

Elder Abuse Basics: Civil Legal Responses

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials 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.

About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

The views expressed are those of the speaker and may not reflect the policy of the American Bar Association.

About Montana Legal Services Association

For over fifty years, the Montana Legal Services Association has helped ensure fairness for all in Montana's justice system by providing civil, non-criminal legal services to low income Montanans living in all 56 Montana counties and on all Tribal Reservations. As a private, non-profit law firm, MLSA provides non-criminal legal information, advice, and representation to thousands of Montanans each year.

About Prairie State Legal Services

The mission of Prairie State Legal Services is to ensure equal access to justice and fair treatment under the law by providing legal advice and representation, advocacy, education, and outreach that serve to protect basic human needs and enforce or uphold rights. PSLS envisions a community where all low-income, elderly and vulnerable people have ready access to legal services to meet their basic needs and where everyone knows, understands and can exercise their rights and be treated fairly in their pursuit of justice.

Key Lessons

- Prevention of abuse involves awareness, planning, and careful selection of supporters.
- Civil interventions are aimed at securing the safety of the person who is experiencing abuse and should always be done in a person-centered and trauma-informed way.
- A variety of civil actions can be used to remediate damages and restore stolen assets.

Defining Abuse

State Definitions

- Every state defines elder abuse in state statute
- For purposes of APS Services
- Some are more comprehensive
- Some are minimal
 - Some states merge criminal and civil definitions
- The civil response can be much broader than what APS is authorized to do
- [A summary and links to the definitions are available here](#)

The CDC Definitions

- Are intended to create uniform data points for research
- May not include every element that every state uses

CDC Uniform Definitions of Abuse

- Physical abuse is any force that causes injury, pain, distress, or death.
- Sexual abuse is any forced or unwanted sexual contact, imaging, or harassment.
- Emotional or psychological abuse is words or actions that inflict emotional distress or degrade a person.
- Neglect is a failure to provide for a person's basic needs for food, shelter, clothing, hygiene, and desired medical care.
- Financial abuse is the unauthorized or improper use of the income or assets of an adult, for the benefit of another person.

Warning Signs of Physical Abuse

- Bruises, black eyes, welts, lacerations, or rope marks
- Bone fractures, broken bones, or skull fractures
- Open wounds, cuts, punctures, untreated injuries in various stages of healing
- Sprains, dislocations, or internal injuries/bleeding
- Broken eyeglasses/frames, physical signs of being subjected to punishment, or signs of being restrained
- Laboratory findings of medication overdose or under-utilization of prescribed drugs
- An older adult's sudden change in behavior
- The caregiver's refusal to allow visitors to see an older adult alone
- An older adult's report of being hit, slapped, kicked, or mistreated

(From [Department of Justice](#))

Warning Signs of Emotional Abuse

- Being emotionally upset or agitated
- Being extremely withdrawn, non-communicative or non-responsive
- Unusual behavior, such as sucking, biting, rocking
- Witnessing a caregiver controlling or isolating an older adult
- Exhibiting a change in sleeping patterns or eating habits
- Personality changes, such as apologizing excessively
- Depression or anxiety
- An older adult's report of being verbally or emotionally mistreated

Warning Signs of Financial Exploitation

- Sudden changes in bank accounts or banking practices, including an unexplained withdrawal of large sums of money by a person accompanying the older adult
- The inclusion of additional names on an older adult's bank signature card
- Unauthorized withdrawal of the older adult's funds using their ATM card
- Abrupt changes in a will or other financial documents
- Unexplained disappearance of funds or valuable possessions
- Substandard care or bills left unpaid despite the availability of adequate financial resources
- Discovery of a forged signature for financial transactions or for the titles
- Sudden appearance of previously uninvolved relatives claiming their rights to property or possessions
- Unexplained sudden transfer of assets to a family member or someone outside the family
- An older adult's report of financial exploitation

Warning Signs of Neglect & Abandonment

- Dehydration, malnutrition, untreated bed sores, and poor personal hygiene
- Unattended or untreated health problems
- Hazardous or unsafe living conditions/arrangements (e.g., improper wiring, no heat, or no running water)
- Unsanitary and unclean living condition (e.g., dirt, fleas, lice on person, soiled bedding, fecal/urine smell, inadequate clothing)
- The desertion of an older adult at a hospital, a nursing facility, or other similar institution, or a shopping center or other public location
- An older adult's report of being neglected or abandoned

Warning Signs of Sexual Abuse

- Bruises around the breasts or genital area
- Unexplained venereal disease or genital infections
- Unexplained vaginal or anal bleeding
- Changes in an older adult's demeanor, such as showing fear or becoming withdrawn when a specific person is around
- Evidence of pornographic material being shown to an older adult with diminished capacity
- Blood found on sheets, linens, or an older adult's clothing
- An older adult's report of being sexually assaulted or raped

Prevention

“An ounce of prevention is worth a pound of cure.”

-Benjamin Franklin

Prevention Starts With Awareness

- Every person in the community
 - What is abuse
 - Unacceptable behavior and actions
- Ways to raise awareness:
 - Community education
 - Articles
 - Social Media
 - Professional education
- Learn More: [National Center on Elder Abuse: World Elder Abuse Awareness Day](#)

Selection of Agents, Supporters, and Service Providers

- Probably the greatest tool for prevention
 - Trustworthy
 - Supportive in style
 - Strong character
 - Able to avoid conflicts and temptations
- Most agents, supporters, and service providers are good, look for risk factors

Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation

The screenshot shows a Zoom meeting interface. The main content is a presentation slide with the following text:

Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation

David Godfrey, JD.
Director, ABA Commission on Law and Aging
August 29, 2023

NATIONAL CENTER ON LAW & ELDER RIGHTS

00:01

On the right side of the screen, there are two video thumbnails. The top one shows David Godfrey, JD., wearing a headset. The bottom one shows Lauren Carden. Above the thumbnails are icons for a clock, a list, and a share icon. At the bottom of the screen, there is a control bar with icons for mute, video, chat, settings, and screen sharing.

Civil Legal Responses in Intervention

Person-Centered and Trauma-Informed

- Listen to the person
- Ask the person what they want you to help with
- Forcing services or forcing the person to discuss what has happened can be very harmful to the well-being of the person who has experienced abuse
- Some persons need to or want to talk
- For others, repeating the experience can cause secondary trauma
- Learn More: [Trauma-Informed Lawyering](#)

Understanding Adult Protective Services

- Gateway to investigation of abuse
- All states have APS
- The programs vary widely
- Threshold questions
 - Is the person eligible for APS
 - Is the issue within the scope of APS
 - If the person is able to consent, do they consent to services

Getting to Know APS

- Learn about your local APS program
 - Statutes or regulations
 - Invite them to do cross training
 - Focus on who they can help, on what issues, and how
- In some (certainly not all) states, APS is the gatekeeper for emergency intervention and support services.
- Learn More: [Partnering with Adult Protective Services: Leveraging Strengths across Disciplines](#)

Mandatory and Permissive Reporting

- Many professionals are mandated reporters
- Who is a mandated reporter varies from state to state.
- Permissive reporting is just as important
- Learn More: [Mandatory & Permissive Reporting for Lawyers](#)

Inpatient Settings

- In some states, abuse in an inpatient setting is reported to health care regulatory agencies
- [Long-term care ombudsmen](#) will know

Domestic or Family Violence Services

- Physical or emotional violence
- Offer person-centered, trauma-informed support services, emergency support
- Get to know them
- Cross train
- Support one another's missions
- Learn More: NCLER Chapter Summary: [Family Violence and Abuse in Later Life](#).

Legal Restraining, Stay Away Orders

- For physical, sexual, and psychological abuse
- Limited to spouse, partner—in some states, household or immediate family members
- May be civil or criminal
- Issued by local courts
- Court process, providing due process protections
 - Survivor-focused courts
- Can be enforced by the police

Creating, Modifying, or Revoking Legal Documents

- Powers of Attorney or Advance Health Care Directives are sometimes used as tools of abuse
- Sometimes these are created to empower supporters to respond to abuse, neglect, or exploitation

The Basics of POAs

- POA appoints an agent to act on the principal's behalf
- Accepted in all states, but requirements vary
- May:
 - Be limited to particular activities
 - Give temporary or permanent authority
 - Take effect immediately or when a future event occurs
- POA may be revoked, but generally requires written notice
 - Just signing a new one generally not sufficient

Revocation of POA

- Does your client have capacity to revoke?
- Does your state require specific language to effectively revoke?
- In writing, signed by the grantor, two witnessed and notarized
- Will there be any issues when the agent receives the notice of revocation?
- What entities need to receive a copy of the revocation?
- Does your client need a new agent?

Language

- Some states may have specific language for revocation
 - Check state law
 - Court or Law Help websites may have samples:
[Connecticut](#)

REVOCATION OF POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, THAT, WHEREAS, by Power of Attorney executed by me, I, _____, then residing at _____ presently residing at _____ appointed _____, my attorney for me to act in my name, place and stead in any way which I myself could do if I were personally present.

NOW KNOW YE, That I, the said, _____, have revoked, countermanded, annulled and made void, and by these presents do revoke, countermand annul and make void the said Power of Attorney above mentioned, and all power and authority thereby given, or intended to be given, to the said _____.

IN WITNESS WHEREOF, I have hereunder set my hand this _____ day of _____, _____.

Health Care Advance Directives

- Some statutes set the level of capacity to modify or revoke and it can be very low.
 - Does the person want to revoke
 - Is this an informed choice
- Always get it in writing – even if the statute says verbal revocation is allowed.
 - How do you prove it?

Modifying or Creating New Docs

- NCLER Training: [Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation](#)
- Assess and document client capacity
- On revocation: some practitioners revoke and if challenged, litigate capability while presenting evidence of abuse, neglect, or exploitation.
- Always weigh the risk of revoking and having no replacement

Other Protective Arrangements

- Limited Court Orders
 - Authorizing legal consent on behalf of a person who is currently unable to provide informed consent
 - For a limited purpose and duration
- Examples
 - Approving the sale of a home with the money going into a trust for the benefit of the owner
 - Authorizing banks to release five years of financial records needed for a Medicaid application
- See article 5 of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

Promoting Autonomy

- When we seek guardianship or conservatorship in response to abuse, it is a restriction of the rights of the person who experienced abuse
- It should be the option of last resort and used sparingly and with limits
- Learn More: [You Can Make a Difference - Defending Against or Terminating Guardianship](#)
- Learn More: [Promoting Autonomy for Older Adults and Adults with Disabilities through Decisional and Other Supports](#)

Remediation

Restoring the person to the prior position by recovering damages and return of assets.

Damages for Injury or Professional Neglect

- Actions for damages are generally based on tort law or contract law.
- These cases need to be screened for viability and collectability.
- Damages for pain and suffering need to be estimated.
- Damages for wrongful death in many states are measured based on loss of earnings, and this can be very limited for an adult who is older or has limited earnings capacity.
- Damages need to be collectable.
- Attorneys who specialize in these cases will carefully weigh these factors and may decline to pursue the case if the costs are likely to exceed the potential recovery.
- Often done on a contingency fee basis

Recovery of Assets

- Increasing area of civil and probate litigation
- Screen for viability
 - Amount taken
 - Collectability
 - Evidence and likelihood of success
- May be done on a contingency fee basis

Breach of Fiduciary Duty

- Breach of fiduciary duty is abuse by fiduciaries such as agents authorized in a power of attorney, trustees, and conservators.
- By serving in these capacities the person has special duties, and should not take advantage of their position.
- When a fiduciary fails to uphold this duty, they can be held responsible for the loss.
- Existing well established civil law

Breach of Contract

- Breach of contract is failure by a party to deliver what was promised in the agreement.
 - The most common examples would be service providers who agree to provide care or home repairs, collect payment, and fail to provide what they agreed to do.
- Damages are limited to undelivered value
- Damages are often limited and can make it difficult to pursue
- Small-claims court
- Know how to help your client collect on a small-claims judgement

Undue Influence

- Undue influence is influence that overrides the free will of the person, for the benefit of another.
- Undue influence requires a person in a position of real or apparent authority, bending the will, or changing the choice of a person who would otherwise make a different choice, for the benefit of someone other than the person.
- Often the influence is in the form of threats.
- Some states require that there be some “vulnerability” but not a total lack of ability to give informed consent. It is the informed consent what is unduly influenced.
- Learn More: [Identifying & Addressing Undue Influence](#)
- Learn More: [Undue Influence and Vulnerable Adults](#)

Conversion

- Conversion is the civil action for recovery of asset stolen by the criminal act of theft.
- The person who steals the asset converts it to the benefit of the thief or a third party.
- Conversion is the unauthorized taking of money or property for the benefit of another person.
- A civil action of conversion seeks return of the asset, or damages for the loss of the asset.
- A civil suit for conversion results in an order for the court for damages that is then enforceable as a civil judgement.
- Screen for viability and collectability

State-Specific Laws

- Some states allow actions for damages for violations of their elder abuse codes
- Some states have other special laws
 - Maine improvident transfer of title act.
- If you have those, use them
- If not, there are common law tort, contract, and probate actions that have an equivalent in every state.

Walk Through a Case: Undue Influence & Fraud

Case Study

- Elder exploitation situation involving two older adult brothers with long family history of ranching and farming, but no children interested in property.
- One of the brothers has diminished capacity.
- Step-daughter and her husband willing to help efforts to cure situation.

Case Study Continued

- CLs trusted neighbors, who included contemporary of CLs
- CLs trusted ADV after ADV negotiated prior land sale with ADV's boss
- April 2020 – CL signs and has his brother sign, an agreement to sell ranch
- June 2020 – after no closing as provided in agreement, ADV sends CLs to title company to have them sign Gift Deed
- COMPELLING/EGREGIOUS FACTS:
 - No money has ever been paid to CLs
 - ADV used Gift Deed to mortgage property

Helviks v. Tuscanos, Sweet Grass County Case Number DV 2021-39 (1 of 2)

- We filed suit with claims that the Agreement and Gift deed that were the result of undue influence and fraud (breach of contract as alternative), and for declaratory action, quiet title.
- Jury trial re: first claims above
- Court consideration post-trial re: remedies

Helviks v. Tuscanos, Sweet Grass County Case Number DV 2021-39 (2 of 2)

- **Jury** determined breach of agreement and gift deed the result of undue influence
- **Court** determined remedy = judicial rescission of agreement; quieted title in clients and ordered that neighbors do whatever is necessary to release mortgage and issue a new deed to clients

Questions

THANK YOU!

From David Godfrey

- Thank you to Administration for Community Living and the Administration on Aging
- Thank you to the National Center on Law and Elder Rights, and before that the National Legal Resource Center
- Thank you to the thousands who have participated in someplace between 45 and 60 webinars over 15 years
- I have learned so much, and tried to share what I know

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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.