

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007) **

As elder abuse becomes a more visible form of social injustice, the criminal and civil justice systems become more integral to the response to the problem. The following bibliography focuses on the role of the attorney, the courts, and legal mechanisms in preventing and remedying elder abuse. References include articles addressing professional practice, creative legal remedies, and barriers to legal access and prosecution. The included articles suggest that the legal system provides many channels for addressing mistreatment, and that the system can expand its role, particularly in the area of prevention, through legislative reform, collaboration, monitoring, and ongoing training and education.

As the following topics have been covered extensively in previous CANE bibliographies, we have only included related references that are *particularly relevant to the role of legal professionals* in the following areas: financial abuse and exploitation, nursing home abuse, dementia, and palliative care and pain management. Only the latest references on guardianship are included as it was also the subject of recent compilation. Articles that have appeared in a previous CANE bibliography are denoted by an asterisk (*) after the file number. This is a selected annotated bibliography, which does not include all published references related to this topic. To search for additional references on this and related topics, please visit the CANE Web site at: <http://www.cane.udel.edu> .

Most of the reference materials can be obtained through local university and community libraries or interlibrary loan services. Increasingly, many resources are available online, and the web addresses are also included.*** Some material must be ordered directly through the publisher or production company. When available, contact and pricing information is included with the abstract. If you have difficulty obtaining any of these references, please contact the CANE office for assistance by emailing cane-ud@udel.edu or telephoning (302) 831-3525.

Additional reports and publications focusing on the intersection of aging and legal issues are accessible from the *American Bar Association Commission on Law and Aging* web site at: <http://www.abanet.org/aging/> .

Some references published before 2003 have been included; these references first appeared in print during a different year and are denoted by a double asterisk () following the publishing date.

***Web addresses may change without notice. If an address provided is no longer accurate, we recommend using a generic search engine, such as Google, to find a current link. If you cannot locate the online publication, contact the CANE offices for assistance by e-mailing cane-ud@udel.edu or telephoning (302)-831-3525.

The National Center on Elder Abuse (NCEA) serves as a national resource for adult protective services, elder rights advocates, law enforcement and legal professionals, public policy leaders, researchers, and citizens. It is the mission of NCEA to promote understanding, knowledge sharing, and action on elder abuse, neglect, and exploitation.

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2007

1. T6695-22*
Abramson, B., Brandl, B., Meuer, T. & Raymond, J.
Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know
NAELA Journal; Vol. III (1), 47-66; Summer 2007.
Journal article (scholarship)

This article discusses the isolation tactics employed by perpetrators who abuse older individuals within a domestic context, including abuse by family members or partners, intimate acquaintances, or caregivers. Case examples are provided that demonstrate how isolation tactics allow abusers to gain and maintain power and control over the victim, including tactics that are more unique and problematic to older victims (such as "crazy-making", refusing home health care for disabled victims, or demanding victims to provide care to abusers). Interventions such as social services, home care, advocacy and housing services, and adult protective services (APS) are important strategies for decreasing isolation. A number of legal interventions are outlined: legislation that permits APS workers access to an alleged victim despite an abuser's (or other's) refusal; court orders for protective services; restraining orders; mental commitment (in cases when the perpetrator has an active mental illness); guardianship, conservatorship; execution of a new durable power of attorney, filing a petition to review an agent's performance; filing for divorce or separation. Elder law attorneys are encouraged to provide accurate information to older clients on a complete range of both civil and criminal legal remedies and of available financial and social support services. They are also encouraged to conduct universal screenings of all clients for signs and symptoms of elder abuse, including isolation. Further, attorneys should recognize that even if the client is currently not ready to take action, they may be willing to do so in the future. In addition, they should engage in efforts to educate prosecutors and encourage prosecution of criminal charges when appropriate.

2. T6751-15*
Gavisk, M. & Greene, E.
Guardianship Determinations by Judges, Attorneys, and Guardians
Behavioral Sciences & the Law; Vol. 25 (3), 339-353; May 2007.
Journal article (research)

After presenting an overview on guardianship determinations and proceedings involving incapacitated adults, this study examines the perceptions of various professionals regarding such determinations. The sample was comprised of 38 probate judges, 56 elder law attorneys, and 57 professional guardians (non-lawyers). Each participant was presented with one of three versions of two different vignettes describing varying degrees of evidence detailing cases of guardianship determination. They were asked to apply a generic definition of an incapacitated adult (provided) to each of the two vignettes reviewed, and respond as to whether they thought the case required further evaluation, limited guardianship, or full guardianship. Overall, full guardianship was not widely recommended even when all necessary evidence was provided in the case vignette to support such a determination, which is in contrast with previous research. Differences across professional groups were also noted.

3. T6787-502 *
Shilling, D.
Legal Issues of Dependent and Incapacitated People
Civic Research Institute, Inc.; Kingston, NJ; 2007.
Book

As quoted from the publisher: "This authoritative resource for attorneys, financial planners, and social service professionals offers a clear roadmap to the legal and financial issues affecting vulnerable clients: adults or children with physical or mental disabilities, abused and neglected children and the elderly. To help them get the services, legal protections, and financial security they need, turn here for essential guidance on: health-related issues/developmental disability; mental illness; and end-life issues such as advance directives and termination of life support; child protection and services/laws dealing with child abuse; dependency actions and other methods of placing at-risk children in a safe, stable environment; the ins and outs of the *Individuals With Disabilities Education Act*; guardianship; financial planning strategies/structuring tort settlements to protect public benefit eligibility; tax issues; using wills, trusts, and the Durable Power of Attorney; federal benefit programs/Supplemental Security Income and Social Security Disability Income; Medicare and Medicaid...." (Note: This book is not available through CANE. To order, visit: <http://www.civicrosearchinstitute.com/lidi.html> or contact the Civic Research Institute at 609-683-7291. Price: \$133.95.)

4. T6726-41*
Stiegel, L.
Recommendations for the Elder Abuse, Health, and Justice Fields about Medical Forensic Issues Related to Elder Abuse and Neglect
Journal of Elder Abuse & Neglect; Vol. 18 (4), supplement 41-81; 2007.
Journal article (scholarship)

Heightened awareness surrounding the issue of elder abuse has led to increased efforts to bring legal action against elder abuse perpetrators. Unfortunately, these efforts have been hindered by a lack of knowledge about the detection and medical diagnosis of elder abuse, among prosecutors, law enforcement, adult protective services and health care providers. This report provides recommendations for the elder abuse, health, and justice fields about medical forensic issues related to elder abuse, developed by a "working group" of twenty professionals from a variety of fields involved in assisting elder abuse victims. Several themes emerged, including the importance of a multidisciplinary approach and the need to balance research efforts seeking future solutions with guidance for response professionals who are presently dealing with the issue. Recommendations are grouped by discipline. (Note: This article is the corrected and revised version of the original, which appeared in the Journal of Elder Abuse & Neglect Vol. 18 Issue 1.)

2006

5. S6151-13*
American Bar Association Commission on Law and Aging
State Adult Guardianship Legislation: Directions of Reform - 2005
American Bar Association Commission on Law and Aging; January 2006.
Online (paper)

This paper summarizes the highlights of legislation related to adult guardianship enacted in 2005 throughout the U.S. As quoted from the introduction: "at least 14 states passed a total of 24 adult guardianship bills -- as compared with 19 bills in 14 states passed in 2004....New Jersey enacted the first major reform of the state's guardianship laws in more than 30 years. Six states made changes in their public guardianship programs, including legislation in Texas providing for extensive reform and reorganization of adult protective services (APS) and guardianship; as well as the creation of a public guardianship program in Georgia. Two states (Texas and New Jersey) initiated guardian certification/registration programs, and one state (Idaho) included certification in a pilot program. In addition, a number of states strengthened the monitoring and accountability of guardians, while others made procedural changes or addressed the powers and authorities of guardians...." Additional legislation is highlighted from the following states: North Dakota, Nevada, Virginia, New

Hampshire, Colorado, Arkansas, New York, Minnesota, Washington, and Connecticut. (Note: This paper is available online at: <http://www.abanet.org/aging/docs/guardian1.pdf>.)

6. T6718-7*

Buka, P. & Sookhoo, D.

Current Legal Responses to Elder Abuse

Journal article (scholarship)

International Journal of Older People Nursing; Vol. 1 (4), 194-200; December 2006.

This article considers the legal responses available for addressing elder abuse in social or health care settings in the U.K. Criminal law responses involve police reports, investigation, and potentially prosecution. Civil remedies include personal injury claims. The *Anti-Social Behaviour Orders (ASBOs)* under the *Crime and Disorder Act 1998*, the *Domestic Violence, Crime and Victims Act 2004*, and the *Human Rights Act* are also discussed. The response to a specific case of mistreatment should carefully consider the intervention's effect upon the victim and his or her particular vulnerabilities. (U.K.)

7. T6585-6*

Dodson, C. & Krueger, L.

I Misremember it Well: Why Older Adults are Unreliable Eyewitnesses

Psychonomic Bulletin & Review; Vol. 13 (5), 770-775; 2006.

Journal article (research)

Researchers used "an eye witness suggestibility paradigm" to study misrecollection associated with cognitive age changes. Older and younger participants viewed a video clip of a crime and then completed a questionnaire, which referred to accurate information and misinformation, and details that were not included in the video. They then completed a source memory test that asked how specific details were introduced: in the video; in the questionnaire; in both; or was new information. They were also asked how confident they were regarding each answer. Three groups were compared: healthy, older adults (aged 60 to 90, n=36); a younger group (aged 17 to 23, n=36) who received the identical treatment; and a young-delay group (n=36), in which participants completed the final memory test two days after completing the questionnaire. The older and young-delay groups were comparably suggestible and both were more suggestible than the younger (no delay) group. Of greatest significance, older adults were most likely to make suggestibility errors when they were most confident in their accuracy. Although the study is limited by small sample size, further research is warranted as these findings may hold significant implications regarding court testimony.

8. S6275-63*

Karp, N. of the AARP Public Policy Institute and Wood, E. of the American Bar Association (ABA) Commission on Law and Aging

Guardianship Monitoring: A National Survey of Court Practices

AARP Public Policy Institute; Washington, D.C.; June 2006.

Online report

This report was designed to assess the current state of guardianship monitoring throughout the U.S., and to determine how the field has advanced since a 1991 ABA survey. The report provides an overview of the guardianship process and a history of monitoring reform efforts. The national project involved surveying experts in the guardianship system (387 judges, court managers, guardians, elder law attorneys, and legal representatives of people with disabilities). There is an ongoing initiative to research guardianship monitoring through site visits and interviews in jurisdictions demonstrating exemplary practices. Key findings include the following: "...Despite a dramatic strengthening of statutory safeguards, guardianship monitoring practices continue to show wide variation; practices regarding filing of reports by guardians have advanced over the past 15 years, with more courts requiring periodic personal status reports and forward-looking plans; verification of guardian reports and accounts is frequently lacking; over one-third of respondents said no one is designated to verify the information in these mandatory reports; over 40 percent reported that no one is assigned by the court to visit individuals under guardianship, and only one-fourth said that someone visits regularly; use of technology in monitoring is minimal, despite vast opportunities for web-based and email monitoring techniques and computerized data collection; funding for guardianship monitoring remains minimal..." Appendices include the survey and a table of state statutory authorities for guardianship monitoring. (Both the "In Brief" and full report are accessible online at: <http://www.guardianship.org/reports/07GuardianshipMonitoring.pdf>.)

9. S6458-5

Morgan, E., Johnson, I. & Sigler, R.

Public Definitions and Endorsement of the Criminalization of Elder Abuse

Journal of Criminal Justice; Vol. 34 (3), 275-283; 2006.

This article reports upon the findings of a longitudinal cross-sectional study conducted to measure public definitions of elder abuse and the willingness to endorse criminal sanctions for perpetrators. Data was collected through random sample surveys conducted in the area of Tuscaloosa, Alabama, in 1986-1987 (n=117), again in 1991-1992 (n=134), and in 1996-1997 (n=159). Results suggest that the public perceptions of what constitutes physical elder abuse remained constant over time. Perceptions of neglect and psychological abuse also appeared relatively constant, with some exceptions. For example, not spending time with the elder was viewed as more neglectful in the earlier survey results compared to later findings. Perceptions of financial abuse appeared less consistent over time. Support for the criminalization of elder abuse increased

throughout the course of the study, as participants endorsed the creation of misdemeanor and felony statutes, and prison sentences for punishment of perpetrators.

10. T6743-6*

Passaro, G.

Claims of Exploitation of the Elderly in the Sale of Financial Products

Florida Bar Journal; Vol. 80; October 2006.

Journal article (scholarship)

This article summarizes a recent trend to legally remedy the exploitative sale of certain financial products, particularly annuities, to elders and vulnerable adults. Efforts to use elder abuse statutes "to transform these claims into more extensive and complex class action lawsuits" are described. Relevant legislation from Florida and California is highlighted. Since currently there are no established guidelines as to when the sale of these products to seniors is appropriate, cases are evaluated on an individual basis by the court system.

11. T6627-15*

Payne, B.

Problems Controlling Fraud and Abuse in the Home Health Care Field

Journal of Financial Crime; Vol. 13 (1), 77-91; 2006.

This study considers the criminal justice perspective in assessing fraud and abuse in the home health care (HHC) industry. In this survey, 18 fraud control unit directors were asked to describe problems in the investigation and prosecution of such cases. Content analysis revealed four basic barriers: detection obstacles; witness problems; ambiguity regarding the offender; and lack of referrals or untimely referrals. Problems in prosecution were related to statutory or policy issues, individual case circumstances, difficulty proving the negative, denial on the part of the victim, and "record chasing" (problems with documentation and the quality of record keeping, which is a common problem among many white-collar crime investigations). Overall, fraud and abuse in HHC was viewed as a "hybrid offense," sharing characteristics of both conventional crimes and white-collar crimes. The article concludes with discussion of various theories of HHC abuses, and practical implications for improvements in the criminal justice response, which include increased funding for fraud control, and increased awareness regarding HHC crimes.

12. S6535-9

Rothman, M. & Dunlop, B.

Elders and the Courts: Judicial Policy for an Aging American

Journal of Aging & Social Policy; Vol. 18 (2), 31-46; 2006.

Journal article (research)

In light of the increasing numbers of older individuals addressing legal issues, this article describes how judicial policy and trial courts should evolve to better accommodate the needs of an aging society. Information was collected through interviews with judges, court personnel, and other professionals from seven state trial courts, and compared with lessons learned through an assessment of the *Elder Justice Center* administered by the *Fifteenth Judicial Circuit of Palm Beach, Florida. Therapeutic jurisprudence (TJ)*, which focuses on the therapeutic (or anti-therapeutic) impact of the law and accompanying legal processes, is described as a means for identifying underlying issues "and to address them within the court context". A number of issues were identified: physical access to the courts; post-incarceration assessment of mental, cognitive and/or physical impairments to ensure appropriate placements for older adults; education for judicial personnel regarding aging issues, and to increase public awareness about legal issues; referral for public programs and social services; interdisciplinary barriers to effective intervention; guardianship (including sufficient guardians and resources for effective program monitoring); information tracking systems and technology; and adequacy of resources.

13. S6449-18*

Schall, V.

The New Extreme Makeover: The Medical Malpractice Crisis, Noneconomic Damages, the Elderly, and the Courts

Appalachian Journal of Law; Vol. 5 (1); Spring 2006.

Journal article (scholarship)

Tort reform and damage caps are emerging as solutions for the U.S. "medical malpractice crisis" but appear to disadvantage elder residents of nursing homes who are victims of abuse and neglect. This legal commentary provides background on sociodemographic trends and the increasing need to provide protection for institutionalized elders. The author reviews the conflict among the courts addressing the constitutionality of statutory noneconomic (pain and suffering, for example) damage caps. Arguments that suggest these measures are necessary to protect medical insurance rates are challenged. In conclusion, the author argues that nursing home abuse should be either treated as a distinct form of custodial neglect, or should not be subjected to caps on noneconomic damages.

14. S6440-27*

Schuyler, D. & Liang, B.

Reconceptualizing Elder Abuse: Treating the Disease of Senior Community Exclusion

Annals of Health Law; Vol. 15; Summer 2006. Journal article (scholarship)

This paper outlines a multidisciplinary approach to assessing the needs of the elderly within the community and addressing existing abuse and neglect. An overview of elder abuse is presented, including a history of the federal and state (notably California) initiatives. In particular, the function of multidisciplinary teams (MDTs) is highlighted along with a number of model programs: the *Elder Abuse Forensic Center* in Santa Ana, California; the *Family Justice Center* of San Diego, California; and the *Elder Justice Centers* of Tampa and Palm Beach, Florida. The

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007)**

components of a proactive, community systems approach include local needs assessment sensitive to the cultural needs of an area; the identification of service providers; and facilitating access between service providers and seniors.

15. S6459-39*
Stafford, B.

Expeditious Efforts for the Elderly: Covenant Care, Inc. v. Superior Court
U.C. Davis Law Review; Vol. 39; February 2006.
Journal article (scholarship)

This legal note examines the California Supreme Court ruling on *Covenant Care, Inc. v. Superior Court* and its potential impact upon cases involving resident abuse and neglect. Case law is cited that illustrates the overlap of the *Elder Abuse and Dependent Adult Civil Protections Act* (referred to by the author as the "*Elder Abuse Act*", which enhances remedies for "reckless, fraudulent, oppressive, and malicious acts of abuse and neglect by individuals and entities"), the *Medical Injury Compensation Reform Act (MICRA)*, which provides defendant protections for nursing homes and other health care providers), and the *California Code of Civil Procedure Section 425.13* (which "seeks to prevent unsubstantiated punitive damages claims from being included in claims against healthcare providers"). The details, rationale, and rulings of the *Covenant Care v. Superior Court* case are described. The case involved a family seeking punitive damages against a nursing home facility for abuse of a resident and claimed the "intentional, egregious elder abuse went beyond the scope of professional negligence." The court determined that section 425.13 did not apply to this or other claims alleged under the *Elder Abuse Act*. The author indicates that this decision will provide incentives for attorneys to take on elder abuse claims by expanding the boundaries for punitive damages and by eliminating procedural hurdles.

16. T6550-210

Uekert, B., et al., for the National Center for State Courts, for the National Institute of Justice
Serving Limited English Proficient (LEP) Battered Women: A National Survey of the Courts' Capacity to Provide Protection Orders

U.S. Dept. of Justice; National Institute of Justice; Washington, D.C.; June 30, 2006.
Online (report)

As quoted from the abstract: "...Findings from the national survey demonstrate that courts have inadequate resources, including a shortage of interpreters. Courts have sparse informational or instructional material on protection orders in languages other than English....In addition, courts have poor data collection and information management systems that do not track requests for language assistance....The Nation's courts need to increase their institutional capacity to identify, develop, and implement an effective system so as to provide 'equal and meaningful access' to protection orders and court services for the LEP population. Three sites were selected for further study based on the high quality of their court programs and community collaboration: Miami-Dade County, FL, King County, WA, and Washington, DC.... The need for language services may be felt most in the case of battered and stalked women who seek reprieve with protection orders. In 2003, the National Institute of Justice (NIJ) awarded the National Center for State Courts a grant to study the capacity of LEP petitioners to receive orders of protection. The multi-method study design included a national survey of courts, an intensive survey of a select group of courts and community-based organizations within their jurisdictions and the assessment of selected sites that could serve as national models..." (Note: This paper is not specific to elders, but may hold implications for victims of elder abuse and elders experiencing intimate partner violence or IPV. It is accessible online at: <http://www.ncjrs.gov/pdffiles1/nij/grants/216072.pdf> .)

17. S6472-28

Watts, L. & Sandhu, L.

The 51st State - The "State of Denial": A Comparative Exploration of Penal Statutory Responses to "Criminal" Elder Abuse in Canada and the United States

Elder Law Journal; Vol. 14; 2006.
Journal article (scholarship)

In this article, the authors describe and compare the criminal justice response to elder abuse in the U.S. and Canada. While the U.S. "has experienced a vibrant and substantive discussion of the issues related to the criminality of elder abuse..." Canada has not. The current status of the law of both countries is discussed, as well as factors that may contribute to the differences. The authors argue that although the Canadian penal response may be ultimately different from that of the U.S., a national debate is long overdue. (Canada)

2005

18. R6104-80

American Bar Association Commission on Law and Aging and The American Psychological Association

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

American Bar Association Commission on Law and Aging and American Psychological Association; Washington, DC; 2005.
Book

As quoted from the Web site: "Lawyers face a growing challenge: older clients with problems in decision-making capacity. While most older adults will not have impaired capacity, some will. Obvious dementias impair decision-making capacity - but what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer. Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the difficult challenges of working with older adults with diminished capacity..." The book addresses such topics as the legal standard of diminished capacity, clinical models of capacity, ethical considerations, and whether an attorney should seek the opinion of a clinician. Note: This resource is available online at: <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> .

19. T6567-9*

Brandl, B., Heisler, C. & Stiegel, L.

The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault

Journal of Elder Abuse & Neglect; Vol. 17 (3), 37-52; 2005.
Journal article (scholarship)

The authors present an overview of undue influence (UI) as a mechanism for financial exploitation with patterns of manipulation that parallel tactics identified in domestic violence (DV), stalking, and the "grooming" behaviors of some sexual predators. UI is a process, not a single event, in which the perpetrator uses "their role and power to exploit the trust, dependence, and fear of others." Although an elder may have

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007)**

the mental capacity to make decisions regarding his or her finances, a number of variables can increase one's vulnerability to UI: significant personal loss; changes in physical, cognitive, or emotional status; certain personality characteristics (such as naivety, or fearfulness); isolation; medication usage and/or substance abuse; etc. Seven parallels are considered: the exploiter and the victim are involved in an ongoing relationship; victims are often targeted and groomed (the act of gaining the victim's confidence) by their perpetrators; exploiters typically use a stealth campaign to influence, coerce, and exploit victims; perpetrators often use charm and deception to manipulate victims and others; exploiters deny, minimize, and justify their behaviors; victims often appear willing participants; victims often experience trauma responses (such as helplessness, guilt and self-blame, denial, etc.) and some reactions impede investigation. The analysis is synthesized into guidelines to enhance the law enforcement and criminal justice response to such cases.

20. S6212-19*

Dessin, C.

Elder Law: Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?

Akron Law Review; Vol. 38; 2005.

Journal article (scholarship)

This article considers whether attorneys can and should report suspected elder financial abuse under mandatory reporting statutes. Conflicts arising from the mandate to report suspected abuse, and the *Model Rules of Professionals Conduct* which describes the attorney's duty to maintain client confidences, are discussed. Distinctions between the Pre-Ethics 2000 version of the *Model Rules* and the Ethics 2000 revision are highlighted; under the latter, in some cases an attorney would be able to reveal information in order to "prevent reasonably certain death or substantial bodily harm" in states only where the reporting is mandatory. The author summarizes the three basic approaches adopted by states to deal with the need to protect client confidentiality while complying with any mandatory reporting requirements. She argues that difficulties in assessing the potentially exploitative nature of financial transactions notwithstanding, attorneys remain responsible for being alert to potential abuse in order to protect the best interests of the client and to fulfill the obligation to provide competent representation. In conclusion, under the principles of providing competent representation, the author argues that the attorney should report suspected financial abuse when the client is perceived as incapable of consenting to the allegedly abusive behavior. In addition, the attorney should report suspected abuse when learning of it through the perpetrator.

21. S6209-30*

Glick, J.

Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy

Virginia Journal of Social Policy & the Law; Vol. 12; Spring 2005.

Journal article (scholarship)

In this legal commentary, the author argues that mandatory reporting statutes should be revised to "...protect those seniors who lack the capacity to make their own decisions, while preserving the autonomy of others who are fully capable of exercising independent judgment...." She provides an overview of the types and causes of elder mistreatment and then describes the perceived flaws of current mandatory reporting statutes. In terms of practical failings, research suggests that while mandatory reporting has an impact upon identification of cases of elder mistreatment, it has not been demonstrated to be effective in prevention or intervention. Ethical concerns are also raised, specifically regarding elder autonomy and sustained emotional victimization. Both ethical concerns can be addressed by revising mandatory reporting laws to include an assessment to distinguish between those elders who are competent and those lacking capacity. The analogy between a competent elder's right to refuse medical treatment with a competent elder's right to refuse "unwanted state intervention under mandatory reporting" is drawn. A framework for making such determinations is presented. In addition to making a determination about the appropriateness of reporting, a number of other recommendations are made, including the need for a uniform definition of elder abuse, and the empowerment of competent victims of elder mistreatment.

22. S6119-10*

Golding, J., Yozwiak, J., Kinstle, T. & Marsil, D.

The Effect of Gender in the Perception of Elder Physical Abuse in Court

Law and Human Behavior; Vol. 29 (5), 605-614; October 2005.

Journal article (research)

This article reports upon a study designed to evaluate the impact of gender on the perception of elder physical abuse in court proceedings. Two experiments were conducted eliciting responses of participants to scenarios involving a fictional criminal trial case of elder abuse. The scenarios varied according to the alleged victim's and perpetrator's gender and age. In both experiments, the majority of participants voted that the alleged perpetrator was guilty. In general, female mock jurors were more likely than men to believe the alleged victim's testimony, particularly when the alleged perpetrator was female. This finding is consistent with previous research concerning other forms of abuse.

23. S6401-42*

Luu, A. & Liang, B.

Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse

Cornell Journal of Law and Public Policy; Vol. 15; Fall 2005.

Journal article (scholarship)

Despite legal mandates to report elder abuse, cases of elder mistreatment remain significantly under-reported. In this article, the authors emphasize the need for coordination between the health care and legal systems in order to provide support and protection to older victims, and to increase the likelihood of bringing the perpetrator to justice. In particular, nursing case managers could perform this function in a variety of health care settings. Part I of the article is an overview of the nature of elder abuse and the settings in which it may occur. Part II outlines the state of California's statutes addressing elder abuse. Part III identifies problems and gaps in the current response to elder abuse. In Part IV, the role of the nursing case manager in detecting and reporting mistreatment, and in providing care, support and referral for the victim, is described.

24. P5886-15

Schimer, M.

Elder Abuse: The Attorney's Perspective

The Clinical Gerontologist; Vol. 28 (1/2), 55-82; 2005.

Journal article (scholarship)

In this article, the author analyzes (from the attorney's perspective) three elder abuse case studies presented for multidisciplinary

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007)**

consideration within the context of Ohio state law. She begins with a discussion about ethical considerations prevalent in elder law: the need to focus on the client's best interest; the need to preserve client confidentiality, with certain noted exceptions; the need for zealous representation; and the need to maintain normal attorney-client relationships even when the client has a disability, unless the client cannot act in his or her own interest. Key elements of the Ohio Revised Code's elder abuse laws are described, including the distinctions between the concepts of "non-support" versus "neglect." By statute, attorneys are required to report suspected elder abuse, regardless of how they become aware of the situation. Ethical dilemmas arise when the suspected mistreatment comes to light within the context of the attorney-client relationship. Issues of competency and autonomy, at the heart of guardianship law, are also discussed. Features of Ohio law that enhance the guardianship process are highlighted, including the appointment of an investigator in such proceedings. (Note: This issue was co-published simultaneously as a book entitled *The Clinical Management of Elder Abuse*, Anetzberger, G., ed.; The Haworth Press, Inc., Binghamton, NY; 2004. The book is not available through CANE; for further information, visit the Haworth Press, Inc. Web site at: <http://www.haworthpress.com> or telephone 1-800-429-6784 in the US/Canada or 607-722-5857 outside US/Canada.)

25. S6190-12

Twomey, M., Quinn, M. & Dakin, E.

From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Later Life

Journal of the Center for Families, Children & the Courts; Vol. 6; 2005.

Journal article (scholarship)

This article, intended for members of all judicial systems, provides an overview of elder abuse and domestic violence in later life with a particular emphasis on legislation and projects from the state of California. Definitions, causal theories, and risk factors are presented, along with barriers that older individuals may experience when attempting to seek assistance. The complex nature of elder abuse cases that reach the courts are highlighted. (Note: This article is available online at: http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/4_Twomey.pdf .)

2004

26. S6213-14*

Cahill, J.

Combating Health Care Fraud and Patient Abuse: The Role of the Medicaid Fraud Unit

New Hampshire Bar Journal; Spring 2004.

Journal article (scholarship)

This article presents an overview of the Medicaid Fraud Unit of New Hampshire and its role of not only addressing fraudulent and abusive billing practices but of investigating and prosecuting cases of vulnerable adult victimization occurring in long-term care facilities. A history of the development of the unit and the evolution of its role in coordination with federal authorities is described. Case illustrations are presented demonstrating a range of scenarios in which the Unit has become involved.

27. S6364-34*

Davidson, M.

Governmental Responses to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act

The Elder Law Journal; Vol. 12; 2004.

Journal article (scholarship)

In this legal discussion, the author provides an overview of elder abuse among nursing home residents, and considers ways in which the criminal justice system and the application of the civil *False Claims Act (FCA)* could be more effective in responding to this problem. While currently no federal statute exists that criminalizes elder abuse and neglect, the *FCA*, which is a primary legal mechanism for addressing fraud involving federal funds, has recently been applied to cases involving substandard care in nursing homes participating in Medicare and/or Medicaid programs. The premise of these cases is that although the U.S. government was billed for services, adequate care was not delivered to the elderly residents. One criticism of this application is that it attempts to federalize malpractice cases. The author points out that many abused and neglected residents are not capable of reporting misconduct, and the *FCA's qui tam* ("whistle-blower") provisions provide financial incentives for institutional administrators and staff to accurately document and report mistreatment issues. Cases are highlighted that reveal various aspects of these arguments.

28. S6247-315

Eglit, H.

Elders on Trial: Age and Ageism in the American Legal System

University of Florida Press; Gainesville, FL; 2004.

Book

In this book the author, an elder law attorney, examines the interactions among court personnel and aging victims and witnesses who become involved in the legal system. He begins by asserting that ageism is as pervasive in the justice system as it is throughout American society. In particular, stereotyping is observed when addressing competency issues, impacts the credibility of the older witness, and appears to restrict damages awarded by juries in civil cases. Chapters are dedicated to the effects of age upon attorneys, judges and juries. (Note: This book is not available through CANE. For more information, visit the publisher's Web site at: <http://www.upf.com/book.asp?id=EGLITS04>

29. or telephone: 1-800-226-3822. Price: \$49.95.)

30. P5610-32

Nerenberg, L., National Committee for the Prevention of Elder Abuse (NCPEA), for the National Center on Elder Abuse (NCEA)

An Introduction to the Civil Justice System and Its Role in Elder Abuse Prevention

NCEA; Washington, D.C.; March 2004.

Booklet

While many professionals in the Adult Protective Services (APS) and related fields have developed an understanding of the role of the criminal justice system in addressing elder abuse, the civil justice system is not as well understood. This publication is intended to provide information regarding this court system for health care providers and social service professionals. The introduction describes types of civil cases and the processing of civil lawsuits, from the pre-filing phase to the post trial. It also includes discussion regarding the distinction between civil and criminal proceedings. *Alternative Dispute Resolution (ADR)* is described. The second section highlights remedies available to elder abuse victims through the civil court system, including tort actions, contract actions, and other remedies such as divorce, constructive trusts,

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007)**

eviction, civil protective orders, guardianship and commitment. Preventative measures regarding financial abuse (by power of attorney, abuse of guardianship, abuse of trusts, etc.) are highlighted. The next chapter describes the challenges encountered, notably the lack of clarity regarding competency (mental capacity) and undue influence, and the financial risks of processing abuse cases, the limited effectiveness of restraining orders and attempts to collect the damages awarded by the courts, and issues of accessibility. Recommendations for overcoming these challenges are provided, along with examples of existing programs. The booklet includes a list of resources and promising practices. (To order, please contact NCEPA at 202/682-4140 or via email at ncepa@verizon.net.)

31. R6082-10
Raybin, D.
Sentencing Lockdown - What is the Impact of Blakely on Sentencing in Tennessee?
Tennessee Bar Journal; August 2004.
Journal article (scholarship)

This article discusses the impact of the decision in the Supreme Court Case, *Blakely v. Washington*, on Tennessee sentencing guidelines. The case questioned the constitutionality of a Judge's ability "...to impose higher sentences when there are statutory enhancement factors such as the presence of a gun or where the victim was particularly vulnerable, e.g. an elderly person...." The decision held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment...." The author compares the federal sentencing guidelines with Tennessee sentencing guidelines, which were reformed in 1989 to allow for increased sentences according to enhancement factors specifically outlined in the statute. The author suggests that there are several reasons why Tennessee sentencing will not be altered significantly by the Supreme Court ruling. Waiver forms in plea bargains can be amended to waive the right to a jury trial not only regarding guilt but also regarding sentencing enhancement factors. In addition, the author also points out that Tennessee has relatively high sentencing minimums and wide sentencing ranges, and that a single criminal episode usually involves multiple charges which can result in consecutive sentences. In conclusion, the author recommends an amendment to the 1989 Sentencing Act which would allow for a "...bifurcated jury trial where - after guilt is assessed - the jury determines only the existence of statutory enhancement factors...the judge may then impose a sentence considering only those factors that the jury determined were proven by the government beyond a reasonable doubt...."

2003

31. P5490-5*
Abramson, B.
Ethical Considerations in Potential Elder Abuse Cases
NAELA Quarterly - The Journal of the National Academy of Elder Law Attorneys; Vol. 16 (4), 15-19; Fall 2003.
Journal article (scholarship)

In this article, the "4 Cs" of ethical considerations are reviewed and illustrated: client identification, conflicts of interest, communication, and competency. Highlighting these issues are scenarios of possible violation of fiduciary duty by an agent, perceived abuse between spouses, physical abuse by an adult child, second marriage financial abuse and threatened criminal activity. (Note: This is an adaptation of a previously published article, available online at <http://www.wisbar.org/wislawmag/2000/09/abram.html>.)

32. P5489-7*
Brisk, W. & Flynn, J.
No Bad Deed Should Go Unpunished: Evaluation and Discovery of Cases of Financial Abuse of Elders
NAELA Quarterly - The Journal of the National Academy of Elder Law Attorneys; Vol. 16 (4), 8-14; Fall 2003.
Journal article (scholarship)

As quoted from the article, "This article is intended to help attorneys who encounter cases of elder financial abuse, whether they are inclined to litigate or not. Upon learning of possible exploitation, attorneys have a duty to provide sound advice which requires at the very least, an understanding of 1) how to conduct initial evaluation of such cases, 2) what types of retainers are appropriate, 3) particular discover strategies, and 4) suitable remedies." The author emphasizes that the more effectively the earlier phases of the process are conducted, the greater the chances of a successful outcome. Topics highlighted include capacity/competence, discovery strategies (such as preservation of testimony), and remedies (such as statutory protections for victims of elder abuse and exploitation, temporary orders, consumer protection statutes, and punitive damages when allowed).

33. P5491-7*
Bueno, J.
Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly
NAELA Quarterly - The Journal of the National Academy of Elder Law Attorneys; Vol. 16 (4), 20-26; Fall 2003.
Journal article (scholarship)

The very strengths of the Durable Power of Attorney (DPOA or DPA), such as inexpensiveness, simplicity and ease of use, also create the potential for abuse. Agents under DPA are not monitored within the court system as some states require guardians to be. Therefore, infractions easily go unnoticed. In this article, the author reports upon state legislation designed to respond to financial abuse and exploitation under DPA. Legislative initiatives were found in the following areas: execution (witnessing requirements); disclosure; accounting requirements; agents duties (including gift-giving authority); and the need for an affidavit from a physician.

34. P5495-21*
Daly, J. & Jogerst, G.
Statute Definitions of Elder Abuse
Journal of Elder Abuse and Neglect; Vol. 13 (4), 39-57; 2001.**
Journal article (research)

This study reviews elder abuse statutes from 50 states and the District of Columbia in order to begin the development of definitions that may be usable to researchers, practitioners and policy makers. Individual state statutes were analyzed by a multidisciplinary team in order to code definitions and terms associated with the concept of elder abuse. The terms "abandonment," "mental anguish," "exploitation," "neglect," "self-neglect," and "sexual abuse" were most commonly used in both the statutes that provide independent definitions of elder abuse and in those addressing "abuse not otherwise specified." The authors also suggest that definitions and terminology related to adult protective services

The Role of Attorneys, Courts, and Legal Mechanisms in the Prevention of and Intervention to Elder Abuse (2003 to 2007)**

interventions (such as "referral," "report," "investigation," etc.) also require codification in order to allow comparisons from one state to another and to facilitate research. Tables are included that illustrate which states contain specific definitions of the above terms identified.

35. P5676-22*

Daly, J., Jogerst, G., Brinig, M. & Dawson, J.

Mandatory Reporting: Relationships of APS Statute Language on State Reported Elder Abuse

Journal of Elder Abuse & Neglect; Vol. 15 (2), 1-21; 2003.

Journal article (research)

Forty-four states and the District of Columbia have mandatory reporting laws that require "individuals who assume the care of older adults, which includes health care providers" to report suspected elder abuse and neglect. This article analyzes the impact of state APS reporting statute language upon rates of reporting, investigating and substantiating domestic elder abuse. Researchers hypothesized that neither the requirement to report nor the type of reporter, time frame for reporting, nor penalties for nonreporting would impact rates of reporting, investigation and substantiation. The number of reports made, investigations conducted and substantiation of allegations for elder abuse in each state (either in 1999 or fiscal year 1999-2000) were identified. The following predictor variables were studied: mandatory reporting; description of mandatory reporters; mandatory education for mandatory reporters; penalty for failure to report; type of penalty; time period stipulated for reporting; the term "social work" specified as a mandatory reporter; the term "nurse" specified as a mandatory reporter; the term "physician" specified as a mandatory reporter; the term "police officer" specified as a mandatory reporter. Investigation rates were significantly higher in states with mandatory reporting. Terminology describing mandatory reporters, penalty for nonreporting, and time frames for reporting did not appear to impact reporting, investigation and/or substantiation rates. The appendix includes a table of state statute listings of mandatory reporters.

36. P5623-25*

Heisler, C. & Stiegel, L.

Enhancing the Justice System's Response to Elder Abuse: Discussions and Recommendations of the "Improving Prosecution" Working Group of The National Policy Summit on Elder Abuse

Journal of Elder Abuse & Neglect; Vol. 14 (4), 31-54; 2002.**

Journal article (scholarship)

This article elaborates upon two of the recommendations that the "Improving Prosecution" Working Group identified as priorities during The National Policy Summit on Elder Abuse (December 2001, Washington, D.C.): "improving the legal landscape by strengthening elder abuse laws" and "increasing awareness within the justice system." The following issues guided the workgroups discussions: the role of the federal and state governments in increasing elder abuse reporting and enhancing prosecution; the need for expert witnesses, support and technical assistance; the identification of barriers to accessing the criminal justice system; the improvement of outcomes in criminal cases; and the need for training of law enforcement, prosecutors, judges, coroners, court personnel and advocates. The authors also provide a historical perspective on the response of the criminal justice system to elder abuse. The article concludes with a highlighting of initiatives occurring since the summit, including the introduction of the Elder Justice Act, as well as efforts by the Office on Violence Against Women (OVW), the National District Attorney's Association, the American Prosecutor's Research Institute, and various states' Attorneys General.

37. P5663-13*

Marshall, J.

Elder Law Symposium - Practice Perspectives: Power of Attorney - Key Issues for Elder Care Planning

Pennsylvania Bar Association Quarterly; Vol. 74, 160-168; October 2003.

Journal article (scholarship)

This article provides an overview of the Power of Attorney (POA) as a tool for elder care planning, particularly as it relates to Pennsylvania statutes. The need to customize the document to suit the principal's specific circumstances is emphasized. The capacity to execute a POA is discussed along with the following critical issues: asset protection (including the authority to transfer and gift); fiduciary duties of the agent (including responsibility for record keeping); health care decision making (including advance directives, limitations of living wills, and the complexities of the Health Insurance Portability and Accountability Act or HIPAA); drafting portable documents; avoiding abuse of a POA; and naming surrogate agents. The author, a certified elder law attorney, cautions that over reliance upon the default language in the Probate, Estates and Fiduciary Code may limit the effectiveness of the POA.

38. P5450-47*

Miller, M. & Johnson, J., for the American Prosecutors Research Institute (APRI)

Protecting America's Senior Citizens: What Local Prosecutors are Doing to Fight Elder Abuse

Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice; Alexandria, VA; September 2003.

Online (report)

This report (one of APRI's Special Topics Series) presents a summary of a national survey of prosecutors' offices regarding the challenges of prosecuting elder abuse cases. Of the findings: nearly 30 percent of the offices have a specialized unit to address elder abuse; very few of the offices emphasize early intervention; less than 25 percent have advocates that work exclusively with elderly victims; nearly 60 percent engage in public outreach and prevention programs; one-third offer specialized training in addressing elder abuse cases. Case studies are highlighted to illustrate such issues as investigation techniques, coordination of services, operational protocols, vertical prosecution, and victims' advocacy. Challenges to prosecution that were identified include a lack of training in abuse issues on the part of law enforcement, a lack of both geriatric and abuse knowledge among physicians, limited service resources, retraumatization of the victim during investigation, and reluctance or inability of victims to provide testimony. (Note: This report is accessible online at <http://www.ndaa.org/apri/>.)

39. P5256-67*

Moskowitz, S.

Symposia: Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect

Loyola of Los Angeles Law Review; Vol. 36; Winter 2003.

Journal article (scholarship)

This article provides an in depth legal discussion of current mechanisms in place in California to address elder abuse and neglect. Mandatory reporting laws, common law negligence liability, negligence per se, nursing home oversight, civil remedies, and criminal laws are discussed. Current legal issues that are highlighted include criminal background checks in nursing homes, "granny cams," expedited legal process, family violence in later life, retaliatory discharges, behavior-based inheritance (which would treat children who abused or neglected their parents as unworthy heirs), hearsay exceptions for elder abuse, and minimum nurse staffing ratios in long-term care facilities.

40. P5475-177*

Payne, B.

Crime in the Home Health Care Field - Workplace Violence, Fraud, and Abuse

Charles C. Thomas Publisher, Ltd., Springfield, IL; 2003.

Book

As the need for home health care (HHC) services has increased significantly during the past decade, the evidence indicates that crime and abuse within the field has increased as well. Written by a professor of criminology, this book first presents an overview of the field and then details the types of abuses occurring in this setting. The types of crimes committed may be categorized as work place, corporate, occupational or white-collar crimes, violence or deviance. Verbal abuse, physical abuse, neglect, sexual abuse, financial abuse, theft, emotional abuse, drug-related offenses, and rights violations are examined within this context. Theft from Medicare and Medicaid as well as other types of fraud (such as provision of unnecessary services, billing for services not provided, double billing and overcharging, forgery and negative charting) are described. Since statistics indicate that health care workers are 16 times more likely than other workers to be victims of workplace violence, and it is estimated that one in three community-based nurses are abused on the job annually, one chapter addresses the victimization of care recipients, family members or others in the environment. The role of HHC as a witness of elder abuse is emphasized and guidelines for use in documentation of suspected mistreatment are provided. The response of the criminal justice system, (including investigations, criminal and civil prosecutions, *False Claims Act* prosecutions, and *qui tam* lawsuits) is also discussed. A listing of Medicaid Fraud Control Unit Contacts throughout the country is provided, along with a listing of the state statutes with penalty enhancement for crimes involving the elderly. (Note: This book is not available through CANE.)

41. P5641-17*

Quinn, M. & Heisler, C.

The Legal Response to Elder Abuse and Neglect

Journal of Elder Abuse and Neglect; Vol. 14 (1), 61-77; 2002.**

Journal article (scholarship)

In this article, the authors present an overview of civil and criminal justice responses to elder abuse and neglect. Using a case study, they demonstrate how parallel civil and criminal investigations were employed to convict perpetrators of undue influence used to obtain control of the victim's significant assets. Criminal justice system initiatives are highlighted. Discussion is also included regarding the differences in the legal systems, most notably in terms of burden of proof (which is lower in civil court proceedings) and the role of the victim (who is not an actual "party" in criminal proceedings). The article concludes with discussion regarding the necessity for (and obstacles to) multidisciplinary approaches in addressing elder mistreatment.

42. P5681-42*

Sandusky, S.

The Lawyer's Role in Combating the Hidden Crime of Elder Abuse

The Elder Law Journal; Vol. 11; 2003.

Journal article (scholarship)

In this legal note, the author attempts to describe how lawyers can ethically assist their elderly clients who appear to be abused. After presenting discussion regarding the scope of the problem in the U.S., she presents hypothetical case scenarios to illustrate the complexities of dealing with abused clients who refuse to allow the attorney to report the mistreatment to protective services. The duty of confidentiality, as described in the American Bar Association's Model Code of Responsibility, is examined as it applies to a competent client. The limited exceptions to the duty of confidentiality are considered, along with The Revised Model Rule 1.6 (not yet adopted by any states) that considers the threat of substantial harm as a proposed exception. The options of withdrawal and/or breaching confidentiality are discussed and considered ineffective in either protecting the client or fulfilling her legal needs. In the second scenario, the vagueness and therefore limited guidance from the Model Code when addressing a questionably competent client is explored, along with the pros and cons of the role of attorney as de facto guardian. The author recommends that the attorney persist in attempting to persuade the client to allow reporting of abuse through the process of "gradual counseling," which facilitates an understanding of the client's resistance. Lawyers are advised to present the client with additional resources, such as hotline information, alternative housing options, elder abuse programs in the area, and family counseling. In dealing with the questionably competent or incompetent client, the attorney needs to recognize that despite the cognitive limitations, he or she may have valid reasons for not wanting to report the abuse. Therefore, a contextual approach to determining capacity to make this decision should be combined with the gradual counseling process.

43. P5642-43

Vron, V.

Using RICO to Fight Understaffing in Nursing Homes: How Federal Prosecution Using RICO Can Reduce Abuse and Neglect of the Elderly

George Washington Law Review; November 2003

(reprinted in Health Care Law, 2006)

Journal article (scholarship)

Observing that understaffing can lead to abuse and neglect of nursing home residents, the author goes on to outline how the federal government can use the *Racketeering Influenced and Corrupt Organizations (RICO) Act* to prosecute elder abuse and neglect. Part I describes the current state and federal regulations governing nursing homes, and their relative ineffectiveness in addressing elder mistreatment. This is in part due to the fact that such measures are loosely enforced, and that sanctions are more likely to hurt residents than facility owners. Part II describes the potential for greater penalties under RICO prosecution, which allows for orders of divestiture and reorganization. Part III describes how RICO can be used to combat "actionable" understaffing in institutional care facilities.

44. P5393-4

Wilkinson, C. & Wilkinson, P.

Financial Abuse: A Case Study & Litigation Guide for the Elder Law Attorney

NAELA Quarterly - National Academy of Elder Law Attorneys; p18-p21; Summer 2003.

Journal article (scholarship)

Using an illustrative case study, this article emphasizes key components of litigating elder financial abuse. In this scenario, a trusted, long-time employee has been named the agent of a husband who is suffering from dementia. Although she does not have power of attorney for his wife, she represents the wife as an agent in a real estate transaction. Later, she diverts funds from the sale to an account on which she is also a signator. Legal issues that are pivotal in addressing such cases of financial exploitation include the following: the need to freeze assets immediately (either through a temporary restraining order or through written instruction to financial institutions); the admissibility of certain victim statements when the victim is deceased; conflicts of interest occurring when an agent represents more than one individual; and the need for tracing the victim's funds, particularly by employing a forensic C.P.A.