

Collaboration in Elder Financial Exploitation Cases

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NYS Cost of Financial Exploitation Study

Highlights of the study:

- **928** cases from 31 social services districts and Lifespan of Greater Rochester
- We looked at: 1.) **Victim financial losses** (ie money and real estate);
2.) **Public benefits costs** (ie Medicaid and SNAP) and
3.) **Service agency costs** (ie cost of APS and LE investigations)
- Based on Lifespan's 2011 Prevalence study, we estimate that the combined costs for a one year period for NYS *vulnerable* adults is approximately **\$1.8 billion**
- This number does not include FE of non-vulnerable adults and is a **low estimate** based on various factors
- Most of the perpetrators were **family members**
- We also gathered relevant demographic information on both victims and perpetrators to help us understand trends and implement methods to combat FE

1st Thing: Criteria to receive APS

The Social Services Law requires APS units to accept and investigate all reports of abuse, neglect and financial exploitation in which the alleged victim or adult at risk of abuse qualifies for protective services. APS serves adults (age 18 and older) who:

1. due to physical or mental impairments,
2. are unable to protect themselves from abuse, neglect, financial exploitation, or other harm; and
3. have no one available who is willing and able to assist responsibly. SSL section 473(1)

2nd Thing: Definition of Financial Exploitation

The Social Services Law defines "Financial Exploitation" as:
 "Improper use of an adult's funds, property 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."
 SSL section 473(6)(g)

3rd Thing: Mandated reporting by APS caseworkers

The Social Services Law requires that whenever an APS worker "has a reason to believe that a criminal offense has been committed, as defined in the penal law, against a person for whom the need for such services is being determined, or to whom such services are being provided or arranged," the APS worker "must report this information to the appropriate police or sheriff's department and the district attorney's office when such office has requested such information be reported."
 SSL section 473(5)

4th Thing: Mandated reporting by all others

In New York State, unlike all other States, there are no legal requirements for reporting to APS.

There are many other states that **DO** require physicians, nurses, accountants, bankers, and other to report to APS.

But there is currently no mandated reporting to APS in New York State.

5th Thing: How a referral to APS is made

Referrals on APS cases, including financial exploitation cases, is made not to the State but directly to the county or, in the case of New York City, to the NYC Human Resources Administration.

OCFS now has a Helpline where a message (*not considered a referral*) can be left for an APS department or other related information can be shared. The toll free # is **844-697-3505**.

6th Thing: Civil Immunity

Under the Social Services Law, there is a grant of civil immunity to any person who in good faith belief that an adult may be an endangered adult or in need of protective services, and who based on such belief either **reports** to an APS unit, to local Office For the Aging, or reports to any other person or agency that such person believes in good faith, will take appropriate action; or to any person who in good faith **testifies** in any judicial or administrative proceeding that arises out of the referral.

SSL section 473-b.

So representatives of financial institutions who make such a good faith referral to APS or other agency to report suspected financial exploitation, or other form of abuse or neglect, would have civil immunity for making such report or for testifying about this.

7th Thing: Banking laws and requirements

There are provisions of law that not only **authorize** banks and financial institutions to provide certain information to APS in connection with the investigation of an APS financial exploitation case, but actually **REQUIRE** that such information be provided to APS.

Where social services officials request that financial institutions provide information concerning whether an APS client has funds, securities or other property on deposit and concerning the amount or probable value of such, sections of the Social Services Law and the Banking Law **require** that such information be provided to the APS unit of the Department of Social Services.

SSL section 144-a, Banking Law section 4.

8th Thing: Federal - Safe Harbors

There are federal laws intended to protect the privacy of customers of financial institutions.

Very reasonably, the banks and financial service providers want to avoid the hazards of violating customer privacy under such laws.

However, there are provisions of federal privacy laws that provide "safe harbors" for banks and financial services providers, "safe harbors" to disclose to APS certain customer information when requested as part of a duly authorized investigation of financial exploitation of a vulnerable adult.

These provisions are included in the **Gramm-Leach-Bliley Act** (15 USC 6802).

8th Thing: New York State - Safe Harbors

On February 26, 2015, the New York State Department of Financial Services (DFS) issued guidance to financial institutions within the State, addressing:

- The "safe harbor" exemptions for disclosing customer private information under federal privacy law;
- Red flags indicating financial exploitation;
- Reporting suspected financial exploitation to APS and other appropriate authorities;
- Civil immunity for financial institutions for good faith reporting under NYS SSL section 473-b.

9th Thing: Power of Attorney

The law that governs powers of attorney, the General Obligations Law, now provides that a bank or other financial institution can reasonably refuse to honor a power of attorney in certain circumstances, including:

- Where the agent refuses to provide an original or certified copy of the POA;
- Where the POA form presented is not a statutory short form POA;
- Where the bank has made a good faith referral of the Agent and the Principal to APS due to suspected financial exploitation;
- Where the bank knows that a third party has made a referral to APS alleging physical abuse, neglect, abandonment or financial exploitation of the vulnerable adult customer by the agent.
- Where the bank has information suggesting that the customer was mentally incapacitated when the POA was created.
- Where the bank knows or reasonably believes the POA was procured through fraud, duress or undue influence; and
- Where the bank knows the POA has been terminated or revoked.

General Obligations Law section 5-1504 subdivision 1(a).

Next steps

Because of the needs of the vulnerable adults who are our clients, and because of the complexities of so many of the cases of financial exploitation, APS needs to work together with representatives of banks, credit unions, financial services, law enforcement, district attorneys, and those in the non-profit sector, among others, to protect our clients.

We need to understand what expertise and what authority each field can contribute to our ultimate goal of preventing financial exploitation where possible, and intervening where it has occurred.

For further information about APS, see our website at: ocfs.ny.gov/ under Adult Protective Services.

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LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Legal strategies for preventing or dealing with financial exploitation:

1. POWERS OF ATTORNEY

-Exercising care when setting up a Power of Attorney

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Revoking Powers of Attorney
- Requesting Accountings from an Agent
- Court action reviewing Powers of Attorney and the actions of agents

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

2. JUDGEMENTS

- Civil judgements v. Criminal Restitution/ Reparation
- Enforcing judgements

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

3. ISSUES TO CONSIDER

- Identity Theft
- Client capacity
- Client authorization for release of information
- Requirements of agencies or businesses involved

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

POWER OF ATTORNEY

In order to establish a POA, a person must have capacity. General Obligations Law, sec 5-1501B

That means the person must comprehend the nature of what they are doing and the consequences of what they are doing. General Obligations Law, sec 5-1501

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Most Powers of Attorney must contain specific wording which is included in General Obligations Law, 5-1513
- - this includes a caution to the Principal, explaining things the principal should know about, and
- - it also includes information for the agent informing the agent what his/ her responsibilities are.

LEGAL CONSIDERATIONS/ FINANCIAL EXPLOITATION

- Some specialized Powers of Attorney are exempted from the rules which generally govern Powers of Attorney

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- If any significant gifts are authorized by the POA, there must be a gift rider attached.
- Without a gift rider, the most an agent can gift under a POA is \$500/ year total.
- Gift riders must specify what gifts are authorized
- Without authorization, an agent is not authorized to make gifts to himself or herself

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Changing the beneficiary of a life insurance, bank account, or other such beneficiary account would be regarded as a gift.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Generally, an agent should not mix combine his/ her property with the principal's
- There is an exception for property which is jointly owned by the principal and agent at the time the POA is executed
- There is also an exception for property which is jointly held as a result of a provision in a gift rider

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- The transfer of property from property jointly held by the principal and agent to the agent alone is considered a gift and would need to be authorized in a gift rider.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

The fiduciary duty of the POA is spelled out in General Obligations Law, sec. 5-1505.

It includes – following directions of the principal,

- acting in the best interest of the principal
- keeping property separate (with exceptions) limited
- keeping records

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

• PREPARING A POWER OF ATTORNEY

- POAS should be completed with the assistance of somebody who is aware of the meaning of the provisions
- The creations of a POA should be done without the involvement of the person who is going to serve as agent

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- When settling up a POA, a person should consider the level to which s/he trusts the person or person(s) being considered as an agent/ successor agent. There should be real trust.
- More than one person can be named as agent. Unless specified otherwise, if more than one person is named, they must work together.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

A monitor can be named. This person can ask the agent for accountings.

LEGAL CONSIDERATIONS/ FINANCIAL EXPLOITATION

An agent can resign

- in the event that the agent resigns and the principal is not competent, the agent can notify APS or request review by the Surrogate Court.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

• REVOKING A POWER OF ATTORNEY

• Any Power of Attorney can be revoked by the Principal as long as the Principal is competent

• Persons and businesses must be notified that the POA has been revoked in order to ensure that they do not act on the POA

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

• REQUESTING ACCOUNTINGS FROM AN AGENT

- The agent(s) must provide the principal with a record of the transactions, including receipts and disbursements upon request.

- General Obligations Law, sec. 5-1510

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- In addition to reporting to the principal, the agent must make the record of transactions and a copy of the Power of Attorney available to, within 15 days:

- Any co-agent or successor agent named in the document
- A monitor named in the document

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Any government agency acting on a report of abuse/ need for protective services
- A court evaluator under Art 81 of the mental hygiene law
- A guardian ad litem appointed under the surrogate court procedure act
- The personal representative of the principal's estate

General Obligations Law, sec. 5-1505

**LEGAL CONSIDERATIONS / FINANCIAL
EXPLOITATION****• COURT ACTIONS**

- Any of the parties entitled to receive a copy of the Power of Attorney and record of transactions may file a special proceeding to compel the release of those things, if not supplied within the time requested

**LEGAL CONSIDERATIONS / FINANCIAL
EXPLOITATION**

- Generally, businesses are required to accept a properly executed Power of Attorney form, unless they have reasonable cause to refuse. Reasonable cause to refuse is outlined in General Obligations Law, sec. 5-1504.

**LEGAL CONSIDERATIONS / FINANCIAL
EXPLOITATION**

- This list includes such things as knowing or having a reasonable basis to believe the principal did not have capacity when the document was executed, knowing there is an Adult Protective review going on or requested, knowing the principal has died, or similar questionable circumstances.
- Under these, a third party who may otherwise be required to act on the POA may ask for a special proceeding.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- A variety of persons can bring a special proceeding to establish:
 - If the POA is valid
 - If the principal had capacity when the document was executed
 - If the POA was procured through duress, fraud, or undue influence, and
 - a list of other specifics

General Obligations Law, sec. 5-1510

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- The persons allowed to request that type of special proceeding, in addition to the other persons named in the document and a third party being asked to accept the document would include the principal, the spouse, child or parent of the principal, or any successor in interest to the principal

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

JUDGEMENTS

Judgements in civil matters differ from restitution or reparation orders obtained in civil court. Those are enforced through the probation departments and a person who does not pay a restitution order could be subject to jail time as a result of non payment.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Civil judgements, if not paid by the debtor, must be enforced by the person seeking the payment.
- Judgements should be registered with the court for enforcement purposes

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Advantages of having money judgements:

- They are collectable for 20 years.
- They will stay on a credit report for 7 years.
- They can be a lien on real estate for 10 years (and if the creditor renews properly before 10 years is up, for an additional 10 years)

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

The fact that the judgement can show up on a credit report may cause the debtor to pay the debt because the credit report can be used

- when the person tries to get future credit
- by some landlord in deciding whether to rent or not
- by some employers when deciding whether or not to hire (somewhat different report and needs the person's permission to check)

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- Unfortunately, for many people, the incentive to avoid the consequences of a filed judgement are not enough to convince them to pay the debt.
- Then the debtor must enforce the judgement by other means

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

This could be:

- Freezing a bank account (the debtor has a right to keep certain minimums)
- Garnishing wages (the debtor has the right to keep certain minimums)
- selling property belonging to the debtor

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

All of these require additional legal processes, for which there are fees.

A good place to obtain information on collecting judgments is <https://www.nycourts.gov/courthelp>

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

ISSUES TO CONSIDER

Identity Theft

Persons can be exploited by having an individual steal their identifying information and incurring expenses or taking other actions in their name.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

If it is suspected that identity theft occurred, the best place to start dealing with that is by contacting the Federal Trade Commission.

The FTC has developed many materials and a complaint procedure available on-line at *IdentityTheft.gov*.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Capacity

Most questions of financial exploitation involve a determination of capacity.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

- If the person does not have capacity themselves, is there a person with legitimate authority to ask for the particular type of action (power of attorney, guardianship, other type of authority)?

- If there is no capacity and nobody to act on their behalf, is there a government agency to act on their behalf?

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Many professions have ethical rules and agencies/ businesses have internal policies regarding when they would be able to refer a person to a government agency for assistance.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

If the person has capacity , then the person generally is entitled to make their own decisions regarding whether actions are going to be taken.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Release of Information Forms

If a competent person is asking you to seek information on that person's behalf or to provide information to somebody on their behalf, businesses and agencies would generally require Release of Information forms.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Agency requirements

If you are seeking help from an agency or organization, clarify what they can and cannot do. Also, clarify who they can take on as clients.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

If the information would touch on medical information, a HIPPA release may be necessary.

If information is disclosed to someone which includes information which touches on a mental health condition or AIDS/ HIV status, that is generally protected from being re-released without an additional release from the individual involved.

LEGAL CONSIDERATIONS / FINANCIAL EXPLOITATION

Practice note:

- Many agencies and organizations have specific Release of Information forms which they wish to have filled out before releasing information.
- It can be helpful to check with them first to request their form.
- Some agencies (like Social Security) have their form release available on line.

Financial Institutions Role in Detecting and Reporting Elder Abuse

The Bank Secrecy Act requires financial institutions to detect and report suspicious activity including Elder Abuse

Suspicious activity is reported on a Suspicious Activity Report (SAR)

SARs are electronically filed to FinCEN (Financial Crimes Enforcement Network, a division of the US Treasury Department)

SARs are then disseminated to Law Enforcement Agencies, District Attorneys offices, Internal Revenue Service, etc.

How do Financial Institutions Detect Elder Abuse

In person:

detect changes in demeanor, physical appearance, 'new' friends assisting with transactions

Transactional changes:

- Overdrawn account
- Large dollar withdrawals
- Other transaction activity out of normal pattern.

How do Financial Institutions Report Elder Abuse

SAR

Referral to Adult Protective Services (APS)

314 (b) Information Sharing

Request for assistance from Local Law Enforcement or Family Member

Obtaining Information from a Financial Institution

Branch staff may be reluctant to provide account information due to privacy regulations

May say a subpoena is required

If a written consent form is received from the account holder or a request for documents is made by the account holder the financial institution may charge research fees.

Laws & Regulation Allowing the Reporting of Elder Abuse

APS provides a copy of social services law (SSL Section 473-b) regarding the safe harbor provision for reporting to authorities that an adult may be endangered or in need of protective services with their requests for information.

Gramm-Leach-Bliley Act contains extensive privacy provisions, but there are several exceptions that permit the disclosure of non-public personal information. The act does not prohibit reporting to APS or law enforcement suspected cases of elder abuse. This applies to mandatory reporting, voluntary reporting or both.

Federal law 31 USC 5318(g)(3) provides protection from civil liability with as safe harbor provision for regulated financial institutions for Suspicious Activity Reporting.

Department or Individual at a Financial Institution to Contact

Financial institutions have different regulators, but they are all required to have a Bank Secrecy Act Officer. One of the main requirements of the BSA is that each employee of a financial institution has to know who is the appointed BSA Officer.

Other titles to asked for:

- Security Officer
- Compliance Officer

Documents to Request

Bank Statement
 Signature Card or Account Agreement
 Deposit tickets or Transaction Slips
 Cancelled Checks
 Deposited Items
 Copies of negotiable items purchased (Cashier's Checks or Money Orders)
 Wire Transfer documentation
 Power of Attorney
 Correspondence
 ACH and Debit Card activity

If possible set a minimum dollar amount for specific items, such as cancelled checks.

Most documents are electronic now, but some items may only be retained for a short period of time or sent to off-site storage.

Surveillance images may only be retained for 90-120 days
