A close-up, profile view of an elderly man's face. He is wearing a light-colored hat with a purple band. The background is a soft, out-of-focus orange-brown color.

Prosecuting Elder Abuse Cases

Basic Tools and Strategies



Prosecuting Elder Abuse Cases

Basic Tools and Strategies

This guide is an overview of elder abuse intended to give prosecutors information about how to identify issues that commonly arise in these cases, suggest practice approaches, and provide a starting point for building effective cases.

The information presented in this guide complements two companion publications: *Prosecution Guide to Effective Collaboration on Elder Abuse* and *Prosecuting Elder Abuse Cases: Proposed Performance Measures*.



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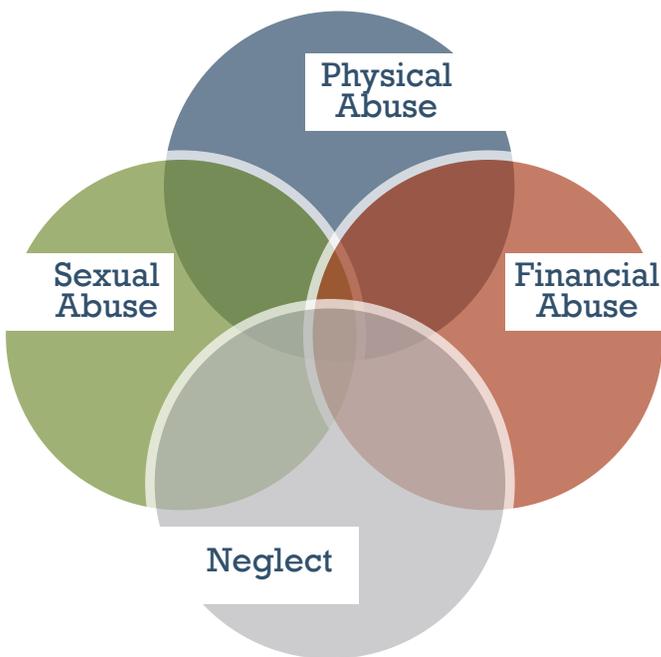
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ABOUT THE CRIME OF ELDER ABUSE

This guide is an overview of elder abuse intended to give prosecutors information about how to identify issues that commonly arise in elder abuse cases, suggest practice approaches, and provide a starting point for building effective cases. The information contained in the guide should be used in conjunction with your state statutes and case law.

Many states have specific laws that criminalize the abuse, neglect and exploitation of elders. There is considerable variability in these statutes. Some states define it as particular conduct against a person over a specified age.

Others focus on the victim's physical or cognitive vulnerability without regard to age. Still others require prosecutors to prove both the age and vulnerability of the victim. Regardless of whether a state has a specific law addressing elder abuse, neglect or exploitation, in every state acts constituting elder abuse violate general criminal laws (e.g., murder, sexual assault, battery, theft, fraud).



The dynamics of elder abuse create multiple challenges for prosecutors.

This guide discusses elder abuse in terms of physical abuse, sexual abuse, financial abuse, and neglect. These types can co-occur in individual cases. Elder abuse can occur in a private home, public location or care facility.

Most elder abuse cases involve the victimization of elders by perpetrators with whom they have an ongoing and trusting relationship. These include intimate partners, adult children, other family members, trusted caregivers, and fiduciaries. Some perpetrators abuse their real or apparent legal authority (e.g., power of attorney, conservatorship, guardianship) in order

to obtain an older person's assets. Others use undue influence to obtain an elder's apparent "consent" to transactions or activities that benefit the perpetrator.

Perpetrators frequently take advantage of the trust placed in them by the victim in order to continue their behavior and avoid responsibility for it. Because they so often trust and depend on the perpetrator, victims may be slow to recognize and report abuse and reluctant to cooperate with criminal justice professionals. In order to overcome these challenges, prosecutors, law enforcement and community partners must work together to achieve successful prosecutions of these crimes.

Elder abuse is often overlooked by first responders.

The prosecutor may be the first person to identify conduct as elder abuse. Reasons that cases may not be recognized as elder abuse include:

- Victim's inability to recognize and report abuse due to cognitive or physical impairment
- Victim's inability to assist in prosecution and serve as a witness due to cognitive or physical impairment

The abuse of one's legal authority is often not recognized as a crime.

- Victim's reluctance to report abuse and cooperate in prosecution due to love for perpetrator, fear of retaliation by perpetrator, or fear of loss of independence if abuse is discovered
- Insufficient training of first responders and criminal justice professionals
- Lack of expert witnesses, including forensic accountants and physicians and mental health professionals with geriatric expertise
- Misperception by public and/or criminal justice professionals that misuse of an elder's assets by persons who have apparent legal authority to make decisions on behalf of the elder is always a civil matter and not criminal conduct
- Lack of recognition by public and/or criminal justice professionals that neglect of an elder is a crime
- General lack of public awareness and understanding of elder abuse
- Inadequate community resources to address the needs of victims and perpetrators



THE ROLE OF THE PROSECUTOR

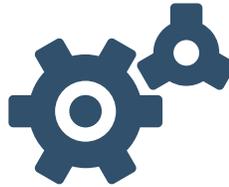
Elder abuse is very often a hidden crime exacting a horrific toll on its victims, resulting in diminished health, loss of independence and dignity, financial ruin, and premature death. The prosecutor is the gatekeeper to the criminal justice system. It is the responsibility of the prosecutor to advocate for justice and ensure that the voices of older victims are heard. In elder abuse cases, the prosecutor should make every effort to:

- Enhance victim safety by addressing any special needs of the elder victim
- Restore what has been taken from the victim
- Gather evidence and preserve testimony using methods that will improve the likelihood of admissibility at trial should the elder victim be unable or unwilling to testify
- Hold the offender accountable and protect the community
- Rehabilitate the offender in appropriate circumstances

ONLINE RESOURCES

Office on Violence Against Women (ovw.usdoj.gov/) – see the Enhanced Training and Services to End Violence and Abuse of Women Later in Life Program. Also visit the National District Attorneys Association (ndaa.org)

ISSUES COMMONLY ARISING IN ELDER ABUSE CASES



IMPROVE YOUR RECOGNITION OF UNDERLYING ISSUES IN ELDER ABUSE CASES

Some of the concepts that make elder abuse cases unique include capacity, consent, competency and undue influence. In addition, for any type of neglect or abuse (physical or sexual or financial exploitation), prosecutors must address whether the victim is able to testify and estimate his or her life expectancy. Issues pertaining to the production of records frequently arise in these cases. The prosecutor's ability to identify underlying issues may be further challenged in those cases in which multiple forms of abuse are co-occurring.

CAPACITY is the cluster of mental skills (such as memory and logic) that people use in everyday life. Capacity can fluctuate over time and can differ depending on the situation or the task. Capacity may be impaired by illness, dementia, developmental disability, or other cognitive conditions. In order to give consent, one must have mental capacity.

CONSENT is the agreement to engage in an act or transaction given by one with sufficient mental capacity who understands the true nature of that to which he or she agrees, and who is acting freely and voluntarily.

COMPETENCY is a judicial determination. All adults are presumed to be competent to testify in court.

UNDUE INFLUENCE is the misuse of one's role and power to exploit the trust, dependence and fear of another to deceptively gain control over that person's decision making and/or assets. It may vitiate consent when it involves deceit or the use or threatened use of force.

ALL-ENCOMPASSING ISSUES

- Addressing the unique dynamics of elder abuse
- Determining whether the victim knowingly, willingly and voluntarily consented
- Mental capacity of the victim at the present time and at critical times in the past
- Determining whether the victim had the capacity to consent
- Victim availability to participate in prosecution
- Accommodation of the victim's physical, communication, cognitive and other needs throughout the process
- Provision of services and advocacy for the victim

PHYSICAL ABUSE ISSUES

- Determining causation (distinguishing abuse from accident, aging, underlying medical conditions, effects of medications)
- Distinguishing intentional conduct from unintentional conduct (e.g., dementia/Alzheimer's, Huntington's, brain tumors affecting behavior)
- Social perceptions of older perpetrators – attitudes that elders are less violent or capable of inflicting serious injury

SEXUAL ABUSE ISSUES

- Victim reactions, including shame, embarrassment, aversion to discussing sexual matters
- Delayed reporting resulting in lack of physical evidence
- Juror reluctance to accept the reality that the elderly may be victims of sexual abuse

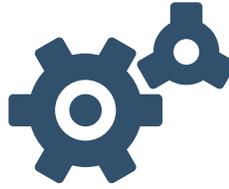
FINANCIAL ABUSE ISSUES

- If the victim had capacity, determining if consent was obtained by undue influence
- If the victim's capacity is impaired, determining the degree of that impairment at the time of the taking or giving of consent
- Identification of the perpetrator – large financial or telemarketing scams
- Following the money – expertise in tracking assets, forensic accounting
- Erroneous assumption that conduct is civil and cannot be prosecuted criminally



NEGLECT ISSUES

- When injury is an element of the charge, establishing the requisite degree of injury
- Determining causation: distinguishing criminal neglect from underlying disease processes
- Proving the requisite intent and degree of negligence (reckless, malicious, criminal)
- Identifying the responsible caregiver(s) to charge
- Establishing the suspect's legal duty of care
- Distinguishing criminal neglect from longstanding lifestyle preferences of the victim
- Overcoming defense claims that the suspect was “doing the best he/she could,” or that he/she was following the victim’s wishes
- Overcoming juror attitudes that may include identification and empathy with the defendant’s caregiving situation and reluctance to see neglect as criminal or volitional conduct
- Lack of community resources to meet the needs of the victim
- Availability of specialized medical experts



IMPROVE YOUR ABILITY TO WORK WITH OLDER VICTIMS

The issues that distinguish elder abuse cases from other crimes also can impact how you communicate with older victims and assist them in participating as fully as possible in the prosecution of their case. Some strategies you can follow to improve your skills in working with older victims include the following:

- The victim is most likely to give you the information you need after you have given the victim what he or she needs. Find out what issues are of concern to the victim, acknowledge them, and address them as soon as practical
- After addressing the victim’s immediate concerns, develop rapport and trust before exploring case facts
- Older victims may need more time to process information and respond to questions. Do not assume that this is a symptom of dementia or memory loss. It is a normal feature of aging. Give them the time they need

- Do not infantilize or patronize older persons (e.g., talking down, baby talk, raising your voice, addressing by first name, physical contact)
- Select a quiet place for the interview and remove all distractions. Turn off cell phones and put away electronic devices
- Meet with the older person in his or her own home whenever possible
- Talk to the victim one-on-one, separating him or her from family members and suspects, especially if it is unclear which family members will be witnesses and/or defendants. Consider the benefit of having an advocate present and whether you will need a witness to any statements. Know your state's law regarding requirements for the presence of advocates
- Inquire in advance about the victim's need for accommodations and incorporate those accommodations into all parts of the criminal justice process, including courtroom appearances. Identify and consider needs pertaining to mobility, language and communication (assistive devices, interpreters and translators), medication, nutrition, hydration, oxygen and other medical treatment
- Tour the courtroom in advance and introduce the victim to court staff. Familiarize the victim with the courtroom accommodations. Make sure there is a safe and comfortable waiting area and a place for the victim advocate to sit during testimony
- Schedule appearances and testimony of the victim at the best time for him or her. For many older persons, this is likely to be mid to late morning. Be flexible to accommodate any special needs of the victim. Avoid delays once the victim is present

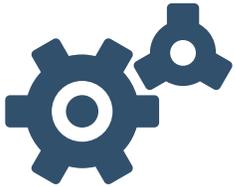
ONLINE RESOURCES

Prosecutor Paul Greenwood's
10 tips on working with elderly persons
<http://bit.ly/Kg7wQu>



STRATEGIES FOR ACHIEVING SUCCESSFUL PROSECUTIONS

Although prosecuting elder abuse cases is challenging, you can increase your success by being creative and prepared. Appendix A provides three examples of successful prosecutions of cases that included elements of elder abuse or neglect. Use the specific strategies outlined below as your guide.



BE CREATIVE IN CHARGING CASES

In light of the impact of elder abuse on its victims, it is critical to expeditiously review and charge elder abuse matters. At every stage of prosecution, efforts should be made to resist delay and/or continuances. If your state allows expedited procedures in elder abuse cases you should pursue using them.

PRACTICE TIP

Set up a procedure in your office that will “flag” elder abuse cases irrespective of charges. This will allow you to track cases and document the effectiveness of various charging strategies.

Think “outside the box.” A variety of charges may be used, such as burglary, tax violations (failure to report income), identity theft, misuse of computer, and obtaining signature using fraud or duress.

When evaluating cases for charging, consider the following:

- Consider elder-specific state laws or procedures. Does your state have specialized elder/vulnerable or dependent adult abuse statutes? Does your state provide sentencing enhancements or special findings in these cases? Presenting direct evidence to the jury about a victim’s frailties and hardships may require more effort, but it can be very effective in increasing the jury’s sense of outrage toward the offender
- Consider also charging general common law or statutory crimes. If an older adult dies from abuse or neglect, the crime may be murder or manslaughter. If an older adult is specifically targeted based on his or her age, does that meet the requirements for your state’s hate crime law? Consider residential burglary or commercial burglary where the suspect enters the victim’s home or a business or bank for purposes of carrying out financial exploitation or other crimes

POWER OF ATTORNEY: a legal document giving another person decision-making authority over an individual's financial and/or health care affairs.

GUARDIAN: an individual or organization named by a court order to exercise limited or plenary decision-making powers over the person and/or estate of an individual.

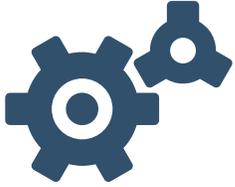
A **GUARDIAN OF THE PERSON** possesses limited or plenary power with regard to the personal affairs of an individual.

A **GUARDIAN OF THE ESTATE** possesses limited or plenary powers with regard to the real and personal property of an individual. These guardians are often referred to as conservators.

- The suspect may have had or may still have legal authority to act on behalf of the elder. The most common types of such authority are powers of attorney, guardianship and conservatorship. Abuse of this legal authority may be criminal. Depending on your state laws and the facts of your case, this abuse can be charged as larceny, theft, embezzlement, elder financial abuse, forgery, financial exploitation, or fraud

- In every state, a surrogate decision maker is a fiduciary who must act in the best interest of the older person. Some states incorporate this duty in specific statutes; in others, it is found in case law or common law
- In large dollar cases contact your state tax agency for possible partnership in prosecution for tax evasion. A suspect may claim money obtained from the victim is a gift or payment for care services, but receipt of the money should be declared as income
- In a facility neglect case, consider who the potential suspects are and whether an offer of immunity or plea to a lesser crime or sentence is an option for a potential codefendant in order to obtain evidence against more culpable parties
- Consider what evidence will be admissible if you charge a certain crime. If you charge a different offense, will important evidence become admissible?
- Always evaluate the likely defenses when selecting charges





ANTICIPATE AND BE PREPARED TO COUNTER COMMON DEFENSES

In addition to focusing on the unique issues posed by various types of elder abuse, prosecutors will need to evaluate potential defenses and be prepared to counter them. For example, the ease of bruising of older persons is a common defense, which makes it critical that prosecutors learn the differences between intentional and accidental bruises (see Appendix B). Generally, defenses differ depending on the type of abuse that is charged.

PHYSICAL ABUSE

- Self-defense: “She has Alzheimer’s and is combative. I was just defending myself.”
- Not volitional as result of illness: “I have Alzheimer’s and I can’t control myself.”
- Injuries as a result of victim's medication or age: “I didn’t touch her. She’s on a blood thinner and bruises easily.”
- Accident: “I didn’t push him. He fell.”
- Victim's dementia: “My wife is demented. You can’t believe anything she says.”

SEXUAL ABUSE

- Lack of knowledge of incapacity: “I didn’t know she had Alzheimer’s.”
- Consent: “She wanted to have sex with me.”
- Alibi: “It wasn’t me. I was somewhere else.”

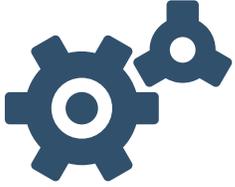
- Lack of physical evidence. “I was just giving her a massage.”
- Age of suspect: “I am old and incapable of having sex.”
- Suspect with dementia: “I didn’t know what I was doing.”

FINANCIAL EXPLOITATION

- Consent: “He gave it to me. He insisted I take it.”
- Legal authority: “I have power of attorney and am only doing what is best for my dad.”
- “We are spending down his assets so that he can qualify for Medicaid.”
- Loan: “I planned to pay her back really soon.”
- “It’s my inheritance and I’ll use it when I need it.”

NEGLECT

- Medical: “He refused to eat and there was nothing I could do about it.” “She was dying and I could do nothing but watch.”
- No duty of care: “It’s not my job. She could take care of herself.”
- Following orders or wishes: “I was following her requests. She refused to go to the doctor.” “I promised that I would keep her at home no matter what.”
- Denial: “I did everything in my power. There was nothing more I could do to help him.” “I didn’t notice that anything was wrong.”



ADDRESS ISSUES OF COMPETENCY AND CAPACITY

It should be assumed that older adults are competent to testify and have the capacity to act and consent to transactions. However, there will be many exceptions to these assumptions in cases of elder abuse.

COMPETENCY is a judicial determination. All adults are presumed to be competent to testify in court. However, where an elder's competency to testify is in question, the prosecution, depending on its position, must be prepared to either support its claim that the elder is incompetent to testify or rebut the defense claim that the elder is incompetent. Either way, the prosecution should request a pre-trial hearing to address this issue and plan on calling witnesses to support its position. Competency determinations are generally conducted as close to the trial date as possible because competency can change significantly over time.

- Probable witnesses would include a treating physician, expert psychiatrist or psychologist who has evaluated the elder, and friends and family, excluding all who are charged or potential suspects in the

case. The victim will most likely be called as a witness if the defense challenges his or her current competency

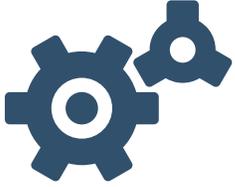
- The prosecutor should consider the impact on the victim of coming to court to testify. In jurisdictions that permit videotaped testimony or conditional examination of an unavailable or incompetent witness, prosecutors may request that a videotape of the victim be offered in lieu of the victim's actual presence at the pre-trial hearing

CAPACITY to consent generally relates to the victim's ability to consent to a particular act or transaction. The degree of capacity required depends on the act or transaction. In other words, a victim may have capacity to sign a power of attorney but may not have capacity to sign a complicated legal document. This determination typically involves looking back at events that occurred months or even years in the past.

- To prove whether a victim had capacity to consent to an action in the past, the prosecutor often must put on evidence of unrelated events in the victim's life that occurred during the same time frame as the charged event, and sometimes over a span of many years



- To prove the victim's capacity or incapacity during a particular time period, the prosecutor should look for those people who interacted with the victim before, during and after that time period, as well as any formal documentation of events that occurred during that time
- Possible witnesses may include friends, family, neighbors, financial advisors, medical providers, attorneys and others, whether or not they had suspicions of improper conduct. These witnesses can provide historical or baseline information about the older adult, including his or her behaviors, level of functioning, independence, decision-making ability, others with whom he or she associated, and the victim's ability to manage other aspects of his or her life
- When seeking evidence relating to capacity, all aspects of the older victim's life at the relevant time are important. Without the context of the victim's behavior and events occurring in the relevant time period, a jury or judge will be hard-pressed to make a determination as to whether the victim gave consent to a given act
- In most cases where a victim's capacity is or may be legitimately raised, prosecutors should consider having him or her evaluated as soon as possible by an expert psychologist or psychiatrist, as set out in the experts chart on the subsequent pages. If a victim is no longer available for such an evaluation, certain experts may be willing to examine the victim's medical records and the other evidence of the case in order to render an opinion of his or her capacity at the time in question
- Even with a victim who is competent to testify and who has had no demonstrated capacity issues, the alleged perpetrator still may attempt to call an older victim's capacity into question, as demonstrated in the common defenses previously noted. Prosecutors should discuss this possibility with each victim and determine whether supportive evidence and witnesses may be helpful. A competent and determined victim on the witness stand may be the best and only evidence a prosecutor needs. However, it is best to make alternate plans. Similar issues of competency and capacity may arise with older defendants



BUILD AN EFFECTIVE CASE

PRACTICE TIP

In a case involving issues occurring across state lines, such as abandonment of an older adult in another state or one with a victim or witnesses who live in other states, consulting with an appropriate federal agency may be helpful. In some circumstances it may be appropriate to refer the entire case to that agency for prosecution.

COLLECT AND DOCUMENT EVIDENCE

The strongest elder abuse cases are built like homicide prosecutions in that they are not dependent on the victim's testimony. Focus on developing corroborative evidence, such as videotaping a walk-through of the crime scene. In some cases, the victim will be available; in others the victim may be uncooperative or unable to testify. Even when older victims are available and cooperative, their testimony alone may not be sufficiently effective for obtaining a conviction because the jurors may have ageist assumptions about their credibility. Appendix C contains a list of potential evidence most common to elder abuse cases; it should be used in addition to standard case building techniques.

UNDERSTAND EVIDENTIARY ISSUES

ABOUT CRAWFORD V. WASHINGTON

Crawford v. Washington is a United States Supreme Court case addressing the defendant's right of confrontation. *Crawford* and its progeny preclude the use of hearsay statements made to a governmental agent where the speaker or the agent could reasonably expect the statements to be used in litigation. The rule does not apply where:

1. The witness is currently unavailable, and
2. At some prior point, the defendant had the opportunity to cross-examine that witness

Prosecution can be successful without the participation of the victim.

This line of cases does not preclude the admissibility of statements made to allow law enforcement to meet an ongoing emergency. *Michigan v. Bryant*, a 2011 United States Supreme Court case, holds that a declarant's statements made to the police in the course of an interrogation during an ongoing emergency are nontestimonial in nature under the confrontation clause and can be offered against the defendant even if the declarant is not available to testify.



Despite *Crawford*, the following types of statements continue to be admissible:

- Spontaneous statements/excited utterances
- Statements for medical diagnosis, including discharge
- Chance remarks heard by law enforcement
- Statements to non-governmental parties
- Dying declarations
- Business records
- Other “firmly rooted” hearsay exceptions, such as present sense impressions and then-existing state of mind

Even in cases where statements should presumably be precluded on *Crawford* grounds, they may be admissible if the defendant’s intentional conduct caused the witness to be unavailable (referred to as the rule of forfeiture or forfeiture by wrongdoing). A history between parties that demonstrates power and control dynamics may be used to help prove that the defendant intended to make the witness unavailable for trial. If a victim becomes unavailable, prosecutors should look for evidence of victim intimidation (e.g., recorded jail calls). Prosecutors may move to have a pre-trial forfeiture hearing to determine which statements will be admissible and inadmissible; this allows for a more streamlined witness order and better time management during trial.

PRACTICE TIPS

- Review the statements of your absent witness and examine each one separately to identify the hearsay exception under which it may be admissible
- Examine your rules of evidence to see if once a defendant testifies to a hearsay statement by an absent witness, additional hearsay statements by the same absent witness are admissible to rebut, clarify or give context to that statement
- Don’t let *Crawford* derail your prosecution. It is an obstacle, not a bar

COORDINATE CRIMINAL CASES WITH CURRENT OR PRIOR CIVIL PROCEEDINGS

Some elder abuse cases may have current or past related civil proceedings, such as guardianships, will contests, and restraining/protection order requests. (In cases where the alleged perpetrator is still a fiduciary for the victim, the prosecutor may need to coordinate efforts with Adult Protective Services (APS) or Legal Services so that such legal authority can be removed in the appropriate venue.) In some cases, the prosecutor may be contacted by civil counsel. Documentation and evidence from

ONLINE RESOURCES

For an outline of post-*Crawford* cases, visit ndaa.org/ncpca_crawford_outline.html

these proceedings may be helpful in the criminal matter. Civil attorneys may have already worked with experts on such issues as capacity or undue influence assessments, forensic accounting, and cause of death. They will likely have documents including answers to pleadings, depositions, prior testimony, expert reports, and legal findings that can be very helpful in the criminal case.

USE EXPERTS WISELY

While not every elder abuse case requires expert testimony, many will benefit from expert consultation. Experts can be extremely helpful in determining whether and what charges are appropriate, anticipating defenses, and helping to prepare for cross-examination of defense experts. In certain instances, the expert may be a professional who was actually involved in responding to your case—for example, a treating physician, medical examiner or bank fraud investigator. When experts are needed, look for specialists with expertise in working with older adults.

There's no single formula for what kind of expert will be helpful in a particular kind of case.

If you are in a small or rural jurisdiction and in need of an expert, the state capitol or a local college or university may be the best starting point. Many professionals make it a point to

extend their services to underserved populations, including older adults and those who work on their behalf. The local community college or university may have faculty in the specialty area

AREA AGENCY ON AGING (AAA): Many local communities have an AAA, which promotes independence of elders in their homes and communities and provides resources. AAA staff may be able to identify local experts that will help build your case.

See the National Association of Area Agencies on Aging, www.n4a.org

ADULT PROTECTIVE SERVICES (APS): Each state has an Adult Protective Services agency. The name and responsibilities of the agency will vary from state to state. For example, in some states APS investigates allegations of abuse in long-term care facilities; in others a different entity oversees those investigations. Generally, APS is responsible for investigating reports of abuse, neglect and exploitation of elders and/or vulnerable adults. If protective services are needed and accepted, APS workers may arrange for a wide variety of health, housing, social and legal services.

See the National Adult Protective Services Association, www.apsnetwork.org



that you need. If the faculty member does not have experience in the appropriate subject area, he or she may be able to recommend a colleague who does. Because cost is almost always a significant concern, do not hesitate to negotiate fees with the expert or request that he or she work on your case pro bono.

When looking for an expert in dementia or capacity, contact your state's public psychiatric hospital or community mental health clinics to see if they have forensic and/or treating geriatric psychiatrists or geriatric psychologists who can assist you or recommend a colleague to assist you. Also consider checking with your local Area Agency on Aging, or other aging network provider; they may have experts on staff or who work with them, often on a volunteer basis. Your APS program may work with local experts as well, and protective services workers can testify as experts on certain issues. In addition, your local sexual assault or domestic violence service providers may have in-house experts who have training on issues involving older adults, even if they do not exclusively serve the older population.

PRACTICE TIPS: WORKING WITH MEDICAL EXPERTS

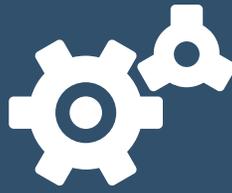
- Meet with the expert prior to trial to review issues, court rulings, and anticipated areas of direct and cross-examination
- Ask your expert if there is a certain day of the week or time of day that is best for him or her, and try to schedule the expert's testimony for that day and time
- Understand that your medical expert's typical day is filled with back-to-back appointments, so that last-minute changes as to when he or she will need to testify can create significant problems for the expert and his or her patients
- Ask the court if you can interrupt testimony (or take a witness out of order) to permit you to put your medical expert on the stand. Most judges understand the difficulties of medical professionals' schedules and are very willing to accommodate them

When seeking an expert forensic accountant, consider contacting your local chapter of Certified Fraud Examiners; also think about contacting the fraud department of one of your local banks. Be sure to consult with your local elder abuse task force or SALT (Seniors and Lawmen/Law Enforcement Together) or Triad (partnering law enforcement, community groups, and senior citizens) if available. If your community has a multidisciplinary team such as fatality review, case management, or Financial Abuse Specialist Team (FAST), consult with its members. Members of these groups or their associates may be willing to consult pro bono or at a reduced rate based on their commitment to fighting elder abuse and neglect.

Remember that when asking for assistance from one of these professionals, it is best to offer to go to the expert's office for any meetings. This minimizes the time the expert must spend away from his or her office and increases the likelihood that he or she will agree to provide free or low-cost consulting. If the expert is in another city or state, consider paying for a video conference call with him or her. This will allow you to make more informed determinations of how he or she will appear when testifying and how best to elicit information from the expert on the stand should he or she be needed to testify.

THE FOLLOWING CHARTS SUGGEST WHICH EXPERTS MAY BE MOST HELPFUL IN PARTICULAR TYPES OF CASES, HOW THOSE EXPERTS CAN ASSIST THE PROSECUTION, AND WHERE TO LOCATE THEM.





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</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, 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>); <i>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, 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, 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



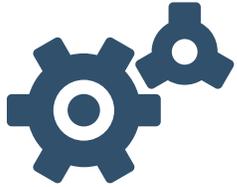
FINANCIAL ABUSE

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>); <i>internist, other physician or gerontologist</i>)	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

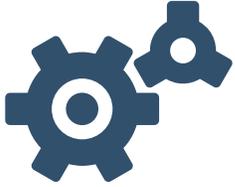


CRAFT APPROPRIATE SENTENCES

Sentencing should serve the dual purposes of protecting individuals from further abuse and providing justice in a particular case. Consider the following checklist as a guide.

- ❑ Review your state statutes for any enhancements or aggravators for crimes against older persons
- ❑ Determine how you will present victim impact to the court. Consider multiple formats, such as previously obtained video (as provided by law) and statements obtained by advocates
- ❑ Determine and evaluate the victim's treatment needs and desire for ongoing contact with the suspect. If contact is desired and you have concerns about unsupervised contact, consider supervised visitation if appropriate. Always prioritize victim safety
- ❑ If probation is considered and appropriate, request that the court frequently monitor compliance with terms and conditions through review hearings. Even if probation is not possible, consider asking the court to set review hearings to monitor defendant's compliance with restitution and other relevant conditions of the sentence
- ❑ Recognize the critical importance of restitution to victims. Consider creative approaches to negotiate early payment of restitution and request that the court monitor compliance. Consider using a suspended sentence contingent upon payment of restitution or payment to a trust fund in lieu of bail. If the bank has reimbursed a victim of identity theft or fraudulent use of credit cards or checks, the bank may become the subsumed victim
- ❑ Make efforts to secure a conviction on a charge that will enable future identification of the offender as an elder abuser. Seek a condition of sentence that prohibits offenders from working or volunteering with older or vulnerable persons or organizations that assist older or vulnerable persons





DEVELOP RELATIONSHIPS WITH COMMUNITY PARTNERS

Elder abuse cases are complex, and no prosecutor acting alone can successfully handle them. Community partners can play a critical role in assisting the prosecutor in collecting, understanding, and presenting evidence in an elder abuse case; beyond that, partners are critical in meeting the current and long-term needs of the victim.

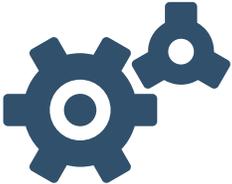
Prosecutors should play a leadership role in their community's response to elder abuse. Community partners addressing elder abuse collaborate in a variety of ways in order to improve systemic responses and address individual cases. Multidisciplinary and Coordinated Community Response Teams play a crucial role in a community's successful response to elder abuse. Just as we learned

with domestic violence and child abuse prosecutions, teamwork wins cases and protects victims. Your team should include, at a minimum, a member from each of the following agencies in your community: the prosecutor's office, coroner/medical examiner's office, APS, local police and sheriff, and a geriatrician or geriatric nurse. Meetings are best when regularly scheduled at the same location, but even ad hoc meetings are better than none.

ONLINE RESOURCES

Kathleen Quinn's 10 tips on working with Adult Protective Services
<http://bit.ly/LMCRg3>

APPENDIX A: CASE STUDIES



CASE STUDY 1: THE BROOKE ASTOR CASE, WITH PROSECUTING ATTORNEY LIZ LOEWY¹

New York County, New York. Legendary New York philanthropist Brooke Astor died at the age of 105 in August 2007. On October 8, 2009, a jury pronounced a “guilty” verdict against the two men who had been entrusted with her financial well-being: son Anthony Marshall and estate attorney Francis X. Morrissey,

Jr. Mr. Marshall was found guilty on 14 of 16 counts and Mr. Morrissey was convicted on counts of fraud, conspiracy and forgery. Mrs. Astor’s condition came to light in 2006 when one of her grandsons sought to have his father removed as her guardian amidst allegations of neglect and financial exploitation. The trial included nearly 19 weeks of testimony and closing arguments. At the heart of the case were questions regarding Mrs. Astor’s mental state and her capacity to make or change decisions regarding her financial well-being and issues related to power of attorney abuse. Elizabeth Loewy served as one of the lead prosecutors on the case.

WHAT ARE CASE MANAGEMENT IMPLICATIONS RELATED TO PROSECUTING ELDER ABUSE CASES WHEN CASES CAN ARISE IN DIFFERENT COURTS? DO THESE MULTIPLE JURISDICTIONS HELP OR HINDER PROSECUTIONS?

The concurrent actions shouldn’t necessarily hinder prosecutions, but they can certainly present a challenge. One interesting aspect of the Astor case was that one of the attorneys on the criminal defense team was also counsel for Marshall on the Matter of Brooke Astor guardianship application and remains a lawyer on the Surrogate’s Court proceeding. Anytime there are related actions being litigated in separate forums, there is additional paper involved. There were a number of affidavits filed in the guardianship case, sworn to by witnesses whom we soon realized would be called by the government in the criminal case. Interviews of these witnesses had been conducted by the defense well before the criminal investigation was initiated. Discovery was turned over to defendant Marshall in the Surrogate’s Court proceeding before that matter was stayed, enabling defense counsel in the criminal case to contact our witnesses first and preview thousands of documents that were pertinent to the subsequent criminal trial. Many of these documents would serve as fodder for cross examination material to be used for potential impeachment of government witnesses at the criminal trial. It also complicated the task of assembling documents and witness statements, both for the investigation and subsequent trial.

¹ This is an edited version of a Q and A with Liz Loewy that appeared in the NCSC’s Center for Elders and the Courts *Sentinel* newsletter (2010).



There is a misconception that a case cannot go forward in criminal court if there is a civil action pending and it involves similar or related issues. The Astor case illustrates that this is not the case.

THERE WERE A NUMBER OF ALLEGATIONS MADE REGARDING ELDER ABUSE AND NEGLECT, YET THE CRIMINAL CHARGES FOCUSED ON THE FINANCIAL ASPECTS OF THE CASE. CAN YOU DISCUSS SOME OF THE CHALLENGES PROSECUTORS FACE WHEN HANDLING CASES THAT INVOLVE SEVERAL TYPES OF ABUSE AND/OR NEGLECT?

The Astor case did involve elder abuse and neglect allegations. There is still a notion that if an older victim is exploited—financially abused—that this doesn’t constitute “elder abuse.” And yet, if you look at the way most law enforcement agencies define “elder abuse,” criminal acts related to an older victim’s money or other property do qualify. Moreover, studies show that financial exploitation is the most common form of elder abuse, though usually not the most obvious. The issue of whether an elder has been physically assaulted or the victim of domestic violence is a separate issue, and of course those criminal acts qualify as “elder abuse” as well.

I HAVE READ SOME CRITICS SUGGEST THAT THIS TYPE OF CASE SHOULD HAVE BEEN HANDLED AS A CIVIL MATTER RATHER THAN A CRIMINAL CASE. HOW DO YOU RESPOND?

I read some of those comments, as well. The Elder Abuse Unit was notified after a highly-respected handwriting expert examined a codicil to Brooke Astor’s will and concluded that it was a forgery. We don’t routinely refer forgeries to Surrogate’s Court, and in this case there were additional allegations warranting a criminal investigation.

In investigating further, we uncovered evidence suggesting that a person in the throes of advanced Alzheimer’s Disease had been the victim of larceny and that a massive fraud had been committed on her estate. Again, this is not the kind of evidence that cries out for civil treatment.

However, some folks have been slow to realize that a larceny involving a victim who is related to the exploiter is also a criminal act. There is no exception in the Penal Code for family members who steal from their relatives. Moreover, there is no “beneficiary defense.” The fact that a child who steals from his mother happens to be a beneficiary under her will doesn’t give him the right to take it early—without permission. That’s criminal. Even if he’s “getting it anyway” and even if he is the sole beneficiary under the will.

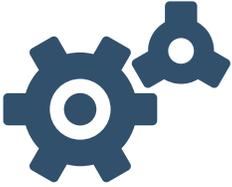
MANY PROSECUTORS WILL NOT PURSUE A CASE OF FINANCIAL OR OTHER ELDER ABUSE WHEN THE VICTIM IS UNABLE TO TESTIFY OR WOULD MAKE A POOR WITNESS. HOW DID YOU OVERCOME THIS OBSTACLE?

The fact that an older victim is unavailable to testify does not always mean that a criminal prosecution isn't viable. The way to overcome this obstacle may be to present evidence that establishes the victim's mental capacity, or lack thereof, during the time of the transfer at issue. This evidence might come in the form of testimony from a treating physician or an expert witness who has reviewed the victim's medical records. It might also come from the testimony of people who observed the victim's physical appearance and demeanor over the years and can describe the change and deterioration. The most powerful evidence on this point may be a defendant's own statements regarding the victim's mental capacity. We used all of the above in Astor. Marshall had commented to Mrs. Astor's personal physician that her memory loss was so poor that he feared what she would say to a lawyer—as far back as 1997. The Second Codicil that Marshall and his lawyer, Morrissey, had her sign was executed in 2004. That was one speedy recovery. Having the victim testify is not always necessary and other evidence can be equally compelling.

“CAPACITY” OF THE VICTIM, ALONG WITH “UNDUE INFLUENCE” APPEARED TO BE CRITICAL FACTORS IN THE OUTCOME OF THIS CASE. WHAT STRATEGIES CAN PROSECUTORS USE TO DOCUMENT AND EXPLAIN THESE CONCEPTS TO A JURY?

Actually, the judge ruled, in substance, that the term “undue influence” should not be used at the criminal trial. The facts underlying what might qualify as “undue influence” in a civil proceeding were relevant to the Scheme to Defraud and Conspiracy charges, and so this evidence was admissible. For instance, one of Mrs. Astor's nurses testified, in substance, that the defendants had physically dragged Mrs. Astor into a room to execute the Second Codicil to her 2002 will, a document she had never been shown before the day it was to be executed. Mrs. Astor exited minutes later and asked what had just happened. Instead of using the term “undue influence,” the testimony regarding this incident was used to support the charge in the indictment that the defendants conspired to steal from Mrs. Astor's estate.





CASE STUDY 2: THE RUBY WISE CASE, WITH PROSECUTING ATTORNEY PAGE ULREY

King County, Washington. Ruby Wise, age 88, was found dead in her home following a call by her son and sole caretaker, Christopher Wise. She was emaciated, bruised, and had pressure ulcers (bedsores) so deep that her shoulder and hip

bones were exposed. She was wearing a hospital gown and a soiled adult diaper, and had flies on her face when law enforcement found her in her bed. She had not seen a physician in two years and was on no medications. Neighbors admitted that they had heard her moaning and crying for help in the weeks before her death.

Death was attributed to complications from eight large pressure ulcers. The defendant claimed he had promised to keep his mother at home and had given up his job so he could care for her. They lived on Ruby Wise's social security and disability checks. Wise was ultimately charged with second degree murder or in the alternative first degree manslaughter, with an aggravator based on the fact that the victim was unusually vulnerable. The jury convicted him of the lesser included offense of second degree manslaughter and found that the aggravator applied. Christopher Wise was sentenced to 27 months in prison (the high end of the standard range) plus an additional 12 months for the aggravating factor.

CAN YOU GIVE A LITTLE BACKGROUND ON THIS CASE? HOW DID THIS CASE FIRST COME TO YOUR OFFICE'S ATTENTION?

Christopher Wise called 911 shortly after his mother died. The EMTs who arrived at the scene pronounced Ruby Wise dead, and, consistent with their protocol, notified the King County Sheriff's Office (KCSO). They did not convey to KCSO that they had any concerns about the condition of the body. Patrol deputies arrived at the home and were immediately struck by the strong odor coming out of Ruby Wise's bedroom. After viewing her body, they immediately notified their sergeant, who called the sergeant of the homicide unit. She then phoned our office and was put in touch with me. From the day Ruby's body was discovered until the end of trial, I worked closely with Detective Thien Do, the homicide detective who was assigned to the case. We were soon joined by Patrick Hinds, another prosecutor who was assigned to co-try the case with me. Patrick and I assisted Detective Do with search warrants and advice on different avenues of investigation to pursue. Detective Do continued to investigate the case even after he submitted it to us for filing, and up until trial. He sat with us throughout the trial and assisted us with trial strategy. It was truly a team effort.

HOW DOES A MURDER CASE INVOLVING ELDER OR DEPENDENT ADULT ABUSE DIFFER FROM OTHER MURDER CASES?

Perhaps the most striking way these cases differ from other types of homicide cases is in the fact that we are so often faced with the additional burden of having to overcome juror nullification due to ageism. This is where the jury essentially refuses to convict despite the fact that the prosecution has proved the elements of the crime beyond a reasonable doubt, because the victim is an older or dependent adult. It is often difficult to determine that nullification drove a jury's verdict, as it is usually not expressed by them overtly when they are talking about the case after the trial is over. Rather, it is expressed through statements such as, "He was going to die anyway," "She had dementia so she didn't feel any pain," "She (the defendant caretaker) was doing the best she could," and similar statements expressing sympathy for caregivers, or an aversion to or disregard for the victim. That the motivation behind these statements is ageism is most easily determined when they are applied to a similar scenario with a child victim. For instance, imagine a child homicide trial involving a mother who left her infant alone in bed for days without feeding or bathing him, ultimately causing his death. If the State had proved the elements of the crime, it is almost unimaginable to think that a jury would acquit because it concluded that the defendant "was doing the best she could." Yet such outcomes occur fairly frequently in neglect cases involving victims who are elders or people with disabilities.

CAN YOU DISCUSS SOME OF THE CHALLENGES PROSECUTORS FACE WHEN HANDLING CASES THAT INVOLVE SEVERAL TYPES OF ABUSE AND/OR NEGLECT SUCH AS FINANCIAL AND PHYSICAL ABUSE AND NEGLECT?

Each type of elder abuse may involve complicated legal, evidentiary, or medical issues that require a significant amount of training and expertise in order to effectively recognize, investigate, and prosecute it. In many police agencies, detectives' units are organized by crime type, so that if a case starts off as being a physical abuse case and ultimately also becomes one of financial exploitation, the investigating detective may be ill-equipped to handle the financial aspects of the investigation. The same is true for prosecutors. This can result in some of the abuse or exploitation that was perpetrated not being investigated or prosecuted properly, despite the fact that it may be more serious, carry a higher sentence, or have a more harmful impact on the victim.



IN MANY CASES, ELDER ABUSE AND NEGLECT REMAIN A “HIDDEN” PROBLEM. WHAT IMPACT, IF ANY, DO YOU THINK THIS CASE CAN HAVE ON THE FIELD OF ELDER ABUSE?

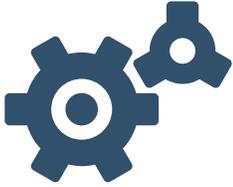
Because the investigators on this case did such an outstanding job, we have excellent documentation of the victim's body and the crime scene. We also have extensive interviews of the suspect and many other witnesses. In addition, we have extremely competent and thorough medical testimony by the pathologist in this case, who himself went to the crime scene. We were also able to talk to the jury at length about their verdict after the trial concluded. For these reasons, I hope that this case can become a good teaching tool for law enforcement and prosecutors on the investigation and prosecution of adult neglect cases.

WHAT WAS THE MOST UNEXPECTED THING YOU TOOK AWAY FROM THE CASE?

How difficult it is to secure a conviction in an adult neglect case, no matter how egregious the facts. In addition to having to overcome ageism and the sympathy that a jury inevitably feels towards a defendant who was a caregiver, we also have to overcome the jury's unfamiliarity with thinking of neglect—the failure to act—as a crime. It is only by our continuing to prosecute these cases and keep them in the public eye that we can begin to improve how the public and juries respond to these cases.

FINALLY, CAN YOU SPEAK TOWARD ANY RESOURCES AVAILABLE THAT WILL HELP PROSECUTORS PREPARE AND PRESENT CASES INVOLVING ELDER ABUSE, NEGLECT, AND EXPLOITATION?

The best resource that I know of at this time for prosecutors is the training on elder abuse prosecution that is put on by the Office on Violence Against Women and originally developed and presented by the National District Attorneys Association. This training was developed and is taught by the leading elder abuse prosecutors in the country. Its graduates become part of a national listserv whose members provide advice and assistance to each other on all aspects of elder abuse prosecution.



CASE STUDY 3: THE ERIC LOUIS BLAND CASE, WITH PROSECUTING ATTORNEY TRISTAN SVARE

Rialto, San Bernardino County, California. Two brothers with developmental disabilities (autism and severe brain injury) lived with their elderly, ailing father suffering from dementia. Their half-sister and her boyfriend took the brother's disability assistance money and the father's

retirement pension and bought food, alcohol, and drugs for themselves while locking the victims in the garage, where one brother wasted away to 75 pounds and survived, while the other starved to a fatal 70 pounds. Charges included felony murder, elder or dependent adult abuse resulting in death, theft from elder or dependent adult by a caretaker, and elder or dependent adult abuse with infliction of injury. The boyfriend received a sentence of 20 years in prison on a plea of guilty to abuse. The sister is serving 15 years to life on a murder conviction.

CAN YOU GIVE A LITTLE BACKGROUND ON THIS CASE? HOW DID THIS CASE FIRST COME TO YOUR OFFICE'S ATTENTION?

This case came to light when paramedics responded to the Johnson home in Rialto, California. Upon arrival, the EMTs noted the victim Eric was nonresponsive and had signs more closely related to cachexia and death from HIV/AIDS, or from the wasting of a cancer. The family members were oddly unemotional and there was nothing indicating the victim was receiving any sort of medical care. The defendants were more worried about getting the body out. The paramedics notified the police, and as luck would have it, the responding detectives, Jacquelyn Haynie and Linda Wells, had recently been through a local training course on elder abuse and abuse of persons with disabilities. The crime scene set off their radar, and they immediately secured it as a homicide scene and began a thorough and systematic review and inventory of everything and everyone present.



MANY PROSECUTORS WILL NOT PURSUE A CASE OF ELDER ABUSE WHEN THE VICTIM IS UNABLE TO TESTIFY OR WOULD MAKE A POOR WITNESS. WAS THIS AN OBSTACLE FOR YOU IN THE ABUSE CASE?

Yes and no. There is a myth that a poor or unavailable victim is going to ruin your case. Yet, every day across the country convictions are obtained in murder cases and those victims are, by definition, unavailable and not testifying. Working with these victims—one deceased, one found incompetent to testify, and one elderly and suffering from dementia—meant that we had to make an evidence-based case. Prosecutors in domestic violence cases, child abuse cases, or even gang prosecutions know how to put on a case to prove it to a jury beyond a reasonable doubt. Having victims and witnesses with cognitive and communication issues means learning a new area of forensics—learning about the disease or the disability—and then moving forward with the case recognizing this bump in the road is not a complete roadblock to prosecution.

HOW DOES A MURDER CASE INVOLVING ELDER OR DEPENDANT ADULT ABUSE DIFFER FROM OTHER MURDER CASES?

There is simply more forensic medicine to know and to explain to the jury. Many elders have pre-existing conditions: arthritis, osteoporosis, hypertension, diabetes, chronic lung conditions, strokes, or cancer. There are also more psychological issues including senility, dementia, or how medications were affecting the victim's cognitive abilities. With most murder cases, no one is thinking that your victim was going to die soon, regardless of the actions of the defendant. In an elder murder case, you have to overcome those stereotypes and misperceptions in yourself, in your investigators, in your pathologist, and most importantly in your jury and judge. There are diseases and conditions that your victim may be suffering from that would lead to a death in a few years or a short time. But if you have a valid case and you present it to the jury you are arguing regular old causation—but for the actions of the defendant, the victim would be alive today or alive longer than they were. I am reminded of the example from law school—if someone, your victim, falls off a building, but on the way down the defendant leans out a window and shoots the victim dead—it is still murder, even if the victim was going to die from the impact from the fall when they hit the street below. In elder murder cases the victim is neglected to death—their last days are in terrible conditions in their own filth. Yes, things like bedsores (or ulcers) happen, even in good hospitals, but when they happen, good caregivers treat them—they are not left to fester and worsen.

CAN YOU DISCUSS SOME OF THE CHALLENGES PROSECUTORS FACE WHEN HANDLING CASES THAT INVOLVE SEVERAL TYPES OF ABUSE AND/OR NEGLECT SUCH AS FINANCIAL AND PHYSICAL ABUSE AND NEGLECT?

I think prosecutors find it daunting when a case moves beyond the artificial boxes we set up. We tend to think of a case as a fraud case, or a theft case, or a neglect case, or an assaultive murder case. Elder abuse is ripe with overlap of these paradigms. Too often the research and anecdotal experience show us that in elder abuse when there is financial abuse there is often physical abuse or neglect, and vice versa. It can be daunting to try and address complex financial crimes of intercepting checks and pensions that were siphoned off for the defendant's drug or gambling habit, and also show that the money was not used for the care of the neglected victim. If you present your case graphically and vividly—showing how the defendant bought alcohol (with the empty bottles now stacked up in the kitchen), and filled their own prescriptions, yet let the victim starve in a bare garage the jury sees the connection. Some prosecutors are good with numbers cases, some with forensic sciences, and some with victimization issues. In elder abuse, you need to be able to work with all these types of cases.

IN MANY CASES, ELDER ABUSE AND NEGLECT REMAINS A “HIDDEN” PROBLEM. WHAT IMPACT, IF ANY, DO YOU THINK THIS CASE CAN HAVE ON THE FIELD OF ELDER ABUSE?

This was a horrible case of abuse of three family members. But as we learned in the investigation, Eric's death at 70 pounds saved his brother's life, who weighed about 75 pounds. It was only because responsible EMS workers noticed something amiss, and they notified the police and the concerned Detectives Haynie and Wells did something. They took what they had learned from our District Attorney Investigator, Jerry Villanueva, about elder abuse, and they treated this case seriously, as any homicide should be treated. We learned in the prosecution that building an evidence-based case is central to a conviction. And, I think everyone involved learned just how important these cases are. Everyone involved, from the EMS workers to the police to the court staff and APS workers to the Medical Examiner to the Judge, and the jury members, will never forget this case. The images stay with you—we need to take these cases seriously, respond to them properly, work them up properly, and prosecute them fully.



WHAT WAS THE MOST UNEXPECTED THING YOU TOOK AWAY FROM THE CASE?

The simple humanity of the victims was the main lesson. We were working with the surviving brother, William Bland, and his elderly father, Paris Bland. At one point the defense attempted to lay blame at the feet of Paris. They called him to the stand where he rambled about delusions and his life from 30 years ago. He lost continence on the stand. The jury was outraged at the defense. The defense had tried to portray William, along with his brother, as uncontrollable animals who had to be kept locked up. At trial William was simply too frightened by the presence of his sister, the defendant, to even speak, let alone testify. We presented testimony and a video of a psychologist's recent interview with William to dispel the lie that he was uncontrollable—he talked about loving milkshakes. A colleague testified about William's conduct in our lunch room while he was waiting for court. He was polite and cooperative, ate his bag lunch, cleaned up after himself, and even put his recycling in a recycling bin and not the trash. To juxtapose these simple acts of humanity with the atrocities the defendants had put these men through, the jury was appropriately moved. I learned to show not just the crime, or the age or the disability of the victims, but also to show their humanity.

FINALLY, CAN YOU SPEAK TOWARD ANY RESOURCES AVAILABLE THAT WILL HELP PROSECUTORS PREPARE AND PRESENT CASES INVOLVING ELDER ABUSE, NEGLECT AND EXPLOITATION?

At times, it is frustrating to see an apparent lack of resources for elder abuse prosecutions. However, by digging a little I think you can find some great resources available nationally or even locally. For instance, the Office on Violence Against Women, which initially partnered with the National District Attorneys Association, has excellent trainings available for local prosecutors and law enforcement. The California District Attorneys Association (CDAA) puts together a wonderful annual symposium that has attendees from across the nation. And, there are places like the University of California/Irvine and the Elder Abuse Forensic Center that offer great medical resources and consultation services. And, locally, by looking around, prosecutors and law enforcement can find geriatricians and geriatric psychiatrists at places like their local county medical centers and state universities. By forming coordinated community responses and multi-disciplinary teams on elder abuse, prosecutors will connect with realtors, CPAs, bankers, therapists, civil attorneys, and others already involved in working with the elderly who can become fantastic resources for consultation. Once you have an expert able to break things down, no case is too complex. We know these cases are too important to ignore.

APPENDIX B: BRUISING IN OLDER ADULTS*

ACCIDENTAL BRUISING

Key findings from a study of accidental bruising in older adults:

- Color of a bruise did not indicate its age. A bruise could have any color from day one
- Ninety percent (90%) of accidental bruises were on the extremities rather than the trunk, neck or head
- Less than a quarter of older adults with accidental bruises remembered how they got them
- Older adults taking medications that interfere with coagulation pathways were more likely to have multiple bruises, but the bruises did not last any longer than the bruises of those who didn't take these medications

INTENTIONAL BRUISING

Key findings from a study of bruising in older adults who have been physically abused were:

- Bruises were large. More than half of older adults with bruises who had been physically abused had at least one bruise 5 cm (about 2 inches) in diameter or larger
- Bruises could be anywhere, but note especially if they are on face, lateral (same side as the thumb) or anterior (same side as the palm of the hand) surface of the arm, or on the back. Older adults with bruises who had been abused had more bruises in these areas than older adults whose bruises were accidental
- Ask the older adult about bruises—gently and in private. Ninety percent (90%) of older adults with bruises who have been physically abused can tell you how they got their bruises, and this includes many older adults with memory problems and dementia

* Wiglesworth A, Austin R, Corona M, Schneider D, Liao S, Gibbs L, Mosqueda L. Bruising as a marker of physical elder abuse. *J Am Geriatr Soc.* 2009 Jul;57(7):1191-6.



APPENDIX C: EVIDENCE COLLECTION CHECKLIST

PART I: TESTIMONY AND BACKGROUND EVIDENCE

- ☐☐ Psychological/psychiatric evaluation of victim (when consent, undue influence, or capacity may be an issue)
- ☐☐ Victim testimony or deposition with full-cross examination, as soon as possible after charging
(*Crawford v. Washington*)
- ☐☐ Videotape the victim at the early stage of the investigation, including the following:
 - ☐☐ Orientation—victim’s perception of time, place, and person

FACTS:

- ☐☐ Consent
- ☐☐ Identity of suspect
- ☐☐ Review documents/evidence. Have victim sign his or her name in video to compare to signature on questioned documents.
- ☐☐ Impact of crime. Include a walk-through video of a neglect or abuse crime scene if possible

MEDICAL EVIDENCE, INCLUDING:

- ☐☐ Medications. Include actual bottles/containers for prescriptions to show physician and pharmacy, possession and full/empty status given recommended dosage over time from the date of the last refill.
- ☐☐ Medical records of current and underlying conditions

Sources of Information:

- | | |
|-----------------------|------------------------|
| ☐☐ Emergency Room | ☐☐ Treating physicians |
| ☐☐ Nursing facilities | ☐☐ Pharmacy |
| ☐☐ Dentists | ☐☐ Other _____ |

Specific Types of Documents to Request:

- | | |
|----------------|--------------------------|
| ☐☐ Lab reports | ☐☐ Nurses’ notes |
| ☐☐ X-rays | ☐☐ Social workers’ notes |

- ☐☐ Adult Protective Services (APS) records of current and prior contacts
- ☐☐ All law enforcement contacts with involved parties and witnesses, including:

☐☐ 911 tapes	☐☐ Arrest reports	☐☐ Criminal histories
☐☐ Jail records, including:	☐☐ Phone calls	☐☐ Visitor logs by or on behalf of suspects

PART I: TESTIMONY AND BACKGROUND EVIDENCE, CONT.

■ ■	<i>Financial records</i>		
■ ■	Credit card records	■ ■	Investment account records
■ ■	Credit reports	■ ■	Suspect's bank records
■ ■	Victim's bank records	■ ■	Checkbook registers
■ ■	<i>Legal documentation</i>		
■ ■	Powers of attorney	■ ■	Prior civil cases
■ ■	Court/protection orders	■ ■	Wills and trusts
■ ■	Property deeds	■ ■	Conveyances
■ ■	Advanced care directives/living wills	■ ■	Guardianship/conservatorship documents
■ ■	<i>Consultation with Experts</i>		
■ ■	Handwriting analysts	■ ■	Geriatricians
■ ■	Forensic accountants	■ ■	Geriatric psychologists and psychiatrists
■ ■	Wound care experts	■ ■	Medical examiner
■ ■	Civil attorneys		



PART II: INTERVIEWS AND PHYSICAL EVIDENCE

INTERVIEWS

Witnesses who can describe the victim's condition, activities, and level of functioning and interaction with the defendant at time of incident and before. Include a description of changes over time.

Possible witnesses:

Family and friends

Banking/financial

Hair stylists/barbers

Local businesses

Adult day care services

Adult Protective Services

Civil attorneys

Acquaintances/social

Medical providers (prior and current)

Faith community

Neighbors

Social services (Meals on Wheels, etc.)

Payees for expenses the suspect paid with the victim's money

Various community "gatekeepers":

Delivery personnel

Meter readers

Postal carriers

Other _____

PHYSICAL EVIDENCE - include an inventory

Photo and video documentation

Crime scene, including, if relevant:

Contents of refrigerator, cupboards, medicine cabinets [include actual bottles/containers for prescriptions to show physician and pharmacy, possession and full/empty status given recommended dosage over time from the date of the last refill].

Suspect's living area

Victim's living area

Major new purchases made by the suspect

Victim's body

Injuries over time

Other signs of neglect

Clothing victim was wearing at time of incident (include adult diapers if applicable)

Bedding

Locks on outside of doors

Writings/journals/letters

Photos and videos related to conduct

Address books and calendars

Defendant's and victim's ISP records

Defendant's computer, flash drives, etc.

Medications and medical supplies

Legal file from victim's civil attorney

Assistive devices (or lack thereof)

Nutritional supplements

Receipts for purchases

Restraints and bindings

Checkbooks, check registers

