CIVIL ELDER FINANCIAL ABUSE FOR PROSECUTORS

Institute on Aging

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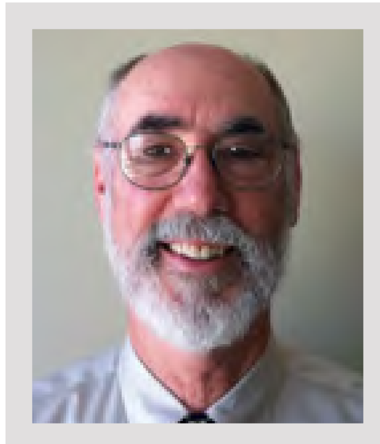
Steven Riess is a San Francisco attorney whose practice is limited to representing elders in financial abuse matters, with a particular emphasis on abusive annuity sales. In 2007, he proposed and drafted Senate Bill 611, which extended the provisional remedy of attachment to victims of elder financial abuse. In 2008, he wrote Senate Bill 1140, a major revision of the financial abuse statutes, which expanded the reach of financial abuse so that its remedies are available to those exploited through undue influence or who lack capacity. He also wrote Senate Bill 1136, which revised the Consumers Legal Remedies Act to include exploitative sales of Medi-Cal pre-qualifications services. He was awarded the 2009 Sentinel Award for lifetime achievement by the Elder Financial Protection Network. He has taught at various law schools in California and in Germany and spent a year as a visiting scholar at Boalt Hall. He is the author of several law textbooks, one of which has been published in Germany and a second as a bilingual text in the People's Republic of China. His website (Riesslaw.com) provides extensive resources on elder financial abuse.



Note: Helen Karr, Esq. contributed material and content for Criminal Elder Financial Abuse for Civil Lawyers.

Chapter 1

Purpose of this Guide

Elder financial abuse can be both a civil wrong and a crime. Civil remedies primarily seek to help victims recover from the consequences of exploitation; criminal sanctions seek to punish and deter such wrongful conduct. Both serve important public policy objectives and promote the Legislature's goal of reducing or eliminating elder financial abuse. While the same wrongful conduct can create both civil and criminal liability, the legal requirements and the practical considerations of each differ significantly. Generally, civil lawyers are unaware of the requirements for a successful criminal prosecution; similarly, prosecutors are often unaware of the requirements for a successful civil action. Both may be frustrated that the other lacks greater interest or insight. The purpose of this publication is to bridge this gap by providing an overview of the law, issues, and practical concerns of elder financial abuse from both a civil and criminal perspective. Its goal is to promote understanding between prosecutors and victim's lawyers with the expectation that this will lead to greater cooperation and thereby help reduce elder financial abuse.

Chapter 2

The Development of California's Elder Financial Abuse Law

In the late 1970's, the California Legislature became aware of extensive anecdotal information that elders were being victimized by abuse and neglect at an alarming rate. In 1982, the Legislature responded by creating a data gathering system in which certain health care professionals and others having frequent contacts with elders and dependent adults were characterized as "mandatory reporters" and were charged with the duty to report incidents of suspected abuse to law enforcement and Adult Protective Services. Within a short time, it became apparent that the problem of elder abuse and neglect was not only very real but widespread. Since 1982 this statutory scheme, the Elder and Dependent Adult Civil Protection Act (Welf. & Instit. Code § 15600 *et seq.* – usually referred to by its acronym EADACPA), has been repeatedly revised to extend its reach and effect and to provide victims with extensive civil remedies. Effective January 1, 2009, the Legislature substantially reworked the definition and civil remedies sections with the result that California now provides its seniors with the most comprehensive and far-reaching financial abuse protections in the nation.

Chapter 3

The Law of Civil Elder Financial Abuse

Three statutes contained in the Welfare & Institutions Code provide the foundation for civil elder financial abuse: (1) 15610.30 defines the term "financial abuse"; and (2) 15657.5 provides civil remedies where financial abuse is proven; and (3) 15657.6 provides for the imposition of damages under certain circumstances where the holder of the property of an incapacitated elder refuses to return the property.

The Definition Statute (Welf. & Instit. Code § 15610.30): Welf. & Instit. Code § 15610.30 defines financial abuse and protects "elders and dependent adults." An elder is a person 65 or older, and a dependent adult is a person between the ages of 18 and 64 years who has physical or mental limitations that restrict his ability to carry out normal activities or to protect his rights. Since an elder is 65 or older and a dependent adult is between the ages of 18 and 64, these categories are mutually exclusive; that is, an elder cannot be a dependent adult and a dependent adult cannot be an elder. However, the protections of these statutes apply equally to elders and dependent adults. In discussion, the term "elder" typically refers to both categories.

The definition of financial abuse models the classic structure of a penal provision by requiring a bad act performed in a manner that strongly suggests that the conduct was performed with a culpable state of mind. The conduct element is described by five verbs:

taking, secreting, appropriating, obtaining, and retaining. The expansive meaning of these words, particularly taking and obtaining, suggest that just about any means of acquiring an interest in the elder's property will satisfy this element. The intent element may be satisfied in one of three ways: by taking the property of an elder (1) for a wrongful use, (2) with the intent to defraud, or (3) by undue influence. Taking property "for a wrongful use" is further defined and means taking property where the abuser "knew or should have known that this conduct is likely to be harmful to the elder." The phrase "knew or should have known" provides both a subjective and an objective standard by which to measure the abuser's intent: subjective where the abuser actually recognized that harm would result; objective where the abuser did not recognize the potential for harm but a reasonable person certainly would have. The term "harmful" is also quite broad and suggests not merely that some undesirable result might occur but that a harmful consequence was substantially likely to occur.

It is important to appreciate that this new standard – taking the property of an elder where the wrong-doer knew or should have known that doing so would harm the elder – is a revolutionary departure from traditional legal principles. While unreasonable conduct has been the historical basis for tort liability, no similar standard of care has been applicable to transactions. Rather, parties to a transaction must only refrain from misrepresentations of material fact – that is fraud – and no duty of good faith exists. As the well-known maxim says: "Let the buyer beware!" The new definition of "wrongful use" now creates a duty to treat elders fairly. Where the terms of a transaction fall below this standard of care, the

beneficiary of the transaction may be held liable for financial abuse damages. This new definition is particularly important because the wrongful taking of an elder's property is often accomplished through transfers relating to some type of transaction. It is of course up to the trier of fact – in most cases a jury – to decide whether the transaction was unreasonable and unfair. While all persons, including elders, may enter into agreements with harmful consequences without liability attaching, where a harmful result is so likely that the wrongdoer knew or should have known that harm would result, then financial abuse occurs. Thus the essence of financial abuse is the community's assessment of whether the transaction meets the most basic measure of fairness or whether it is exploitative.

Undue influence is historically a contract law concept. The definition is codified in the Civil Code (§ 1575) in the chapter specifying the characteristics of consent sufficient to form a binding contract. In the absence of sufficient consent, a contract is voidable, and the consideration given must be returned. Civil Code § 1575 was enacted in 1872 and has never been revised. However, since its enactment, the term undue influence has been referenced in many other statutes not directly related to contracts, including when it may be appropriate to appoint a conservator (Probate Code§ 1801), the wrongful taking of estate property (Probate Code§§ 259 and 859), the creation of involuntary trusts (Civil Code§ 2224), the effect of testamentary dispositions (Probate Code§ 6104), the effect of donative transfers (Probate Code§ 21380), and of course financial abuse (Welf. & Instit. Code § 15610.30).

Obviously, a person's judgment and decisions are influenced by the comments, thoughts, and opinions of others. However, the law draws an important distinction between mere influence and persuasion which is considered excessive: that is, influence is an acceptable reality of social interaction while undue influence is wrongful. Undue influence has been referred to as "over persuasion." While this boundary between permissible influence and influence that is undue is far from clear, undue influence essentially occurs where the will of the influencer replaces the will of the person manipulated. A person who uses undue influence to obtain the property of an elder is now liable for financial abuse (Welf. & Instit. Code § 15610.30).

The definition also makes clear that the taking of just about any property right and in just about any context will satisfy the statute, including by agreement, donative transfer, or testamentary bequest. This means that financial abuse may occur by way of contract, by a gift, or by changing a will. It also includes taking an elder's property whether the property is held directly by the elder or by a representative. Thus, financial abuse may occur where the property is taken from the elder's conservator, trustee, or from a person with a power of attorney.

The Remedies Statute (Welf. & Instit. Code § 15657.5): Welf. & Instit. Code § 15657.5 provides the basic remedies available for financial abuse as well as providing an enhancement where the conduct is particularly egregious. The basic remedies are available where the elder proves financial abuse by a preponderance of the evidence. These remedies include compensatory damages, mandatory attorney's fees, and costs, including the expenses of a conservator. Compensatory damages include present and future

damages for pain, suffering, and emotional distress, as well as for out-of-pocket economic harm. The remedies statute provides that where an elder proves financial abuse, the court must award attorney's fees. That is, the decision to award a successful elder attorney's fees is not discretionary with the trial judge; rather, the Legislature has directed that as a matter of public policy, a successful elder must be awarded attorney's fees. Moreover, a decision of the Court of Appeal held that where the elder pleads but fails to prove financial abuse, the prevailing defendant may not recover attorney's fees from the elder even if an independent basis for their recovery exists. (*Wood v. Santa Monica Escrow Company* (2007) 151 Cal.App.4th 1186.) The remedies statute also provides that, where appropriate, punitive damages pursuant to Civil Code § 3294 are available. In other words, to recover financial abuse damages, an elder must prove by a preponderance that the taking of his property was for a wrongful use, with the intent to defraud, or by undue influence; to add punitive damages to the recovery, the elder must prove by clear and convincing evidence that this wrongful conduct was done with oppression, fraud, or malice. The standard for the enhancement provision is very similar – although not identical to – that for recovering punitive damages. In order to obtain the enhancement, the elder must prove by clear and convincing evidence that the abuser acted with "recklessness, oppression, fraud, or malice." While oppression, fraud, and malice are all intentional acts, recklessness requires something less: that is, the harm was not actually intended, but the conduct was substantially likely to result in harm. Accordingly, it is conceivable for an elder to obtain the enhancement based on recklessness without recovering punitive damages based on the intentional conduct of oppression, fraud, or malice.

The enhancement authorized is the recovery of general damages where the elder has died. Normally, general damages (that is damages for pain, suffering, and emotional distress) are not recoverable where the plaintiff is deceased and only out-of-pocket damages may be recovered (as sometimes stated: general damages die with the plaintiff). However, where recklessness, oppression, fraud, or malice is proved by clear and convincing evidence, general damages may still be recovered notwithstanding the death of the elder.

The Unsound Mind Remedy (Welf. & Instit. Code § 15657.6): In addition to the definition and remedies statute, a third statute provides a remedy where property has been taken from an elder while incapacitated. Welf. & Instit. Code § 15657.6 addresses the problem where an incapacitated elder's property is held by a third person who now refuses to return it. Rescission is the traditional remedy for recovering property taken in a transaction with an incapacitated person. A rescission action is based on the invalidity of the incapacitated person's assent. That is, to be valid a contract requires assent, and if the elder cannot consent because he or she lacks capacity, then the contract is unenforceable and any consideration given must be returned. Since the sole remedy in a rescission action is a judgment restoring the property, defendants in such actions are rarely motivated to return the property expediently. The unsound mind remedy addresses this problem by awarding financial abuse damages where a defendant refuses to return the property upon demand. A common example of this would be where an incapacitated elder is sold an annuity by an independent agent. While the elder may be unable to prove that the insurance company now holding his assets was aware of or responsible for

the wrongful conduct in initially taking his property, the insurer must nevertheless return the elder's money or face damages for elder financial abuse.

Statute of Limitations (Welf. & Instit. Code § 15657.7): Welf. & Instit. Code § 15657.7 establishes a four year period of limitations within which to file an action. The period does not commence until the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the abuse. Since elder financial abuse typically involves elements of fraud, misrepresentation, breach of fiduciary duty, or lack of capacity, the period of limitations often does not commence until the elder consults an attorney.

Protective and Restraining Orders (Welf. & Instit. Code § 15657.03): An elder may obtain a protective order, with or without notice, based upon reasonable proof of a past act of abuse; a showing that abuse is likely to reoccur is not required. However, the protective order is limited to restraining the defendant from further acts of abuse, destroying personal property, contacting or disturbing the peace of the elder, and with some limitations, excluding the defendant from the residence of the elder. A protective order may be effective for up to three years and must be entered into the California Law Enforcement Telecommunication System (CLETS). A temporary restraining order pursuant to CCP § 527, by which the court is broadly authorized to restrain almost any conduct, may also be available.

Right to Attach Orders (Welf. & Instit. Code § 15657.01):

A right to attach order is a provisional remedy by which a plaintiff may levy on the property of a defendant at the outset of litigation so that the defendant's assets may not be hidden or wasted during the pendency of the action. Where the ability of a defendant to pay damages is questionable, obtaining a right to attach order early in the litigation allows the elder to explore whether continuing the litigation is economically justified. Even where the defendant is clearly financially responsible, obtaining a right to attach order may be strategically valuable because it may tie up the defendant's assets and demonstrate at the outset the probable validity of the elder's claim. In order to obtain a right to attach order, an elder must demonstrate the "probable validity of the claim." This means that a full evidentiary hearing may be required to obtain an order, and the expense of such an "early pre-trial" must be weighed against the probability of success. Where a right to attach order issues, the elder is required to post a $10,000 undertaking.

Chapter 4

The Context of Elder Financial Abuse Cases

Although no such statutory distinction exists, civil elder financial abuse cases can be usefully divided into two major categories: domestic cases and commercial cases. Domestic financial abuse generally involves the economic exploitation of elders by family members, care-givers, acquaintances, and neighbors and often involves the donative transfer of an elder's property or an inappropriate bequest obtained through undue influence. In domestic elder financial abuse, the wrongdoer typically has a relationship with the elder which pre-exists the abusive conduct. The wrongdoer realizes that the elder's vulnerability creates opportunities for gain and exploits the existing relationship for this purpose. While occasionally a wrongdoer may abuse more than one elder, domestic elder financial abuse typically involves the abuse of a single elder. By contrast, commercial financial abuse involves the economic exploitation of elders by sellers of products and services and involves issues of capacity to contract, undue influence, and misrepresentation. In commercial elder financial abuse, the wrongdoer actively seeks elders to exploit through a commercial enterprise. This is often done through advertising, promotions, free-lunch seminars, sales presentations, and direct calls. The wrongdoer often enhances the elder's vulnerability by encouraging the elder's fears of sickness, impoverishment, and isolation and exploits the elder's lack of understanding of legal and financial matters. In commercial elder financial abuse, the wrongdoer typically serially exploits many elders. The most common forms of commercial elder financial abuse are the sale of expensive and unsuitable trusts, annuities, reverse mortgages, and long-term health care planning. While accurate data is limited, some studies suggest that the majority of financial abuse incidents are domestic. While incidents of commercial abuse may not be quite as numerous as incidents of domestic abuse, estimates suggest that the value of assets appropriated through commercial abuse far exceeds that from domestic abuse.

While the cost of prosecuting a criminal matter is borne by the State, the cost of pursuing a civil matter must be borne by the individual. Civil financial abuse matters are often handled on an hourly fee basis, although contingent fee arrangements are not uncommon. Where the fee is hourly, the client bears the risk of lack of success, and where contingent, the attorney bears the risk. In either situation, a threshold issue is the prospect of satisfying a judgment and therefore recovery. Because the definition of financial abuse is so broad, the practical challenge in many cases is not proving financial abuse but engaging in meaningful settlement discussions based on an abuser's ability to pay. In this respect, the distinctions between domestic and commercial abuse can be quite significant. In domestic financial abuse, the pilfered assets are often wasted or hidden. In such cases, it may make sense to obtain asset searches or engage in other investigation at the outset to determine whether proceeding is justified. In commercial cases, the presence of errors and omissions insurance is often critical. Early discovery, as well as choice of defense

counsel, often suggests the existence of such coverage.

One particularly challenging facet of elder financial abuse is sometimes referred to as "fraudulent affection" or "fraudulent romance." This often involves the romantic involvement of a younger person with an elder for the purpose of obtaining property transfers or rights of inheritance. From a public policy standpoint, this situation is particularly challenging since there is no easy way to evaluate the authenticity of a loving relationship. Clearly, a large difference in age or resources cannot be the only test as there are many instances of authentic relationships under such circumstances. The difficulty of challenging a relationship based on fraudulent affection is compounded by the typical reluctance of the elder to cooperate. Without the elder's cooperation, no one (other than perhaps a conservator or a current beneficiary of a trust) has standing to object. Moreover, the concept of undue influence in a "romantic" relationship can be quite problematic as between spouses varying degrees of influence may be exerted. Often, the persons most motivated to address the apparent problem are the heirs of the elder. Not only is there a conflation of the heirs' personal and economic motivations, but they run the risk of retaliation. For example, the child of an elder who attacks the interests of the new romantic partner runs the risk that the elder may change his estate plan to disinherit that child. While a petition for a conservatorship may later be successful such that the conservator has standing to bring a financial abuse action on behalf of the elder, this does not necessarily mean that the elder lacks testamentary capacity to change the estate plan. Under current law, it is very difficult to remedy instances of fraudulent affection.

Chapter 5

The Challenge of Overlapping Substantive Areas

One significant challenge of representing elders in financial abuse cases is that such cases often involve multiple overlapping substantive practice areas. For example in a domestic context case, an elder's child may be providing the elder with custodial care and thereby may improperly influence the elder to change an estate plan. If litigation results, the elder's lawyer will need to be familiar with the substantive law of financial abuse, civil litigation procedure, the law of trusts and estates, the law of capacity, and the law of real property transfers. In a commercial financial abuse case, a long-term care and trust mill may charge an elder an exorbitant fee for providing Medi-Cal prequalification services, may revise estate planning documents, may recommend the sale of existing investments, and may sell replacement annuities. An attorney representing the elder will need to be familiar with the substantive law of financial abuse, civil litigation procedure, Medi-Cal eligibility regulations, the law of trusts and estates, the Consumers Legal Remedies Act, securities regulation, state insurance law, and the nature of annuities. In other words, an attorney who handles elder financial abuse cases must commonly develop a working knowledge of many related practice areas. This complexity often discourages attorneys from taking financial abuse cases.

Chapter 6

Conclusion

While the exploitation of elders has existed for centuries, some suggest that the problem is worsening because of our aging population, the concentration of wealth in the hands of elders, and harsh economic conditions. California has responded to this problem by enacting powerful new laws to protect elders. Nevertheless, the law of civil elder financial abuse is in its infancy and much remains to be accomplished. First, elders must be educated to protect themselves from exploitation. Similarly, they must be able to recognize when they have been victimized and that help is available. Lawyers must learn how to use these powerful new remedies and be willing to learn related areas of the law. Finally, the appellate courts must clarify much of the new statutory language created by the Legislature.

CRIMINAL ELDER FINANCIAL ABUSE FOR CIVIL LAWYERS

Institute on Aging

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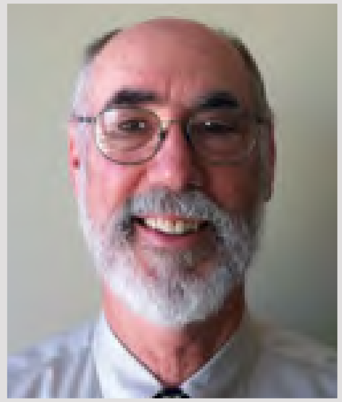

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Chapter 1

Purpose of this Guide

Elder financial abuse can be both a civil wrong and a crime. Civil remedies primarily seek to help victims recover from the consequences of exploitation; criminal sanctions seek to punish and deter such wrongful conduct. Both serve important public policy objectives and promote the Legislature's goal of reducing or eliminating elder financial abuse. While the same wrongful conduct can create both civil and criminal liability, the legal requirements and the practical considerations of each differ significantly. Generally, civil lawyers are unaware of the requirements for a successful criminal prosecution; similarly, prosecutors are often unaware of the requirements for a successful civil action. Both may be frustrated that the other lacks greater interest or insight. The purpose of this publication is to bridge this gap by providing an overview of the law, issues, and practical concerns of elder financial abuse from both a civil and criminal perspective. Its goal is to promote understanding between prosecutors and victim's lawyers with the expectation that this will lead to greater cooperation and thereby help reduce elder financial abuse.

Chapter 2

Development of the Criminal Elder Abuse Statute

In 1983, California enacted Penal Code § 367a, its first criminal statute designed specifically to protect vulnerable adults (re-codified in 1984 as Penal Code § 368). The statute initially applied only to adults who were unable to provide for their own personal needs, were unable to manage their financial resources, or were unable to resist fraud or undue influence. In 1986, the statue was amended to include all elders (persons 65 and older) and dependent adults. A dependent adult is a person between the ages of 18 and 64 who has physical or mental limitations that restrict the ability to carry out normal activities or to protect personal rights. Since an elder is defined as a person 65 or older and a dependent adult is defined as a person between the ages of 18 and 64, these categories are mutually exclusive; that is, an elder cannot be a dependent adult and a dependent adult cannot be an elder. The word "elder" is used in this guide to include both elders and dependent adults.

Early versions of the statute were modeled on child abuse laws and only provided protection against physical abuse and neglect. In 1998 and 2004, the statute was amended to include protection against various financial crimes.

Chapter 3

Content of Penal Code § 368

Penal Code § 368 sets forth the elements of criminal elder abuse. It begins with a statement of purpose:

"The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf." (Penal Code § 368(a).)

It then criminalizes four categories of conduct perpetrated against elders: (1) physical abuse and mental suffering; (2) neglect; (3) financial crimes; and (4) false imprisonment.

(1) Physical abuse and mental suffering:

"Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . is punishable by imprisonment . . . or fine." (Penal Code § 368(b) and (c).)

(2) Neglect:

"Any person . . . having the care or custody of any elder or dependent adult, [who] willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment . . . or fine." (Penal Code § 368(b) and (c).)

(3) Financial crimes:

"Any person who . . . violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who . . . [commits] identity theft . . . of an elder . . . is punishable by imprisonment . . . and by fine." (Penal Code § 368(d).)

Theft, embezzlement, forgery, fraud, and identity theft are all crimes proscribed by other sections of the Penal Code. However, where the defendant had knowledge, or reasonably should have known, that the victim of such a crime was an elder, additional penalties may be imposed for elder abuse pursuant to Penal Code § 368. If the defendant is a caregiver, the prosecution is not required to prove that the defendant knew that the victim was an elder. Statutes creating civil obligations, rights, and consequences tend to regulate conduct in broad generic terms. By contrast, penal statutes tend to be much more specific as to the conduct proscribed. For example, theft in its various forms is addressed in at least 57 sections (Penal Code §§ 484 to 502.9) and includes the

unlawful taking of personal property, labor, animals, minerals, by unlawful credit card or automated teller machine withdrawals, and many other specifically described circumstances. Accordingly, which financial crimes sections apply depend upon the circumstances of each case. The following summarizes the general elements of each of these underlying financial crimes.

(a) Theft

Theft is the intentional deprivation of another's property by larceny, by trick and device, by false pretense, or by embezzlement. (Penal Code § 484.) Larceny, embezzlement, and stealing all constitute theft. (Penal Code § 490a.) Theft is a specific intent crime. That is, the prosecution must prove that the defendant acted with the intent to deprive an owner of his property, either permanently or for such a time as to unreasonably deprive the owner of a major portion of the property's value or enjoyment.

(b) Embezzlement

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. (Penal Code § 503.) Embezzlement occurs where the owner of property entrusts it to the defendant and the defendant fraudulently converts the property for his own benefit and does so with the intent to deprive the owner of its use.

(c) Forgery

A person who signs another's name, or alters, corrupts or falsifies a legal document with the intent to defraud commits forgery.

(Penal Code §§ 470-476a.)

(d) False Pretenses and Criminal Fraud

False pretenses, also called criminal fraud, is the obtaining of money, labor, or property through misrepresentations made with the intent to defraud. (Penal Code § 532.) Intent to defraud means an intent to deceive another person for the purpose of gaining some material advantage over that person or to induce that person to part with property or to alter that person's position to his injury, and to accomplish that purpose by some false statement, false representation of fact, wrongful concealment or suppression of truth, or by any other artifice or act designed to deceive. A person intends to defraud if he has the specific intent to deceive another person to cause a loss of money or goods or services or something else of value, or to cause changes to a legal, financial or property right. Criminal fraud does not require that a victim actually suffer property loss as a result of the defendant's conduct.

(e) Identity theft

Identity theft is the unlawful use of a victim's personal identifying information. (Penal Code § 530.5.) A person commits identity theft when he willfully obtains personal identifying information of another and uses that information for any unlawful purpose, including obtaining, or attempting to obtain credit, goods, services, real property, or medical information, without the consent of the victim. Identity theft does not require that a victim actually suffer property loss as a result of the defendant's conduct and does not require an intent to defraud. (*People v. Hagedorn* (2005)

127 Cal.App.4th 734.)

Various other financial crimes exist, including grand theft, involving $950 or more, petty theft, involving less than $950 (Penal Code §§ 487, 488), theft of or wrongful use of a credit card (Penal Code § 484d), filing false or forged documents (Penal Code §§ 115, 115.5), and excessive taking (Penal Code § 12022.6). Lesser included offenses may include attempted theft (Penal Code § 664) and petty theft (Penal Code §§ 486, 488).

(4) False imprisonment:

"Any person who commits the false imprisonment of an elder or a dependent adult by the use of violence, menace, fraud, or deceit is punishable by imprisonment." (Penal Code § 368(f).)

Chapter 4

Undue Influence and Statute of Limitations

Undue Influence

Undue influence is a civil law concept codified at Civil Code § 1575. Obviously, a person's judgment and decisions are influenced by the comments, thoughts, and opinions of others. The civil law draws an important distinction between mere influence and persuasion which is considered excessive. A person who uses undue influence to obtain the property of an elder may be liable for financial abuse (Welf. & Instit. Code § 15610.30) and the consequence is just as harmful as if the property were taken by theft. However, no penal statute currently exists criminalizing taking the property of an elder by undue influence and use of the civil statute has been held to be unconstitutional. (*People v. Brock* (2006) 143 Cal.App.4th 1266.)

Statutes of Limitation

The statute of limitations for violating Penal Code § 368 is either four or five years, depending upon which aspect of the statute is charged. For example, Penal Code § 801.5 provides for a four year statute of limitations for violations of Penal Code § 368(d) and (e), and Penal Code § 801.6 provides for a five year statute of limitations for other violations of Penal Code § 368.

Chapter 5

Red Flags of Elder Financial Abuse

Elder financial abuse takes many forms and occurs in many contexts. The following circumstances may suggest financial abuse and may warrant closer investigation.

- Unusual financial activity such as sudden or frequent account withdrawals, new or frequent ATM withdrawals (particularly if the elder is housebound), or unusual purchases of goods or services.
- Travel where the elder is unable to easily travel.
- The purchase of new vehicles, breast implants, or expenditures beyond the elder's financial capacity.
- Bounced checks.
- Tardy bill payment when previously the elder had little or no debt and typically paid bills on time.
- Applications for additional credit cards, home mortgages, lines of credit, or reverse mortgages.
- The purchase of annuities and other expensive or risky financial services.
- Changes in title to property.
- Changes in ownership of bank accounts such as new joint or pay on death accounts, or authorizing third parties to sign checks.
- Changes in trusts, wills, or powers of attorney, especially if the changes are made when the elder is ill, hospitalized, or exhibits declining cognitive capacity.

- Excessive compensation for custodial care or household assistance.
- Excessive or inappropriate gifting or loaning.
- A history of prior exploitation.

Perpetrators of financial abuse may be well known to their victims and are often family members, caregivers, neighbors, holders of powers of attorney, trustees, fiduciaries, or long-time family friends. Perpetrators may also be insurance licensees, financial planners, salesmen, telemarketers, or email solicitors.

Chapter 6

Mandated Reporting of Elder Abuse

While accurate data does not exist, it is widely believed that most financial abuse goes unreported, with perhaps only one in 100 cases documented. Thus, while physical abuse and neglect are generally more obvious, financial abuse is typically a hidden crime. Victims of financial abuse may many times not be aware that they have been exploited; similarly, a fearful victim may attempt to conceal the exploitation. In 1982, the Legislature created a system of mandatory reporting by which certain persons are required to report incidents of suspected abuse. (Welf. & Instit. Code § 15630.)

Who Must Report: Mandated reporters include any person who has assumed full or intermittent responsibility for the care or custody of an elder, whether or not he receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elders, or any care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency. (Welf. & Instit. Code §§ 15610.37, 15630 (a).) Officers and employees of financial institutions are also mandated to report financial abuse. (Welf. & Instit. Code § 15630.1.) While anyone may report incidents of suspected elder abuse, only non-mandated reporters may report anonymously.

What Must Be Reported: Any mandated reporter who, in his professional capacity, or within the scope of his employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, abduction, isolation, financial abuse, or neglect, or who is told by an elder that he has experienced such behavior, must report the incident. (Welf. & Instit. Code § 15630 (b)(1).)

When Must It be Reported: A mandated reporter must report the known or suspected instance of abuse by telephone immediately or as soon as practicably possible, and by written report sent within two working days. (Welf. & Instit. Code § 15630 (b)(1).)

To Whom Must It Be Reported: If the abuse has occurred in a long-term care facility, except a state mental health hospital or a state developmental center, the report must be made to the local long-term care ombudsperson and to local law enforcement. If the abuse has occurred any place other than in a long-term care facility, state mental hospital or a state developmental center, the report shall be made to adult protective services or the local law enforcement. (Welf. & Instit. Code § 15630(b)(1)(C).) Adult Protective Services is an agency that is responsible for investigating elder abuse that does not occur in a long-term care facilities, state mental health hospitals, or state developmental centers.

Penalties For Failure to Report Any Type of Abuse: The failure of a mandated reporter to report incidents of suspected elder abuse constitutes a misdemeanor punishable by up to six months in jail, a fine of up to $1,000, or both. If a failure to report results in

death or great bodily injury, the penalty may be increased to one year in jail, a fine of $5,000, or both.

Penalties Against Employees of Financial Institutions Who Fail to Report Financial Abuse: Officers and employees of financial institutions who fail to report are not subject to imprisonment; however, penalties of up to $5,000 may be imposed.

Chapter 7

Criminal Case Investigation, Evaluation, and Prosecution

How Cases Come to Prosecutors: Investigations of incidents of suspected elder abuse are typically initiated by local police, Adult Protective Services, private civil attorneys, non-profit agencies, the Contractors State License Board, the Department of Insurance, Multi-disciplinary Teams, Financial Abuse Specialist Teams, family members or friends of victims, and by victims themselves.

Handling of Referrals: While some District Attorney's offices have staff to handle intake and initiate investigations, others refer complainants to police or Adult Protective Services case workers.

Prosecutorial Options: Most police arrests in elder abuse cases involve physical abuse. In financial abuse cases, the District Attorney typically relies upon an investigation and thereafter obtains an arrest warrant. After considering the results of an investigation, prosecutors have considerable discretion as to whether to file charges.

Criminal Jurisdiction: While victims have the right to have a police report taken in the county of the victim's residence, crimes are prosecuted in the county where they occur. If a crime is committed in two or more counties, prosecutors in either county can prosecute. (Penal Code § 781.) Similarly, if property is stolen in one county and taken to another, prosecutors in either county can prosecute. (Penal Code § 786.)

When a Criminal Case Has Been Charged

During the defendant's first court appearance (arraignment), the judge may set bail. The prosecutor may seek a criminal stay away order, which would then be in effect for up to three years. A criminal stay away order is separate and distinct from a civil restraining order that the victim may obtain on their own behalf.

Speedy Trial Right of Defendant: A preliminary hearing must be held within ten court days of arraignment if the defendant is in custody; otherwise, the preliminary hearing must be held within 60 days. After a preliminary hearing or Grand Jury indictment, a pretrial conference is conducted in which a judge may dismiss the charges, even over the prosecutor's objection. If charges are not dismissed, the defendant is entitled to a speedy trial. A trial must be held within 60 calendar days of arraignment. However, a defendant often waives the right to a speedy arraignment and trial so as to engage in negotiations with the District Attorney, conduct additional investigation, or make legal motions.

Evidence When Case Has Been Charged: If a material witness or victim is an elder, the defendant or the prosecutor may apply for an order that the witness be examined conditionally. The defendant must be fully informed of his or her right to counsel at such an examination. The examination is often heard during the preliminary hearing, and videotaping of the examination is permitted. The examination may be done at a location other than in a courtroom. (Evidence Code § 1335.)

Difficulties in Prosecution: Infirmities of the elder may present particular problems for prosecutors. For example, the victim may suffer from memory impairment, particularly where substantial time has passed between the wrongful conduct and trial. Victims may have difficulty understanding or communicating the details of complex and multiple financial transactions. Victims may suffer from developing dementia or other cognitive impairment that renders them incompetent and prohibited from testifying. Victims may suffer from physical infirmities that prevent them from coming to court. The victim may die before trial. The victim may harbor favorable feelings toward the defendant, particularly if he is a relative. A victim may feel responsible for the defendant's upbringing and problems. Often, family members may not support prosecution of a family member and pressure the victim to keep the problem "in the family." If the defendant is not related to the victim, but was the victim's caregiver, the victim may similarly not wish to prosecute. The victim may be closer to the defendant than to any other person. The victim may, at least in part, have desired to give the defendant the property.

Protection of property during prosecution: Penal Code § 186.12 permits prosecutors, under certain circumstances, to apply to the court for an order preserving property belonging to the defendant so that it is available to satisfy any subsequent restitution order. Such an order is only available where the elder abuse is charged as a felony and the amount allegedly taken exceeds $100,000.

Chapter 8

Differences between Civil and Criminal Cases

Collection of Evidence: In criminal cases, prosecutors must be ready to prove charges when the case is first charged, therefore investigations are typically completed prior to charging. By contrast, civil cases may be filed where the elder merely has a "colorable claim," and evidence is often collected after the case has been filed.

Constitutional Right to Confront Accuser: The Confrontation Clause of the Sixth Amendment to the US Constitution provides that a witness can be heard only in the presence and subject to the examination of all parties to the action. (Evidence Code § 711.) A defendant has the right to produce witnesses on his behalf and to confront witnesses testifying against him. This confrontation occurs in court, although hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action. (Penal Code § 686 (3)(a).)

Evidence of Prior Elder Abuse: Evidence of prior acts of elder abuse may be admissible. However, acts occurring more than 10 years earlier are inadmissible unless the judge decides admission of the evidence is in interest of justice. (Evidence Code § 1109.)

Burden of Proof: In a criminal case, guilt must be proven beyond a reasonable doubt. This means, considering all of the evidence, the jury determines that guilt is the only reasonable interpretation of the evidence. Accordingly, the issue is often whether or not innocence is also a reasonable interpretation. In civil cases, liability generally must be proven by only a preponderance of the evidence.

Jury Trials: In a felony prosecution, a jury must consist of 12 members. Trials of civil matters also typically involve 12-member juries; however, the parties are permitted to agree to a jury of fewer members. In a criminal trial, the verdict of the jurors must be unanimous; in a civil trial, a verdict requires that only three-quarters of the jurors agree. If courtrooms are unavailable, criminal trials take priority over civil trials.

Remedies/Punishment: The judge controls plea bargaining and criminal sentencing. The measure of civil damages is typically determined by the jury. In criminal cases, a defendant faces state prison, county jail, fines, probation, and restitution. In civil cases, remedies typically consist of damages and injunctions.

Elder Financial Abuse Penalties: If the defendant is convicted of theft, embezzlement, forgery, fraud or identity theft of an elder's property or personal identifying information, the punishment is imprisonment in a county jail for up to one year, or state prison for up to two, three, or four years and a fine of up to $1,000 when the money, labor, goods, services, or real or personal property taken is of a value exceeding $950. If the value is less than $950, the defendant may be imprisoned for up to one year in a county jail, be fined $1,000, or both.

County jail punishment: County jail punishment includes actual custody, Sheriff's Work Alternative Program, home detention, or residential treatment programs for alcohol, drug, or mental health problems.

Probation: After conviction, a defendant may be ordered to receive appropriate counseling, which the court may impose through probation. The defendant may be prohibited from serving as an elder's caretaker, from handling an elder's finances, or may be prohibited from visiting an elder without supervision. (Penal Code §§ 1202.7, 1203, and CRC Rule 4.435.)

Restitution: Restitution for a victim's economic losses, including attorney fees, medical expenses, mental health counseling expenses, lost wages, and increased security measures, is mandatory regardless of whether the sentence imposed is prison or probation, and is enforceable as a civil judgment. (Penal Code § 1202.4.)

Chapter 9

Conclusion

Elders and dependent adult are some of the most vulnerable members of society, and the state has an obligation to protect them from exploitation. Unfortunately, prosecutors are faced with daunting challenges in prosecuting perpetrators of financial abuse. Unlike many other crimes, financial abuse usually does not center on a single violent act, but rather involves a course of conduct that may closely resemble legitimate transactions, and investigations usually must "follow the paper" in order to build a case of financial abuse. The high standard of proof – beyond a reasonable doubt – together with the pressure to prosecute higher profile violent crimes often affect the decision to prosecute. Nevertheless, a single conviction for financial abuse may send a powerful message to the community that the exploitation of elders will not be tolerated.