

# **Elder Abuse: Domestic Violence, Self-Neglect and Financial Exploitation**

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## **Introduction and Overview**

The goal of this presentation is to provide participants with a basic understanding of the way elder abuse cases involving domestic violence and financial exploitation are prosecuted within the Criminal Justice System in New York State.

## **Outline:**

### **I. Elder Abuse - Defined**

A. Police and prosecutors define elder abuse as any crime or violation involving a victim who is sixty years of age or older.

1. Elder abuse crimes may fall into one or more of the following categories: domestic violence, financial exploitation, general offenses.

a. Police and prosecutors define domestic violence as any crime or violation that includes an act of violence or threat of violence, committed by a defendant against a member of his or her same family or household.

b. Financial exploitation is defined by prosecutors as the unauthorized use of a victim's funds or resources. Financial

exploitation has been characterized as “the illegal or improper use of an adult’s funds, property or assets” or “resources by another individual, including, but not limited to, fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.” (See N.C.E.A. National Incidence Abuse Study; N.Y. State Social Services Law)

2. New York State Penal Law offenses charged on elder abuse cases consist of violations, misdemeanors, and felonies.
  - a. A violation is an offense that carries the lowest sanction, and it is not defined as a crime. The maximum term of imprisonment is fifteen days. Examples of violations charged on elder abuse/domestic violence/financial exploitation cases include: Disorderly Conduct, Harassment, and Trespass.
  - b. A misdemeanor is classified as the least serious level of crime. Misdemeanors are divided into two classes: "A" and "B." The maximum term of imprisonment for an "A" misdemeanor is one year, and three months for a "B" misdemeanor.

Examples of misdemeanors commonly charged on elder abuse/domestic violence/financial exploitation cases include: Assault 3<sup>o</sup>, Attempted Assault, Criminal Contempt (the violation of a valid order of protection), Criminal

Possession of Stolen Property 5<sup>o</sup>, Criminal Possession of a Weapon 4<sup>o</sup>, Endangering the Welfare of an Incompetent or Physically Disabled Person, Forgery (and related charges), Fraudulently Obtaining a Signature, Jostling, Menacing, Petit Larceny, Stalking, Theft of Services, and Unlawful Use of a Credit Card.

- c. Felonies are more significant crimes for which more than one year of imprisonment may be imposed. Felony crimes are classified from "A" to "E", with "A" representing the most serious and "E" the least serious. Examples of felonies commonly charged on elder abuse/domestic violence/ financial exploitation prosecutions include: Assault 1<sup>o</sup> and 2<sup>o</sup>, Burglary, Criminal Possession of Stolen Property 1<sup>o</sup> - 4<sup>o</sup>, Criminal Possession of a Weapon 1<sup>o</sup>-3<sup>o</sup>, Endangering the Welfare of A Vulnerable Elderly Person, Forgery (and related charges), Grand Larceny 1<sup>o</sup> - 4<sup>o</sup>, Kidnapping, Rape, Robbery, Scheme to Defraud, Unlawful Imprisonment, and Murder. Above lists are not all-inclusive.

3. Domestic Violence/Financial exploitation crimes that target elderly and/or impaired victims may qualify as Hate

Crimes.

- a. The Hate Crimes Act of 2000, P.L. § 485.05, was enacted to address what the Legislature perceived as an increase in crime involving violence, intimidation and destruction of property based upon bias and prejudice. Under the Act, an individual commits a hate crime when he or she intentionally commits a specified offense and targets a person for such an offense because of his belief or perception regarding the victim's race, color, national origin, ancestry, gender, religion, **age, disability** or sexual orientation, regardless of whether that perception is accurate. "Age" means 60 years of age or older while disability means a physical or mental impairment that substantially limits a major life activity.
- b. Some of the enumerated offenses under the Hate Crimes Act include Assault, Grand Larceny, Harassment, Kidnapping, Rape, Robbery, Stalking, and Murder.
  1. For purposes of sentencing, a conviction for one of the offenses covered by the Act would be as though it was for an offense that is one category higher (an A misdemeanor conviction would be sentenced as an E felony; an E felony would be sentenced as a D felony).

## II. The Referral of the Case to the District Attorney's Office

A. Criminal cases involving elderly victims in a domestic setting are brought to the attention of local District Attorneys' Offices through various channels.

1. Police : the police investigate crimes and arrest individuals who are suspected of committing them. The criminal action commences when the police officer has "probable cause" to believe that an individual has committed a specific offense, and he/she is taken into custody.
2. Civilians: most District Attorney's Offices have a unit where individuals who are not members of law enforcement can report crimes which require some degree of investigation. Elder abuse complaints involving the exploitation of an elderly victim in a domestic setting are commonly referred directly to the D.A.'s Office by family members, social workers, government agencies, such as Adult Protective Services (A.P.S.), the Department for the Aging, bank personnel, civil attorneys, guardians and judges on guardianship proceedings, medical professionals, community agencies, caregivers and concerned friends and neighbors.

Note: New York State does not presently have statutory "mandated reporting" rules for elder abuse which mirror the reporting

requirements for cases of suspected child abuse. Assistant district attorneys, therefore, are not 'mandated reporters' for elder abuse cases in this state. Adult Protective Services (A.P.S.) workers, however, are mandated to contact the police if they have reason to believe their client is a crime victim. See §473 (5) of the Social Services Law.

See also: N.Y. C.L.S. Pub. Health §2803-d, relating to the reporting of abuses of patients receiving care or services in a public health care facility.

B. Investigation of the complaint.

1. The District Attorney's Office often initiates a criminal investigation of an elder abuse matter before an arrest has been made, especially in financial exploitation cases in which records must be reviewed in order to determine the nature and extent of the criminal activity.

a. As part of the pre-arrest investigation, the assistant district attorney will interview witnesses, collect and review documents, and inspect physical evidence. The A.D.A has the power to "open" an investigation in the Grand Jury and request that the grand jury issue subpoenas duces tecum for the purpose of compelling witnesses to appear and produce documents relevant to the elder abuse case. See C. P.L. §610.20; C.P.L.R. §1311(a).

2. The Statute of Limitations, which governs when the prosecution

must commence a criminal action, may present a challenge on elder abuse cases.

- a. The prosecution of most felonies (excluding murder) must commence within 5 years of the commission of the felony act, two years for a misdemeanor, and one year for a violation.  
See C.P.L. §30.10.

C. Prosecution of the elder abuse complaint after the arrest.

1. As in other kinds of cases, after the police make an arrest, the assistant district attorney will review the sufficiency of evidence to support the charges and draft the accusatory instrument (the complaint), upon which the defendant will be arraigned. Certain elder abuse charges that fall within the statutory definition of "family offenses" qualify the victim to be able to proceed in Criminal Court, Family Court, or both venues concurrently. See C.P.L. § 530.11.

- a. The complaint must allege facts providing "reasonable cause" to believe that the defendant committed the offenses.  
See C.P.L. § 100.40.

2. Once the complaint is drafted, the defendant is brought before the Criminal Court for the arraignment and a hearing on bail. If not disposed of at the Arraignment, the case will be adjourned for grand jury action (felonies), motion practice or conference (other offenses) and, eventually, trial. Defendants who are not released on

their own recognizance will either post bail or be detained in jail during the pendency of the case. See C.P.L. § 170.10, 180.10.

D. Once an action is commenced in Criminal Court, the defendant is entitled to a speedy trial.

1. The prosecution must be ready for trial within 6 months of the commencement of most felonies (except murder), 90 days for an A misdemeanor, 60 days for a B misdemeanor and 30 days for a violation.
2. Once a defendant has been arraigned, the case will not usually proceed to trial immediately. The judge may adjourn the case for grand jury action, motion practice (scheduling discovery, demand to produce, applications for pre-trial hearings), or for plea-bargaining conferences. The defendant may choose to enter a guilty plea at any time during this process, or before or during the trial. An order of protection may be issued and extended each time the case is adjourned, mandating that the defendant stay away from the victim's residence and refrain from communication with the victim. See C.P.L. Art. 170 and §530.13.

E. Upon conviction by plea or after a trial, the Criminal Court judge can impose conditions on the defendant's sentence; these conditions may be significant to the elderly victim.

1. The Court may issue a long term order of protection as a condition of



the defendant's sentence; 5 years for a felony, 3 years for a misdemeanor, and one year for a violation, and this order can be tolled to become effective after a defendant's period of incarceration has been completed.

See C.P.L. § 530.12.

2. The Court may opt to make restitution of stolen funds a condition of the defendant's sentence on a financial exploitation conviction.

See P.L. §60.27. This is an extremely important option for elderly victims who cannot afford to pay for civil litigation to recover stolen funds.

3. A defendant may be ordered to complete either drug or alcohol rehabilitation as a condition of sentence. Psychological treatment programs dealing with abusive behavior are another sentencing option on domestic violence/financial exploitation cases. See C.P.L. Art. 410.

### III. Anatomy of an Elder Abuse/Domestic Violence/Financial Exploitation Prosecution

#### A. Who are the victims?

1. Elder abuse victims come from all socio-demographic groups.

A recent study in New York City identified the majority of victims as Caucasian females living with another adult; in most cases it was their abuser. See Journal of Elder Abuse and Neglect, Vol.11(4) 1999, p. 81.

2. The victim's mental status is crucial in determining whether and how to proceed on a criminal case.

- a. The victim may be mentally ill, have a substance abuse dependency (drugs or alcohol), and/or dementia.

B. Who are the abusers?

1. New York County D.A.'s Office statistics indicate that abusers of the elderly include their family members, home attendants, health care workers, fiduciaries (including accountants, brokers, attorneys, agents, guardians) and strangers (street crime, con and scam artists).

a. The abuser may also have mental health issues, but these are less likely to determine how the prosecution proceeds, unless it is determined that the impairment affected the defendant's intent when he/she committed the crime.

C. Proving a criminal case when the elderly victim is reluctant to cooperate.

1. Domestic violence cases involving adult couples are notoriously difficult to prosecute; domestic violence crimes involving parents and grandparents who are being physically/financially exploited by their children often present with the most reluctant witnesses of all.

2. Prosecutors will attempt, whenever possible, to "build a case" without relying on the reluctant or impaired victim to testify.

a. The prosecution may attempt to prove its case at trial without requesting or subpoenaing the elderly victim to testify. There are certain offenses, like Criminal Contempt (violation of an order of protection), which the prosecution may be able to prove beyond a reasonable doubt through the introduction of evidence other than the victim's statement (i.e.: the order of protection and a police officer's testimony that he witnessed the

defendant at the victim's residence in violation of the order).

- b. The following evidence may be crucial in preparing for a "victim/witness - less" trial:
1. a defendant's admissions to civilian witnesses (family member, neighbor, A.P.S. worker, bank employee, medical professional) or to the police at the time of crime/arrest. Tape recorded conversations (pre-arrest) between the defendant and the cooperative witness, in which the defendant is confronted with the abuse and/or exploitation;
  2. medical evidence pertaining to the nature of the victim's injuries;
  3. photographs or drawings of the home (condition of residence of victim and violent abuser), crime scene (if different), and/or the victim's injuries;
  4. witnesses' observations of the victim and/or defendant's abusive or exploitive conduct or condition of the residence;
  5. financial records which establish the unauthorized transfer of the victim's funds (including canceled checks

- balance books, deposit and withdrawal slips, deeds, trusts, power of attorney documents, applications, contracts, receipts, bills, and ATM film, when it exists);
- 6. legal documents such as wills, health care proxies, contracts, deeds;
- 7. forensic evidence, such as laboratory examinations, handwriting analysis and voice analysis; and
- 8. physical evidence obtained from the crime scene or from the defendant.

c. If the prosecution cannot prove the elements of the crimes charged "beyond a reasonable doubt" without calling the reluctant victim to testify, a subpoena to compel the witness' attendance can be issued by the District Attorney.

See C.P.L. §610.20.

D. Proving a criminal case when the victim is mentally impaired.

1. The Criminal Procedure Law directs that a witness must have testimonial capacity (competence) in order to give sworn testimony at trial. See C.P.L. § 60.20.

- a. If the witness is mentally impaired, the court will assess whether or not he/she understands the nature of the oath.
- b. If the judge determines that the mentally impaired witness does not sufficiently understand the oath, the witness may be permitted to give unsworn testimony if the court is satisfied that

the witness possesses sufficient intelligence to justify the reception thereof. Note: A defendant may not be convicted of a crime based solely upon unsworn testimony.

2. An elderly witness may have testimonial capacity, but little or no memory of the matter in question due to Alzheimer's disease, or some other age-related illness.
3. There are a small number of charges in the Penal Law which apply specifically to mentally impaired victims:
  - a. Endangering the Welfare of an Incompetent or Physically Disabled Person is a misdemeanor that criminalizes activity by an individual who "knowingly acts in a manner which is likely to be injurious to the physical, mental or moral welfare of one who is unable to care for himself or herself because of a physical disability, mental disease or defect." See P.L§ 260.25. This charge may be pertinent in self-neglect cases.
  - b. Endangering the Welfare of a Vulnerable, Elderly Person, a relatively new addition to the Penal Law, makes it a felony for a paid caregiver to commit certain misdemeanor crimes, such as assault, against a person over sixty who is suffering from a disease or infirmity associated with advanced age.

Certain felonies are also upgraded to a more serious classification. See P.L. §§ 260.32, 260.34.

4. Article 155 of the Penal Law, the larceny statute, does not address the issue of theft from a mentally impaired person.

a. Prosecutors in New York State rely on cases that are instructive on the issue of whether an owner's mental state is important when determining if a theft has occurred.

1. People v. Camiola, 225 A.D.2d 380

(1st Dep't 1996), lv denied 5/14/96, is a case in which an accountant for an elderly, senile woman maintained a pattern of thefts from her over a two year period. The victim passed away by the time of the trial. The defense contended that the victim had consented to the transfers of funds in question, and that they were gifts she had knowingly given to the defendant. The Court held that the jury, in evaluating the definition of larceny, was properly instructed that it could consider the victim's capacity to form consent in order to determine whether there had been a trespassory taking of her property, a form of larceny actionable pursuant to section 155 of the Penal Law. Id. at 380; People v. Shurn, 69 A.D. 2d 64

(2d Dep't 1979).

- b. Larceny actions involving joint bank accounts are often unprovable.
  1. Under New York State Banking Law section 675, as well as the definition of "Owner" in section 155 of the Penal Law (larceny statute), a theft charge is often not viable against an account holder who is a joint tenant of funds in a joint bank account.
- c. If a defendant opens a joint account with funds obtained from a mentally incapacitated person, a larceny charge may be supported by the evidence pursuant to People v. Patricia Gbohou and Calloway Johnson, 186 Misc.2d 324 (Sup. Ct. Bronx Co. 2000)
  1. In Gbohou, the Court determined that the defendant, a home health aide, had created a joint account with her impaired clients' funds at a time when she knew that they had significant mental impairment. Citing Camiola, supra, and People v. Antilla, 77 N.Y. 2d 853 (1991), the judge held that this transfer of funds was a "wrongful taking" within the meaning of the larceny statute.
- d. There is currently a bill before the State Legislature that seeks to amend Article 155 of the Penal Law to include larceny from

a mentally disabled or mentally incapacitated person. (S. 702; A. 1797).

E. Financial exploitation and the power of attorney.

1. Durable powers of attorney are a significant vehicle for criminal financial exploitation of elderly victims in domestic settings.
  - a. There is relatively easy access to power of attorney forms sold at local stationery stores, and many banks now routinely distribute their institutional p.o.a. documents to individuals who plan to become agents for account holders. Virtually anyone has access to these forms.
  - b. There are no legal filing requirements and no provisions for an accounting by the attorney in fact.
2. The larceny statute does not specifically address the issue of theft through the use of a power of attorney. The General Obligations Law is also silent on the issue of the fiduciary obligations of the agent.
  - a. Prosecutors rely on case law in an effort to prove that larceny has been committed through the use or misuse of a power of attorney.
    1. New York law dictates that an attorney in fact must act as a fiduciary for the principal.  
See Elco Shoes Inc.v. Sisk, 260 N.Y. 100 (1932);  
Matter of Moglia, 144 A.D.2d 347 (2d Dep't 1988).



A power of attorney is given with the intent that the agent will use that power "for the benefit of the principal" Id. at 348. Therefore, prosecutors can argue that the siphoning of a principal's funds for the agent's personal use is clearly a "wrongful taking" within the definition of larceny pursuant to section 155.05 of the Penal Law. See also Mantella v. Mantella, 268 A.D.2d 852 (3d Dep't 2000); Matter of Eric G. Paul, 308 A.D. 2d 130 (4<sup>th</sup> Dep't 2003).

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