

Presenting a live 90-minute webinar with interactive Q&A

Elder Financial Abuse: Legal Considerations

Identifying, Preventing and Redressing Exploitation

TUESDAY, JANUARY 31, 2012

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Today's faculty features:

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Financial Elder Abuse



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Types of Financial Abuse

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- **Identity Theft**
 - Credit card, bank fraud, telephone, internet scams
- **Caretakers - stealing or inappropriate use of assets**
- **Financial Investments**
- **Reverse Mortgages**
- **Insurance**
 - Annuities
 - Long Term Care

Elements of Fraud – CA Law

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- **Fraud (CA Civil Code §1572):**
 - The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
 - The positive assertion, in any manner not warranted by the information of the person making it, of that which is not true, though the person making the assertion believes it to be true;
 - The suppression of that which is true, by one having knowledge or belief of the fact;
 - A promise made without any intention of performing it; and
 - Any other act fitted to deceive.

Typical Scams That Target Elders

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- Financial seminars aimed at selling insurance products
- Announcements of a “prize” that the elderly person has won but must pay money to claim
- Phony charities
- Investment fraud

Protecting Seniors from Scams

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- Fraud schemes have common themes and often follow recognizable patterns.
- The **MOST** important question to ask:
 - Who initiated the contact?
 - If it wasn't the consumer, it's likely a scam.



FINANCIAL ELDER ABUSE

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Financial Elder Abuse Examples

- **By Family:**
 - Borrowing with no intent to repay
 - Denying care or services to conserve funds
 - Selling or gifting elder's possessions
 - Signing or cashing Social Security checks
 - Misusing ATM or credit cards
 - Compelling elder to sign over property
- **By Strangers**
 - Health remedies
 - Insurance: health, funeral, life
 - Investments
 - Home repairs
 - Charitable contributions
 - Prizes and sweepstakes
 - Loans and mortgages

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Undue Influence

- **Traditionally determined after death, in will contest.**
- **Can be stopped before death –**
 - **Adult Protective Services**
 - **Long-term care Ombudsman**
- **Confidential relationship = position of trust**
- **Suspicious circumstances**
- **Deceit, coercion, emotional abuse**
- **Misuse of joint accounts, power of attorney**



Misuse of POA or Guardianship

Power of Attorney

- Limit the scope of a POA
- Require informal annual accounting

Guardianship

- Guardianship is court supervised
- *Marte v. Oliveras*, 378 N.J. Super 261 (2005) – Guardian’s self-designation as beneficiary constituted improper gift.

Identity Theft

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- Identity Theft is:
 - a dangerous form of exploitation,
 - whereby one assumes another person's identity,
 - typically in order to
 - ✦ access resources or obtain credit and other benefits in that person's name;
 - ✦ fraudulently obtain goods or services in the victim's name, or
 - ✦ conceal his/her true identity from authorities and background checks

Identity Theft & The Elderly

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- Three most common perpetrators:
 - Relatives
 - Caregivers
 - Scammers
- In some cases, a duty to report arises (e.g. when the perpetrator is a relative or caregiver)

Identity Theft Can Result In...

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- Denial of credit
- Harm to credit rating
- Harassment by debt collectors
- Loss or denial of employment
- Legal action
- Arrest
- Tax problems
- Garnishment of wages
- Difficulty in renewing a drivers license
- Denial of public benefits
- Denial of medical care
- Time and expense

Emotional Toll of Identity Theft

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VICTIMS MAY EXPERIENCE:

Shame
Sadness
Helplessness
Anger
Isolation
Rage
Betrayal
Suicidal feelings



Medicare / Medicaid Fraud

- **Billing for services or supplies not provided**
- **Billing for medically unnecessary services**
- **Altering claims forms and/or receipts**
- **Miscoding**
 - **Federal False Claims Act - 31 USC 3729 *et seq***
 - **Federal *Criminal* False Claims Act – 18 USC 287**
 - **Federal Program Fraud Civil Remedies Act – 31 USC 3801 *et seq.***

Failure to Fulfill Contracted Services

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- Contractors – reverse mortgages
- Financial planners
- Insurance agents
- Telemarketing scams
- Investment schemes
- “Help you pay your bills” scams



Warning Signs

- **Living conditions well below resources**
- **Unusual or inappropriate bank activity**
- **Checks written to “cash”**
- **Bills unpaid or overdue**
- **Transfer of title or other assets**
- **Reluctance to discuss finances**
- **Personal belongings missing**
- **Isolation**
- Reference: National Council on Aging



Prevention Tips

- **REDUCE ISOLATION**
- **Limit powers of attorney**
- **Request periodic accountings**
- **Direct deposit income – watch joint accounts!**
- **Auto-pay bills wherever possible**
- **Geriatric care managers**
- **REDUCE ISOLATION**



Reporting Abuse

- **In Home or Community: Adult Protective Services (APS)**
- **In Nursing Home or other Institution: Long-Term Care Ombudsman (LTCO)**
- **Authority and scope of APS and LTCO varies from state to state.**
- **Be as specific as you can in your description**
- **Understand the elder does have the right to refuse services**
- **Keep your eyes and ears open – each report is a snapshot**

Attorney-Client Privilege

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- *Privilege to refuse to disclose, and to prevent anyone else from disclosing, confidential communications between client and attorney.*
- *Communications where legal advice is given/received.*
- *Belongs to client, not attorney, so only client may waive it.*

Conflicts Issues

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- Victim's son or daughter contacts firm on her behalf
- Girlfriend or second spouse is taking advantage of an older man
- Caregiver is taking advantage of an elder; children want to take action; elder likes and feels loyalty towards caregiver



Guardianship and Conservatorship

- **Vary State to State**
- **Most impose least restrictive measures**
- **Requires a court proceeding**
- **Full guardianship strips ward of rights**
- **Often a last resort**

Financial Counseling

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- **Crucial to stay informed and organized:**
 - Consult with an attorney about future planning and appointing a power of attorney.
 - Keep financial records neat.
 - Know where to go if you suspect abuse.

CA's Financial Elder Abuse Reporting Act

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- Created to protect vulnerable elders from financial abuse and manipulation.
- **§ 208.62 Suspicious Activity Reports**
 - (a) Purpose. This section ensures that a member bank files a Suspicious Activity Report when it detects a known or suspected violation of Federal law, or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act. This section applies to all member banks.

§ 15630. Mandated reporters; known or suspected abuse; telephone or Internet reports; failure to report; impeding or inhibiting report; penalties

- (b)(1) Any mandated reporter who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect, or is told by an elder or dependent adult that he or she has experienced behavior, including an act or omission, constituting physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect, or reasonably suspects that abuse, shall report the known or suspected instance of abuse by telephone or through a confidential Internet reporting tool, as authorized by Section 15658, immediately or as soon as practicably possible.
- (h) Failure to report, or impeding or inhibiting a report of, physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect of an elder or dependent adult, in violation of this section, is a misdemeanor, punishable by not more than six months in the county jail, by a fine of not more than one thousand dollars (\$ 1,000), or by both that fine and imprisonment.



Criminal Prosecution

- **Exploitation is Theft, plain & simple**
- **State prosecutors are alert to elder crimes – some have special elder crimes units.**
- **Federal Elder Justice Act**
 - **Requires prompt reporting of crimes in long-term care facilities**
 - **Serious bodily injury – 2 hours!**
 - **Otherwise – 24 hours**
 - **Provides grants to establish 10 forensic centers**
 - **Establishes Elder Justice Coordinating Council - DHHS and DOJ**

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Civil & Equitable Remedies

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- Restitution
- Constructive Trust
- Compensatory Damages

Restitution

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- Describes the act of restoration.
- Basic purpose is to achieve fairness and prevent the unjust enrichment of one party.
 - It is used in contractual situations where one party has conferred a benefit on another party but cannot collect payment because the contract is defective or no contract exists.

Constructive Trust

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- When Party A has been wrongfully deprived of his rights – where Party B obtains title to a property that she should not possess – the court can impose this equitable remedy to avoid unjust enrichment of Party B.
 - It must cover specific property.

Compensatory Damages

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- A sum of money awarded in a civil action by a court to indemnify a person for the particular loss, detriment, or injury suffered as a result of the unlawful conduct of another.

California Welf. & Inst. Code 15600 (i) and (j)

- (i) Therefore, it is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to [Section 15630](#), or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.
- (j) It is the further intent of the Legislature in adding Article 8.5 (commencing with [Section 15657](#)) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.

- If there are: Violations aggregating \$5,000 or more where a suspect can be identified in violation of Federal law or a suspicious transaction, then a SAR (Suspicious Activity Report) must be filed

12 C.F.R. § 208.62 (c)(2)

- Another red flag: (iii) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

12 C.F.R. § 208.62(c)(4)(iii)

- (e) Reports to state and local authorities. Member banks are encouraged to file a copy of the SAR with state and local law enforcement agencies where appropriate.

12 C.F.R. § 208.62 (e)

Timing of SAR Creation

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- (d) Time for reporting. A member bank is required to file a SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR. (d) Time for reporting. A member bank is required to file a SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR.

12 C.F.R. § 208.62

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Resources

- **National Committee for the Prevention of Elder Abuse (NCPEA) – www.preventelderabuse.org**
- **Center for Elder Rights Advocacy (CERA) – Provides a state by state directory of legal aid websites and hotlines - www.legalhotlines.org**
- **National Council on Aging (NCOA) – www.ncoa.org**
- **National Academy of Elder Law Attorneys (NAELA) – www.NAELA.org**
- **National Association of Professional Geriatric Care Managers (NAPGCM) – www.caremanager.org**



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