Legal Basics: Elder Financial Exploitation

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Housekeeping

• All on mute. Use Questions function for substantive questions and for technical concerns.

• Problems with getting on to the webinar? Send an e-mail to NCLER@acl.hhs.gov.

• Slides and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.
About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living’s Administration on Aging.
The mission of the **American Bar Association Commission on Law and Aging** is to serve as the collaborative, interdisciplinary leader of the Association’s work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons, particularly low income and vulnerable elders.

Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.
Key Lessons

1. Many different **types** of financial exploitation are prevalent, costly, devastating, and usually unreported.

2. Common **characteristics of victims** of exploitation are observable and important to **screen** for.

3. Several legal **action strategies** are available to you to prevent, intervene and redress financial exploitation.

4. Take advantage of **systems change opportunities**. No one entity is fully capable of preventing the problem or meeting the needs of victims. Each has a crucial role to play, and interaction and collaboration among resources and stakeholders is necessary.
Section 1: Definition and Types of Financial Exploitation
Definition & Types of Financial Exploitation

Definition

• National Center on Elder Abuse: “The illegal or improper use of a vulnerable adult's funds, property, or assets.”

• Older Americans Act: “The fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets.”

42 U.S.C.A. § 3002 (West)

• State Law definitions vary.
Financial Exploitation Examples

- Mr. Ames receives phone call from his adult son’s “friend” saying son is stranded in Guatemala, because his wallet has been stolen and he desperately needs $500 to get home. He sends the money via Western Union before he finds out it was a scam.

- Drug dependent son intimidates mother to help financially support his lifestyle (undue influence).
Financial Exploitation Examples (continued)

• Mr. Bates, an older widower with mild dementia, is befriended by his home help aide and soon is paying large sums to help pay “medical expenses” for the aide’s sick daughter until his entire savings is gone. The aide disappears.
Among community dwelling elders...

• **Financial abuse/exploitation by a known person** (a family member, close friend, caregiver, or person/organization in a position of trust) who breaches the trust between a vulnerable person and misuses the individual’s funds to serve own needs at the elder’s expense

• **Fraud, misrepresentation, or scams by a stranger** or “new friend” who deceives the vulnerable person via an ever-changing variety of con games, such as bogus lotteries, sweetheart swindles, grandparent scams, fake charities, home repair fraud, IRS back taxes schemes, identity theft, etc.
Financial Exploitation in Context

• Older adults commonly experience multiple forms of abuse simultaneously:
  • Physical Abuse
  • Emotional Abuse
  • Sexual Abuse
  • Financial exploitation
  • Neglect
  • Abandonment
  • Self-Neglect
Extent & Cost of Problem

• Pervasive:
  • Approximately 10% of older adults experience some form of elder abuse. Prevalence rate likely to be higher.
  • 3.5% to 5.2% of community dwelling elders experience financial abuse by family members.
  • FTC survey (2011) of scams and frauds: 7.3% of adults 65-74 were victims and 6.5% of adults 75 and older.

• Under-reported:
  • Only 1 in 4 to 1 in 23 cases reported.
Extent & Cost of Problem (continued)

• **Costly:**
  - Annual financial losses estimated at $2.9 billion (MetLife Study of Elder Financial Abuse, 2011) to $36.5 billion (True Link Report, 2015).

• **Devastating:**
  - Enhances risk of hospitalization, nursing home admission, death.
Section 2: Victim/Perpetrator Characteristics and Screening
More Financial Exploitation Examples

• Adult son convinces 70 year old mother to name him as agent under a POA to “help her manage her finances,” and uses mother’s a funds to pay for his new car and pay his personal expenses.
  • Same as above but son convinces mother to add his name to her bank account.

• Roofing contractor in the neighborhood notices Mr. Daley’s aging roof and offers to repair it. Several thousands of dollars later, roof is not fixed.
Victim Characteristics/Risk Factors

• Increased age
• Gender (Female)
• Cognitive impairment
• Physical impairment
• Dependence on perpetrator
• Depression, loneliness & substance abuse,
• Social isolation
Perpetrator Characteristics

• Predominantly family, more likely to be younger

• Factors enhancing risk:
  • Caregiver burden
  • Being dependent on the victim
  • Depression, substance abuse & other mental health issues
  • Lack of social support
Victim Dynamics

• May be unable or reluctant to seek help:
  • Does not recognize the exploitation
  • Fear disbelief, stigma, or retaliation
  • Dependent on perpetrator
  • Reluctant to get perpetrator in trouble
  • Fear guardianship or placement in long-term care facility
Behavior Indicators

• Signs abuse may be occurring, more so when risk factors exist:
  • Banking inconsistent with older adult’s ability & past
  • Unusual ATM use or wiring or money
  • Changed or missing financial documents
  • Unable to pay bills normally paid
  • Forged or suspicious signature on documents
  • Lack of affordable necessities or amenities
  • Recent, new “best friends” or “sweethearts”
More Indicators

- Missing property
- Older adult is being isolated by others
- Changes in older adult’s appearance, mood, habits
- Older adult accompanied by coercive other person
- Older adult doesn’t remember or understand recent transactions
- Older adult voices concern about missing assets
Screening Tools

For **Capacity** Concerns:


ABA Commission on Law and Aging &
American Psychological Association
**Capacity Worksheet for Lawyers**


Please read and review the handbook prior to using the worksheet.

**Client Name:** __________________________ **Date of Interview:** __________________________

**Attorney:** __________________________ **Place of Interview:** __________________________

### A. Observational Signs

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<th>Section</th>
<th>Examples</th>
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| Cognitive Functioning                  | **Short-term Memory Problems**  
Repeats questions frequently  
Forgets what is discussed within 15-30 min.  
Cannot remember events of past few days  
**Language/Communication Problems**  
Difficulty finding words frequently  
Vague language  
Trouble staying on topic  
Disorganized  
Bizarre statements or reasoning  
**Comprehension Problems**  
Difficulty repeating simple concepts  
Repeated questioning  
**Lack of Mental Flexibility**  
Difficulty comparing alternatives  
Difficulty adjusting to changes  
**Calculation/Financial Management Problems**  
Addition or subtraction that previously would have been easy for the client  
Bill paying difficulty  
**Disorientation**  
Trouble navigating office  
Gets lost coming to office  
Confused about day/time/year/season  |
| Emotional Functioning                  | **Emotional Distress**  
Anxious  
Tearful/distressed  
Excited/pressured/manic  
**Emotional Lability**  
Moves quickly between laughter and tears  
Feelings inconsistent with topic  |
Screening Tools
EIFFE Prevention Program

Clinician’s Pocket Guide

**Pocket Guide on Elder Investment Fraud and Financial Exploitation**

**Should I be concerned?**

**Red Flags in patient/client history:**
- Social Isolation
- Bereavement
- Dependence on another to provide care
- Financially responsible for adult child or spouse
- Alcohol or drug abuse
- Depression or mental illness

**Red Flags from clinical observations:**
- Cognitive problems
- Fearful, emotionally labile, or distressed
- Suspicious, delusional
- Change in appearance, poor hygiene
- Accompanied by caregiver who is overly protective; dominates patient/client
- Change in ability to perform activities of daily living, including self-care, daily finances, medication management

[Image of Pocket Guide]

Patient Education Brochure

[Image of Patient Education Brochure]

http://www.investorprotection.org/ipt-activities/?fa=eiffe-pp
Screening Tools

EIFFE Checklist - Legal Project of the Investor Protection Trust, the ABA et al.

2 page Checklist for Lawyers

Full copy in materials

Elder Investment Fraud and Financial Exploitation: Checklist for Lawyers

Screen all older clients about whether they are experiencing investment fraud and financial exploitation because:
• Victims often will not disclose their situation voluntarily but they will do so if asked;
• Establishing the practice of asking all clients reduces the stigma felt by the victim and helps you feel more comfortable about asking sensitive questions; and
• Questions that demonstrate an awareness of the issue indicate to clients that they can seek help from you in the future if they are not ready or able to do so now.

Before asking older clients about investment fraud and financial exploitation as part of their initial interview:
• Determine who your client is, if it is not obvious;
• Interview your client alone;

Be aware of red flags in client history:
• Social Isolation
• Bereavement
• Client’s dependence on possible exploiter (for care, financial support, housing, companionship)
• Possible exploiter’s dependence on client (for care, financial support, housing, companionship)
• Alcohol or drug abuse
• Depression or mental illness

National resources for additional information:
• Investor Protection Trust, www.investorprotection.org
• American Bar Association Commission on Law and Aging, www.americanbar.org/aging

Possible Indicators

- Accompaniment by a stranger, family member or other person especially if they seem to prevent self-expression or decision-making, or to coerce decisions or transactions
- Accusations that caregivers, family members, or others are taking or mismanaging assets
- Banking activity that is erratic, uncharacteristic, or inconsistent with ability
- Carrying financial documents around in bags all the time
- Changes in appearance, grooming, hygiene, mood, patterns of eye contact
- Changes in property titles, will, or other documents, particularly if the person is confused and/or the documents favor new acquaintances
- Concern or confusion about missing funds or property
- Confusion about executing or having executed a power of attorney
- Expressions of fear, such as cringing or withdrawing
- Fearful of eviction, institutionalization, or abandonment if money or other assets are not given to caregiver or others
- Frequently forgetting or claiming to have forgotten ATM card, checkbook, deposit slips, or other items needed for financial transactions
- Resistance to enter into or engage in conversation
- Implausible explanations about what is being done with money or property
- Lack of awareness or understanding of recently completed financial transactions
MANAGING SOMEONE ELSE’S MONEY
Help for agents under a power of attorney

https://www.consumerfinance.gov
## Screening Tools

<table>
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<th>Model</th>
<th>Factors</th>
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| **Singer “Cult Model”**    | 1. Isolation  
2. Dependency  
3. Creating Siege Mentality | 4. Sense of Powerlessness  
5. Sense of Fear/Vulnerability  
6. Staying Unaware |
| **Blum “IDEAL” Protocol/Worksheet** | 1. Isolation  
2. Dependency  
3. Emotional manipulation and/or Exploitation of a vulnerability | 4. Acquiescence; and  
5. Loss. |
| **“S.C.A.M.” MODEL**       | 1. Susceptibility  
2. Confidential Relationship | 3. Active Procurement  
4. Monetary Loss |
| **Brandle/Heisler/Stiegel Undue Influence Wheel** | **Goal:** Financial Exploitation  
**Perpetrator Tactics:**  
1. Isolate from others and information  
2. Create fear  
3. Prey on vulnerabilities  
4. Create dependency | 5. Create lack of faith in own abilities  
6. Induce shame and secrecy  
7. Perform intermittent acts of kindness  
8. Keep unaware |

Screening Tools

- **California Undue Influence Screening Tool**, available at: [www.elderjusticecal.org](http://www.elderjusticecal.org)

- Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
  1. The vulnerability of the victim....
  2. The influencer's apparent authority....
  3. The actions or tactics used by the influencer....
  4. The equity of the result....

  
  Cal. Welf. & Inst. Code § 15610.70 & Probate Code §86

- Tool provides a Checklist of Indicators for each of the four factors.
About Screening Tools

• Currently there is no proven standard for elder abuse screening.
• Many screening tools exist, a majority designed for use by health care providers.
• Differing opinions on whether screening presents more benefits or harms.
• A positive screen for elder abuse means that further information should be gathered. It’s not conclusive that elder abuse is occurring.
Screening Tips

1) Ask ALL clients about financial management.
   • Makes lawyer feel more comfortable
   • Makes client feel more comfortable
   • Reduces stigma felt by victims
   • Answering questions easier than volunteering information
   • Indicates client can return for future help
Screening Tips (continued)

2) Use scripts and screening indicators.
3) Determine who is your client.
4) Interview your client alone.
5) Explain why you ask all clients these questions
6) Explain implications if mandated to report.
7) Ask direct, but not conclusive, questions.
Section 3: Action Steps
Financial Exploitation Examples

• Mrs. Clark’s court appointed guardian is “borrowing” funds from Mrs. Clark’s assets to purchase real estate for himself and concealing the transactions.

• A “free trial” of a miraculous memory pill results in a bill for a 12 month supply that “according to the terms of our offer,” the individual is told she agreed to.
Action Steps

• If you know of/suspect financial abuse:
  • Reassess ethical responsibilities to client
  • Evaluate your reporting obligations
  • Encourage client or others to report
  • Consider whether other services are appropriate
  • Refer client to other needed services
More Action Steps

• Prevention
  • Provide public and professional education
  • Counsel clients
  • Strengthen clients (and abuser’s) connection to services and the community – the more eyes the better.
  • Recommend and draft protective measures, especially in the drafting of POAs
Types of Power of Attorney Abuse

• In creating of the POA
  • Incapacity at execution
  • Forgery/Fraud/Misrepresentation
  • Undue influence
Types of Power of Attorney Abuse (continued)

• Implementing POA
  • Transactions exceeding intended authority
  • Transactions conducted for self-dealing
  • Transactions contravening principal’s expectations
Drafting POAs

• Consider:
  • Requiring annual accountings to a 3rd person(s).
  • Requiring a second signature for large transactions.
  • Granting a power to revoke to a 3rd person.
Drafting POAs (continued)

- Clearly address “hot powers” – i.e., power to:
  1) Make a gift (limit to whom/how much)
  2) Create or change rights of survivorship
  3) Create or change a beneficiary designation
  4) Create, amend, revoke, or terminate a trust
  5) Delegate agent’s authority
  6) Waive principal’s rights under a joint and survivor annuity, including survivor benefit under a retirement plan
  7) Disclaim property, including a power of appointment
Civil Remedies Prevention

- Divorce or legal separation
- Protection/restraining orders
- Injunctions
- (Limited) Guardianship/conservatorship
Civil Remedies: Asset Recovery

- Accounting
- Breach of fiduciary duty
- Constructive trusts
- Conversion
- Fraud
- Rescission
- Restitution
- Private right of action for Elder Abuse?
Civil Remedies: Challenges

• Slow pace & customary delays
• Evidence & witnesses may be unavailable
• Victim may lack capacity to testify
• Proving lack of capacity may be difficult
• Proving undue influence may be difficult
• Victim may lack money for lawyer
• Perpetrator may lack money for restitution
Criminal Remedies

- Increasing recognition as a crime
- Increasing involvement of law enforcement
- Increasing involvement of prosecutors
- Courts changing procedures
- Legislatures strengthening laws

Thanks in part to the DOJ Elder Justice Initiative and Elder Justice Coordinating Council
Agency Enforcers

The DOJ Elder Justice Initiative web page has an *Elder Abuse Resource Roadmap* tool for Financial Exploitation to identify the appropriate agencies to report exploitation:

https://www.justice.gov/elderjustice/roadmap
Section 4: System Change Opportunities
System Change Opportunities

• Know what other systems interact with elder abuse victims, especially APS
• Learn about the roles of those other systems
• Educate those other systems about your roles
• Advocate for state law reform
• Participate in multidisciplinary teams
• Educate older persons & families, caregivers and other professionals
• Improve services to victims
Additional Resources (1 of 3)

• Join the Elder Abuse Email List by contacting NCEA@med.usc.edu
• ABA Commission Contact: Lori Stiegel, lori.stiegel@americanbar.org
• Key Statutes Governing Elder Abuse:
  • Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 et seq.
  • Elder Abuse Prevention and Prosecution Act, PL 115–70 [S 178], approved October 18, 2017
  • State Adult Protective Services Laws
• Key Federal Regulations Related to Institutional Elder Abuse:
  • Long-Term Care Ombudsman Program Regulations 45 CFR Parts 1321 and 1327
Additional Resources (2 of 3)

• Key Federal Agencies Addressing Elder Abuse:
  • U.S. Administration for Community Living, Department of Health and Human Services, [www.acl.gov](http://www.acl.gov)
  • Consumer Financial Protection Bureau, [www.consumerfinance.gov/older-americans](http://www.consumerfinance.gov/older-americans)
  • U.S. Department of Justice
    • Elder Justice Initiative, [www.justice.gov/elderjustice](http://www.justice.gov/elderjustice)
    • Office for Victims of Crime, [www.ojp.usdoj.gov/ovc](http://www.ojp.usdoj.gov/ovc)
    • Office on Violence Against Women, [www.justice.gov/ovw](http://www.justice.gov/ovw)
Additional Resources (3 of 3)

• Select National Entities Providing Additional Resources:
  • American Bar Association Commission on Law and Aging, www.americanbar.org/aging
  • Lori Stiegel, lori.stiegel@americanbar.org
  • National Center on Elder Abuse, www.ncea.acl.gov
  • Elder Justice Coalition, www.elderjusticecoalition.com
Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.