abuse

TYPE OF ABUSE	DEFENSE
Physical Abuse	<ul style="list-style-type: none"> • Self-defense • Victim fell • Accident • Victim's injuries were self-inflicted • Not abuse but caused by medications, underlying medical conditions, skin breakdown
Sexual Abuse	<ul style="list-style-type: none"> • Consent • Thought there was consent (victim unable to give legal consent) • Victim misinterpreted normal necessary care for sexual abuse (<i>e.g.</i>, harmful genital practices)
Caregiver Neglect	<ul style="list-style-type: none"> • Not the legal caregiver • Even if I am the legal caregiver, this was not my responsibility (<i>e.g.</i>, facility cases) • Caregiver stress • Doing the best I can • Victim's condition due to underlying medical condition, not neglect • Lack of resources • What the victim wanted
Emotional/ Psychological Abuse	<ul style="list-style-type: none"> • No intent to cause suffering • Not the level of conduct required to cause suffering

Financial Exploitation	<ul style="list-style-type: none"> • Consent • Gift • Loan • Quid pro quo (value for services rendered) • Acting within legal authority (e.g., power of attorney, guardian/conservator, trustee)
All Forms	<ul style="list-style-type: none"> • Victim imagined or misunderstood events due to dementia • Identity of the perpetrator • Defendant is not legally responsible (insanity)

Legal defenses, whether countering the elements of the crime or specified as affirmative defenses, require the prosecutor first to establish that the defendant committed the charged acts with the requisite state of mind. As with any criminal case, prosecutors must focus not only on physical and testimonial evidence about the criminal event itself, but also additional evidence to support and corroborate the prosecution's theory of the case and the victim's account (if any) about what occurred, systematically eliminating alternative possibilities about causation and culpability and disproving any affirmative defenses beyond a reasonable doubt.

Consultation with experts (who may be called to testify at trial) will help to determine the plausibility of any possible defenses and experts may also suggest evidence to effectively disprove them. For example, it is not unusual for a defendant to blame the victim's injuries in a physical abuse case on a fall (a common accidental cause of injury among the elderly) or on the victim's susceptibility to bruising due to thinning skin or skin breakdown related to normal aging (also common). A geriatrician may be able to explain that the location or appearance of the injuries is inconsistent with a fall or with normal bruising from accidental contact, as well as provide an opinion as to whether the victim's medical history is consistent with such an explanation (*e.g.*, a history of falls). Experts on injuries and causation should have access to the victim's complete medical record to make an accurate assessment of the victim's condition (including the effects of any prescribed medications) before and after the offense.

Where the perpetrator is also elderly—typically a caregiver-spouse or partner, or another resident of a facility—the offender may assert the defense that s/he is physically incapable of committing the offense, raise a mental-health defense based on dementia due to Alzheimer's or other disorder, or assert a claim of self-defense. Such claims should be investigated, with awareness that jurors may incorrectly assume, based upon stereotypes, that the older defendant is harmless, weak, or unable to lucidly process events. In the case of intimate-partner violence, any history of domestic violence or coercive control will be highly relevant in proving the defendant's intent to harm the victim and disproving the possibility that the act was a product of a mental disability.

In the case of sexual abuse, a caregiver defendant may claim that injuries were received as a result of providing personal hygiene assistance or care to the victim. A professional in geriatric medicine can explain the unlikelihood of accidental genital injury as a result of normal bathing or cleansing. Where the offender is a caregiver-spouse or partner, or another resident of the same facility, a consent defense is likely and that defense may be asserted in other contexts as well. If the victim suffers from dementia or another medical condition or takes medications that can affect capacity to knowingly and voluntarily engage in sexual activity, expert testimony will be required to explain the victim's capacity. Testimony of family and caregivers may also be helpful in establishing the victim's capacity before and at the time of the assault.

Where there is financial exploitation, common defenses include the claim that the victim had authorized the expenditure/use of funds, or that the victim had made a gift to the offender. The victim's capacity to make a gift, to engage in complex financial transactions (where such transactions are at issue), or to be exploited by manipulation or threats should be investigated and explained at trial.

Countering nullification/mitigation strategies by the defense often requires a consistent offender-focused approach, including during *voir dire* and through the use of expert testimony to disabuse jurors of stereotypes and misconceptions about the elderly and the level of care required, and to explain the availability of resources to help caregivers. Others who interacted with the victim in different contexts (physicians, family members, neighbors, etc.) should be interviewed about their knowledge of *this* victim and her/his physical and mental capabilities, activities and interests, principles and desires, and relationship with the abuser. Prosecutors, at all times, should focus the jurors' attention on the defendant's actions rather than on the victim's behavior; however, false or inaccurate defense claims about the victim should be refuted where possible. The focus can be returned to the offender by demonstrating a lack of effort on the part of the defendant to obtain assistance with caregiving responsibilities.

Because "research has found that in most cases of elder abuse [committed by partners, family, and others in trusted relationships with the victim] the abuser-victim dynamic is more like the traditional domestic violence model" based on power and control,²³⁸ rather than "caregiver stress," such claim has no more validity in elder abuse or neglect cases than it does in domestic violence cases. The offender's failure to take simple actions to care for the victim, or to request assistance from any of the multiple sources of caregiving help, can be highlighted. Prosecutors should note that additional or different dynamics may exist in financial and other abuse cases where the abuse is committed by non-related advisors, fiduciaries, and others. Financial motivations for neglect (*e.g.*, improper diversion of financial resources for the benefit of the offender) should also be developed where those appear to be present. Additionally, actions by the offender to socially isolate the victim, which may result in long periods before abuse is detected, may be highly relevant to intent.

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J. Trial

1. Jury Selection

The goal of *voir dire* in elder abuse cases is to select a jury that will be able to fairly hear and understand the evidence of the crime (*e.g.*, financial exploitation, physical abuse/neglect, or sexual violence), and that will be able to collectively listen to, evaluate, and credit evidence from elderly persons fairly and objectively without allowing personal biases, experiences, and preconceived ideas to influence their decisions. Jurors, whether older or younger adults, may harbor harmful stereotypes about older adults²³⁹ and make assumptions based on age and beliefs that older witnesses are less credible than younger witnesses. Some jurors are uncomfortable with or resistant to the notion of older people engaging in sexual activity or find it difficult to accept that older people can be victims of sexual abuse. In addition, jurors may carry "personal baggage" from their own experiences with parents, grandparents, or other older adults in their lives.

Prosecutors should explore jurors' attitudes about age and credibility and should consider whether they believe that dementia is a normal part of getting older or that caregiving is so difficult it is understandable or justifiable

²³⁸ BRANDL, ET AL, *supra* note 15.

²³⁹ See, *e.g.*, HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* (University Press of Florida 2004); see also Olivia M. Wong, *Book Review: Elders on Trial: Age and Ageism in the American Legal System*, 6(2) MARQUETTE ELDER'S ADVISOR 361-80 (2005).

that a caregiver would hit or neglect an older person in her/his care. Others jurors may be afraid of growing old and facing death, allowing such feelings to affect their objectivity. They may objectify victims or distance themselves from what has happened in this case to protect themselves from emotional harm. Unless the prosecutor is able to overcome myths and stereotypes about elderly people, there is a real chance that the jury will be unable to objectively and reasonably assess victim credibility and the case evidence.

The other purpose of *voir dire*, of course, is to use it to educate the jury. Through carefully crafted questions, it is possible to elicit juror responses that will educate the others about issues that may be important in the trial. Some prospective jurors, for example, may be overly sympathetic to caregivers who are charged with abuse or neglect, based upon their own experiences caring for older loved ones, or their fear of someday having to do so. They may be sympathetic to defense arguments that the defendant was “doing the best s/he could,” that the defendant was overworked and exhausted from caring for an ungrateful father who had abused him/her as a child, or that the victim simply refused to allow anyone to touch, bathe/groom, or feed her/him. By asking questions of those who have cared for older people, who have friends or relatives who have done so, or who have considered what such care would involve, the prosecutor can elicit suggestions about other ways a stressed caregiver can deal with caregiving responsibilities. Asking about whether anyone has ever discussed long-term care with an older relative may elicit responses about the older relative’s fear of being placed in a nursing home, or the relative’s desire to remain in her/his own home, which will help the other jurors to understand the victim’s fears about reporting abuse. During *voir dire*, prosecutors should also be prepared to respond to defense suggestions/questions that reinforce harmful stereotypes.

Voir dire questions should be tailored to the facts of the case. Some general questions about attitudes toward older people, and about various types of elder abuse and neglect, can be found in Appendix B.

2. Opening Statement

The prosecutor’s opening statement should continue with the themes introduced during *voir dire*, preview the prosecutor’s theory of the case, and outline the evidence s/he anticipates introducing at trial. The opening statement is an opportunity to set the stage for what is to come—the case theory, case theme, key parties, and important facts and evidence told in a way that engages the jurors and tells them what to listen for and what evidence merits special attention—so that such evidence will not pass unnoticed.

As with all opening statements, the prosecutor should avoid predicting what the defense will claim (unless the prosecution’s case-in-chief will introduce evidence of that claim such as through a statement by the defendant). It is usually preferable to generalize what the victim’s testimony will be (*e.g.*, “Mr. Smith will tell you about his relationship with his son and about what happened on that day”) rather than promising that the victim will testify in a certain way, only to have the victim testify differently or be unable to testify at all. If the victim or other key witnesses are definitely not available to testify, the prosecutor’s opening statement should tell the jury that they will not be testifying, and, if permitted by the court, should preview what evidence will be presented to explain their absence. The opening should focus primarily on the other evidence in the case that will prove defendant’s guilt.

The opening statement should place the crime, and the evidence the prosecutor anticipates to be introduced at trial, into context so that the jury will understand the significance of each piece of evidence as it is received at trial. This includes presenting evidence of acts of financial, physical, or sexual abuse in the context of any intimidation that has occurred. When intimidation issues are emphasized in the opening statement, the jury can be on the alert for that evidence as it comes in at trial and can be prepared to put the pieces together at the time of summation.

The opening should also mention any case weaknesses as well as any “negative facts” about the victim or other witnesses. If the witness is soft-spoken or is difficult to understand because of a medical condition, for example, the jury should be prepared. If the victim is reluctant to testify against a child or trusted advisor, if permitted by the court, this is the time to clarify that it is the prosecutor who is bringing the case and s/he will ask the jury to return a guilty verdict if s/he has presented sufficient evidence to prove the defendant’s guilt beyond a reasonable doubt.

3. Examination of the Victim

Determine from the victim, and perhaps APS with input from caregivers, the best time of day for her/his testimony. Some victims, for example, may be more comfortable testifying early in the morning, and may also feel better and more alert if they have eaten prior to trial. In advance of trial, spend time preparing the victim for the trial – both for the testimony itself and the in-court process. Make sure to arrange for any needed accommodations and transportation to and from court.²⁴⁰

Deciding when to call the victim during the case is a matter of trial strategy (balanced with what works practically with the victim’s own schedule). It may be a good approach to set the scene and provide supportive testimony through other witnesses first. Calling the victim after others who have described what preceded the charged event can prepare the jury for the victim’s testimony by first providing context about the victim, the perpetrator, and the crime.²⁴¹ The earlier introduction of such testimony may make it easier for the jury to then understand the victim’s reluctance, behaviors, or reactions.

As with other cases and witnesses, direct examination of an older victim should be tailored to the victim’s ability to understand, process, and respond to questions. If the victim has cognitive limitations, avoid complex and lengthy questions. Consider breaking down questions into a series of shorter questions. If the witness is fearful or has hearing problems, ask the court’s permission to move closer to the witness stand so it is easier for the victim to hear you. Standing between the witness stand and the jury box will also allow the elderly witness to avoid having to continuously look directly at the defendant.

Monitor the victim’s level of energy and attention. In advance of testimony, alert the court to the possible or likely need for more frequent breaks for the victim to use the restroom, to take medications, to replenish oxygen, or to rest. Consider requesting a short recess between direct and cross-examination to give the victim a chance to use the restroom, have a quick snack, and regroup.

During cross-examination of the victim, be alert for any signs that the victim is becoming distressed, confused, or tired, but intervene only if necessary. It is usually preferable to conclude the witness’s testimony in a single day, when possible.

4. Cross-Examination of the Defendant

Many defendants will testify in elder abuse cases. Many do not have criminal histories and will want to bring out that they loved and cared about the victim, the stresses of caregiving they faced, their belief in the need for self-defense, that they acted within the scope of their authority, or that the victim gave them consent to do what they did.

²⁴⁰ See, e.g., Colorado Judicial Department, Access to Courts: A Resource Guide to Providing Reasonable Accommodations for People with Disabilities for Judicial Officers, Probation and Court Staff (2007), <http://www.hearc.org/file/ADAresourceguide.pdf>.

²⁴¹ E.g., The first responders who came to the scene, people who can introduce the victim as s/he was before the defendant entered the victim’s life or before critical incidents, and even some witnesses who analyzed important evidence.

Prosecutors can challenge these defenses on cross examination. For example, in a neglect case where the defendant is the adult child of a victim and is asserting s/he did the best they could, prosecutors may want to conduct a “soft cross” by playing into the narrative and taking the opportunity to point out all of the things they *did not do*, the people they *did not call*, and the resources they *did not reach out to*, etc.

Defendants will try to position themselves as benevolent providers of care for the victim, so taking time to talk to the victim and to other witnesses in advance about what they think the defendant will say should provide a road-map for points on which to cross. For example, in a neglect case, the defendant may admit that s/he knew that the victim was confused or ill and required care, and the nature of that care. In a financial abuse case, the defendant may admit that s/he was the agent for a power of attorney and with that authority moved money around to new accounts and made certain purchases with the elder’s money.

Cross-examination is an opportunity for the prosecution to rebut defense arguments, including that the victim fabricated the incidents leading to the defendant’s arrest by bringing out that the victim had no motive to lie, as the defendant was her/his primary caregiver.

5. Closing Argument

Closing is the time to return to the case theory and theme(s) introduced in *voir dire* and the opening statement to show how the evidence fits together and meets the legal elements of the charged crime(s). Arguments must be clearly made that the offender is guilty of the charged elder abuse crime(s) and often this is where a prosecutor must win both the hearts and the minds of the jurors. Where exhibits and testimony are introduced from a variety of witnesses, it is key to use this opportunity to organize for the jury the evidence presented and clearly articulate how each piece establishes not only the elements of the charge, but also how the defendant preyed upon a vulnerable older adult. It is also a chance to tell the story more than once—the first recitation focusing on the “story” from the witnesses; the second describing what must be proven and how it was proven through each witness and piece of evidence.

If the victim made a particularly important statement, mention it and highlight it in writing or on a PowerPoint slide. For example, in a case in which undue influence was used to obtain consent, the question, “If you had known all of this (everything the defendant hid, did not disclose, or lied about), would you have signed the document/the power of attorney/or agreed to the business transaction?” Answer: “No way, I still cannot believe that my nephew betrayed my love and trust.” That answer is so powerful and central to the prosecution’s case that it needs to be emphasized during closing and again on final summation.

Using that response as a theme, the closing could then focus on all how each of the defendant’s acts or omissions undermine the defense claim that he loved his aunt and could never have taken advantage of her. Afterwards, the case theme of “betrayal of love and trust” will hopefully continue as a theme during jury deliberation.

Closing should address and overcome any defenses raised. A prosecutor may challenge the legality of the defense, or argue how it does not fit the facts as proven or does not raise a reasonable doubt about the prosecution’s proof. For example, in a neglect case where the defendant claims s/he did the best they could, if the evidence establishes that the victim was suffering, was in pain, and had obvious pressure ulcers and dehydration, and defendant did nothing to seek care but instead spent the final days of the victim’s life playing cards with friends, listening to music through a head set, and playing online games, it would be appropriate to argue that the defendant did not raise a legal defense. The defendant’s actions are inconsistent with a claim of providing adequate care, and do

not create doubt about the prosecution's proof. If the defendant also claimed that he loved his mother and would never do anything to harm her but his actions show that he was pursuing his personal enjoyment over his mother's well-being, that could be the basis for the argument that his acts were not those that demonstrate love for his mother. In financial abuse cases, if the defense is that the defendant acted within the scope of her/his authority, the prosecution can counter by showing that many of the expenses benefitted the defendant (such as paying off the defendant's mortgage and credit cards), exhausted the victim's resources leaving her/him without money for the rest of her/his life, and were inconsistent with earlier spending patterns of the victim.

Some elder abuse cases can be highly emotional for both the jury and the prosecutor. Be cautious about asking jurors to put themselves in the victim's position. Such remarks can be considered improper appeals to sympathy, and thus, prosecutorial misconduct. However, there is nothing wrong with asking the jury to imagine how *this* victim probably felt, considering the circumstances (*e.g.*, the history of abuse and recognition that the perpetrator was her/his child, embarrassment of having been misled and conned by a trusted advisor, shame at not recognizing that the defendant's claims of love and devotion were bogus, fear that if the victim told anyone s/he would be forcibly placed in a nursing home), and fears about coming to court and testifying against the defendant. Such arguments are based upon reasonable inferences that can be drawn from the evidence.

If any evidence of witness abuse, manipulation, or intimidation and/or the effect of such acts on the witness was presented during the trial, those should be reviewed. With a proper foundation, these acts can be admitted and argued as consciousness of guilt²⁴².

6. Jury Instructions

Prosecutors should review patterned jury instructions that may be relevant in the elder abuse case. Any instructions that address evaluating the credibility of a victim or witness with a disability or that address proper consideration of testimony from a witness who relied on assistive technology to communicate should be considered. If the victim did not testify, evaluate whether an instruction to not draw any conclusions about why the person did not appear is needed. If the defendant is elderly or has physical or cognitive deficits (that do not raise a defense such as diminished capacity or inability to form intent), it may be important to seek an instruction about not being swayed by passion or sympathy for a party.

Cautionary or limiting instructions may need to be drafted whenever evidence is admissible only for a limited purpose, such as to prove other crimes, wrongs, or acts under Fed. R. Evid. 404(b) or the jurisdictional equivalent. These limiting instructions should be given at the time the evidence is admitted, and again at the time of the final jury charge. Such instructions will substantially reduce the risk of any unfair prejudice, and thereby reduce the risk of reversal on appeal based upon the possibility that the jury considered the evidence for any improper purpose.

For other crimes, wrongs, or acts evidence, it is best to request a restrictive limiting instruction that directs the jury to consider the evidence only as proof of knowledge or intent, absence of mistake, or for some other permitted purpose, and not as evidence of the defendant's bad character. To the extent that evidence of intimidation is admitted on the issue of consciousness of guilt, the instruction should be drafted like a standard instruction regarding

²⁴² Witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt; *State v. Edwards*, 383 S.C. 66, 678 S.E.2d 405 (2009); *See also United States v. Hayden*, 85 F.3d 153, 159 (4th Cir. 1996)

evidence of flight.²⁴³ Typically, such an instruction tells the jury to decide whether the conduct occurred and, if so, to decide whether the conduct indicates a consciousness of guilt or whether it has an innocent explanation.

If hearsay statements of an unavailable witness were admitted under the doctrine of forfeiture by wrongdoing, a jury instruction on how the jury is to consider such evidence is also advisable.

7. Verdict

Prosecutors should plan to spend time with the victim explaining and discussing the verdict. The victim should be reassured that a “not guilty” verdict does not mean the jury or court disbelieved the victim, that resources and services will continue to be provided, and that efforts to enhance victim safety will continue.

If the trier of fact returns a guilty verdict on one or more charges, explain the sentencing proceeding to come, and how the victim can participate. If the victim objects to a jail or prison sentence being imposed against the defendant, assure the victim that s/he can tell the judge what the victim wants to have happen (although it should be stressed that the court will do whatever it feels is appropriate under all of the circumstances). A victim-witness assistant or victim advocate can assist the victim in preparing a victim-impact statement for the court’s consideration.

The prosecutor or advocate should tell the victim that the probation department is likely to contact the to ask their input, gather contact information, and collect any documents that may need to be reviewed. For example, if there is restitution required, the probation department may need receipts for medical and other care, documentation of losses, pay records for lost employment, and records of other expenses such as repairs to property, legal fees, costs to repair credit, and costs to repair or replace glasses and assistive devices.

8. Sentencing

In some jurisdictions, the prosecutor can prepare a comprehensive sentencing memorandum for the court detailing the sentence the prosecutor recommends, including a complete analysis of all relevant sentencing factors—particularly any statutory aggravating and mitigating factors (*e.g.*, vulnerability of the victim, abuse of a position of trust). The prosecutor should account for any mandatory penalties or consequences (such as sex offender or elder abuse registration) that may accompany a conviction for elder abuse, domestic violence, or sex crimes. Restitution is extremely important to most elder abuse victims, especially in financial abuse cases, but also in other cases where the victim was forced to incur expenses as a result of the crime. If any assets possessed by the defendant have been the subject of a seize and freeze civil action, the court can order that those assets be used to pay restitution, once the civil proceedings are completed.

Sentencing in an elder abuse case should attempt to enhance the victim’s safety and restore to the victim what has been taken through restitution and other court orders, protect the community from further criminal conduct, and hold the offender accountable. This may be especially difficult in an elder abuse case due to the relationship between the parties, dynamics of the relationship, and likelihood that the victim, if still alive, may have decreased life expectancy from the impact of the abuse.²⁴⁴

Some older victims may want to have continued contact with the abuser. The prosecutor should consider whether there are ways to permit contact, either immediately or after defendant has completed certain conditions (*e.g.*, a

²⁴³ Contact AEquitas 24/7 for assistance drafting jury instructions.

²⁴⁴ DONG, *supra* note 29; LACHS ET. AL., *supra* note 181.

certain number of counseling sessions or payment of a certain amount of restitution), and how the court can balance victim safety with the desire for contact. The prosecutor may want to recommend that the visitation be supervised and, at least initially, that it be limited to specific times and dates. Prosecutors may also want to recommend that visitation be conducted in a public place, either for a stated period or for the length of the court's jurisdiction.

If probation is appropriate, the prosecutor should make recommendations about whether it should be supervised by the probation department. Reasons for seeking supervised probation may include ensuring that the defendant is complying with court orders without having to require the victim to initiate reports of problems; verifying that defendant is paying restitution; ensuring that the defendant is enrolled in counseling or batterer's intervention programs and attending as directed; overseeing any drug or mental health treatment; and communicating to the defendant that the court, and not the victim, is supervising the case.²⁴⁵

If the defendant is a licensed professional, consideration should be given to requiring that s/he surrender her/his license and cease any employment for which the license is required for the period of probation. The court may also be asked to order that the defendant cooperate with any investigation conducted by the defendant's professional licensing and/or disciplinary agency.

The prosecutor should consider the value of requesting monitoring or compliance hearings to ensure that defendant is complying with the terms of the court's sentence.

PRACTICE NOTE: SENTENCING OF ELDERLY DEFENDANTS

If the defendant is also elderly, there is likely to be pressure not to incarcerate even if a similar crime by a younger person would receive a jail or prison term. Courts may be inclined to impose shorter probation periods because of the defendant's age or the victim's age and health.

If the older defendant has dementia or other significant medical conditions, the prosecutor may want to encourage the court to evaluate the defendant's capacity to understand, participate in, and benefit from group counseling or batterer's intervention programs based on a group counseling model. The prosecutor should look at whether the defendant is able to control her/his behavior, and if not, what interventions or orders are sufficient to meet both the defendant's need for supervision and the victim's and society's need to be protected. S/he should also assess whether there is a need for a psychiatric or medical evaluation, and address whether the defendant needs a protective placement such as a conservatorship or guardianship.

Prosecutors should be aware that there are no studies evaluating whether placing an adult child in a batterer's intervention program is helpful or whether placing an elderly batterer in a program designed for younger abusers is appropriate. Few communities have specially designed probation and counseling programs for elder abuse offenders.

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²⁴⁵ JUDICIAL COUNCIL OF CALIFORNIA, JUDGES GUIDE: ABUSE IN LATER LIFE 12-63 (2015), <http://www2.courtinfo.ca.gov/protem/pubs/dv-elders.pdf>.

CONCLUSION


Prosecutions for elder abuse, neglect, and exploitation are difficult and often present unique challenges, but involvement in these cases is critical to protecting victims and the community, and holding offenders accountable. Prosecution efforts on behalf of abused, neglected, and exploited elders and vulnerable adults may be the only appropriate way to protect the community from those who take advantage of frail and often invisible victims and give them a voice. Prosecutors who approach that responsibility with willingness, respect, and a spirit of cooperation and service will be rewarded with the knowledge their efforts can make a difference in the justice and quality of life for older adults.

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APPENDICES

A. Expert Testimony Chart

Reprinted with permission from Brenda K. Uekert, et al., National Center for State Courts, Prosecuting Elder Abuse Cases: Basic Tools and Strategies, <https://www.bja.gov/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf>.



ALL CASE TYPES

TYPE OF EXPERT	PURPOSE	SOURCES
MENTAL HEALTH EXPERT <i>psychologists, psychiatrists, others with geriatric expertise</i>	Assess mental capacity, social functioning, undue influence, mental health disorders	Universities, practice settings, clinics, medical schools, community health care
APS WORKER	Prior allegations against suspect, service plans offered to suspect and victim, cognitive status of victim, statements made by suspect and victim	Adult Protective Services agency
ADVOCATES	Assess and refer for services needed	System-based (victim-witness coordinators, victim advocates) and/or community-based (domestic violence, sexual assault, elder abuse)
JURY CONSULTANT	Assess strengths and weaknesses of case, advise as to preferred jurors and questions to ask in voir dire	Private practice
EXPERT IN DYNAMICS OF ELDER ABUSE AND NEGLECT	Explain dynamics to judge and jury	System-based and community-based advocacy agencies, universities, Adult Protective Services agency
EXPERT IN ANIMAL ABUSE	Links between animal and elder abuse; tactics of manipulation and coercion	Humane Society or animal control agency, veterinarian



PHYSICAL ABUSE

TYPE OF EXPERT	PURPOSE	SOURCES
GERIATRICIAN <i>(MD with geriatric training); internist, cardiologist, other physician or gerontologist</i>	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression	Medical clinics, medical societies, medical schools, hospitals, geriatric centers
TREATING PHYSICIAN	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression	Victim's primary care physician
PHARMACIST, PHARMACOLOGIST	Medication interactions and effects	Pharmacies, medical schools, pharmacy schools, hospitals, pharmaceutical representatives
PATHOLOGIST	Description of injury, degree of harm, cause and manner of injury/death	Medical examiner's/coroner's office, hospitals, private practice
NURSE <i>(may specialize in wound care, in-home care, geriatrics)</i>	Description of injury, standard of care/wound care, evidence of improper care, cause of injury, degree of pain	Private practice, nursing association, hospitals, nursing schools, medical clinics, hospice
DIRECTOR OF NURSING/ NURSE INVESTIGATOR	Standard of care in facilities, evidence of non-compliance, history of improper care, review of medical records	Local care facilities, nursing schools, state facility licensing agencies, Medicaid Fraud Control Unit (MFCU)
APS WORKER	Prior allegations against suspect, service plans offered, cognitive status of victim, statements made by suspect and victim	Adult Protective Services agency
OCCUPATIONAL, SPEECH, OR PHYSICAL THERAPIST	Identification of injury, appropriate course of treatment, progress in treatment	Service agency, clinics, private practice, hospitals
HOSPITAL DISCHARGE PLANNER	Care instructions given and referrals made to caregiver, statements and conduct of victim and caregiver	Hospitals
OPHTHALMOLOGIST, OPTOMETRIST	Identification and description of vision-related injuries	Optometry associations, private practice, hospitals
DENTIST	Cause and mechanism of force (when injury occurs to mouth)	Dental associations, private practice, dental clinics



SEXUAL ABUSE

TYPE OF EXPERT	PURPOSE	SOURCES
SANE/SART (<i>Sexual Assault Nurse Examiner/Sexual Assault Response Team member</i>)	Examination and collection of evidence, description of injury, victim statements and impact	Hospitals, International Association of Forensic Nurses
GERIATRICIAN (<i>MD with geriatric training</i>); internist, cardiologist, other physician or gerontologist	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression	Medical clinics, medical societies, medical schools, hospitals, geriatric centers
TREATING PHYSICIAN	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression	Victim's primary care physician
PHARMACIST, PHARMACOLOGIST	Medication interactions and effects	Pharmacies, pharmacy schools, medical schools, hospitals, pharmaceutical representatives
PATHOLOGIST	Identification and description of injury, degree of harm, cause and manner of injury/death	Medical examiner's or coroner's office, hospitals, private practice (state medical association)
ANESTHESIOLOGIST OR NURSE ANESTHETIST	Effect of any drugs administered, appropriate dosage	Hospitals, private practice
NURSE (<i>may specialize in wound care, in-home care, geriatrics</i>)	Description of injury, standard of care, evidence of improper care, cause of injury, degree of pain	Private practice, nursing association, hospitals, nursing schools, medical clinics, hospice
DIRECTOR OF NURSING/ NURSE INVESTIGATOR	Standard of care in facilities, evidence of non-compliance, history of improper care, review of medical records, progress in treatment	Local care facilities, s state facility licensing agencies, Medicaid Fraud Control Unit (MFCU)
APS WORKER	Prior allegations against suspect, service plans offered, cognitive status of victim, statements made by suspect and victim	Adult Protective Services agency
GERIATRIC OR FORENSIC PSYCHIATRIST OR PSYCHOLOGIST	Capacity to consent, undue influence	Private practice, hospitals, universities
COUNSELOR, THERAPIST (<i>only with victim's or guardian's informed consent</i>)	Impact of assault on victim, prior interactions between victim and suspect, victim's statements	Private practice, hospitals, social services agencies, mental health clinics



FINANCIAL ABUSE

TYPE OF EXPERT	PURPOSE	SOURCES
APS WORKER	Prior allegations against suspect, service plans offered, cognitive status of victim, statements made by suspect and victim	Adult Protective Services agency
BANKER, ACCOUNTANT, FORENSIC AUDITOR/ ACCOUNTANT, TAX ATTORNEY	Fiduciary duty, accounting principles, accounting of victim's and suspect's assets and expenditures, financial timeline/ comparison of assets and change over time, information on impact of financial issues and gifts/loans on tax laws and Medicare eligibility	Banks, private practice, universities, local chapter of Certified Fraud Examiners
GERIATRIC OR FORENSIC PSYCHIATRIST OR PSYCHOLOGIST; NEUROPSYCHOLOGIST	Victim's capacity to consent (can also assess capacity in past), ability to make informed decisions, susceptibility to undue influence	Private practice, hospitals, universities, clinics
ELDER LAW OR OTHER CIVIL ATTORNEY	Prior proceedings in the case, capacity to consent, fiduciary duty, standard of practice	Private practice, elder law section of bar association
PROBATE INVESTIGATOR OR EXAMINER	Prior proceedings in the case, evidence that was not admitted in the probate court but might be admissible in criminal court, prior accountings, information or training provided to guardian or conservator regarding duties, other interested parties (possible witnesses), statements by elder, observations of elder's condition	Court (probate or whichever court handles these issues in your jurisdiction)



NEGLECT

TYPE OF EXPERT	PURPOSE	SOURCES
WOUND CARE NURSE	Identification and description of wound/injury, causation, standard of care, instructions given to suspect, degree of pain associated with injury	Hospitals, clinics, nursing schools
VISITING OR HOME HEALTH NURSE	Identification of injury, evidence in the home, standard of care for home treatment, standard of nursing care	Private practice, nursing association, hospital
GERIATRICIAN (<i>MD with geriatric training</i>); internist, other physician or gerontologist)	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression, standard of care	Medical clinics, medical societies, medical schools, hospitals, geriatric centers
TREATING PHYSICIAN	Identification and description of injury, degree of harm, cause of injury/death, disease symptoms and progression, instructions given to suspect, statements made by suspect and victim	Victim's primary care physician
PHARMACIST, PHARMACOLOGIST	Medication interactions and effects	Pharmacies, medical schools, pharmacy schools, hospitals, pharmaceutical representatives
PATHOLOGIST	Identification and description of injury, degree of harm, cause and manner of injury/death	Medical examiner's or coroner's office, hospital, private practice (state medical association)
DIRECTOR OF NURSING/ NURSE INVESTIGATOR	Standard of care in facilities, evidence of non-compliance, history of improper care, review of medical records, progress in treatment	Local care facilities
APS WORKER	Prior allegations against suspect, service plans offered, cognitive status of victim, statements made by suspect and victim, identification of caregiver in past contacts	Adult Protective Services Agency

B. Sample Voir Dire in Elder Abuse Cases

“The jury selection process is the first opportunity for a prosecutor to begin educating jurors ... and allows prosecutors to identify and strike jurors whose biases will interfere with their ability to follow the law and render a fair verdict.”²⁴⁶ Asking questions that specifically address jurors’ ideas about elderly persons, providing care to an older person, the involvement of the criminal justice system when a family member has harmed a relative, the prosecution of a person who has “helped” the victim at other points in time, a minimizing or recanting victim, or an unavailable victim will help prosecutors select jurors who are open-minded and will listen to the evidence and apply it to the law. The below questions are designed as a starting point for a prosecutor who is going to develop her/his own questions.

Please contact AEquitas for additional support on issues related to *voir dire* at <http://www.aequitasresource.org/taRegister.cfm> or at (202) 558-0040.

Elder Abuse

- Does the subject of elder abuse, or crimes committed against the elderly or infirm, cause you to have concerns about being able to sit as a fair and impartial juror?
- Does anyone think neglecting someone is less serious than assaulting someone? Why or why not?
- Would you be able to listen to the testimony of an elderly or person with a disability, and give it the same credibility you would to any other witness?
- Do you have any concerns about listening to the testimony of, or about, someone with a medical condition that may appear different or unusual to you?
- Do you have any concerns about listening to the testimony of, or about, someone with a medical condition such as a mental disorder or psychiatric condition?
- Have you or a close friend or relative ever been the victim of an elder abuse or domestic violence incident, even if it didn’t result in a criminal charge?

Family Violence

- Have you ever had a conflict with someone in your family? Have you ever had what you considered to be a significant conflict with a family member?
- Are there any circumstances you can think of in which physical force against a family member might be justified? Under what circumstances would it be justified?
- Should the criminal justice system treat an assault by a family member differently from an assault by a stranger? Examples where it would be appropriate?
- Have you ever known someone victimized by a family member?
- Have you ever known an elderly person who was victimized by a family member?
- Have you or a close friend or relative ever been accused of an elder abuse or domestic violence incident?
- Did the incident result in a criminal charge?
- Do you believe that physical force or violence by one spouse against the other should be treated as a crime?
- What about physical abuse or violence by a child or grandchild against a parent or grandparent.
- Should the police get involved when such incidents occur?
- What if both spouses in a domestic violence case are elderly—should that change the response by law enforcement?
- What if, instead of a spouse assaulting a spouse, the situation is a caregiver who strikes an elder—should that make a difference?

²⁴⁶ Christopher Mallios & Toolsi Meisner, *Educating Juries in Sexual Assault Cases, Part I: Using Voir Dire to Eliminate Jury Bias*, 2 STRATEGIES (July 2010), available at www.aequitasresource.org/library.cfm.

- What if, instead of a spouse assaulting a spouse, the situation is a son/daughter who strikes an elder—should that make a difference?
- Can you think of reasons why an elderly person might not want to report abuse by a family member, family member, or trusted other to law enforcement?
- Can you think of reasons why an older victim of abuse (or neglect) would not want to testify against a spouse, son/daughter, other family member, significant other? What might some of those reasons be?
- Do you think that fear of retaliation by the defendant or other family members might make a victim or witness reluctant to testify? (Use ONLY if you have admissible evidence of threats or intimidation.)

Misconceptions About Older Adults

- What are some of the physical or mental changes that people experience as they age?
- Does everyone age in the same way, and at the same rate?
- Can you assume anything about someone's capabilities or physical or mental condition based on her/his age alone?
- What are some of the good things about getting older?
- What are some of the things that might be unpleasant or frustrating about getting older?
- Is the premature or preventable death of an older person less tragic or important than that of a younger person?
- What do we, as a society, owe to older citizens?
- Do you think that a person might intentionally target an older victim for a crime in the belief that such a person could be easily victimized, might not be believed, or might be blamed for the crime?
- Do you have a loved one living in an assisted living facility or nursing home? How do you feel about that? (Expect answers such as "guilty," "worried," and/or "relieved." Follow up on these answers by asking more pointed questions about their feelings.) What kind of care do you expect from the providers at the facility?
- Have you ever known an elder who was physically, financially or emotionally abused? Neglected?

Caregiver Issues

- Whose job is it to care for an elder who needs care?
- Is it any one person's responsibility?
- Have you ever provided care for a relative/elderly person/person who could not care for him or herself?
- What was that experience like?
- Describe a typical day as a caregiver. For what purpose or special need did the person need care?
- Did you have any assistance or additional resources? Did you use an in-home caregiver or hospice services?
- How did the caregiving relationship come to an end?
- Did you ever find yourself getting angry or overwhelmed by the caregiving responsibilities?
- What did you do in response to those feelings?
- Have you ever been cared for by a non-professional caregiver?
- Do you have elderly parents living with you currently, or did you in the past?
- Do you anticipate having your parents come live with you in the future?
- Have you ever had professional help from a caregiver for yourself, a close friend, or family member?
- Was that experience positive or negative?
- What was negative about the professional caregiver's time with you?
- Who was responsible for the negative aspects of that time? Why?
- Have you ever been stressed when performing caregiver duties?
- What did you do when you got stressed out in response to your caregiving duties? (Use with caution.)
- What techniques did you use to take care of yourself during your most stressful times?

- Has anyone on the panel heard of caregiver stress? What is it?
- What are some ways that a caregiver can appropriately deal with that stress?
- If the person being cared for is rude or mean to the caregiver or others, what can a caregiver do in response? (Use with caution when applicable.)
- Have you ever disciplined a child? How did you do so?
- Would you discipline an elder in the same manner?
- Do you think it is acceptable to use physical force to control someone being cared for when things get difficult? Why/why not? (Need to follow-up/engage with jurors on this question.)
- Does anyone believe that caregivers are underpaid or underappreciated for their work?
- What should be the solution to the problem of underpayment or underappreciation?
- Should the caregiver be permitted to compensate him/herself as a reward for providing care? (Getting at loans, gifts, or bonuses alleged to have been taken from the victim that weren't lawful.)
- Have you held a power of attorney or any other legal document permitting you to handle someone else's financial or medical affairs?
- What if an elderly person hires an accountant to handle his/her finances? After that, the elderly person starts gifting the accountant large sums of money. Is anything wrong with that? Can the accountant just take as much as the elderly person wants to give him/her?
- Have you ever had to take responsibility for an elder relative's or friend's finances?
- Were there any disputes, either with the person whose property you were managing or with other family members? What happened?
- Add questions about consent (*e.g.*, agree we can give away our things as long as we understand what we are doing and act with full knowledge of what we are doing, and a coerced or deceived. Not legal consent if we are lied to or manipulated so we are not acting freely or using the exercise of our own free will (independent judgement).

General Questions That May Be Significant in Elder Abuse Cases

(If victim's cognitive impairment is at issue)

- Are you familiar with the term [INSERT RELEVANT TERM(S) INDIVIDUALLY, *e.g.*, dementia.] What does this term mean?
- Have you ever known anyone with [INSERT TERM]?
- Can a person with [INSERT TERM] accurately explain what happened to him/her during a period of time or during an incident?
- Would you be more likely to believe (or disbelieve) a person with [INSERT TERM] because s/he had been diagnosed with [INSERT TERM]?
- How did you know the person?
- What was that person like?
- Was the person able to communicate? Perceive with all senses?
- [Describe victim/witness's impairment.] Would any of the described impairments affect your opinion of the victim's credibility?

(If victim's capacity to consent is the theory of the case)

- A [INSERT TERM(S) THAT APPLY TO VICTIM IN CURRENT CASE] means [INSERT DEFINITION THAT APPLIES TO INCAPACITY]. Have you ever known anyone with a [INSERT RELEVANT TERM(S)]?
- How did you know the person?
- What was that person like?
- Was the person able to communicate? Perceive with all senses?
- *(If the victim is reluctant/recanting)*
- Have you ever felt fear or concern when faced with a new or different situation, such as testifying in court?
- If a victim does not testify in court, but there is other evidence of the defendant's guilt, would you be able to find a defendant guilty beyond a reasonable doubt?
- Do you believe that someone reluctant to testify in court must have been untruthful/lying when the crime was first reported?
- Can you think of reasons why someone who was the victim of a crime might lie to protect the perpetrator?
- Do you believe that the State should prosecute a case even when the victim may not desire prosecution? Why/why not?
- What are some reasons why a victim might not want a case prosecuted? If the victim is elderly, does that bring to mind any additional reasons?
- I believe the judge will instruct you [summarize jury instruction as to circumstantial vs. direct evidence]. Can each of you follow the judge's instruction and find someone guilty based upon persuasive circumstantial evidence alone? [Examples include kid with broken cookie jar, snow on ground, etc.].

(If the juror is religious)

- Do you understand that you are being asked to judge whether the State has introduced evidence to prove beyond a reasonable doubt that certain actions committed by the defendant constitute certain crimes?
- Do you have such a strong opposition to judging others that you couldn't sit on this case?
- If the victim has forgiven the defendant, should the State still prosecute the defendant for those crimes?

(If jury nullification will be an issue)

- Will you accept the law as the judge gives it to you? Will you follow the judge's instructions as to the law?
- If you find that an explanation or excuse for certain behavior is convincing, but the judge instructs you that the law does not allow that explanation or excuse, can you follow the judge's instructions to disregard the explanation or excuse?
- Do you feel that you look at someone and know what s/he is capable of?
- Can you recognize a child molester, for example, just by looking at him/her? Why/why not?
- What about someone who seems to be very nice, who doesn't look like a criminal. Is that person less likely to commit a crime than someone who fits the stereotype of what a "criminal" might look like?
- What if you sit as a juror on this case, and something happens in the trial that makes you feel sorry for either the victim or the defendant? Is that something that you should take into account when you deliberate? Why or why not?
- You are in jury deliberations, and you find yourself feeling sorry for one of the people involved. What do you do? Do you allow it to be part of your reasoning in reaching your verdict? Why is it that we can't allow sympathy to be part of our deliberations?

C. Additional Resources

This Appendix provides a non-exhaustive list of organizations that work on issues that impact the investigation and prosecution of elder abuse cases. These organizations can provide additional information, assistance, and resources to prosecutors handling these cases.

AEQUITAS, www.aequitasresource.org/library.cfm.

Commission on Law and Aging, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/law_aging.html.

Elder Abuse Courts, CALIFORNIA COURTS, <http://www.courts.ca.gov/5981.htm>.

CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/>.

Nursing Response to Elder Mistreatment Curriculum, INTERNATIONAL ASSOCIATION OF FORENSIC NURSES, <http://www.forensic-nurses.org/?page=ElderMistreatment>.

FINANCIAL INDUSTRY REGULATING AUTHORITY, <http://www.finra.org>.

NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, <http://www.napsa-now.org>.

NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE, <http://www.ncall.us>.

NATIONAL CENTER ON ELDER ABUSE, <https://ncea.acl.gov>.

CENTER FOR ELDERS AND THE COURTS, <http://www.eldersandcourts.org/>.

NATIONAL COMMITTEE FOR THE PREVENTION OF ELDER ABUSE, <http://www.preventelderabuse.org/index.html>.

NATIONAL GUARDIANSHIP ASSOCIATION, INC., <http://www.guardianship.org>.

NATIONAL LONG-TERM CARE OMBUDSMAN RESOURCE CENTER, <http://ltcombudsman.org/home>.

Elder Justice Initiative, DEPARTMENT OF JUSTICE, <https://www.justice.gov/elderjustice/>.

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