

ABUSE, NEGLECT AND FINANCIAL EXPLOITATION OF THE ELDERLY AND DISABLED

by

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I. INTRODUCTION¹

As with other professionals who work with senior citizens, lawyers have observed a shocking increase in the incidents of abuse, neglect and financial exploitation of the elderly. Cases are brought to our attention from many different sources: the elder himself or herself, a concerned family member, friends and neighbors, social workers, adult protection workers, medical personnel, financial institutions, senior centers and programs, clergy and even other lawyers. When faced with a case of abuse, neglect or financial exploitation of an elder, the attorney can recommend and pursue a number of legal options. This paper will review the statistical realities of the aging population; define the terms abuse, neglect and financial exploitation; identify who the most common perpetrators are; analyze why our elders are mistreated; examine what characteristics make the elderly particularly vulnerable; consider preventative drafting strategies; and address the legal remedies available to the elder and how he or she can fight back.

II. STATISTICAL ANALYSIS OF THE AGING POPULATION

It is no secret that our population is rapidly aging. With an increasing number of elders, there are more people to victimize and greater opportunities to abuse, neglect and financially exploit. Consider how the following statistics affect the incidents of abuse, neglect and financial exploitation of the elderly.

It is estimated that Americans over the age of 65 years now represent approximately 12.4% of the entire U.S. population. This figure has more than tripled since 1900, when only 4.1% of the population was age 65 or over.

¹ This paper is not intended to represent formal, legal writing. Rather, while it incorporates some legal citations and principals, it is intended primarily for the purposes of disseminating information, serving as a spring board for further discussion and as providing information to assist with seeking assistance for such elders.

By the year 2050, it is estimated there will be 82 million older persons. Shockingly, two-thirds of all people who have ever lived longer than 65 years are alive today.

Of great significance is the fact that the older population is getting older, with those who are age 85 and over representing the fastest growing segment of the elder population. In 2000, there were approximately 18.3 million people between the ages of 65 and 74, which is approximately eight times greater than a century before; those ages 75-84 (12.3 million) were approximately 14 times greater; and those ages 85 and older (4.3 million) were approximately 28 times greater.

The fact that women typically outlive men represents another factor in the increase in abuse, neglect and financial exploitation. After age 65, women increasingly outnumber men. In 2000, there were 7.3 million older (age 65 and above) women compared with 5.1 million older men. This represents a ratio of 143 women for every 100 men. This ratio increases with age: women typically live longer than men. Significantly, older men are much more likely to be married than are older women. Not surprisingly, there are almost five times as many widows as there are widowers.

Why is this country experiencing such an "age boom?" First, people are living longer. The average life expectancy in 1900 was only 47 years. Men who reach age 65 now have an average life expectancy of an additional 15.4 years; women who reach age 65 now have an expectation of an additional 19.2 years.

Second, a large segment of our society, the "baby boomers" (those born between 1946 and 1964), are aging. The oldest baby boomers turned 60 in 2006. The most rapid increases in age are expected to occur between 2010 and 2030, when this generation reaches age 65.

Financial factors also contribute to abuse, neglect and financial exploitation of the elderly. The median income of persons 65 years and above in 2004 was \$21,102 for men and \$12,080 for women, which is not remarkable. However, in 2000, the median net worth (assets minus liabilities) of age 65 and older households was \$108,885, which is well above the U.S. average of \$55,000.² In 2000, over 78% of older persons owned their homes free and clear. The median value of homes for this population was \$85,516.³

Medical considerations constitute another factor in abuse, neglect and financial exploitation of the elderly. Most older persons have at least one chronic condition. The most frequently occurring conditions in 2000-2001 were: hypertension (49.2%), arthritis (36.1%), heart disease (31%), cancer (20%), sinusitis (15.1%) and diabetes (15%). The vast majority of people age 65 and older are farsighted. As people age, they lose night and peripheral vision. Many people age 65 and older have some degree of hearing loss. Major depression, which represents the most common form of mental illness experienced by older adults, and Alzheimer's Disease and other dementias are of growing prevalence and concern. In 1997, 1.5 million Americans age 65 or older (4.3%) lived in nursing homes. However, this percentage increased

² These figures undoubtedly have changed due to the current economic crisis.

³ Likewise, this figure likely also has changed.

dramatically with age: in 1997, 14% of the elderly residents were 65-75 years old, 36% were 75-84 years old and 50% were 85 and older.

Statistics concerning the incidents of elder abuse, neglect and financial exploitation are scant at best. It has been estimated that as many as 10% of older adults are victimized by elder abuse. However, only one in eight abuse incidents is actually reported. Many of us who work with the elderly suspect that abuse, neglect and financial exploitation are far more prevalent, to the point of representing a national crisis and scandal.

III. DEFINING THE TERMS ABUSE, NEGLECT AND FINANCIAL EXPLOITATION OF THE ELDERLY

Definitions of abuse, neglect and financial exploitation are found in Colorado law in the *Protective Services for Adults at Risk of Mistreatment or Self-Neglect Act*, and in other sources such as the American Association of Retired Person's publication *Domestic Mistreatment of the Elderly -- Towards Prevention*, written by Richard L. Douglass, M.P.H., Ph.D., in 1987.

A. Abuse

Abuse generally falls into two categories: physical abuse and psychological abuse. The definition of abuse under Colorado law is:

...infliction of physical pain or injury, as demonstrated by, but not limited to, substantial or multiple skin bruising, bleeding, malnutrition, dehydration, burns, bone fractures, poisoning, subdural hematoma, soft tissue swelling, or suffocation; ... unreasonable confinement or restraint; or ... nonconsensual sexual conduct or contact classified as a crime under the 'Colorado Criminal Code' of an at-risk adult. (C.R.S. Section 26-3.1-101((4)(a)).

The definition of an at-risk adult under Colorado law is:

an individual eighteen years of age or older who is susceptible to mistreatment ... or self-neglect ... because the individual is unable to perform or obtain services necessary for the individual's health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual's person or affairs. (C.R.S. Section 26-3.1-101(1)).

Dr. Douglass defines physical abuse as "the infliction of physical pain or injury, or physical coercion (confinement against one's will)." Examples include "slapping, bruising, sexually molesting, cutting, lacerating, burning, physically restraining, pushing, shoving."

Psychological or emotional abuse, which may be restrained under Colorado law, includes repeated acts that constitute verbal threats or assaults, verbal harassment, threats of inappropriate use of medications and misuse of power or authority granted to a person through a power of

attorney or by a court in a guardianship or conservatorship proceeding that results in unreasonable confinement or restriction of liberty. (C.R.S. Section 13-14-101(1)).

According to Dr. Douglass, psychological abuse is "the infliction of mental anguish." Examples include "demeaning, name calling, treating as a child, insulting, ignoring, frightening, humiliating, intimidating, threatening, isolation."

Neglect

Pursuant to C.R.S. Section 26-3.1-101(4)(b) caretaker neglect occurs when

...adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision is not secured for the at-risk adult or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise...."

In *Domestic Mistreatment of the Elderly -- Towards Prevention*, neglect is divided into two categories: (1) passive neglect, which is defined as "the unintentional failure to fulfill a caretaking obligation; there is no conscious or willful attempt to inflict physical or emotional distress on the older person." Examples include "non-provision of food or health-related services because of the caregiver's infirmity, laziness, or inadequate skills, knowledge, or understanding of the necessity of prescribed or other essential services."

(2) Active neglect, which is defined as "the intentional failure to fulfill a caretaking obligation, including a conscious and willful attempt to inflict physical or emotional stress or injury on the older person." Examples include "deliberate abandonment, deliberate denial of food or health-related services, depriving of dentures or eyeglasses."

Another category of neglect is self-neglect which is defined as "an act or failure to act whereby an at-risk adult substantially endangers the adult's health, safety, welfare, or life by not seeking or obtaining services necessary to meet the adult's essential human needs." (C.R.S. Section 26-3.1-101(7)).

C. Financial Exploitation

Examples of financial exploitation include stealing property and money, using the elder's money and/or credit cards, "borrowing" money from the elder without paying it back, transferring title to assets, for example, the home or financial accounts, various home improvement and foreign scams and cashing in CDs, money markets, life insurance policies, etc.

IV. INDICATORS OF POSSIBLE FINANCIAL ABUSE

According to Colorado Adult Protective Services, some of the indicators of possible financial abuse include the following:

- a) Unusual activity in bank accounts;
- b) Activity in bank accounts that is inappropriate to the older person, i.e., drastic changes in types and amounts of withdrawals from automated banking machines when the person cannot walk or get to the bank;
- c) Unusual interest in the amount of money being expended for the care of the older person by a third person;
- d) Refusal to spend money on the care of the older person, including numerous unpaid bills such as overdue rent, utilities, taxes, etc.;
- e) Recent acquaintances expressing undying affection for an older person with assets;⁴
- f) Recent change in the title of the house in favor of friend or relative;
- g) Caretaker only asks financial questions; does not ask questions about health and care;
- h) Living arrangements not commensurate with alleged size of estate;
- i) Lack of amenities, i.e., TV, personal grooming items, appropriate clothing when the estate can well afford it;
- j) Personal belongings such as art, silverware, jewelry and other valuables missing;
- k) Caretaker tries to isolate the older person from family and friends;
- l) Promises of life-long care in exchange for willing or deeding property/bank accounts to caretaker;
- m) Checks and other documents signed when older person cannot write;
- n) Older person complains that he or she used to have money and doesn't anymore;
- o) Caretaker is evasive about financial arrangements; and
- p) Implausible stories about the finances by the caretaker and/or the older person.

V. IDENTIFYING THE MOST COMMON PERPETRATORS OF ABUSE, NEGLECT AND FINANCIAL EXPLOITATION

Unfortunately, nearly anyone can be a perpetrator of abuse, neglect or financial exploitation of the elderly, either through ignorance, inexperience, failure to act or intentional acts. Well-meaning caregivers, weary from the demands of catering to an elder, may forget to administer medication. Or, in a moment of extreme stress, a daughter may handle her elderly father too roughly and curse at him for soiling himself. Or, while running errands for an elder, a friend may buy a few items for himself and pay for it with the elder's funds, justifying it because, after all, he, the friend, has done so much for the elder.

Those who are perpetrators of abuse, neglect and financial exploitation of the elderly tend to fall into specific categories. These include the following:

1. Spouse caregivers;
2. Adult child or other family member caregivers;
3. Caregivers who are unrelated to the elder;

⁴ The author would add: *Relatives* expressing undying affection for an older person with assets.

4. Those serving as a fiduciary for the elder, e.g., guardians, conservators, trustees, agents under a power of attorney and personal representatives;
5. Medical facilities and personnel, including hospitals, nursing homes, assisted living facilities and board and care homes;
6. Financial facilities and personnel, including stock brokers, insurance agents and accountants;
7. Others in a position of trust, e.g., lawyers and those who offer to "help" the elder with paying bills, depositing money, filing health insurance claims, etc.; and
8. Strangers perpetrating various "scams," notably telephone or home repair fraud.

VI. WHY ARE OUR ELDERS MISTREATED?

In analyzing the problem of elder abuse, neglect and financial exploitation, it is important to identify why senior citizens are particularly vulnerable to mistreatment. In April 1990, the Subcommittee on Health and Long-Term Care of the Select Committee on Aging of the House of Representatives issued a report entitled *Elder Abuse: A Decade of Shame and Inaction*. The report addressed the primary reasons for mistreatment of the elderly as follows.

1. **Retaliation.** If the adult child was abused by the elder during childhood, mistreatment may be used to seek revenge. Additionally, unresolved conflicts between the adult child and the elder can lead to retaliation.
2. **Violence As a Way of Life.** A family history of violence or the mere fact that there is widespread acceptance of violence in this country may lead to mistreatment.
3. **Unresolved Conflict.** This can occur between elders and their adult children and between elderly spouses.
4. **Lack of Close Family Ties.** If an elder and the adult child have had an emotionally distant relationship, resentment may occur when the adult child suddenly has to care for the elderly parent. Additionally, lack of close family ties often leads elders to seek non-relative caregivers, who may not feel the same sense of responsibility as a family member.
5. **Lack of Financial Resources.** This can be a factor for both the elder and the adult child caregiver. The elder may have limited financial resources and, therefore, must rely on the caregiver to supplement some of the expenses. The caregiver may resent having to pay for the elder's care, particularly if it negatively affects the family's resources. Additionally, women are working in much greater numbers and having to sacrifice a job or career to care for an elder can lead to tremendous resentment and stress. Finally, elders who have limited resources are often forced to seek inappropriate caregivers who, themselves, may have financial problems.

6. **Resentment of Dependency.** A caregiver can become overwhelmed at the amount of time and effort caring for an elder requires. The caregiver's loss of independence can lead to frustration, anger and resentment.

7. **Increased Life Expectancy.** Because elders are living longer, they are becoming more frail, they require more care and the number of years spent providing care are increased.

8. **History of Mental Problems.** This is particularly a problem when the caregiver, often an adult child, has mental problems. The elder becomes a target when the caregiver strikes out.

9. **Unemployment.** When the primary income-producing member of the family is unemployed, intra-family violence increases not only toward the spouse and children, but also toward the dependent elder.

10. **History of Alcohol and Drug Abuse.** As with mental problems, caregivers who abuse alcohol and drugs tend to be more violent or prone to exploit others.

11. **Environmental Conditions.** All kinds of environmental conditions, such as living in a crowded home, can lead to violence.

In addition to the above factors, it is the author's observation that **greed** is a tremendous influence, primarily in circumstances constituting financial exploitation of the elderly. Greed affects relatives and non-related individuals alike. The opportunity to benefit financially is often too great a temptation to resist. In many family circumstances, rationalizations for financially exploiting a relative abound. Examples include, "Mom always loved me best" and "I've sacrificed by providing care for Mom, therefore I am entitled." Additionally, hostility between family members, primarily siblings, results in a race to see who can get his or her hands on the elder's resources first.

VII. CHARACTERISTICS THAT MAKE ELDERS PARTICULARLY VULNERABLE

The report *Elder Abuse: A Decade of Shame and Inaction* identifies the factors that make elders particularly vulnerable to abuse, neglect and financial exploitation.

1. **Female.** There are more older women than men, which makes being female a risk factor. Additionally, women are more likely to be targets of sexual abuse.

2. **Advanced Age.** The older the person is, the higher risk he or she has of being abused. Physical and mental impairments may affect the elder's ability to resist abuse.

3. **Dependent.** The more dependent an elder is, whether physically, emotionally, or financially, the more likely he or she is to be a victim.

4. **Problem Drinker.** Elders who abuse alcohol are at higher risk of being victims, especially if they have difficulty caring for themselves.

5. Intergenerational Conflict. When long-standing conflicts between parents and adult children are unresolved, the elder is at greater risk of being victimized.

6. Internalizing the Blame. An elderly person who blames himself or herself for a particular situation is more vulnerable and less likely to acknowledge that abuse is the fault of the abuser, not of the elder.

7. Isolation. Loneliness can lead elders to trust an apparently "friendly" individual bent on exploitation. Because the elder is isolated from others, it is less likely that victimization will be detected by third parties.

8. Provocative Behavior. Elders who are demanding, ungrateful, uncooperative or abusive themselves are often more likely to be victims.

VIII. FINANCIAL EXPLOITATION INVOLVING AGENTS UNDER POWERS OF ATTORNEY

As described above, perpetrators of financial exploitation are, unfortunately, often family members or friends who have been given authority under a power of attorney, to act on behalf of the elder. These individuals abuse their position of trust by making gifts to themselves or otherwise using the principal's assets for their own direct or indirect benefit. Sometimes the agent simply intends to borrow the funds for a short time and never gets around to paying the "loan" back. Other times, the agent rationalizes that he or she has "earned" it in some fashion. Although there are several legal and equitable remedies available to recover assets wrongfully transferred by agents (see discussion below under Section IX), attorneys should consider the following, as possible methods for preempting exploitation.

1. Make Sure the Client Understands the Authority Given. To the typical client, a power of attorney is simply a means of allowing someone to pay bills if the client should become disabled. Most powers of attorney, however, go much farther than this. Forms of powers of attorney run the gamut from a simple one paragraph "blanket" authority to twenty or thirty page powers of attorney which detail almost every type of transactional authority possible. Consequently, one of the most crucial roles that an attorney can play in limiting the potential for financial exploitation is to make sure the client understands the extent of the authority given to the agent. In many cases, this authority is universal, i.e., the agent is given the authority to do anything the principal is entitled to do. Clients need to understand that this could include, in addition to simply paying bills, divesting the principal of his or her assets, disinherit heirs under the principal's will by dispersing or re-titling assets prior to death, canceling insurance policies, etc. One simple way to ensure the client does understand the dangers associated with granting an agent extensive authority is to have the client sign a disclosure statement detailing some of the risks, such as that provided below:

PREFATORY POWER OF ATTORNEY WARNING NOTICE

IMPORTANT NOTICE AND WARNING RELATING TO THE FOLLOWING POWER OF ATTORNEY: THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT TAKE NOTICE OF THE FOLLOWING CAUTIONARY WARNINGS.

UNLESS YOU LIMIT THE POWER IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO ACT FOR YOU, WITHOUT YOUR CONSENT, IN ANY WAY THAT YOU COULD ACT YOURSELF. THIS POWER OF ATTORNEY GIVES THE PERSON YOU DESIGNATE BROAD AND SWEEPING POWERS TO HANDLE YOUR PROPERTY AND FINANCIAL AFFAIRS, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL, GIFT OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THIS POWER OF ATTORNEY IS EFFECTIVE WHEN SIGNED BY YOU. UNTIL YOU REVOKE THIS POWER OF ATTORNEY OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU MAY BECOME DISABLED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER OF ATTORNEY.

At a minimum, the attorney should go over each paragraph of the power of attorney with the client eliminating those powers with which the principal is not comfortable. It also goes without saying that the principal must trust his or her agent(s), or, if not, limit the agent's powers.

2. Carefully Craft Gifting Provisions. Under general principals of common law, an agent has no authority to make gifts to himself or herself under a power of attorney, unless the power of attorney expressly permits such gifts. Here, however, it is important to distinguish power from authority. An agent will almost always have the power to make a gift by virtue of his or her ability to access the principal's assets under the power of attorney. This is so, regardless of whether the authority to make gifts is granted in the power of attorney. The agent simply writes a check to himself or herself from the agency account. Authority is important for purposes of recovery - if not authorized, the principal or appropriate interested person may seek recovery from the agent under legal or equitable civil remedies.

If the client does not wish to authorize gifts, it is best to expressly prohibit gifts in the power of attorney. The absence of any language dealing with gifting is often interpreted by agents and others as permitting such use of the principal's funds. If, however, the client wishes to include gifting, the attorney should discuss the various types of gifting authority available. Examples of different types of gifting powers are listed below.

To make gifts of any property, real or personal, tangible or intangible, to any person or persons, including my agent, provided that the aggregate of any gifts to any one person during any calendar year shall not exceed \$10,000.00;

To make gifts, grants or other transfers without consideration, either outright or in trust to such person(s) (including my agent) or organizations as my agent shall select, including, without limitation, the following actions: (a) transfer by gift in advancement of a bequest or devise to beneficiaries under my will or in the absence of a will to my spouse and issue in whatever degree; and (b) release of any life interest, or waiver, renunciation, disclaimer or declination of any gift to me by will, deed or trust;

To give to any of my children or grandchildren gifts of tangible or intangible personal property that my agent in his or her sole discretion believes is advisable as an estate planning measure;

To give to any of my children or grandchildren or charitable organizations gifts of tangible or intangible personal property consistent in value with gifts or contributions I have made to such parties in the past;

To give to my spouse or any of my children or grandchildren gifts of tangible or intangible personal property that my agent in his or her sole discretion believes is advisable as an estate planning measure; provided, however, that no distribution shall be made to one or more of my agents except upon review and written certification by _____ (or, in the event of his death, disability, or nonavailability, another attorney experienced in estate planning and elder law) that such distribution is appropriate under this paragraph and is otherwise in my best interest.

To possibly avoid treatment of the gifting power as a taxable general power of appointment held by the agent, consider including the following:

Notwithstanding the foregoing provisions hereof, any authority granted to my said agent shall be limited so as to prevent this power of attorney (1) from causing my agent to be taxed on my income, (2) from causing my estate to be subject to a general power of appointment by my agent, and (3) from causing my agent to have any incidents of ownership with regarding to any life insurance policies on the life of my agent.

3. Draft in Safeguards and Oversight Provisions. Another method of possibly preventing financial exploitation is drafting certain safeguards and oversight provisions in the power of attorney. For instance, the power of attorney could include a provision requiring the agent to communicate with the principal and/or another person (e.g., the contingent agent) prior to taking certain actions.

Another provision might mandate quarterly or annual accountings be made to a relative, CPA, attorney or other interested person. Another useful option is to expressly permit a designated third party to access bank records and other documents relevant to the agency. A sample paragraph is as follows:

Upon a written request made by me or by _____, my agent shall within 30 days of such request deliver to me or to such designated individual a full written accounting of my agent's acts and actions under this instrument. In addition, my agent shall grant me or such designated individual, immediate access, upon demand, to all books, records, accounts and other documents which pertain to this agency.

The principal might also consider designating co-agents with joint or several authority to avoid misuse of agency authority. For instance, the power of attorney could require the signatures of both co-agents on all checks. Even if the authority granted to the co-agents is several (i.e., each can act alone), financial exploitation is less likely to occur given the other co-agent has equal access to records.

If there are co-agents, it is wise to determine, in writing, a method of dispute resolution. For example, if there are two co-agents, the principal can designate that, in the event of a dispute, one co-agent will make the final decisions. In the case of an odd number of co-agents, the principal can designate that the majority rules. Finally, the principal could consider adding a dispute resolution clause in the power of attorney, such as requiring the parties to seek resolution of their dispute(s) with the assistance of a qualified mediator (except in the case of an emergency). An example of such language is as follows:

In the event of a dispute between my co-agents, unless emergent or emergency issues exist, my co-agents shall participate in mediation with a qualified mediator prior to making a decision. The goal of the mediation shall be to reach a consensus between the co-agents which they believe would represent my wishes, if I were able to communicate. If my wishes cannot be ascertained, the co-agents, through mediation, shall attempt to determine what is in my best interest.

What is to occur if mediation fails should also be outlined in the document as discussed above.

If Medicaid planning is anticipated, the principal might include a requirement that sufficient funds be retained to cover the Medicaid penalty period or the look-back period as follows:

Qualification for Public Benefits: To make gifts without limitation as to amount in order to facilitate my qualifying for the receipt of government benefits for my long-term healthcare and nursing-home needs. Such gifts shall be irrevocable, and my Agent is authorized to make such gifts as long as my long-term care is reasonably provided for by my Agent from the assets subject to this Power or otherwise, during the time period I would be disqualified from receiving long-term care and/or medical assistance under the state of Colorado or any other state "Medicaid" program, Veterans program, or other public-assistance program. Any gifts made pursuant to this subparagraph are to be made to those individuals

who would take my assets pursuant to my then-existing testamentary plan or, if I have no existing testamentary plan or, if I have no existing testamentary plan, according to the Intestate Laws of the state of Colorado. Any gifts may be made outright or in trust. Any gifts made pursuant to this Paragraph by my Agent may also include a gift to my Agent as long as the gift is made in the same manner as my established estate plan, if I have one, or pursuant to the Intestate Laws of the state of Colorado.

4. Delay Effectiveness. Another approach followed by many attorneys is to delay the authority given to an agent until such time as the principal is disabled. This is a so-called “springing” power of attorney, which might include the following provision:

Effective Date. This General Durable Power of Attorney shall be come effective only upon my disability or incapacity and shall be binding not only upon me but also upon my heirs, executors, and administrators up to the time of the receipt by my said attorney of a written revocation signed by me or of reliable evidence of my death. I shall be considered to have incurred disability or incapacity for the purposes of the Power of Attorney when, for any reason, including, but not limited to, the following enumerated reasons, I am unable to conduct my personal and/or business affairs: illness, injury, dementia, alcohol abuse, drug abuse, mental illness or admission in or commitment to any facility for the mentally ill. The determination of disability or incapacity shall be documented to my agent hereunder by a licensed physician.

The effective date of the power of attorney can also be varied depending upon who is acting as agent. For instance, the principal could make the power of attorney immediately effective for his or her spouse, but “springing” for another other agents. This provision might read as follows:

Effective Date. With my spouse acting as agent under this power of attorney, this instrument shall be effective immediately. If any successor agents are acting as agents under this power of attorney, this instrument shall only be effective upon my disability. For this purpose, disability shall be determined by a written certification by my attending physician, that he or she has examined me and determined that I am incapable of acting on my own behalf. Such incapacity shall be deemed to cease upon delivery of a similar certification to my agent that the incapacity has ceased. Upon receipt of such certification, my agent is no longer authorized to act on my behalf pursuant to this instrument.

Although this may limit the period of time during which the agent can exploit the principal, additional protections, such as an inspection clause or periodic accounting requirement, should also be included.

5. Educate the Agent. Although we are typically focused on the needs of our client, the principal, it is good practice to also inform the agents of their duties under the power of attorney. Most agents are relatives who do not know the various duties a fiduciary has. By

educating the agent as to his or her duties of loyalty, impartiality, etc., financial mismanagement and inadvertent abuse by an inexperienced agent may be avoided. The Colorado Bar Association has pamphlets describing such duties, which can be obtained at minimal cost and given to the client at signing.

6. Revocation. A durable financial power of attorney is revocable by the principal at any time (although this may be questionable if the principal is incapacitated). Although it can be revoked orally, it should always be done by written instrument. Clients can be provided with blank revocation forms at the time they originally sign their document. If the principal later elects to revoke the authority, copies of a completed revocation form with a cover letter should be provided to the agent, the principal's banks, brokerage firms and any other persons or entities which may have previously acted or could act on the original power of attorney. Advise the client to retain copies of all transmittals and to send the revocation notices certified, return receipt requested.

IX. FIGHTING BACK: LEGAL REMEDIES AVAILABLE TO THE VICTIMS OF ABUSE, NEGLECT AND FINANCIAL EXPLOITATION

What if, notwithstanding the preventative strategies described above, an individual is the victim of abuse, neglect or financial exploitation. There are three categories of legal remedies for the victim of elder abuse, neglect and financial exploitation: (1) criminal, (2) civil and (3) administrative. Although the focus of this paper is on civil and administrative remedies, criminal remedies will be discussed briefly.

A. Criminal Remedies

A criminal case is brought on behalf of the public at large ("the people") by the District Attorney or the Attorney General for violations of state criminal law, and by the U.S. Attorney for violations of federal law. The State of Colorado or the United States are the plaintiff in criminal cases and the perpetrator of abuse, neglect or financial exploitation is the defendant. The victim is not a party to the case, but rather is a witness. It is generally in the discretion of the District or U.S. Attorney to file a criminal case. Prosecuting cases involving elder abuse, neglect and financial exploitation can be difficult: the victim is often a poor witness, whether from fear, confusion, diminished capacity, memory failure or frailty. Conversely, the defendant is often a better witness and can raise defenses such as the impairment of the elder's memory, claims that the elder made a gift, the elder entered into a contract, etc.

Colorado's Criminal Code contains a Section entitled *Wrongs to At-risk Adults*, which specifically targets abuse, neglect and exploitation cases against at-risk adults. (See C.R.S. Section 18-6.5-101 *et. seq.*) and creates augmented penalties. At-risk adults are defined as "any person who is sixty years of age or older or any person who is eighteen years of age or older and is a person with a disability." The reasoning for the augmented sentencing is found in the legislative declaration accompanying this statute which provides, in pertinent part, that:

The general assembly recognizes that fear of mistreatment is one of the major personal concerns of at-risk adults . . . and that at-risk adults . . . are more

vulnerable to and disproportionately damaged by crime in general, but, more specifically, by abuse, exploitation, and neglect because they are less able to protect themselves against offenders, a number of whom are in position of trust, and because they are more likely to receive serious injury from crimes committed against them and not to fully recover from such injury. . . . The general assembly therefore finds that penalties for specified crimes committed against at-risk adults ... should be more severe than the penalties for the commission of said crimes against other members of society.

Crimes which are often prosecuted in financial exploitation cases include: theft (C.R.S. Section 18-6.5-103(5)); forgery (C.R.S. Section 18-5-101 *et. seq.*); criminal impersonation (C.R.S. Section 18-5-113); unlawful use of a financial transaction device (C.R.S. Section 18-5-701 *et. seq.*); securities fraud (C.R.S. Section 11-51-501 *et. seq.*); and violation of the Colorado Organized Crime Control Act (C.R.S. Sections 18-17-104(3) and 103 (3) and (5)). The Criminal Code also provides for restitution and preferential trial dates in cases involving at-risk adults.

B. Civil Remedies

In a civil case, a victim of abuse, neglect or financial exploitation, or someone on his or her behalf such as a guardian or conservator, can sue the perpetrator directly for monetary damages. As a part of a civil case, a victim can also sue for injunctive relief directing someone to perform a specific act or to refrain from performing a specific act. Thus, for example, an elder could sue a perpetrator for money damages for theft or breach of fiduciary duty and, at the same time, ask the court to issue an injunction prohibiting the perpetrator from having any contact with the victim.

As with criminal cases, bringing a civil case can be difficult. For example, the elderly victim may be a poor witness, statutes of limitations may have expired before the elder seeks help, pursuing a lawsuit can be costly and there may be a long delay before a court date.

Another civil remedy is a restraining order, which can be issued separately from and independent of a civil suit. A restraining order is a court order that restrains a person from taking certain actions.

A third civil remedy is to seek the appointment of a guardian and/or a conservator or other protective arrangement on behalf of an elder under the Colorado Probate Code.

1. Mediation, Arbitration and Alternative Dispute Resolution

When a person has been the victim of abuse, neglect or financial exploitation, it may sound peculiar to suggest that he or she would engage in mediation with the perpetrator. However, particularly when the victim is represented by an attorney or other advocate, confronting the wrong-doer in a safe setting can be quite empowering. Mediation can include, but need not necessarily be limited to: (a) securing an apology; (b) negotiating the cost of medical bills, past and future; (c) negotiating return of property or money; (d) negotiating terms whereby the victim

will not sue the perpetrator; or (e) seeking an admission of wrongdoing. The options are limited only by the facts and the parties' creativity.

2. Civil Suits

There are a number of legal theories under which a victim of elder abuse, neglect or financial exploitation can sue the perpetrator. The following is representative only and is not intended to be an exclusive list of legal theories.

a. **Assault** is the willful attempt or threat to inflict injury on a person, and any display of force that would cause the victim to fear or expect immediate bodily harm. An assault can be committed without actually touching, striking or harming the victim. An example is shaking a fist in the elder's face in a threatening manner.

b. **Battery** is the willful physical contact of a person which causes bodily injury or is offensive. This can include punching, hitting or rough handling.

c. **Breach of contract.** When a person enters into a contract with another, and fails to perform under the terms of the contract, the defendant has breached the contract. An example is a written agreement to provide care to an elder, being paid in advance, and the caregiver not providing the care.

d. **Breach of fiduciary duty.** A fiduciary is a person or entity who, as the result of a particular undertaking, has a duty to act primarily for the benefit of another in matters connected with the undertaking. This duty is often referred to as a fiduciary duty. An example of a fiduciary is an agent under power of attorney, a conservator or a stockbroker. When a person breaches a fiduciary duty, the victim incurs damages, such as loss of property or money. An example is self-dealing or using the elder's funds or property for the agent's own benefit. If more than one person is involved, liability may attach for aiding and abetting breach of fiduciary duty (See *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994)).

e. **Constructive trust.** When a person acquires the property of another by abusing a confidential relationship that exists between the two people, the court can remedy this abuse by imposing a constructive trust on the property. This means that the defendant no longer owns the property, but that it is held for the benefit of the plaintiff. This theory is particularly important in abuse of financial power of attorney cases. For example, an adult daughter convinces her elderly mother to deed the home to the daughter without paying the mother. If the mother sues the daughter, the court could hold the property in a constructive trust and redistribute it to the mother.

f. **Conversion** is the civil equivalent to theft. Conversion means that a person takes control over the property of another with the intent to deprive the victim of the property, such as stealing money or personal property. Embezzlement is another cause of action if the person already has possession of the principal's property.

g. **Duress** is coercing a person to do something against his or her free will, such as forcing an elder to sign a check payable to the perpetrator.

h. **False imprisonment** is the intentional restriction of a victim's freedom of movement. This can include the use of physical restraints, removal of the elder's means of transportation (e.g., cane or wheelchair) or locking the elder in a room.

i. **Fraud and deception** is the making of a false representation of a material fact to another, when the person making the representation knows that the representation is false and knows that the victim will act on it, thereby causing damage to the victim. Examples include telephone scams, sweepstakes, requests to send money to "win."

j. **Intentional infliction of emotional distress** is engaging in conduct for the purpose of causing severe emotional distress on another person or knowing that certain conduct will have that result. An example is threatening to put an elder in the nursing home if he does not "behave."

k. **Negligence** is the failure to use the care that a reasonably prudent person would use under similar circumstances, which results in harm to the victim. An example is failure to administer medication in a timely manner.

l. **Unjust enrichment** occurs when a person benefits unjustly, at the expense of another, and it is unfair for the defendant to retain the benefit. An example is an informal promise to provide care to an elder, being paid in advance, and the caregiver not providing the care.

m. **Other legal remedies.** Malpractice (medical, accountant, legal and other professionals), violations of securities laws, etc., are also available causes of action to the elderly plaintiff.

3. Civil Protection Orders (Restraining Orders)

Obtaining a civil protection order is one important remedy often employed to limit further damage to the elder. Under C.R.S. Section 13-14-101 *et. seq.*, a temporary and permanent civil protection order can be entered by a municipal, county or district court to prevent assaults and threatened bodily harm; to prevent domestic abuse, to prevent stalking, and to prevent emotional abuse of the elderly. Elderly is defined as age sixty years or more. Emotional abuse of the elderly is defined under the statute as repeated acts that: constitute verbal threats or assaults; constitute verbal harassment; result in the inappropriate use or the threat of inappropriate use of medications upon a person; result in the inappropriate use of physical or chemical restraints; result in the misuse of power or authority granted to a person through a power of attorney or by a court in a guardianship or conservatorship proceeding that results in unreasonable confinement or restriction of the liberty of an elderly person.

Use of the civil protection order can be an effective means of stopping the abuse or exploitation and separating the perpetrator and the victim. Venue is in any county where the acts

that are the subject of the motion or complaint occur, in any county where one of the parties resides, or in any county where one of the parties is employed.

An injunction under C.R.C. P. 65 can also be pursued as part of a civil action against the exploiting party.

4. Guardianship, Conservatorship and Other Protective Arrangements

The Colorado Probate Code, at C.R.S. Section 15-14-101 *et. seq.*, provides that an elder or someone on his or her behalf can petition the court to appoint a guardian and/or a conservator or to enter a protective order for the benefit of the elder. A guardian is a person or institution appointed by the court to make decisions concerning the person of someone who is incapacitated. For example, a guardian decides where the person will reside, what kind of medical treatment will be administered, etc. A conservator is a person or institution appointed by the court to manage the estate and affairs of a person who is unable to manage his or her property and affairs effectively. In cases involving elder abuse and exploitation, an emergency guardian and special conservator can often be obtained on an emergency basis without notice. Unless limited by the court, the emergency guardian or special conservator has all of the powers over the estate of the protected person that the protected person has. The Court also has the authority to issue orders to preserve the protected person's property, which might include revoking powers of attorney, freezing bank accounts, moving the protected person, etc.

Instead of pursuing a full-blown conservatorship proceeding, an interested person can petition the court to issue a protective order under C.R.S. Section 15-14-412, authorizing, directing or ratifying "any transaction necessary or desirable to achieve any arrangement for the security, service or care meeting the foreseeable needs of the protected person." An example of a protective arrangement might be a court order permitting the sale of the elder's home, but restricting the use of the proceeds.

After appointment of a conservator, the protected person or a person interested in his or her welfare, can file a petition under C.R.S. Section 15-14-414, for an order requiring an accounting, bond or removal of a conservator.

Also, under C.R.S. Section 15-12-723, if any person interested in the estate of a protected person complains in writing to the court that any person is suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the protected person, the district court may cite the suspected person to appear before it and may examine the person under oath. If the person cited refused to appear, the court may issue a warrant for the person's arrest. This remedy can be particularly useful where a suspicion of wrong-doing exists, but the records cannot otherwise be obtained.

C. Administrative Remedies

One of the most important administrative remedies available to a victim of elder abuse, neglect or financial exploitation is a law entitled *Protective Services for Adults at Risk of*

Mistreatment or Self-Neglect Act. This law, found at C.R.S. Section 26-3.1-101 *et seq.* "urges" (but does not require) professionals and others who are in a position to detect abuse, neglect and financial exploitation of an elder to report to the County Department of Social Services or, during non-business hours, to law enforcement agencies, when they have "observed the mistreatment or self-neglect of an at-risk adult or who has reasonable cause to believe that an at-risk adult has been mistreated or is self-neglected and is at imminent risk of mistreatment or self-neglect."

An "at-risk adult" is defined as "an individual eighteen years of age or older who is susceptible to mistreatment . . . or self-neglect . . . because the individual is unable to perform or obtain services necessary for the individual's health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual's person or affairs."

The statute designates those who are "urged" to report in the following general categories: medical personnel (including hospital and nursing home personnel engaged in the admission of patients); mental health professionals; social workers; dentists; law enforcement officials; court appointed guardians and conservators; fire protection personnel; pharmacists; community centered board staff; financial institution personnel; state and local long-term care ombudsmen; and personnel, volunteers or consultants for any licensed care facility, agency, home or governing board. Additionally, "any other person may report such known or suspected mistreatment or self-neglect of an at-risk adult."

Once the agency has received a report, it is immediately required to "make a thorough investigation." A written report must be made within 24 hours. If it is determined that an at-risk adult is being mistreated or self-neglected, or is at risk thereof, the Department can immediately provide protective services if the adult consents. If the adult does not consent, the Department is "urged" to file for an order authorizing protective services, including the appointment of a guardian and/or a conservator. However, any protective services sought must constitute "the least restrictive intervention." The statute does not cover verbal or psychological abuse.

A victim of abuse, neglect or financial exploitation can also file a complaint against an entity or a person who is regulated by an administrative agency. For example, nursing homes must comply with the regulations of the Colorado Department of Health. Insurance companies are governed by the regulations of the Colorado Commissioner of Insurance. Stock brokerages must comply with the regulations of the Colorado Commissioner of Securities and the U.S. Securities and Exchange Commission. If the administrative agency determines that a potential violation of its regulations has occurred, it can conduct an investigation and take action against the wrongdoer.

X. CONCLUSION

As professionals working with the elderly and disabled, it is incumbent upon all of us to recognize the signs of abuse, neglect and financial exploitation, to identify the victims, to assist them in pursuing their legal rights under the law and to attempt to limit their exposure to exploitation through properly drafted instruments.

April 20, 2009