

Pursuing Justice: Overcoming the barriers that hinder criminal prosecution of elder abuse

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“Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are.”

John Wooden
1910- 2010

WARNING!

- The views expressed by the presenter are not necessarily those of the San Diego District Attorney's Office

Career
prosecutors

How are we to measure a community?

- By the way we care for our very young, the elderly and the defenseless

All victims deserve our
utmost response

- Sadly, some victims are overlooked, ignored, disbelieved, or simply are abandoned

Why should we care?

- “Our debt to the heroic men and valiant women in the service of our country can never be repaid. They have earned our undying gratitude. America will NEVER forget their sacrifices.”
- President Harry S. Truman
- Inscription at WWII Memorial

Elder Abuse is.....

- A Crime
- Going unpunished
- Predictable
- Affecting both urban & rural areas
- Where child abuse & DV were 30 years ago
- Escalating

The aging of America

- Between 1950 & 2000, the total population increased by 87%
- Age 65+ - by 188%
- 85+ - by 635%
- By 2030 - 65+ will triple to over 70 million

Demographics of living longer

- 71,000 Americans are 100+
- By 2010 there will be 114,000
- By 2020, there will be 241,000

ELDER ABUSE IS

- Fastest growing age group
- No known cure for dementia etc.
- Victims often do not report
- Third fastest growth job is home care
- Minimal background checks
- High temptation, low risk factors

UNDERSTANDING THE DYNAMICS

- Fears of many seniors
- Leads to underreporting
- Feelings of shame
- Concern that exposure will lead to loss of independence
- Sometimes accompanied by threats from perpetrator

Vulnerable/disabled adult
vs. Elder criteria

65+

Destroying the myths.....

My top ten.....

- Some of these myths affect all forms of elder abuse
- Some affect only financial elder abuse

“The legal system doesn’t have the legal resources in place to stop elder abuse - that was the message that a group of panelists sent Tuesday evening.”

LJ World [Lawrence Journal]
June 16th 2010

“Elder abuse can be hard to prosecute, Douglas County District Attorney Charles Branson said. Often the victim depends on the perpetrator of the abuse to take care of them. Cases can involve victims who might not remember they were taken advantage of or don’t realize they were a victim.”

LJ World - June 16th 2010

Myth #1

- Elderly people make terrible witnesses

AVOID STEREOTYPING OF SENIORS

- Forgetful
- Senile
- Longwinded
- Grumpy
- Disabled
- Fragile



Myth # 2

- If elderly victim refuses to provide information, there is nothing that can be done

- We can still build a case by talking to other key witnesses
- Start on the outside and work your way to the middle
- Let the DA figure out a way to break through victim's wall of silence

LESSONS LEARNED FROM DOMESTIC VIOLENCE

- Self-determination is not the answer

“Victim declines
prosecution”

Why self-determination is a problem

- If not punished, the perp **WILL** abuse again
- We **CAN** convict even without the assistance of the victim
- Abuse is a crime against **NOT** **JUST** the abused

Myth # 3

- If elderly victim gives the money voluntarily, it is not a crime

- There are times when the apparent voluntariness has been diluted by fraud, undue influence or by exploiting the mental limitations of the victim

Myth # 4

- If the financial institution reimburses the elderly victim and then declines to seek prosecution, we have no victim

- Once a victim, always a victim!
- Restitution can NEVER remove the stigma

Myth #5

- If victim is deceased before we discover the theft, we cannot prosecute

- Wrong!
- Treat such a case as if it were a murder
- There are some situations in which we do not need the victim for a prosecution

Myth # 6

- Any case where the elderly victim is involved in a home repair & there is a dispute over money – this is **ALWAYS** a civil matter.

- Are there other victims out there?

- Did he get the money up front?

- What services did he promise?

- What did he deliver?

Myth # 7

- Suspects of elder abuse crimes **NEVER** call 911

- Wrong!
- Dispatchers need training
- As do paramedics

Myth # 8

- Elderly people die from natural causes

- The importance of an elder death review team

Deaths in San Diego County

- 20,000 deaths a year
- 52% are reportable
- Criteria is ...not seen by MD in last 20 days/not a “natural” death
- Out of 11,000 possible cases 7,000 are waived automatically.
- Out of 4,000 cases that come in, only 2,700 autopsies

Lessons to learn from....

- Dr. Harold Shipman
- Charles Cullen

Myth # 9 - the anyway excuse

- There are more important cases out there and anyway we don't have the additional resources
- The victim was going to die anyway
- She was going to inherit anyway

Myth # 10

- “We don’t have jurisdiction... the crime did not occur here...”

An e-mail I received a
few weeks ago...

I am a retired catholic priest and former Army Chaplain. I was recently involved in a "fraud" by a gentleman who claimed to be an attorney for the Publishers Clearance House. I was sent a notice that I was the grand prize winner of \$1,600,000.00 and that i must follow the directions given me in order to receive the prize. After many telephonic calls and assurances I was directed to first send a check of \$41,000.00 which would cover all the federal and state taxes incurred. I envisioned the financial help I would be giving to a high school and church because of paying just a rather small sum for the full prize amount. How naive I was. After weeks of communication and my final attempt to finalize the deal, I realized that the check I was mailed was a fake and the phone number I tried calling was "no longer in operation". I lost half my life savings and probably will never recover the amount; but I would do anything to prevent this happening to anyone else. I would be happy to meet with you if at all possible.

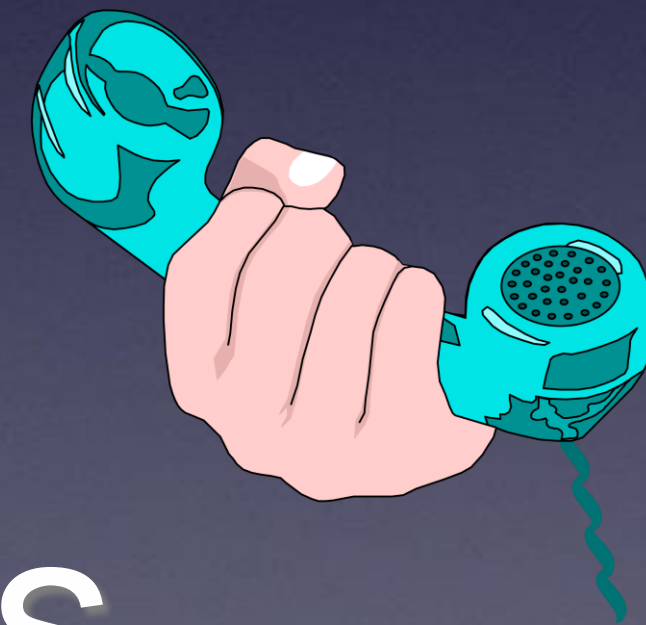
Building blocks to form collaborative approach

- APS/Ombudsman program
- Law enforcement
- Prosecutors
- Coroner
- Public Health
- Seniors
- Public Guardian/Probate Court
- Elder law attorneys

APS/ Ombudsman

Creating/promoting referral line:

- Every County must have a reporting line
- Billboards
- Posters
- Radio and TV PSA's
- # of calls WILL increase



Law enforcement

- Recognize red flags of elder abuse
- Respond to referral of an elder abuse case
- Take initial report and make sure case is assigned to a detective for follow up

Common reactions among law enforcement

- It cannot be a crime - she gave him the money
- It can't be filed - he does not want us to prosecute
- The prosecutor won't file the case - the victim will make a terrible witness
- It is a civil matter - it involves a Power of Attorney

Prosecutors

- These cases are worthy
- These cases are provable
- We should get more creative in our charging
- We should not be obsessed with a win-loss record
- We need to talk to APS

Coroner /Medical examiner

- Train ME Investigators who take calls from police after a death
- Establish a protocol for reviewing suspicious deaths of elders
- Can instigate an elder death review team

Public health

- Remind them of their mandated reporter obligations
- Develop training at every hospital, E.R., clinic
- Watch for unexplained injuries or inconsistent explanations

Involving seniors

- Reaching them through day centers, senior fairs and other workshops
- Provide a positive message!
- Door prizes & a free lunch
- Use them as volunteers - RSVP, DA's office
- Top ten tips for safety ...

- # Elder Law attorneys
- Act for client for many years
 - Replaced without warning by new attorney
 - Obligation to inquire.....
 - Consult State Bar over attorney/client privilege communications

Building the awareness level

- Through public speaking at Rotary, Kiwanis, Lions etc...
- Front counter personnel at police/sheriff's station
- Pharmacies

The faith aspect

- Train the clergy - mandated reporters?
- Most are unaware of the problem
- Encourage an overhaul in visitation ministry

Financial Institutions

- Mandated reporters.....
- They can make a difference between preserving or losing life savings
- Train the tellers
- Hold them accountable
- Recognize their efforts

Reach out to other
“government” agencies...

Trust Mill scams

State agencies that regulate
SNF's & Board & Care facilities

Be media friendly....

Specific crimes.....

Elder sexual abuse

- **Examples of elder sexual abuse**
 - Coercing an older person through force, trickery, threats or other means into unwanted sexual activity.
 - It includes sexual contact with elders who are unable to grant consent, and sexual contact between service providers and their elderly clients

Elder Sexual Abuse can include:

- Forcing the victim to view pornography or to listen to explicit sexual accounts or comments
- Coerced nudity & sexually explicit photographing
- Sexualized kissing & fondling
- Oral-genital contact/digital penetration
- Vaginal rape/ anal rape
- Rape by objects/attacking victim's genitals with blows or weapons

Some special
challenges associated
with sexual assaults of
the elderly

Delay in reporting incident, especially if at a facility or where suspect is employee of caregiver agency.

Delay itself should trigger an investigation as to whether the facility/agency violated any duties as a mandated reporter.

Victim may not be able to
provide a history of what
happened.

Physical findings may be “clouded.”
Bruising/lacerations in vaginal area
can often be explained away or
misinterpreted.

Employee suspect on resident
victim- other eye witness credibility
issues?

The consent issue.....

- Be careful about obtaining medical release from V when consent is an issue because of capacity concerns
- Obtain a geriatric assessment as to V's level of cognitive faculties

Neglect....

Jury appeal?

Do you have a
sympathetic defendant?

Gathering the evidence....

- Do you have a 911 call from the suspect caregiver?
- Who were the first responders?
- Using your paramedic as a key witness

Classic neglect cases

- Deprivation of medical attention
- Deprivation of food
- Lack of hygiene
- Lack of ventilation, heat or light
- Over-medicated
- Under-medicated

The classic neglected victim

- Malnourished
- Semi-comatose
- Dehydrated
- Coated with fecal matter/ urine stained
- Inadequately clothed
- Untrimmed toenails, matted hair
- Bed sores

Pressure sores....

Are these avoidable? When
is it criminal?

Gathering the evidence:

- Prior APS reports of neglect, abuse or abandonment
- Statements from neighbors
- Photos of the living conditions - the kitchen, bathroom, the victim's bed, & the suspect's quarters
- Evidence of any addictions attributed to suspect
- Evidence of suspect's role as a caregiver

Gathering the evidence...

- In many situations it is preferable not to arrest suspect - so as to allow time to develop case
- Non-custodial statement from suspect - to establish whether they admit to having a caregiver role & allow for possible defenses to be disclosed

Anticipating some
defenses...

“At least I was doing
something. The rest of the
family simply didn't bother.”

She hated doctors. She refused to let me get help.

His religious beliefs got in the way. He only wanted “divine healing.”

- Cooks reference with financial abuse exploitation
- Documents giving control to suspect
- POA
- Quitclaim deed
- New will
- Correspondence, bank statements
- Check book ATM pawn slips

- Manslaughter - neglect causes death
- Murder
- Intimidation/Mental & Psychological Abuse
- False Imprisonment
- Torture
- Robbery and extortion

Profile of the physical abuser:

- Son in his late 30's to late 40's
- Living at home with Mom
- Divorced/ returns or single and unmotivated or just out of jail
- Lazy and unemployed
- Drugs, alcohol or gambling
- Feeds habit off Mom
- Sometimes history of mental illness

Financial exploitation of elders

Financial Abuse:

- Theft
- Credit card fraud
- Real Property transfers
- Home Improvement scams/burglaries
- Work by unlicensed contractors/overcharging
- Telemarketing, sweepstakes & e-mail scams
- Investment fraud

Current top elder financial scams

- Canadian & other foreign lotteries
- Phishing & identity theft
- Investment Frauds
- Bogus charities

The grandma
scam.....

Watch out for Green Dot
cards.....

Typical theft scenarios

- Jewelry
- Checks
- ATM card
- Credit card & identity theft
- Transfer of title - POA & quitclaim deed
- Bogus investment scams

HOW TO PROVE STEALING?

- Taking property
- belonging to another
- without consent &
- with intent to permanently deprive

Lack of consent

- To consent to a transaction a person must:
- Act freely & voluntarily & not under the influence of threats, force or duress
- Have knowledge of the true nature of the act or transaction involved
- Possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person

- Consent requires a free will and positive cooperation in act or attitude

Three prosecutable scenarios

- Classic case of theft from a competent victim
- Theft from an incompetent victim
- Theft from a marginally competent victim [by undue influence]

SCENARIO # 1

- Victim testifies
- Did not give permission
- Did not owe monies to suspect
- Victim is credible

Bank surveillance photos
are crucial...

SCENARIO # 2

- Victim cannot testify
- Medical testimony that victim suffers from dementia/ Alzheimer's/ Parkinson's or some other illness that deprives victim of necessary understanding
- Incapacity was present at time of transaction

SCENARIO # 3

- Is it theft, a loan, or a gift?
- Victim is marginally competent
- Suspect exploited victim's vulnerability
- Victim was unduly influenced or was defrauded

Undue Influence

- Victim 'was pushed in a direction that he did not want to go.'
- The influence by suspect was sufficient to remove the voluntariness of the transaction
- No longer free will
- Victim has been evaluated by a geriatric psychiatrist/psychologist

How to prove undue influence?

- Length of relationship
- Place of first meeting
- Prior spending habits
- Prior “charitability”
- What is left?
- Multiple escalating transactions
- Statements & conduct by suspect

Witnesses

- Bank teller
- Pastor
- Neighbor
- Doctor, pharmacist, optometrist of V
- Family
- Ex- spouse of suspect
- Business contacts of suspect

Evidence collection

- Bank, credit card statements
- Bank surveillance tapes
- Prior medical records
- Look for the inappropriate purchases
- Ask questions, questions, questions!!!

People v. Harris

- Victim was classic example of theft by undue influence
- Victim testified
- Short term memory problems
- Areas of extreme vulnerability

Be careful about

- Obtaining a consent release form
- If V has mental capacity problems, then do NOT get a release
- Obtain through search warrant or if after case has been issued, through subpoena

Interviewing an elderly victim

- Venue is important
- Build a rapport
- Look for achievements
- Try to identify areas of vulnerability
- Preserve the interview on video

Evaluating the victim's cognitive functioning

- Memory deficits?
- Memory tests

Some closing
thoughts....

Crawford v. Washington

- We must bring elderly victims into court **AT EARLIEST OPPORTUNITY** to allow confrontation to take place
- Investigations are time sensitive
- Prosecutors should minimize delays in filing

Seniors and the court process:

- Getting them to court
- Bringing the court to them
- Waiting at court
- Testifying in court
- After court - to prevent further victimization

Assess the impact of the crime

- Financial
- Emotional
- Residual

A Message to Seniors:

- We respect and honor you!
- We commit to seeking justice for you
- We prosecute with:
 - Passion
 - Purpose
 - Perseverance

Please feel free to contact me:

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Our Graying Society: *Issues of Elder Abuse and Age Bias*

by Paul R. Greenwood

Americans who are 65 years or older represent the fastest growing population in the United States. The California Attorney General's website reports that the U.S. Census Bureau has projected that California's elderly residents will nearly double within the next 20 years—from 3.7 million to more than 6.4 million.¹ This burgeoning population is reflected in a survey prepared for the National Center on Elder Abuse that compared reports of elder abuse, neglect, and exploitation in 2000 with those in 2004, showing a 19.6 percent increase.²

Prosecutors need to heed the mounting statistics and prepare now to meet the challenge of responding to the growing needs of a graying society. All available data warns law enforcement professionals that within five years, the term "elder abuse" will be as familiar as spousal abuse and child abuse are now.

In the past, law enforcement has routinely minimized the importance of cases involving elderly victims. Police officers have tended to stereotype older victims, prosecutors have been reluctant to allow seniors to testify, and judges have underestimated the impact of the crime of abuse upon the victim. This article is intended to shatter some of the myths associated with prosecuting crimes against the elderly, and provide practical pointers for prosecutors to use in protecting our communities' elders.

Perception and Stereotypes

Most states have specific statutes in their criminal codes addressing "elder abuse" crimes; yet, few prosecutorial agencies take advantage of such laws, in part perhaps, because of outdated perceptions about seniors.

Some of the classic stereotyping of older citizens lump them together as being senile, fragile, long-winded, grumpy, hard of hearing, and unable to see well.

It is not unusual for police officers to write incomplete crime reports when the alleged victim is elderly because of an unfounded belief that the victim is incapable of providing sufficient information that can lead to a successful prosecution, that he or she may not have a reliable memory, that the victim's senses are not adequate, or that he or she may not be strong enough physically to pursue prosecution.

Prosecutors can help educate officers about the need to thoroughly investigate all cases of suspected elder abuse—and help prepare law enforcement agencies for the anticipated influx of such cases in the next five years.

Definitions

For the sake of clarity in this article, a few definitions need to be set out. Elder abuse takes two basic forms—physical and financial, but within those two broad categories are other subcategories.

The main branches of **physical** elder abuse include assault and battery, neglect, and sexual assault.

- **Assault and battery** is primarily inflicted by either: (1) opportunists who target the elderly in the streets by muggings and robberies; (2) family members (typically sons, daughters, or grandchildren) who systematically wield aggression against the elderly relative; or (3) care providers who, out of a sense of frustration, lash out in anger against the victim.
- **Neglect** may be assessed when a care provider willfully or deliberately fails to provide basic services of hygiene, medical support, or nutrition to the victim.

continued on page 42

- **Sexual assault**—Non-consensual sexual contact often happens in a care facility by an employee against a female Alzheimer's patient.

Financial fraud or psychological elder abuse can manifest in many forms:

- **Psychological abuse or mental anguish**—Normally surfacing as verbal threats by a family member, psychological abuse may include threats, intimidation, humiliation, or other such degradation. Threats may encompass hints of personal violence against the victim or a loved one if the victim fails to deliver on financial "commitments."
- **Theft**—Most commonly, thefts of personal items will include jewelry and antiques (taken by a care provider) that inevitably end up in the local pawn shop.
- **Theft of individual checks**—Again, most commonly committed by a trusted care provider, checks are usually ripped from the back of the victim's checkbook.
- **Misuse of an ATM card**—The misuse of a victim's ATM card will most likely be perpetrated by someone who has gained the trust of the victim or by the use of threats and intimidation.
- **Credit card fraud**—Going beyond just the misuse of personal credit, this perpetrator successfully forges the victim's details into a new credit application that has been obtained without the victim's consent or knowledge.
- **Theft of assets**—For large-scale pilfering of assets such as savings accounts, stocks, or real property, trusted individuals may employ either a power of attorney or quitclaim deed, either of which will be obtained through stealth or intimidation.³
- **Scams**—Today's uncertain financial climate is fertile ground for crooks and con men to target the elderly with a large variety of schemes. A few are listed here:
 - Telemarketing fraud such as bogus charity schemes, illegal sweepstakes, and false investments take advantage of the naiveté of some seniors.
 - Door-to-door salespeople who convince the elderly victim to pay up front for labor services such as a new roof, driveway, or other home improvement. These con artists may make off with the up-front money or stay around to bilk the senior out of his or her savings.
 - Pretending to be representatives of utilities or roofing companies or some other trustworthy agency, thieves gain access to a senior's home with the intention of either stealing what they can grab at the moment or casing the residence for a return visit and a more thorough theft opportunity.
 - Exchanging a senior's assets in return for a false promise of "lifetime care" relies on a fear that often haunts a senior's contemplation of the future when he or she may be less self-reliant.
 - Telephone scams in which the caller pretends to be a relative such as a grandchild who is in some kind of trouble and needs money has been one of the more recently reported scams aimed at well-meaning seniors.⁴

Elder Abuse Prosecution Unit

Ideally, each district attorney's office would have an elder abuse prosecution unit. Even if that is not an option at the present time, prosecutors can be aware of which areas need to be addressed. Individually, effectiveness may be more limited, but even on an individual basis, progress can be made in protecting our elders.

In setting up an elder abuse prosecution unit—or in acting individually—attention to the following factors is recommended:

Educate police, whenever and however possible, to perform **thorough investigations** of all suspected elder abuse crimes. Law enforcement should be encouraged to treat any suspected case of elder abuse with the same amount of enthusiasm and dedication as any other serious crime.

- Special attention should be aimed at interviewing techniques, the importance of photographs and videotaped victim interviews, and in spotting red flags and indicators of abuse.
- Officers need to understand their duty to cross-report to Adult Protective Services and to make inquiries of neighbors, relatives, and close friends of the elderly victim.
- In financial abuse investigations, officers should not dismiss the matter as “civil” simply because of the existence of a power of attorney.

Establish a **public awareness** campaign that informs the community of the correct channels for reporting suspected cases of abuse.

- Most counties throughout the United States have a 1-800 telephone number that is reserved for reporting suspected cases of elder abuse. However, the majority of the public does not know this number and have never heard of Adult Protective Services.
- Prosecutors should orchestrate community efforts to create billboards, posters, and public service announcements on local television and radio. Slogans such as “abuse is getting old” have been found to be an effective means of getting the message out to the public.

Use every opportunity to educate **key personnel** who deal with elders in need, such as Adult Protective Services (APS) caseworkers, emergency room nurses and doctors, paramedics, and fire officers in awareness, recognition, and response:

- APS workers: After the initial referral is made via the 1-800 telephone number, a caseworker is assigned to pay an unannounced call upon the senior. These workers need to be tuned into looking for possible signs of abuse so they will know when to bring in law enforcement.
- Emergency room and other medical personnel: Sometimes an elderly patient will appear at a hospital suffering from injuries sustained from an assault or through neglect. Medical practitioners need to be able to differentiate between accidental and intentionally inflicted injuries. The victim may be unwilling to explain the cause of such injuries truthfully, and it will be up to the triage nurse to obtain as many details as possible regarding the patient's living conditions and the events leading up to the patient's arrival at the hospital.

Multiple resources, including the California's Elder and Dependent Adult Abuse Reference Guide, are available on the CDAA website at www.cdAA.org. Enter the Violence Against Women Project through the Project Sites tab off the CDAA home page. From there, the Elder and Dependent Adult Abuse link will open a selection of resources for you.

continued on page 40

Over the next few years, elder abuse will become one of this country's major crimes. It is important that prosecutors prepare now to meet the challenge.

ELDER ABUSE from page 43

- Paramedics: At times, these professionals are the first responders to a domestic call for assistance where an elderly person is in need. If the paramedic is not trained to observe certain indicators of abuse or neglect, there is a danger that the police will not be called to the scene.
- Fire officers, like paramedics, are often the first responders to the home of an elderly victim. They also require training to spot potential abuse or neglect.

The venue for many crimes of financial elder abuse is a bank, credit union, or stockbroker firm. The perpetrator will often take the elderly victim into a **financial institution** in order to prepare a power of attorney or arrange for a transfer of monies. The staff at these institutions may or may not be trained to spot various techniques used to exploit seniors. Prosecutors dealing with personnel from financial institutions in any situation can help alert them to red flags and suggest possible responses.

For example, financial staff should make it a policy to discuss any alterations in financial arrangements or substantial withdrawals with elderly customers in private, away from the elder's companion. Some states have already established protocols—notably Massachusetts and Oregon—and these protocols provide excellent resources for other states.⁵ Several states are enacting laws that provide immunity to banks when reporting a suspected case of financial elder abuse to Adult Protective Services or to law enforcement.

Red Flags/Indicators of Physical Abuse of Elder⁶

At times, signs of elder abuse may be mistaken for the initial symptoms of dementia or merely the result of increasing frailty. Caregivers may offer logical-sounding explanations for everything from unusual bruising to abnormally frequent check writing. While many caregivers are warm and caring people who are trustworthy, law enforcement professionals need to examine situations with a keener eye than the general populace.

A victim of elder abuse may become increasingly withdrawn from the community and much more dependent upon the perpetrator. If an unannounced visit by a caseworker from Adult Protective Services is made, the perpetrator may insist that "this is not a good time." Excuses might include that the victim is sleeping or is unwell. Even if access is given, the suspect may try to prevent a private conversation between victim and the social worker or friend by leaving the door open or by hovering over the victim. Family and friends who attempt to make telephone calls are often prevented from speaking directly to the victim or the perpetrator will monitor the phone call in some fashion.

Physical factors to keep in mind include:

- Unexplained signs of injury such as bruises, welts, or scars, especially if they appear to be symmetrical or shaped like a specific object.
- Broken bones, sprains, or dislocations.
- Overdose of prescription drugs or indications of medication not being taken regularly (a prescription has more remaining than it should or remains unfilled).
- Broken eyeglasses or frames.
- Signs of physical restraints (marks around the wrists or ankles).
- Unaccounted weight loss, signs of malnutrition, dehydration.
- Untreated physical problems (bed sores, urinary tract infections, etc.).
- Unsanitary living conditions (dirt, bugs, soiled bedding and clothes).
- Elder being un-bathed and unkempt.

- Unsuitable clothes for the weather.
- Living without essentials (no heat or running water, faulty electrical wiring, other fire hazards).
- Elder left alone in a public place.

In financial transactions at a bank, the suspect caregiver will often attempt to control the conversation with the bank official and will endeavor to speak on behalf of the victim. The bank clerk may be told that the elderly customer is unwell or hard of hearing. The suspect will justify the need for a power of attorney or will insist that any withdrawals are made in cash. Other flags include: larger than usual withdrawals; sudden changes in the elder's financial condition; items or cash reported missing from the senior's home; suspicious changes in wills, power of attorney, titles, and policies; names added to the senior's signature card; bills uncharacteristically left unpaid; financial activity that the senior could not have done because of physical impairments; contracts for unnecessary services, goods, or subscriptions; or evidence of over- or under-medication.

Seniors and the Court System

For many seniors, their own abuse situation will be their first exposure to the criminal justice system. There are often fears, misconceptions, and feelings of reluctance. A prepared prosecutor can sometimes make the difference for the senior who in turn will prove to be an effective witness.

Some important factors are:

- **Logistics**—Find out early on in the case whether the senior has special needs for transportation. The prosecutor—through victim witness services—may need to provide wheel chair assistance, oxygen, or an escort. The elder may require special hearing or optical devices for his or her court appearance.
- **Medical concerns**—Questions to ask might include: Is the senior taking medication that could affect the ability to testify? Does the elderly witness cope better in the morning or afternoon? What is the elder's state of health? Is the elder being treated medically for anything and by whom? It may turn out that the elder is physically incapable of coming to court, thereby necessitating a request for the court to be convened at the senior's bedside.
- **Personal concerns**—The elder may have a hearing deficiency or a vision problem that may impact the credibility of his or her testimony. Knowing this beforehand will allow prosecutors to prepare their questions accordingly. Hearing or visual deficiencies may also impact a person's effectiveness during testimony. A victim who cannot hear out of one ear or at a certain distance or who has trouble seeing except directly in front will need the prosecutor to be on his or her "good" side during questioning. Knowing these things ahead helps the astute prosecutor be prepared to adjust accordingly. The senior may also have a problem with incontinence that could become a matter of logistics as well as affect his or her willingness to appear in court. Again, issues need to be addressed before the court date in order to alleviate any worries.
- **Comfort of the senior at court**—Invariably, witnesses are kept waiting at court. Standing in hallways or sitting on hard benches for hours on end is difficult for even young people; imagine the discomfort for "old" bones. It is vital that prosecutors are able to provide seniors with a hospitable and friendly environment in which to wait. Therefore, every effort should be made

continued on page 46

to establish a waiting area exclusively for seniors, consisting of a room with comfortable sofas, a television, soft lighting, reading materials, and crossword puzzles.

Profile of a Physical Abuser of the Elderly

Typically, the physical abuser of an elder is the son of a widowed woman. He is either divorced and has come back to live at home with mom because of financial pressures borne by the divorce or he is single and has never left home. He tends to be in his late-30s to mid-40s, while his mother is usually in her mid-to-late 70s. In the majority of cases, the son is lazy and unemployed. He will have used a variety of excuses as to why he is unable to work, and his mother has accepted such excuses. He will be addicted to alcohol (normally beer), narcotics, or gambling. In order to feed his habit, the son extracts money from his mother. There may come a time when the mother refuses to provide any more money, and this tends to be the flash point for violence. Violence may begin with him breaking objects in the home that he knows the mother values. An escalation of violence may materialize as grabbing his mother's arms and shaking her or pushing her into furniture or throwing an object at her. Characteristically, the mother will not immediately call the police, perhaps out of a sense of failure or shame. Often, neighbors hear the altercations between the son and his mother, but they may also be reluctant to involve the police.

Hurdles to Successful Elder Abuse Prosecutions

In discussing concerns to be addressed prior to court appearances, as well as the reticence often found in witnesses to these particular crimes, a picture emerges of the hurdles prosecutors face in successfully prosecuting elder abuse. Among those factors to prepare for are:

The recanting victim—Many parallels can be drawn between elder abuse and domestic violence cases, particularly in the area of the recanting victim. In such cases where the victim is an elderly parent or grandparent and the defendant is the child or grandchild, it is not uncommon for the victim to recant. Confusing emotions, including fear, love, shame, hope are all part of the abuser's arsenal of weapons. After the defendant has been arrested and taken to jail pending an arraignment, the elderly victim will often receive a telephone call from the incarcerated perpetrator requesting that charges be dropped. The abuser may invoke the bond of the shared relationship, beg forgiveness, promise change. If that does not work, the victim may be "reminded" that the defendant is the only friend that the victim has, and that harm might come to the defendant in jail unless the victim drops the charges.

In such situations, the elder abuse prosecutor will sometimes be able to give the "tough love" speech to the victim. Other times, the prosecutor will need to impeach the victim with prior inconsistent statements made to a paramedic or ER nurse or neighbor. Often, the 911 call is the most persuasive evidence of the victim's state of mind at the time of the alleged incident of abuse. There may be injuries that can corroborate the earlier statements of the victim, as well as evidence of prior similar abusive acts.

The victim may not be alive when the case comes to court—One of the reasons that seniors are targeted is that many suspects rely on the fact that by the time the crime is detected, investigated, and an arrest is made, the victim may have already died.

In the past, law enforcement made it a point to videotape interviews with elderly victims as soon as possible since under Evidence Code section 1380,⁷ the introduction of a victim's out-of-court statement was allowed at the trial judge's discretion.

However, in 2004, the United States Supreme Court ruled in *Crawford v. Washington*⁸ that the Sixth Amendment (the confrontation clause) requires that the defendant has had a prior opportunity to cross-examine the victim before “testimonial” evidence such as a videotape can be admitted.

Crawford’s impact on prosecution of crimes against elders who are unavailable for cross-examination is especially problematic. While many physical abuse cases can still be proved beyond a reasonable doubt even in the absence of the victim, the victim’s testimony is often crucial when prosecuting a financial abuse case. Direct testimony may be the only way to establish that the defendant did not have the victim’s consent at the time of the transfer of assets from the victim to the defendant.

It is important to note, however, that even though a videotaped statement may no longer be admissible in court, **preserving the victim’s account of the criminal act on videotape is still recommended.** Such a record may prove useful in a variety of ways, i.e., establishing the victim’s frame of mind and command of faculties, confirming injuries sustained and emotional damage, providing details of the case that might not have been written down, etc. In major cases that have the potential for lengthy litigation, this type of documentation may prove especially helpful—and there is always the possibility of the legal prohibition against its admissibility being changed in the future.

How to establish that a theft has occurred in a financial abuse case—

Sometimes a prosecutor will be faced with a difficult decision as to whether sufficient evidence exists to prove that a suspect has taken property from the victim without consent and with the intent to permanently retain said property. Four different scenarios often surface, the first two of which are fairly straightforward, leaving the third and fourth as tough calls:

- The victim is able to testify competently that the defendant took money or property from the victim without consent. The victim may be asked to look at a check and confirm that the signature is not that of the victim or that a series of ATM transactions was not authorized by the victim.
- The victim is incompetent to testify because of dementia or Alzheimer’s or Parkinson’s disease. The transactions took place at a time when the victim was already in the condition that has caused the incompetency. The prosecution will be able to have the victim evaluated for the incompetency and can lay the appropriate medical testimony foundations to establish that the victim would have been unable to provide the necessary consent at the time of the transaction.
- The victim is deceased by the time the discovery is made that monies or property have been removed from the victim during the victim’s lifetime. Traditionally, such scenarios have led to an immediate decision by law enforcement not to investigate the matter further because of an inability to prove that the victim did not give consent. However, it still might be possible to prove a case of theft if, in fact, there is medical evidence that prior to the victim’s death, the victim was diagnosed with dementia, Alzheimer’s, etc., and that the transaction in question was made during a period when the victim did not possess the necessary ability to give true consent.
- The victim is marginally competent to testify, although there may be some signs of short-term memory loss. The victim appears to have voluntarily transferred assets to the suspect and appears to understand the nature and extent of the transaction. The suspect may describe the transfer as either a

gift or a loan. Again, law enforcement has traditionally refused to investigate such a scenario on the basis that no apparent crime has been committed. The scenario may further be compounded by the fact that the victim, prior to the transaction, was taken to meet with an attorney to discuss the impending transfer. That attorney will testify that the client understood the significance of the transaction and wished to proceed.

This last scenario is perhaps the most difficult one to prosecute as a theft. Prior to a California appellate decision in 2006, prosecutors had been able to draw on the theory of “**undue influence**” in these cases. *People v. Brock*⁹ changed that. Defendant Ronald Brock was convicted of theft against an elder and two counts of grand theft. The trial court’s instructions to the jury included the definition of “consent” as found in CALJIC 1.23,¹⁰ but the court then took the definition further, relying on Civil Code parameters to state that “undue influence” exists when someone takes “an unfair advantage of another’s weakness of mind.”¹¹ The court of appeal reversed the trial court’s decision, holding that the jury instructions were flawed. The appellate court elucidated as follows:

Here, the instructions presented the jury with alternate theories for finding guilt, some of which were legally correct and supported by substantial evidence. For example, the jury could have found defendant guilty on the theories that he obtained [the victim] Roussey’s consent by duress or by misrepresentation. However, the instructions on undue influence were erroneous, at least to the extent the jury was permitted to convict if it believed defendant took unfair advantage of Roussey’s “weak mind.” The prosecutor argued the erroneous legal theory to the jury, and, on more than one occasion, expressly conceded that her case was focused on undue influence. Nothing in the record demonstrates that the jury necessarily rejected this theory and convicted defendant on the theory that he obtained possession of the property by duress or by misrepresentations. Given the evidence and arguments, we conclude there is a reasonable probability defendant’s conviction was based on the legally insupportable theory that Roussey’s consent to the property transfers was undermined by the defendant’s exercise of undue influence.¹²

Optimistically, we can hope that the *Brock* decision may provide the impetus for a more clearly set out definition of “undue influence.” In the meantime, prosecutors can still utilize an awareness of factors that might have influenced the victim to act against his or her best interests. Now, however, these factors need to be used to support existing theories of fraud, duress, or coercion. Some details to consider:

- The **length** of the relationship between the victim and the suspect. The longer the friendship, the less likely it is that fraud can be established.
- The **nature** of the relationship between the victim and the suspect. If the suspect performed certain services for the victim without any other evident remuneration, an assessment must be made to determine whether the amount of the transfer is a reasonable exchange for services rendered.
- The spending **habits** of the victim prior to the transfer. If it can be established that the victim had a history of frugal spending, it might be possible to show that this particular transaction was completely out of character.

- The **amount** of the transfer compared to the residue left for the victim. Sometimes, the victim is left with insufficient funds to provide for unexpected emergencies after the transaction has been completed.
- The **documentation** that accompanied the transaction. If the suspect maintains at the time of the investigation that the monies were given in the form of a loan, then it might be expected that supporting paperwork evidencing a loan was drafted at the same time.
- Whether the **attorney** who prepared the documentation was introduced by the suspect to the victim.
- Whether the victim demonstrated any changes in **behavior** prior to the transaction that might point to signs of short-term memory loss, confusion, or a decrease in the ability to make wise decisions.
- The **methods** used by the suspect to develop the friendship with the victim. Did the suspect create a false persona to be more interesting to the elder? Did the suspect gradually isolate the victim from other friendships and family, causing the victim to become increasingly dependent upon the suspect?

Investigative Resources

The following are checklists of investigative resources for prosecutors that can strengthen an elder abuse case.

Physical abuse cases

- Check if there is a 911 tape in existence.
- Contact Adult Protective Services to see if there is a history of prior reported abuse.
- Obtain the victim's consent for disclosure of medical records if victim's mental capacity is not an issue.
- Talk to neighbors for any corroborating testimony regarding hearing loud voices or arguments.
- Consult a geriatric physician who can identify and separate intentionally inflicted trauma from accidental injuries.
- Interview the paramedic or ER personnel who treated the victim to find out if the victim made any spontaneous statements about the cause of the injuries.
- Take photos of the residence.

Financial abuse cases

- Obtain handwriting exemplars if possible from both the victim and the suspect.
- Order copies of checks from the bank showing endorsements.
- Consider obtaining an evaluation of the victim from a geriatric psychiatrist.
- Conduct a pawn search for items taken.
- Perform a credit check on the victim to see if any recent credit card applications have been made in his or her name.
- Request copies of bank surveillance tapes or photos.
- Obtain copies of any credit card transaction slips.
- Thoroughly review all bank statements for the past year.
- If possible, execute a search warrant on the suspect's bank accounts.
- Interview bank clerks.

continued on page 50

Over the next few years, elder abuse will become one of this country's major crimes. It is important that prosecutors prepare now to meet the challenge and develop an expertise so that they can aggressively prosecute the escalating group of criminals who are preying upon our elderly population.

Paul Greenwood has been a deputy district attorney in San Diego County since 1993. He received his Bachelor of Laws in England in 1973, and was admitted to the California Bar in 1991. He has previously served as a legal consultant to the British Broadcasting Company in London, and worked as a barrister and then a solicitor of the Supreme Court of England and Wales from 1981 to 1991.

ENDNOTES

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6. HelpGuide.Org, Elder Abuse: Types, Signs, Symptoms, Risk Factors, and Prevention, http://www.helpguide.org/mental/elder_abuse_physical_emotional_sexual_neglect.htm (accessed Feb. 10, 2009).
7. Evidence Code § 1380 took effect in January 2000.
8. *Crawford v. Washington* (2004) 541 U.S. 36.
9. *People v. Brock* (2006) 143 Cal.App.4th 1266.
10. *Id.* at 1276. "[T]he trial court instructed the jury with CALJIC 1.23: 'To consent to an act or transaction, a person: (1) must act freely and voluntarily and not under the influence of threats, force or duress; (2) must have knowledge of the true nature of the act or transaction involved; and (3) must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person. Merely being passive does not amount to consent. Consent requires a free will and positive cooperation in act or attitude.'"
11. Civil Code § 1575: Undue influence exists where a defendant does one or more of the following: "(1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) In taking an unfair advantage of another's weakness of mind; or (3) In taking a grossly oppressive or unfair advantage of another's necessities or distress."
12. *People v. Brock, supra*, 143 Cal.App.4th at 1282-1283.

EDITOR'S NOTE

On March 18, Paul R. Greenwood, deputy district attorney for San Diego County and a committed champion of the elder community, was honored by the Construction Industry Legislative Council (CILC) for his "passion and dedication in protecting the integrity of the construction industry, the elderly, and consumers who have been victimized by unscrupulous individuals in construction related schemes."

Deputy District Attorney Greenwood was credited by the Council for pioneering the use of felony residential burglary charges against unlicensed contractors who often prey on the elderly by taking money for unnecessary or shoddy home repairs. The Council cited, in particular, his help in severely curtailing the activities of a multi-state service and repair firm last year, in conjunction with the California State License Board and California Attorney General's Office. The resulting litigation resulted in a \$3 million judgment.

"I am honored to be recognized for the work in which I passionately believe—that of pursuing justice for seniors and seeking to hold those accountable who prey upon elders" said Greenwood. "As our population ages, the elderly are increasingly being targeted as potential victims, and elder abuse is becoming one of the fastest growing crimes in the nation. Often these unscrupulous individuals pose as licensed contractors in order to gain legitimacy and the homeowner's trust."