

**MAKING ELDER FINANCIAL  
EXPLOITATION CASES PART OF A  
SUSTAINABLE PRACTICE: TIPS FROM  
THE EXPERIENCES OF THE  
UNIVERSITY OF ILLINOIS COLLEGE  
OF LAW'S ELDER FINANCIAL  
JUSTICE CLINIC**

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*The American public has grown more aware of the growing threat of elder financial exploitation; counterintuitively, civil representation for victims of elder financial abuse has not become more readily available. In this Article, Professor Andres reviews the practice of elder financial exploitation and provides a guide for attorneys and students wishing to make elder financial exploitation a part of their legal practice. This Article further provides unique insight from the perspective of the first law school clinic in the country solely focused on representing victims of elder financial exploitation, the Elder Financial Justice Clinic at the University of Illinois College of Law.*

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## I. Introduction

Awareness of elder financial exploitation has increased significantly in the last decade,<sup>1</sup> and it is now recognized as one of the major problems facing America's seniors.<sup>2</sup> While general awareness has increased, civil legal representation for victims of elder financial abuse has not become more readily available. Civil lawsuits are often the only way for seniors to redress their suffered financial abuse.<sup>3</sup> Most cases of financial abuse are never reported to authorities or reviewed by a civil attorney.<sup>4</sup> When financially abused seniors do seek the help of an attorney, private attorneys tend to shy away from financial exploitation cases,<sup>5</sup> leaving the task of serving the civil legal needs of seniors who have been victimized primarily to overtaxed legal aid providers.

In 2013, the University of Illinois College of Law started the Elder Financial Justice Clinic (EFJC) to try to fill the gap in legal services for elder financial exploitation victims in Illinois. The College of Law has found elder financial exploitation a rich subject for teaching students about the practice of law and the importance of providing legal assistance to vulnerable populations. In its two years of existence, the EFJC has helped Illinois seniors stand up for their rights against those who have taken advantage of them, and it has more broadly been an advocate and an agent of change for victims of elder financial exploitation. The EFJC hopes to continue to expand its reach throughout Illinois and the United States.

Unfortunately, one law school clinic cannot hope to serve all legal needs of financially abused seniors in Illinois, much less across the country. It is essential that more legal aid organizations see financial exploitation cases as a priority and something they can handle. It is equally important that private attorneys see the

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1. See *World Elder Abuse Awareness Day, June 15th*, ADMIN. ON AGING, [http://www.aoa.gov/AoA\\_Programs/elder\\_rights/EA\\_Prevention/weaad.aspx](http://www.aoa.gov/AoA_Programs/elder_rights/EA_Prevention/weaad.aspx) (last visited Nov. 4, 2015); see also *Elder Financial Exploitation*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, <http://www.napsa-now.org/policy-advocacy/exploitation/> (last visited Nov. 4, 2015).

2. *Id.*

3. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 224 (2000).

4. Lori A. Stiegel, *An Overview of Elder Financial Exploitation*, 36 GENERATIONS 73, 74 (2012).

5. Lisa Nerenberg, *Forgotten Victims of Elder Financial Crime and Abuse: A Report and Recommendations*, NAT'L CTR. ON ELDER ABUSE 3, 17 (1999), <http://ncea.aoa.gov/Resources/Publication/docs/fvefca.pdf>.

value to them and their clients of financial abuse cases where victims may be able to pay for services or recover money from perpetrators.

This Article defines elder financial exploitation and explores the prevalence of financial abuse, who the victims and perpetrators are, and how financial exploitation impacts victims. The Article then goes on to describe the various types of legal interventions that can benefit elder financial abuse victims and the reasons that there is not enough civil representation available for them. Additionally, the Article describes the EFJC, how it operates, and provides some examples of the cases the EFJC has handled in its first two years of operation. Finally, in an effort to demystify litigation of financial exploitation cases and to assist attorneys in providing quality representation to victims of financial abuse, the Article provides important tips for attorneys, in both legal aid and private practice, who may be handling or considering taking on elder financial exploitation cases.

Victims of financial exploitation cannot afford to have their legal needs continue to go unserved. Hopefully, attorneys in public interest and private practices will soon begin to see financial abuse cases as worthwhile, both for their clients and for themselves, and the legal profession can begin to fill the gaping void in civil legal services for victims of elder financial exploitation.

## II. Facts About Elder Financial Exploitation

In order to recognize elder financial abuse cases and to be able to properly assist victims, attorneys need to understand what elder financial exploitation is, how prevalent it is, who the likely victims and perpetrators are, and what effects financial abuse can have on its victims.

### A. Statutory Definitions of Elder Financial Exploitation

The basic definition of elder financial exploitation is the improper use of an elderly person's assets.<sup>6</sup> The Older Americans Act, which provides funding to a range of social and legal services agencies, defines financial exploitation as:

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6. Dessin, *supra* note 3, at 206.

the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets.<sup>7</sup>

The above statutory definition includes acts committed by anyone, whether they are relatives, caretakers, merchants, or strangers, and accommodates situations not only where there is intent to defraud by the perpetrator, but also circumstances where no intent may exist but harm to the elderly individual still occurs. A senior that finds themselves in a situation fitting within these broad definitions may need civil legal assistance to redress the financial abuse he or she has suffered.

Many state statutes establishing criminal penalties or civil causes of action for elder financial abuse include more targeted definitions of financial exploitation. These state statutes dictate whether a victim of financial exploitation can recover through the courts in a particular situation, what can be recovered, and which legal theories can be put forth in the course of litigation. Civil and criminal statutes addressing financial exploitation vary from state to state in what they include as financial abuse.<sup>8</sup> For an act to constitute financial exploitation, some states require that someone other than the victim benefits from the act, while other states consider financial exploitation to include both situations in which the victim is disadvantaged by the action and those where an advantage accrues to someone other than the victim, even if those things do not co-occur.<sup>9</sup> Additionally, state statutes also often differ about whether a perpetrator must be a caretaker or fiduciary of an elderly person for financial exploitation to occur or whether an-

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7. 42 U.S.C. § 1397j(8) (2012).

8. Some states like Maryland define "financial exploitation" and "financial abuse" differently. MD. CODE ANN., FIN. INST. § 1-306 (2014). However, most states use either the term "financial exploitation" or "financial abuse," and it seems generally accepted in scholarship about the issue that the two terms are interchangeable. Thus, they will be used interchangeably throughout this Article.

9. Dessin, *supra* note 3, at 206. ("The distinction [in how financial exploitation is defined] may be an important one. A jurisdiction that requires benefit to someone other than the victim would not be criminalizing the wasting of the victim's assets.").

yone, regardless of their relationship with the senior, can commit financial abuse.<sup>10</sup>

While long-standing criminal statutes regarding crimes like theft, embezzlement, and check fraud criminalize those actions against all victims, financial exploitation is its own crime or civil cause of action only if it is committed against someone that a state considers vulnerable.<sup>11</sup> Some states have determined that a person only qualifies as a vulnerable person if he or she suffers from some sort of impairment,<sup>12</sup> while other states make it illegal to exploit a person with an impairment *or* of a certain age, even if there is no sign of impairment.<sup>13</sup> States that define who can be financially exploited based on age differ between whether a person is elderly at sixty,<sup>14</sup> sixty-two,<sup>15</sup> or sixty-five.<sup>16</sup>

## B. The Prevalence of Elder Financial Exploitation

Studies show that financial exploitation is either the first or second most common form of elder abuse in the United States,<sup>17</sup> and financial abuse has been found to be present in the vast major-

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10. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution the Problem?*, 34 MCGEORGE L. REV. 267, 275 (2003).

11. *Id.* at 289.

12. See, e.g., MINN. STAT. ANN. § 609.232(11) (2014); see also, e.g., FLA. STAT. ch. 825.101 (2014) (which defines “disabled adult” and “elderly person” separately, and defines “elderly person” as “a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired,” but then goes on to use “disabled adult” and “elderly person” together at all times, thereby criminalizing the same conduct for both groups).

13. See, e.g., CAL. WELF. & INST. § 15610.30 (2014) (giving a victim a civil cause of action for financial abuse if he is an “elderly or dependent adult”); CAL. WELF. & INST. § 15610.27 (2014) (defining “elder” as “any person residing in this state, 65 years of age or older”).

14. See, e.g., 720 ILCS 5/17-56(c)(1) (2015).

15. See, e.g., HAW. REV. STAT. § 28-94 (2015).

16. See, e.g., GA. CODE ANN. § 16-5-100 (2015).

17. Agber Dimah & Keren Patricia Dimah, *Gender Differences Among Abused Older African Americans and African American Abusers in an Elder Abuse Provider Agency*, 32 J. BLACK STUD. 557, 566 (2002) (showing financial exploitation to be the most common form of elder abuse other than physical neglect); see Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 294 (2010) (finding that more seniors surveyed experienced financial exploitation in the past year than any other form of elder abuse or mistreatment).

ity of reported cases of elder abuse.<sup>18</sup> It is estimated that older adults lose \$2.9 billion of their personal wealth each year to unscrupulous businesses and individuals.<sup>19</sup> Recent studies have shown that four to five percent of seniors have been financially abused by a family member or trusted individual within the past year.<sup>20</sup> These estimates do not include fraud committed by businesses and strangers,<sup>21</sup> and these studies did not survey people without telephones, people who lacked capacity to respond to the survey, and people in long-term care or other facilities, three groups thought to be at heightened risk for financial abuse.<sup>22</sup> Given these exclusions, the numbers reflected in these studies undoubtedly underestimate the number of seniors actually suffering from financial exploitation.<sup>23</sup> A comparison of self-reported and documented cases of financial exploitation in New York found that only one in forty-four cases of elder financial exploitation are reported to Adult Protective Services,<sup>24</sup> which shows many cases of financial abuse are going unrecognized.

Incidents of financial exploitation are sure to increase given recent United States Census data and projections. In 2010, there were 40.2 million people age sixty-five and older.<sup>25</sup> That figure did not include any of the baby boomers, the first of whom did not turn sixty-five until 2011.<sup>26</sup> By 2030, it is projected that there will be seventy-two million people over sixty-five, and by 2050, that

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18. *The National Elder Abuse Incidence Study: Final Report*, NAT'L CTR. ON ELDER ABUSE 1, 9 (1998), [http://aoa.gov/AoA\\_Programs/Elder\\_Rights/Elder\\_Abuse/docs/ABuseReport\\_Full.pdf](http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf).

19. *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders*, METLIFE MATURE MKT. INST. 7 (2011), <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

20. Acierno et al., *supra* note 17, at 294 (finding that 5.2% of seniors have been victims of financial exploitation by a family member in the past year); *Under the Radar: New York State Elder Abuse Prevalence Study*, LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MEDICAL CENTER OF CORNELL UNIV. & NEW YORK CITY DEP'T FOR THE AGING 54 (2011) (finding 4.2% of seniors have suffered financial abuse at the hands of someone in a position of trust in the past year).

21. *New York State Elder Abuse Prevalence Study*, *supra* note 20.

22. Stiegel, *supra* note 4, at 75.

23. *Id.*

24. *New York State Elder Abuse Prevalence Study*, *supra* note 20, at 50.

25. Grayson K. Vincent & Victoria A. Velkoff, *The Next Four Decades: The Older Population in the United States: 2010 to 2050*, U.S. CENSUS BUREAU 1 (2010), <https://www.census.gov/prod/2010pubs/p25-1138.pdf>.

26. *Id.*

number is expected to reach 88.5 million people.<sup>27</sup> Baby boomers will be entering their golden years with nearly \$30 trillion in investable assets, twice the number of investable assets held by the previous generation,<sup>28</sup> making them highly desirable targets for all kinds of financial exploitation.

### C. Who Are the Victims?

Elder financial abuse victims do not fall within a particular profile. Elder financial exploitation happens to both male and female seniors of all economic strata.<sup>29</sup> The likelihood of a senior being financially abused does not increase or decrease depending on income.<sup>30</sup> Rather, the risk of being financially abused increases as seniors get older.<sup>31</sup> Studies have shown that people suffering from depression, cognitive deficits, or dementia are also at an increased risk for financial exploitation.<sup>32</sup> Other factors, such as age, race, levels of social support, residing alone, marital status, and periods of significant stress or emotional distress may affect a senior's likelihood of being financially exploited, but studies have not proven these connections conclusively.<sup>33</sup>

### D. Who Are the Perpetrators?

Financial abuse can be committed by a wide range of individuals, including people close to the victim, fly-by-night businesses, or far-off scam artists.<sup>34</sup> Common types of financial exploi-

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27. *Id.*

28. Mamta Badkar, *We're on the Verge of the Greatest Transfer of Wealth in the History of the World*, BUS. INSIDER (June 12, 2014, 12:26 PM), <http://www.businessinsider.com/biggest-transfer-of-wealth-in-history-2014-6>.

29. *National Elder Abuse Incidence Study*, supra note 18; see *Why Some Older Adults Fall Victim to Financial Exploitation*, U.S. DEP'T OF JUST., <http://www.justice.gov/elderjustice/research/why-older-adults-are-financially-exploited.html> (noting that gender and income are not correlated to likelihood of being financially exploited) (last visited Nov. 4, 2015).

30. Stiegel, supra note 4, at 75.

31. *National Elder Abuse Incidence Study*, supra note 18, at 4-14.

32. *Why Some Older Adults Fall Victim*, supra note 29.

33. *Id.*

34. Dessin, supra note 3, at 206-09; *Scam Alert – This Home Improvement Deal is Really a Scam*, COUNCIL OF BETTER BUS. BUREAUS, <http://www.bbb.org/Council/news-events/bbb-scam-alerts/2015/07/scam-alert-this-home-improvement-deal-is-really-a-scam/> (last visited Nov. 4, 2015); *Summer Contracting Scam Tricks Homeowners*, COUNCIL OF BETTER BUS. BUREAUS, <http://www.bbb.org/pittsburgh/news-events/bbb-scam-alerts/2015/07/summer-contracting-scam-tricks-homeowners/> (last visited Nov. 4, 2015).

tation include theft of money or property by family members or caregivers, phone and email scams inducing seniors to send money to far-away places, businesses inducing seniors to pay too much money for goods or services they do not need, and investment advisors convincing elderly people to buy products that are inappropriate for them but that will yield big fees or commissions for the broker.<sup>35</sup>

Because the types of financial abuse vary so widely, the people that commit the abuse similarly vary. However, family members are the most common perpetrators of elder financial exploitation.<sup>36</sup> A number of theories exist as to why family members financially abuse seniors. The stress of caregiving is thought to be one potential trigger.<sup>37</sup> Abusers could also have learned their behavior from growing up being abused, either by the parent whom they are now abusing or by another parent or family member who had also previously abused the victim.<sup>38</sup> The abuser may also suffer from mental illness, chemical dependence, or other addiction.<sup>39</sup> It may be the case that the abuser, by virtue of being a family member or caretaker of the elderly individual, feels entitled to the person's assets, perhaps because the abuser expects to one day inherit those assets or perhaps because the abuser feels he or she is owed something for taking care of the elderly person.<sup>40</sup> As Lisa Nerenberg stated in "Forgotten Victims of Elder Financial Crime and Abuse," "The intimacy, proximity, and dependency that the caregiving relationship engenders place unscrupulous caregivers in disturbingly opportune positions to exercise coercion, subtle influence, and outright control."<sup>41</sup>

#### E. Effects of Financial Exploitation

Elder financial exploitation can have devastating effects on its victims. It goes without saying that a victim's financial security can be severely affected depending on the amount of money taken and the assets that the senior retains. Financial abuse can force

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35. Dessin, *supra* note 3, at 206-09; see *Elder Financial Exploitation*, *supra* note 1.

36. Dessin, *supra* note 3, at 203.

37. *Id.* at 213.

38. *Id.*

39. *Id.*

40. *Id.*

41. Nerenberg, *supra* note 5, at 4.



seniors into poverty or even homelessness.<sup>42</sup> Victims' credit scores may be irreparably damaged, potentially making it impossible for them to obtain credit.<sup>43</sup> Financial losses may force seniors to rely on family members, social welfare agencies, or the government for assistance, which can cause a loss of independence and security as well as a decrease in their quality of life.<sup>44</sup> Because most seniors' incomes are relatively fixed, they may have very little chance to recover from a significant financial loss.<sup>45</sup>

Victims of financial exploitation may also suffer health consequences because of their abuse.<sup>46</sup> Being taken advantage of can cause victims to feel fearful, depressed, and even suicidal,<sup>47</sup> and the financial strain caused by financial exploitation can increase stress, which is connected to decreased mental and physical health and increased mortality.<sup>48</sup> Victims of financial exploitation may be unable to afford their required medications,<sup>49</sup> and financial exploitation has been directly linked with an increased risk of hospitalization.<sup>50</sup>

### III. Legal Remedies for Victims of Elder Financial Exploitation

The legal system can offer hope to victims of elder financial exploitation. Victims can seek redress or protection for the abuse they have suffered through the courts in several ways, including criminal prosecution of the perpetrator, filing a civil lawsuit against the abuser, and seeking an order of protection to prevent

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42. *How Financial Exploitation is Defined and Detected*, U.S. DEP'T OF JUST., <http://www.justice.gov/elderjustice/research/how-financial-exploitation-is-defined-and-detected.html> (last visited Nov. 4, 2015).

43. *Id.* (citing L.D. Deem, *Notes From the Field: Observations in Working with the Forgotten Victims of Personal Financial Crimes*, J. ABUSE & NEGLECT 12, 22-48 (2000)).

44. Nerenberg, *supra* note 5, at 3; *How Financial Exploitation is Defined*, *supra* note 42.

45. Dessin, *supra* note 3, at 205; Nerenberg, *supra* note 5, at 3; Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect – the Legal Framework*, 31 CONN. L. REV. 77, 101 (1998).

46. *How Financial Exploitation is Defined*, *supra* note 42.

47. Nerenberg, *supra* note 5, at 3; *How Financial Exploitation is Defined*, *supra* note 42.

48. *How Financial Exploitation is Defined*, *supra* note 42.

49. *Id.*

50. XinQi Dong & Melissa Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173 J. AM. MED. ASS'N INTERNAL MED. 911, 913-15 (2013).

further abuse.<sup>51</sup> Concerned family members, friends, or others can also seek guardianships of seniors to prevent them from giving away additional money or property or from allowing others access to the seniors' assets.<sup>52</sup> Each of these legal avenues can be effective, depending on the type of financial exploitation suffered and the senior's problems and goals, but each also has drawbacks that can prevent it from being a desirable solution or fully remedying the senior's situation. This Section will discuss the different ways a victim can seek legal justice through the courts.

#### A. Criminal Prosecution

Criminal prosecution can be a very effective tool in combating elder financial exploitation. Currently, thirty-three states have enacted specific statutes criminalizing elder financial exploitation<sup>53</sup> and five other states have enhanced sentences for financial crimes when the victim is elderly.<sup>54</sup> Criminal statute definitions of elder financial exploitation vary, so prosecutors in one state may not be able to prosecute all financial exploitation that is criminalized by another state.<sup>55</sup> More general criminal laws for crimes such as theft, larceny, embezzlement, forgery, fraud, and identity theft can also be used to prosecute elder financial exploitation, depending on the methods used by the perpetrator.<sup>56</sup>

Criminal prosecution, or the threat of criminal prosecution, carries many advantages that can help victims of financial exploitation recover stolen assets. Police have strong investigative and

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51. See generally Candace Heisler, *Elder Abuse and the Criminal Justice System: New Awareness, New Responses* 24 GENERATIONS 52-58 (2000); see also *Elder and Dependent Adult Abuse*, CAL. CTS., <http://www.courts.ca.gov/selfhelp-elder.htm> (explaining the process for an elderly person to obtain an order of protection) (last visited Nov. 4, 2015); Rebecca Henry, *Elder Abuse & Domestic Violence in Later Life*, A.B.A. COMM'N ON DOMESTIC VIOLENCE AWARENESS MONTH (2007), <http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/ElderAbuseDVAM2007.authcheckdam.pdf>.

52. Dessin, *supra* note 10, at 282-85.

53. *Financial Exploitation of Incapacitated Adults*, VA. ST. CRIME COMM'N 1 (2012), <http://vscc.virginia.gov/documents/financial.pdf>.

54. *Id.*

55. See Lori Stiegel & Ellen Klem, *Types of Abuse: Provisions and Citations in Adult Protective Services Laws, By State*, A.B.A. COMM'N ON L. AND AGING (2007), [http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/Abuse\\_Types\\_Statutory\\_Provisions\\_by\\_State\\_Chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/Abuse_Types_Statutory_Provisions_by_State_Chart.authcheckdam.pdf).

56. Dessin, *supra* note 10, at 268-321; Candace J. Heisler & Jane E. Tewksbury, *Fiduciary Abuse of the Elderly: A Prosecutor's Perspective*, 3 J. OF ELDER ABUSE & NEGLECT 23, 30-32 (1991).

persuasive powers that victims and their civilian advocates do not have. Police may be able to freeze bank or investment accounts to protect victims' assets while investigating allegations of financial exploitation.<sup>57</sup> The threat of incarceration and the stigma of a potential conviction can be strong motivators for perpetrators to return stolen money and property. Criminal restitution orders are also highly enforceable, and even when perpetrators do not still have the money or property to return to their victims, state criminal restitution pool funds may be available to reimburse the victims for some of their losses.<sup>58</sup> Because prosecutors are charged with protecting the public and not individual victims, prosecutors can file charges and pursue cases even where victims are unwilling to press charges or to cooperate in the prosecution, as long as those cases are otherwise provable.<sup>59</sup>

Unfortunately for financial abuse victims, prosecution of elder abuse is rare.<sup>60</sup> One of the primary reasons for the low rate of prosecution is that victims frequently do not report financial exploitation to the police.<sup>61</sup> It is estimated that for every reported case of elder financial exploitation, forty-four cases go unreported.<sup>62</sup> There are many reasons for this lack of reporting. The most common perpetrators of elder financial exploitation are family members, friends, and caretakers of victims.<sup>63</sup> Seniors hesitate to

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57. Candace J. Heisler & Lori A. Stiegel, *Enhancing the Justice System's Response to Elder Abuse: Discussions & Recommendations of the 'Improving Prosecution' Working Group of the National Policy Summit on Elder Abuse*, 14 J. OF ELDER ABUSE & NEGLECT 31, 50 (2002).

58. This is especially true thanks to a Department of Justice policy change announced July 13, 2015, clarifying that Victims of Crime Act funds, which were previously only available to compensate victims of violent crime, can be distributed to victims of financial exploitation. See *Historic Elder Justice Announcements at 2015 White House Conference on Aging*, SENIORLAW CTR. (2015), <http://seniorlawcenter.org/2015/07/historic-elder-justice-announcements-at-2015-white-house-conference-on-aging/>.

59. *What to Expect from the Criminal Justice System*, RAPE, ABUSE & INCEST NAT'L NETWORK, <http://rainn.org/get-info/legal-information/working-with-the-criminal-justice-system> (last visited Nov. 4, 2015).

60. Shelly L. Jackson & Thomas L. Hafemeister, *Pure Financial Exploitation vs. Hybrid Financial Exploitation Co-Occurring with Physical Abuse and/or Neglect of Elderly Persons*, PSYCHOL. OF VIOLENCE 1, 1-6 (2012) (discussing different types of elder abuse); Adria E. Navarro et al., *Holding Abusers Accountable: An Elder Abuse Forensic Center Increases Criminal Prosecution of Financial Exploitation*, 53 THE GERONTOLOGIST 303, 303-04 (2013); Nerenberg, *supra* note 5, at 3.

61. Dessin, *supra* note 3, at 210; Jackson & Hafemeister, *supra* note 60, at 10.

62. *New York State Elder Abuse Prevalence Study*, *supra* note 20.

63. *Financial Exploitation of the Elderly: How Financial Institutions Can Help*, ARIZ. ELDER ABUSE COALITION (2007) (showing that twenty-eight percent of pe-

report financial abuse committed by these people because they do not want to see their loved ones put in jail, they fear being cut off from their assistance and further isolated, and they fear potential reprisal by the perpetrator.<sup>64</sup> In fact, victims may worry, perhaps because they have been told so by their abusers, that their lives would be worse without their abusers around.<sup>65</sup>

Victims of all types of financial exploitation may fail to report abuse because they do not realize they have been victimized, either because they do not know money has been taken or they do not recognize the taking of that money as an illegal act.<sup>66</sup> Victims might also not know where to report abuse,<sup>67</sup> or they may think it is too late to take action to remedy the exploitation.<sup>68</sup> They may also worry that they will not be believed.<sup>69</sup> Some victims might not report the exploitation because they are embarrassed that they fell victim to fraud,<sup>70</sup> may worry about perceived stigmatization of victims,<sup>71</sup> or may fear that by exposing the exploitation they will be seen as incapable of handling their own affairs and thus may be involuntarily appointed a guardian or placed in a nursing facility.<sup>72</sup> Some victims may believe that some level of abuse is normal and something with which they must live, perhaps because they feel they are a burden to their caretakers or because they were in other abusive relationships in the past.<sup>73</sup> Others have a deep distrust of law enforcement or may simply not trust police or other authorities to properly handle their complaint.<sup>74</sup> Some seniors may not be

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trators are family members, seventeen percent are caregivers, seven percent are neighbors, and seventeen percent are friends); see RICHARD J. BONNIE & ROBERT B. WALLACE, *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 13 (1st ed. 2003).

64. Dessin, *supra* note 3, at 210-12.

65. *Id.* at 210-11.

66. *Id.* at 212, 216.

67. *Id.* at 212.

68. Katherine Bosse, *It's What She Would Want: The Need to Criminalize Personal Financial Elder Abuse*, NAT'L ACAD. ELDER L. ATT'Y 1, 8 (2011), [https://www.naela.org/app\\_themes/public/PDF/Library%20Tab/06\\_Kathryn\\_Bosse.pdf](https://www.naela.org/app_themes/public/PDF/Library%20Tab/06_Kathryn_Bosse.pdf).

69. Stiegel, *supra* note 4, at 75.

70. Dessin, *supra* note 3, at 211.

71. William J. Brisk & Judith M. Flynn, *No Bad Deed Should Go Unpunished: Evaluation and Discovery of Cases of Financial Abuse of Elders*, 16-FALL NAT'L ACAD. ELDER L. ATT'Y Q. 8, 9 (2003).

72. *Id.*

73. Dessin, *supra* note 3, at 212.

74. Susan Keilitz et al., *Prosecution Guide to Effective Collaboration on Elder Abuse*, NAT'L CTR. FOR ST. CTS. 1, 3 (2009), <http://www.eldersandcourts.org/Elder-Abuse/~//media/Microsites/Files/cec/Prosecution%20Collaboration.ashx>.

able to report the exploitation because they are not physically or mentally capable of reporting or of even realizing that they have been abused.<sup>75</sup>

Even when cases of financial abuse are reported, it can be challenging for victims to get police and prosecutors interested in their cases.<sup>76</sup> Despite their investigative powers, it is difficult for police to discern what happened in many instances of alleged financial abuse.<sup>77</sup> Fraud by family members, friends, or caretakers is often seeded in long-standing relationship dynamics and disputes that can be hard to sort out. The abuser may claim that money or property transferred from the victim was a gift or that it was compensation for assistance the abuser provided to the senior.<sup>78</sup> It is also common for abusers to claim that their taking of the senior's money was necessary to qualify the senior for Medicaid,<sup>79</sup> which is a plausible defense given Medicaid eligibility rules.<sup>80</sup> On the surface, many instances of abuse may appear as though the senior has consented to a transaction into which he or she has actually entered due to undue influence or coercion.<sup>81</sup> Such situations may not fit neatly into definitions of specific crimes in criminal statutes, and thus police and prosecutors may not be able to identify the crime that was committed.

Other types of fraud such as consumer, contractor, mortgage, and investment fraud require analysis of complex records, contracts, or business dealings that police and prosecutors may not be willing or equipped to do.<sup>82</sup> In addition, financial exploitation

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75. Donna J. Rabiner, Janet O'Keeffe & David Brown, *Financial Exploitation of Older Persons: Challenges and Opportunities to Identify, Prevent, and Address It in the United States*, 18 J. AGING & SOC. POL'Y 47, 47 (2006); Stiegel, *supra* note 4, at 75-6; Dessin, *supra* note 3, at 212-13.

76. U.S. GOV'T ACCOUNTABILITY OFF. GAO-11-208, ELDER JUSTICE: STRONGER FEDERAL LEADERSHIP COULD ENHANCE NATIONAL RESPONSE TO ELDER ABUSE 19 (2011); Navarro et al., *supra* note 60, at 304.

77. Navarro et al., *supra* note 60, at 310. See also Dessin, *supra* note 3, at 208-10.

78. Dessin, *supra* note 3, at 213.

79. Brenda K. Uckert et al., *Prosecuting Elder Abuse Cases: Basic Tools and Strategies*, NAT'L CTR. FOR ST. CT. 1, 9 (2012), [http://www.eldersandcourts.org/ElderAbuse/~media/Microsites/Files/cec/Prosecution%20Guide.ashx](http://www.eldersandcourts.org/ElderAbuse/~/media/Microsites/Files/cec/Prosecution%20Guide.ashx).

80. *Financial Requirements - Assets*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/financial-requirements-assets/> (last visited Nov. 4, 2015).

81. Dessin, *supra* note 3, at 210.

82. Page Ulrey, *Written Testimony to the United States Senate Special Committee on Aging 2* (2015), [http://www.aging.senate.gov/imo/media/doc/SCA\\_Ulrey\\_2\\_4\\_15.pdf](http://www.aging.senate.gov/imo/media/doc/SCA_Ulrey_2_4_15.pdf); Dessin, *supra* note 3, at 217.

cases tend to be paper intensive, creating challenges and deterrents for law enforcement officials used to relying on testimony and physical evidence.<sup>83</sup> Police and prosecutors may also worry about charging a perpetrator with a crime that must be proven beyond a reasonable doubt based largely on the testimony of a senior who might have perceived the incident or who may have real cognitive or physical impairments that might impact his or her reliability or ability to serve as a witness.<sup>84</sup> And even once financial abuse is reported, victims may decide that they are unwilling to testify against their abusers due to the factors mentioned above.<sup>85</sup> Although elder financial exploitation is a crime and prosecution can be an effective tool for recovering victims' lost money and property, all too often, law enforcement officials tell seniors that their financial exploitation is not a crime but a civil matter.<sup>86</sup>

### B. Civil Lawsuits

Taking civil legal action may be more appealing than pursuing criminal charges to some seniors who have fallen victim to fraud, particularly at the hands of loved ones. As Denis Cully and Jaye Martin point out in "No Higher Calling – Representing Victims of Financial Exploitation," filing a civil lawsuit against their financial abusers "is often the only way to restore assets, safety, autonomy and dignity to elderly victims,"<sup>87</sup> and it presents a viable alternative to criminal prosecution for seniors who do not want to report the financial exploitation they suffered to the police, who cannot get law enforcement to prosecute their abusers, or who simply want to control the trajectory of their case instead of placing it in the hands of prosecutors.<sup>88</sup> Pursuing a civil suit when no prosecution occurs may be a necessity for elderly victims of financial exploitation, who are less likely to be able to recover from fi-

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83. Ulrey, *supra* note 82, at 2, 3.

84. Brisk & Flynn, *supra* note 71, at 9; Navarro et al., *supra* note 60, at 304; Ulrey, *supra* note 82, at 3.

85. Dessin, *supra* note 3, at 217.

86. Suzanne J. Levitt & Rebecca J. O'Neill, *A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience*, 5 *ELDER L. J.* 195, 207 (1997); Nerenberg, *supra* note 5, at 9; Ulrey, *supra* note 82, at 2.

87. Denis Cully & Jaye Martin, *No Higher Calling – Representing Victims of Financial Exploitation*, 34 *BIFOCAL* 89, 89 (2013).

88. *Id.*

nancial losses because of fixed incomes and shorter life expectancy.<sup>89</sup> In fact, in cases where Medicaid is threatening penalties against a financial abuse victim because of an improper transfer of assets that was actually abuse, filing a civil action may be the only way to maintain Medicaid eligibility absent prosecution of the abuser.<sup>90</sup>

Civil actions against financial abusers may be brought using any combination of traditional tort causes of action, breach of contract claims, breach of fiduciary duty causes of action, statutory fraud claims,<sup>91</sup> or, in a small number of states, specific causes of action for financial exploitation.<sup>92</sup> Civil suits may seek damages, the rescission of a contract or transfer of a deed, permission to enter property, an accounting of assets from a fiduciary, or some other form of specific performance.<sup>93</sup> Depending on the state and the causes of action alleged in a civil suit against a financial abuser, the victim may be able to recover compensatory damages, attorney's fees, noneconomic damages, damages for emotional distress, double or treble damages, and/or punitive damages.<sup>94</sup> Awards exceeding mere reimbursement for the money stolen can greatly improve a senior's ability to rebound from the abuse.

### C. Orders of Protection

For attorneys and lay people alike, the first thought when they hear that someone is trying to escape abuse is that the abused person ought to seek an order of protection. Protection orders generally prohibit a person who has harmed, threatened harm, or stalked another person from having further contact with the victim and/or from committing or threatening further harm.<sup>95</sup> While all states offer orders of protection to prevent physical abuse,<sup>96</sup> fewer states explicitly list financial exploitation as one of the grounds for

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89. Moskowitz, *supra* note 45.

90. Cully & Martin, *supra* note 87, at 90.

91. Dessin, *supra* note 3, at 224.

92. See, e.g., OR. REV. STAT. § 124.100 (2015); 720 ILCS 5/17-56 (2015).

93. Brisk & Flynn, *supra* note 71, at 8, 13.

94. *Id.*

95. Dessin, *supra* note 3, at 224.

96. Thompson Reuters, *Domestic Violence: Orders of Protection and Restraining Orders*, FINDLAW, <http://family.findlaw.com/domestic-violence/domestic-violence-orders-of-protection-and-restraining-orders.html> (last visited Nov. 4, 2015).

granting a protection order.<sup>97</sup> In states where financial exploitation is a stated basis for an order of protection, and in some states where it is not, victims can not only obtain an order prohibiting the people causing them harm from contacting them, but they also can obtain orders requiring an accounting by abusers of stolen assets, return of lost money and property, and payment by abusers of victims' costs associated with seeking a protection order.<sup>98</sup> Because protection order statutes were originally drafted to protect domestic violence victims,<sup>99</sup> many states require that the victim of the abuse have or have had some form of domestic relationship with the abuser to obtain a non-stalking protection order.<sup>100</sup> This can prohibit financial exploitation victims who are taken advantage of by scammers, businesses, or other strangers from obtaining protection orders against their abusers.

Orders of protection can be very effective tools against abuse, in large part because violation of them is generally a criminal offense that can result in jail time for the abuser.<sup>101</sup> They can also alert police and Adult Protective Services to previously unknown problems the senior is suffering and put them on the lookout for additional abuse.<sup>102</sup> Still, protection orders are only court orders, and their effectiveness is often determined by the willingness of police and prosecutors to enforce them or by the victim's ability to go back to court for a contempt order. If an abuser is determined to exploit a victim and is unconcerned about the prospect of going to jail, an order of protection may do very little to stop further abuse.

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97. See generally Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later life*, 8 *ELDER L. J.* 297, 316 (2000) (stating the fact that in some states domestic violence restraining orders are narrowly defined to include only spouse/partner relationships); Stiegel & Klem, *supra* note 55 (listing the provisions and citations in adult protective service laws by state).

98. See, e.g., 750 ILCS 60/214(a)(13) (2015).

99. Jane K. Stoever, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 *OHIO ST. L.J.* 303, 306-07 (2011).

100. *Id.* at n.6. See also, e.g., Denis Culley & Hanna Sanders, *Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective*, 62 *ME. L. REV.* 429, 443-44 (2010).

101. Reuters, *supra* note 96.

102. Moskowitz, *supra* note 45, at 107.



#### D. Guardianships

Guardianships can be used as both a sword and a shield to prevent and to commit financial exploitation of seniors.<sup>103</sup> In situations where an elderly person has developed impairments that have allowed him or her to be financially victimized, a guardianship or conservatorship action brought by a capable and trustworthy friend or family member,<sup>104</sup> or by the state,<sup>105</sup> may be the only way to stop abuse.

In order to obtain a guardianship, the petitioner seeking to be the guardian must first show that the alleged incapacitated person is unable to make decisions that are necessary for his or her safety and well-being, and if that is found, the court will then determine who the appropriate person is to act as guardian.<sup>106</sup> Plenary guardianships vest the power to make all decisions for the ward in the hands of the guardian,<sup>107</sup> while conservatorships, in some states called guardianships for the estate,<sup>108</sup> grant the guardian or conservator only the power to make financial decisions for the ward.<sup>109</sup> Guardianships can be granted indefinitely or temporarily, and can be limited in scope or include the power to make all decisions for the ward.<sup>110</sup>

Guardianships, particularly plenary guardianships, strip the senior of most of his or her civil rights.<sup>111</sup> In recognition of this, the most recent amendments to the Uniform Probate Act have made clear that guardianships should only be granted when absolutely necessary, and they should be tailored so that they are limited to the least restrictive order necessary to protect the vulnerable per-

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103. Lori A. Stiegel & Erica F. Wood, *Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, 30 BIFOCAL 1, 4 (2009).

104. Dessin, *supra* note 10.

105. Guardianships may be brought by Adult Protective Services when necessary to protect a senior from abuse. See Dessin, *supra* note 3, at 223.

106. Kimberley Dayton, *Guardianship in the U.S.: Themes and Commonalities Across the States*, in COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP 231, 239 (2014).

107. The terminology and definitions used in this guardianship section are based on Dayton, *supra* note 106, at 231.

108. See, e.g., 755 ILCS 5/11a-18 (2007).

109. Dayton, *supra* note 106, at 233.

110. *Id.* at 232-39.

111. William J. Brisk, *An Elder Law Attorney's View of the Financial Competence of Older Adults*, 36 GENERATIONS 88, 89 (2012).

son.<sup>112</sup> If used appropriately in situations where seniors are financially exploited, guardians can wrest control of the senior's finances, thereby keeping abusive family members, scammers, and unscrupulous businesses from being able to bilk the elderly person out of money through theft or undue influence.

On the other hand, guardianships can be used by abusers to gain complete control over victims' finances and drain them of all their property and resources.<sup>113</sup> The strong powers that a guardianship conveys on the appointed guardian and the disability that the elderly individual must have to require a guardianship mean that a guardianship or conservatorship granted to someone with bad intentions can be devastating for a vulnerable adult.<sup>114</sup> It is therefore imperative that seniors be able to challenge in court guardianships that are likely to result in them suffering abuse. This is only possible, though, if victims have family members or advocates who can detect the abuse and have access to civil attorneys to bring these cases to court.

#### IV. Availability of Civil Counsel for Victims of Elder Financial Exploitation

Unfortunately, there is far too little civil legal assistance available for victims of elder financial exploitation,<sup>115</sup> and as a result, very few cases of financial abuse are litigated.<sup>116</sup> Older adults who are victims of financial exploitation have two possible avenues for legal representation in civil lawsuits: private attorneys or legal aid organizations.<sup>117</sup> In many cases, victims may be unable to pay private attorneys for legal assistance because their resources have been depleted by the financial exploitation, and many seniors

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112. UNIF. PROBATE CODE § 5-409 (2010). While the Uniform Guardianship and Protective Proceedings portion of the Probate Code has been adopted by only nineteen states. Table *Excerpted From "Record of Passage of Uniform and Model Acts, as of September 30, 2010"*, <http://www.uniformlaws.org/Shared/Docs/Probate%20Code/UPC%20Chart.pdf>, the ideas that guardianships should be granted only as a last resort and in the least restrictive way possible has become a universal norm. See Dayton, *supra* note 106, at 243. See also Gregory S. French et al., *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA J. 5 (2005).

113. Nerenberg, *supra* note 5, at 15.

114. *Id.*

115. *Id.*

116. Seymour Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 194 (2001).

117. Brisk & Flynn, *supra* note 71, at 7-8.

are on fixed incomes that cannot accommodate extraordinary expenditures like legal fees.<sup>118</sup> This means that many senior victims may not have any money to pay a private attorney for his or her services unless and until the lost money is recovered.

Several states have established elder financial exploitation as an independent civil cause of action.<sup>119</sup> In those states, attorney's fees are recoverable for all financial abuse that meets the definition in the statute.<sup>120</sup> Yet, in states where no such cause of action exists, the availability of attorney's fees often depends on the claim brought.<sup>121</sup> This makes it difficult for private attorneys to take on financial abuse cases where it is not obvious from the beginning what the causes of action will be, and it may prohibit private attorneys from accepting a case altogether. Additionally, individuals and disreputable businesses that defraud seniors have often already spent the money or disposed of the property taken by the time a legal case is resolved.<sup>122</sup> Therefore, even when a case is successfully litigated and a judgment is obtained on the merits of the case, collecting on a judgment and obtaining money from a perpetrator to pay the victim's attorney's fees may be impossible.

Financial exploitation cases often require expertise in a variety of legal areas, are technically demanding, and are resource-intensive;<sup>123</sup> for those reasons, private attorneys, who have no ethical duty or obligation to handle cases that do not appeal to them, tend to avoid elder financial exploitation cases.<sup>124</sup> Transactional at-

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118. *Id.* at 4-5.

119. See Carolyn Dessin, *Financial Exploitation Statutes' Impact on Domestic Relations Practice*, 16 J. AM. ACAD. MATRIM. L. 379, 382 (2000) (examining financial exploitation statutes in several states); see also Julie Sirrs, *Protecting the Elderly: Should Montana Provide Civil Cause of Action for Elder Abuse?*, 40 MONT. L. REV. 15, 16-18 (2014).

120. Dessin, *supra* note 119, at 393.

121. See Donald D. Vanarelli, *Financial Exploitation of the Elderly: Impact on Medicaid Eligibility*, 6 NAELA J. 39, 45 (2010).

122. Nerenberg, *supra* note 5, at 17 ("Perpetrators are often 'judgment proof,' that is, they have no assets from which victims can be reimbursed and attorney fees paid."); Stiegel, *supra* note 4, at 77; Kim Boyer, *Elder Financial Exploitation Litigation in Nevada: A Model for Effective Recovery of Assets*, NAELA ADVANCE PRACTITIONER'S PROGRAM (Mar. 12-14, 2004) ("the exploiter has frequently squandered the assets. Even if there is a high probability of victory in court, the hard work of obtaining a judgment may not be worth the effort if there is no possibility of collecting on the debt.").

123. Cully & Martin, *supra* note 87.

124. *Id.*; Nerenberg, *supra* note 5, at 17-18; Steven Riess, *Civil Elder Financial Abuse for Prosecutors*, INST. ON AGING (2012), [http://www.ioaging.org/wp-content/uploads/2015/03/CivilCriminalResourceGuide\\_0512-11.pdf](http://www.ioaging.org/wp-content/uploads/2015/03/CivilCriminalResourceGuide_0512-11.pdf).

torneys are unlikely to litigate a case of financial exploitation, and like prosecutors, most civil litigators may be wary of the time sifting through long paper trails of financial transactions may take. Defendants and sufficient evidence to file a complaint may be difficult to find, causing the attorney to expend a lot of resources perfecting service and putting together a complaint before the case starts. Civil attorneys may also fear relying on a senior with real or perceived memory or cognitive deficiencies, and they may worry that the senior might become incapacitated or die before finishing the case, therefore making recovery impossible. For all of these reasons, many elderly abuse victims cannot find willing and competent civil legal assistance.

Publicly funded legal aid organizations are, in most places, the last possible legal intervention available for victims of elder financial exploitation. While nearly every jurisdiction in the country is served by some organization receiving federal funding to provide legal services to seniors,<sup>125</sup> the money given to these programs funds a very limited number of attorneys, and those attorneys are required to handle all types of cases for seniors.<sup>126</sup> According to the Legal Services Corporation, resource constraints force federally-funded legal services organizations nationwide to turn away one eligible person for every person to whom they provide services.<sup>127</sup> And while legal services providers that receive federal Title III funding are prohibited from excluding seniors from services based solely on their incomes,<sup>128</sup> legal services programs are allowed to prioritize cases, which may cause them to exclude financial abuse cases that will be resource-intensive and where chances of financial recovery may be uncertain.<sup>129</sup> This can leave elder financial abuse victims with no source of help to recover stolen money or property.

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125. See generally *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. (2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

126. *Id.*

127. *Id.*

128. Health & Human Servs. Requirements, 45 C.F.R. § 1321.71(d) (2014).

129. Cully & Martin, *supra* note 87, at 90.

## V. The History of the Elder Financial Justice Clinic

The University of Illinois College of Law's Elder Financial Justice Clinic (EFJC) was established in 2013 to address the lack of civil legal resources for victims of elder financial exploitation in Illinois.<sup>130</sup> The EFJC is the first law school clinic in the country solely focused on combating financial exploitation.<sup>131</sup> The EFJC provides free and direct-representation legal services to financial abuse victims<sup>132</sup> in all types of civil law matters.

The EFJC subscribes to the definition of elder financial exploitation set forth in the Older Americans Act,<sup>133</sup> and the Clinic considers potential clients for representation if the conduct they allege falls within this broad definition. While the EFJC does not impose strict income or asset guidelines in selecting clients, the Clinic only represents individuals who cannot find private attorneys to take their cases, and it prioritizes clients who have little income and few assets.

The EFJC is part of the University of Illinois College of Law's experiential learning curriculum. Each semester, eight second- and third-year law students enroll in the Clinic for one semester, and they each receive four credits for 180 hours of work in the Clinic. EFJC students, who are eligible to practice law under the supervision of a licensed attorney pursuant to Illinois Supreme

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130. The EFJC is funded by the College of Law and through a generous grant from the Alvin H. Baum Family Fund, a private foundation based in Chicago.

131. *Law 693: Elder Financial Justice Clinic*, ILLINOIS LAW, <https://www.law.illinois.edu/academics/course/517> (last visited Nov. 4, 2015). While other elder law clinics may handle cases of financial abuse, they also work on many cases unrelated to elder financial exploitation, which might include obtaining public benefits; drafting of wills, advance health care directives, and powers of attorney; long-term care planning; settlement of estates; and counseling on grandparents' rights. These are all vital services for the seniors these clinics serve. However, the EFJC's specific and unique mission gives the Clinic's instructor and students an opportunity to develop specialized knowledge in litigating elder financial exploitation cases, and it also means that the EFJC handles a larger number and wider variety of financial abuse cases than other elder law clinics.

132. The EFJC will consider for representation any victims of financial exploitation who are age sixty or older or who are disabled in a way that makes them susceptible to financial abuse.

133. 42 U.S.C. § 1397(j)(8) (2015) ("[T]he fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets.").

Court Rule 711,<sup>134</sup> act as the attorneys for their clients, conducting client interviews, researching the relevant legal issues, drafting pleadings and motions, and preparing for and conducting hearings. As Clinic Director and Assistant Clinical Professor at the College of Law, I meet with students regularly to discuss strategic decisions, review all written documents, and attend all court appearances to ensure high-quality representation and to provide feedback on students' performance. The goal of everyone involved in the EFJC is to provide top-notch legal representation that is at least equal to the quality of representation clients would get from a paid attorney. My personal aims, which are shared by the University of Illinois College of Law's administration, are to teach students how to be excellent legal advocates, to train them to handle financial exploitation cases so that they can do so in practice, and to expose them to the rewards of advocating for seniors and vulnerable adults.

The EFJC has represented clients throughout the State of Illinois. Most of the individuals receiving services reside in rural or semi-rural areas of Central Illinois. The EFJC receives referrals of clients from service providers who work with seniors, and it also receives calls directly from seniors who believe they have been taken advantage of financially. Because potential clients must generally consent to referrals and must always consent to receiving the Clinic's services unless subject to a guardianship, the EFJC relies on potential clients to self-identify as victims of financial exploitation. Further inquiry of the circumstances of their particular cases occurs at several phases of the intake process to determine whether applicants for services have indeed suffered financial abuse and whether the Clinic might be able to investigate their claims or take any action on their behalf. Potential clients may be rejected if the Clinic decides they have not suffered financial exploitation, if they are not over sixty years old or disabled, if there is some form of unresolvable conflict per the Rules of Professional

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134. Under Illinois Supreme Court Rule 711, law students are eligible to practice in Illinois state courts under the supervision of a licensed attorney after they have completed half of their required law school credits, which generally occurs after their third law school semester. Each state has a student practice rule that allows law students to practice while in school with supervision. For more information on the student practice rule in your state, see *Student Practice Rules – Clinical Research Guide*, GEORGETOWN LAW LIBRARY (last updated Oct. 14, 2015, 12:43 PM), <http://www.law.georgetown.edu/library/research/guides/studentpractice.cfm>.

Responsibility, if it is likely that the potential clients will be able to find private legal counsel, or if the case is of a type that the Clinic does not handle (e.g., divorce).

If, after the initial intake, the screening process, and a full interview, the EFJC decides to represent a client, the Clinic can have the client sign one of two agreements, both of which make the alleged victim a client of the Clinic. The first is called an "Investigate and Advise Agreement," and it commits the Clinic to investigate the allegations the client is making and advise the client on the avenues available to address the exploitation that occurred. Signing an Investigate and Advise Agreement does not commit the Clinic to advocating on the client's behalf, and it is the agreement chosen when the facts of the case and the potential recourse remain unclear after the full client interview. The second agreement is a "Client Retainer Agreement," and this agreement commits the Clinic to advocate on the client's behalf through any combination of a demand letter, informal negotiations, or a court case. It is not unusual for a client who was initially taken on under an Investigate and Advise Agreement to later sign a Client Retainer Agreement if the EFJC's investigation shows that viable claims exist that could allow a client to recover lost money or property and the client wishes to pursue those claims.

While the EFJC is open to representing victims of any type of financial exploitation, most of the EFJC's cases thus far have involved either fraud by family, friends, and caretakers, or contractor fraud. The EFJC has also handled a number of cases of consumer fraud and scams, and only a few cases of mortgage fraud and investment fraud. In its first two years of operation, the EFJC received 110 requests for services, and the Clinic provided substantive legal services to thirty-four individuals.<sup>135</sup> The Clinic has represented clients in order of protection hearings, fought against guardianship petitions brought by exploiting children, challenged wills that seniors were fraudulently induced into signing, and filed and litigated all types of civil lawsuits against family members, friends, and business owners who took advantage of our clients. The Clinic has also investigated numerous allegations of financial

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135. *Elder Financial Justice Clinic – 2014-15 Report*, ILLINOIS LAW <https://www.law.illinois.edu/content/pdf/clinics/EFJC-2014-15-Report.pdf> (last visited Nov. 4, 2015).

exploitation that were not litigated, sometimes because no fraud was found, sometimes because no immediate legal remedy existed for the client, or sometimes because the client chose not to go forward with the case. Some of the EFJC's order of protection cases, negotiated resolutions, and investigations have lasted only a few weeks. Other cases have involved protracted litigation and have gone on for nearly two years.

Below are synopses of three of the EFJC's cases that illustrate the types of matters the Clinic has handled and the results the Clinic has achieved for its clients.

#### *Case 1*

Joe<sup>136</sup> was an eighty-one-year-old widower who had been diagnosed with Alzheimer's disease. Shortly after Joe's wife died in March 2013, a woman named Peggy, whom Joe had met years before in an Alcoholics Anonymous program, called Joe out of the blue and asked to get together with him. Joe was flattered by the attention, since he had just lost his wife and Peggy was nearly thirty years younger than him. Joe and Peggy started going out to dinner together regularly, with Joe paying each time.

After a few months, Peggy started pressuring Joe to take her to stores and buy her things. He bought her items at the store on numerous occasions, each time paying with a check, which was unusual for Joe because he is illiterate and thus always paid for things using his credit card. Joe could not write out the checks himself, so Peggy would write them in her own handwriting and Joe would sign them. Due to his poor vision and illiteracy, Joe also could not read the amounts on the checks, and on numerous occasions, Peggy wrote the checks for amounts in excess of the purchase price of the items and kept the refunded cash. Peggy returned a number of items that Joe bought her, unbeknownst to him, and kept the cash from those returns. She also wrote and signed checks to "Cash" from Joe's account without his knowledge, keeping the money for herself. Peggy took over \$2000 from Joe through these fraudulent methods.

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136. The EFJC cases summarized in this Article have been included with the permission of the clients involved in the cases. The names of EFJC clients and opposing parties, along with certain identifying information, have been changed in these case summaries to protect the privacy and confidentiality of our clients.



After several more months Peggy tried to convince Joe to buy her a car. Joe resisted this request. Based on Peggy's exploitation of Joe and his worsening dementia, Joe's stepson moved Joe into a nursing home. A week later, Peggy and Joe called a local attorney inquiring about changing Joe's power of attorney. The attorney called Joe's stepson because Joe had seemed very confused on the phone, and Joe's stepson told her that Joe had dementia. Several days later, Peggy again came to visit Joe at the nursing home, this time bringing with her a quit claim deed to Joe's house. Peggy worked hard to convince Joe to sign the deed over to her, and Joe was about to when his roommate at the nursing home intervened and told Joe not to do it.

When Joe's stepson heard about Peggy's escalating efforts to take advantage of Joe, he filed for and obtained a guardianship over Joe and contacted the EFJC for assistance with getting an order of protection against Peggy. After a half-day contested hearing at which EFJC students working on the case solicited most of the substantive testimony from Peggy, the Clinic was able to obtain an order of protection preventing Peggy from having any further contact with Joe. The judge denied the Clinic's request for reimbursement to Joe of the money Peggy took despite the fact that Illinois' order of protection statute allows for recovery of money lost due to financial exploitation, finding that the Clinic was not able to prove the exact amount taken because of Joe's inability to remember the specific transactions.

#### *Case 2*

Sarah came to the EFJC seeking to invalidate the will of her brother, Mark, who had recently died. The will had been submitted to probate by the attorney for Mark's landlord because Mark's landlord was named the executor of Mark's estate in his will. The will had been drafted by the landlord's attorney and signed by Mark six months before he died, while he was in a nursing home attempting to recover from injuries he suffered in a bus accident. Mark had no assets other than the personal injury lawsuit against the bus company that had been filed on his behalf by the landlord's attorney while Mark was in the nursing home. That suit sought reimbursement for Mark's medical expenses and additional

noneconomic damages, which the landlord's attorney valued at \$175,000.

Mark's will as written by the landlord's attorney gave the landlord the first \$150,000 of Mark's estate, the landlord's handyman the next \$25,000, and any remaining money and assets to Mark's family, which included Mark's three children, four grandchildren, and seven siblings. Sarah was not expecting to inherit anything from Mark, and she had no idea whether the personal injury case had any merit. Yet, she knew Mark's landlord had taken advantage of him and she was angry that the landlord was the executor of the estate and its primary heir.

The EFJC agreed to help Sarah challenge Mark's will in probate court. EFJC students assigned to Sarah's case tracked down the witnesses to Mark's signing of the will in the nursing home. One was a woman who had been visiting her father at the nursing home when she was grabbed in the hallway and asked to witness the will. The other witness was a ninety-one-year-old resident of the nursing home who had been asked by the nursing staff to come into the room to witness Mark's signature. The first witness told the students that she did not know Mark, that it was the attorney, not Mark, who told her the document was Mark's will and asked her to sign it, that she never spoke to Mark, although she did see him sign the document, and that the other witness was not present when Mark signed the will. All of these things were contrary to the attestation clause in the will. The second witness did not remember the signing of the will at all. She said that the nursing staff frequently had her witness 'Do Not Resuscitate Orders,' but that she was never aware that she had witnessed a will.

At the proof of will hearing, both witnesses testified consistently with what they had told the students, and the judge found that the will had not been properly executed. He threw out the will, leaving Mark's estate subject to intestate succession, and the judge appointed Sarah as the executor of the estate even though she was no longer an heir under Illinois' rules of intestacy. Although she received no monetary benefit from the court's decision or the Clinic's representation, Sarah was extremely pleased that her nieces and nephews would rightly inherit anything Mark had left and that Mark's landlord no longer had any legal connection to Mark's legacy or estate.

*Case 3*

In August 2012, Margaret was sixty-seven years old, single, and had just moved from an apartment into a small foreclosed home that she purchased with the help of a neighborhood improvement grant. The grant also carried with it some extra money to pay for repairs to the house. Margaret decided that she should purchase a new roof with her grant money, although the roof that was on the house was not leaking, just old and worn. She was referred by a friend to two local men who held themselves out as professional roofers, and she contacted them to see if they would be willing to replace her roof. The men said they could do the work for \$4000, which included tearing off and replacing shingles on the peaked portion of the roof and applying a sealant to a flatter portion of the roof over a converted garage. Margaret paid them the money up front, and they began work on her house.

Unfortunately for Margaret, the contractors, who held themselves out as qualified and experienced roofers, were not licensed to do roofing work as Illinois law requires and did not know how to properly roof her house. They used the wrong tar product on the flat portion of her roof, causing tar to run into her gutters, onto her siding, and onto her cement driveway and sidewalks. Their poor workmanship on the shingled and tarred portions of the roof, which became obvious the first time it rained, caused significant leaking and water damage.

The contractors were unable to properly repair the damage they had done to the house, so Margaret filed a small claims action against the men. Due to Margaret's financial circumstances, she reached out to the EFJC for assistance with her court case. EFJC students filed an amended complaint on behalf of Margaret alleging breach of contract, fraud, and negligence against the contractors. In October 2014, after two days of trial, the court awarded Margaret a judgment of \$14,000 against the two contractors.

Unfortunately, Margaret has not been able to collect any of that money. At a collections hearing after the trial, one contractor was declared judgment proof by the court. That same day, the other contractor filed for Chapter 13 bankruptcy. The EFJC is continuing to represent Margaret in the defendant's bankruptcy case and has filed objections to the contractor's proposed bankruptcy plan and an adversary complaint seeking to have the contractor's

debt deemed nondischargeable because it was the product of fraud. The EFJC is hoping that by continuing to pursue the contractor in bankruptcy court, Margaret might receive enough money to at least shore up her roof and repair some of the damage to her house, which has worsened since the court entered its judgment because her home continues to be exposed to the elements.

## **VI. Tips for Litigating Civil Cases of Elder Financial Exploitation**

As discussed above, there is a paucity of civil lawyers who are litigating financial exploitation cases for seniors. As such, there are not many publications or resources to help attorneys who want to specialize in or start taking on financial abuse cases. The most helpful resources available are guides that discuss how to litigate specific types of cases or that alert practitioners to particular laws that might be useful in bringing claims against abusers. The EFJC's specific mission has given everyone involved in the Clinic an opportunity to develop specialized knowledge in litigating elder financial exploitation cases. Below are some tips for both private and public interest civil attorneys who might be considering taking on financial abuse cases. Hopefully, these insights and suggestions will make it easier for attorneys to reach seniors suffering from financial exploitation, to successfully litigate financial abuse cases, and to recover money and property for clients and attorney's fees for themselves so that financial exploitation cases may become a sustainable part of their practice.

### **A. How to Find Cases and Clients**

As I found in starting the EFJC, establishing a law practice focused on elder financial exploitation, even when offering services for free, can be a difficult task. While there are not many attorneys taking on financial exploitation cases and thus not a lot of competition for clients, this means that victims of financial abuse and advocates for seniors do not expect there to be legal representation available when they need it, and thus they may not seek out an attorney. For attorneys, the key to making sure that financial exploitation cases will come your way is for your name to be top of mind

whenever a senior finds that he or she has been abused or an advocate or community member learns of abuse that has occurred.

**1. GET TO KNOW ADULT PROTECTIVE SERVICES AND OTHER STAKEHOLDERS AND BE A RESOURCE TO THEM**

In 1974, Congress mandated, through the Social Security Act, that all states set up Adult Protective Services (APS) agencies to detect abuse of elderly and disabled adults and to provide assistance to victims.<sup>137</sup> APS workers encounter more financial exploitation than any other group of professionals, and they are always looking for resources for other professionals willing to provide services to victims of abuse.<sup>138</sup> The first thing that any attorney wanting to start taking on financial exploitation cases should do is set up a meeting with the head of APS in their area. The attorney should ask the head of APS what kinds of fraud he or she is seeing, what legal services the seniors in his or her area need the most, and whether the agency refers people to attorneys.

The EFJC's relationship with APS providers throughout the state of Illinois has yielded the majority of the Clinic's referrals. Of course, APS may be more willing to make referrals to the EFJC because the Clinic provides free services to clients, but private attorneys may be able to get referrals in places where legal aid services for financial abuse are not available or in situations where a victim of financial abuse may not qualify for free services and may have resources available to pay counsel. The EFJC has also spread the word about our services by presenting about financial exploitation at regional and statewide APS meetings. While APS workers see a great deal of financial exploitation and may know more about the types of financial exploitation and how they occur than the attorney, they are also excited to ask legal questions of an attorney and to discuss the legal options in specific cases they are handling. Even if APS is not willing to refer victims out to private attorneys for civil litigation services, local APS agencies may need attorneys to assist in filing for guardianships to prevent abuse or to enforce other portions of their state's adult protection statutes.<sup>139</sup>

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137. Dessin, *supra* note 3, at 222-23 (citing 42 U.S.C. § 1397a(a)-(e)).

138. *Id.* at 226.

139. For example, in Illinois, APS has been statutorily granted the power to request an accounting of expenditures from individuals holding power of attorney over a senior. See 755 ILCS 45/2-7(c)-(d) (2014). APS does not have in-house counsel available to handle this, so agencies in Illinois are regularly looking for

There are also many other stakeholders working with seniors in various communities who would undoubtedly like to know that there are legal resources available for victims of financial exploitation. Police officers, nursing home administrators, home healthcare providers, counselors, and doctors all are likely to encounter victims of financial abuse, and they may be looking for someone to answer legal questions about financial exploitation when they come up. If these professionals know that an attorney is willing to be a resource for them and will take the time to answer their questions when they call, that attorney will be able to establish their expertise and win their trust, which can lead to referrals and other profitable opportunities.

Also, attorneys handling financial exploitation cases should make sure that other attorneys, including prosecutors and the state's attorney general's office, know that they specialize in financial exploitation cases. As noted above, agencies that are appointed to prosecute financial abuse cases are not willing or able to bring charges in all situations that cross their desks. The EFJC has received a number of referrals from the Illinois Attorney General's Office and county prosecutors in situations where they have felt a private civil suit might be more successful than state action.

In many communities, there is at least one, and often multiple, councils and committees that allow stakeholders working with seniors to get together and talk about issues in the community. Presenting to or joining those groups can help an attorney make connections to potential referral sources and can allow an attorney to be seen as a resource for professionals seeing financial abuse.

## 2. GO WHERE SENIORS ARE

While the EFJC does receive a significant number of referrals from agencies and advocates, many seniors will call seeking an attorney themselves if they know that services are available to help them seek redress for financial abuse they have suffered. Therefore, it is important to get the word out to seniors directly about the help that is available to them. Setting up a presentation on financial exploitation at a retirement community or nursing home is a great way for attorneys to help prevent abuse and to introduce

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attorneys who would be willing to make these requests in court on the agency's behalf.

themselves to people who may need their services. Senior groups at churches or community centers would undoubtedly welcome presentations as well, and the EFJC has also presented to community groups like Rotary Clubs that, while not specifically targeted at seniors, certainly have a lot of senior members and connections to other organizations. Similarly, caretaker networks and support groups may welcome presentations or opportunities to ask legal questions of an attorney specializing in financial exploitation. Many communities have aging fairs or seminars at which an attorney focusing on financial abuse could present, purchase a table, or act as a sponsor to attract business.

Attorneys who have expertise in several areas of the law may want to do a free legal advice walk-in clinic at a senior center or nursing home to meet potential clients. People always have legal questions they want to ask on a variety of subjects, and seniors who might not identify their legal issue as financial exploitation may bring a financial abuse situation to a walk-in clinic if the event is billed as a chance to get general legal advice.

### 3. ADVERTISE WHERE SENIORS CAN FIND YOU

In its first semester, the EFJC had a very difficult time getting the word out about its services and attracting clients. Then, I received a fortuitous call from a reporter for the Illinois version of the American Association of Retired Persons (AARP) Bulletin, who had heard about the EFJC from someone at the AARP to whom I had previously reached out. The reporter indicated that he wanted to do a profile of the EFJC in conjunction with an article about the new Elder Justice Center at the circuit court in Cook County, Illinois. The article appeared on page thirty-six of the January 2014 Illinois edition of the AARP Bulletin,<sup>140</sup> and the EFJC was only discussed in the last four sentences of the article. Based on that brief mention, the EFJC received twenty-five calls requesting its services, and the Clinic has had a full caseload ever since.

The lesson here is to know what seniors are reading and to get the word out in those publications, either by convincing someone to write an article or through paid advertising. As it turns out, AARP publications are widely read, apparently cover-to-cover, but

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140. Joseph Sjostrom, *Justice Centers Ease Legal Worries*, AARP BULL. 36 (Jan. 1, 2014), <http://states.aarp.org/il-justice-sc-il-wp/>.

there may also be local publications targeted at seniors in a specific community. Newspapers are also great conduits of information, particularly for people who came of age before the internet. Knowing one's clientele and being seen where those people are and where they are looking is vital to building up a client base in such a niche area of the law.

### **B. Stop the Bleeding As Quickly As Possible**

The first thing attorneys need to think about when they take on a financial exploitation case is what can be done immediately to stop further abuse or to prevent the dissipation of remaining assets. If the abuser has a power of attorney over the victim, even if that is not the mechanism that was used to take the victim's money or property, the victim needs to revoke that power of attorney right away if the victim is competent to do so.<sup>141</sup> If the victim is not competent to revoke a power of attorney, or if some informal fiduciary relationship has been established between the abuser and the victim, the victim's counsel may petition the court to set up a constructive trust requiring the fiduciary to use resources only for the benefit of the senior.<sup>142</sup> If a representative payee is stealing money from the senior, notice should be sent to the Social Security Administration right away to remove that person as payee.<sup>143</sup> If the abuser has a guardianship over the exploited senior, a petition to terminate that guardianship should be filed immediately, and in conjunction with that filing the victim should request the appointment of a separate conservator or, at least, an order prohibiting the abuser from spending any of the victim's money or dissipating any of the victim's assets.

In cases of family fraud, it is not uncommon for the victim and the abuser to share a bank account, which may have provided the avenue for the abuser to abscond with the victim's money. It may be impossible to remove the abuser's name from the joint account, especially if he or she is a full account holder, but the victim should have access to any money in the account and should take all money that is rightfully the victim's out of the joint account as

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141. Moskowitz, *supra* note 45, at 103. It may also be possible to demand an accounting of the money that has been spent pursuant to the power of attorney.

142. Moskowitz, *supra* note 116, at 224; Moskowitz, *supra* note 45, at 103-04.

143. Moskowitz, *supra* note 45, at 103.



soon as possible after the theft is discovered. That money can then be moved to an account that cannot be accessed by the abuser. Similarly, if there are other accounts to which the abuser has access or other authority that the victim has previously granted the abuser, make sure that that access or authority is terminated immediately. In cases where the opposing party has convinced a senior to give away personal property or sign over the deed to a piece of real property, it may be important to ask for injunctive relief or a memorandum of *lis pendens* to prevent the sale of that asset.<sup>144</sup>

An order of protection is another immediate intervention that victims can seek to prevent additional harm. Seniors who are being taken advantage of by friends, family members, or caretakers may be susceptible to further fraud, even once they are aware that they have been defrauded. An order of protection can prevent the abuser from further abusing the victim, and, as mentioned above, may allow for recovery of assets in some jurisdictions.<sup>145</sup> However, as previously noted, the effectiveness of an order of protection in stopping abuse is limited by the abuser's regard for that order and the prosecutor's, court's, and victim's willingness to enforce.

### C. Think About Resolution of the Case From the Beginning

Due to the potential that victims may suffer from declining health, capacity, and will as litigation progresses, attorneys representing victims of financial exploitation should be thinking from the very beginning of the case about the best way to induce settlement or win the case on summary judgment. Even if a victim's memory or ability to testify does not decline over the course of the case, testifying in court may be traumatic for some victims, and avoiding that trauma can be very important to the victim. Settlement may have added value in cases of financial abuse by family members where a cooperative settlement process may preserve familial relationships better than a winner-take-all court battle.<sup>146</sup> Settlement also guarantees financial recovery, whereas a judgment obtained after trial may lead to lengthy collection efforts or even the defendant filing bankruptcy, thus preventing the victim from

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144. Brisk & Flynn, *supra* note 71, at 13.

145. *Id.* at 13-14.

146. Moskowitz, *supra* note 116, at 228.

ever fully recovering his or her lost money, much less any additional damages awarded.

#### **D. Know the State's Financial Exploitation Laws (if any) and Use Them**

While the Older Americans Act does define financial exploitation,<sup>147</sup> there is no federal statute criminalizing financial abuse and no federal cause of action for exploitation.<sup>148</sup> Thus, knowing the particular state's laws is essential when handling financial exploitation cases. As stated above, thirty-three states have specifically criminalized elder financial exploitation.<sup>149</sup> Yet, only a handful of states have laws that provide victims of financial abuse with a specific civil cause of action for elder financial exploitation.<sup>150</sup> Illinois became the most recent state to grant an independent civil cause of action to victims of financial exploitation with the enactment of Public Act 99-0272, first proposed by the EFJC, eliminating the previous requirement that an abuser had to be prosecuted for financial exploitation before the victim could bring a civil suit.<sup>151</sup>

Although attorneys representing financial abuse victims should bring cases based on any theories of recovery that are useful and supported by the facts, where a cause of action for financial exploitation is available and the defendant's conduct meets the definition of financial exploitation, attorneys should always include that claim in a lawsuit because of the benefits that financial exploitation statutes tend to offer both the client and the attorney.<sup>152</sup> Most financial exploitation civil causes of action mandate

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147. 42 U.S.C. § 1397(j)(8) (2012).

148. Dessin, *supra* note 3, at 223; see 42 U.S.C. § 1397m-5 (2012).

149. *Financial Exploitation of Incapacitated Adults*, VA ST. CRIME COMM'N (2012), <http://vsc.virginia.gov/documents/financial.pdf>.

150. *Id.*; see, e.g., ARIZ. REV. STAT. § 46-456 (2015); FLA. STAT. § 415.1111 (2015); OR. REV. STAT. § 124.000 (2015); MINN. STAT. § 626.557(20) (2015); UTAH CODE ANN. § 62A-3-314 (2015); 720 ILCS 5/17-56(g) (2015); WASH. REV. CODE § 74.34.200 (2015).

151. Public Act 99-0272 (eff. Jan. 1, 2016).

152. Katherine C. Pearson, *Professor Matthew Andres' Civil Remedy for Financial Exploitation Enacted by Illinois Legislature*, ELDER L. PROF. BLOG (Sept. 9, 2015), [http://lawprofessors.typepad.com/elder\\_law/2015/09/Professor-matthew-andres-civil-remedy-for-financial-exploitation-enacted-by-illinois-legislature.html](http://lawprofessors.typepad.com/elder_law/2015/09/Professor-matthew-andres-civil-remedy-for-financial-exploitation-enacted-by-illinois-legislature.html). Of course, this makes it very important that the attorney handling a financial exploitation case understands the definition of financial exploitation in his or her state and in what situations the financial exploitation statute applies. What may constitute financial exploitation in one state may not be financial exploitation in

that courts award plaintiffs double or treble damages if they prevail, and some also allow for a discretionary award of noneconomic and/or punitive damages.<sup>153</sup> Not only do these increased damages have the potential to help stabilize and improve the economic security of financial abuse victims, punish abusers, and deter future abuse, but they also incentivize abusers to settle cases prior to trial which, as discussed above, is particularly beneficial to plaintiffs in elder financial exploitation cases.

Most statutes setting forth a civil action for elder financial exploitation also make mandatory an award of attorney's fees to a prevailing plaintiff.<sup>154</sup> Like double or treble damages, attorney's fees provisions have the effect of encouraging defendants to settle, and they provide even more incentive than heightened damages for defendants to settle early to prevent the plaintiff from racking up even more attorney's fees. Of course, attorney's fees awards can make it much more feasible for an attorney to take on a case of financial exploitation where the victim cannot pay for services up front or on an hourly basis, both because there may be a collectable judgment awarded specifically for the attorney and because the time commitment for the attorney may be reduced by an increased likelihood of settlement.

Some states also have other laws that may assist in the litigation of financial exploitation cases. Maine's Improvident Transfer of Title Act makes transfers of major assets to fiduciaries presump-

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another state, and some people or situations covered by one state's statute may not be included in another state's statute. For instance, some states consider an elderly person anyone over sixty, while others only include people sixty-five and older. See footnotes 12-13, *supra*. In California, only elders who are California residents can bring a cause of action in California courts for financial exploitation (see CAL. WELF. & INST. CODE § 15610.27), and in Washington only residents of licensed care facilities or people who were abused by home health workers can bring a civil cause of action for financial exploitation (WASH. REV. CODE § 74.34.200(1) (2015)). Some elder financial exploitation statutes only allow victims to bring a cause of action when the abuser is in a position of trust to the victim (ARIZ. REV. STAT. ANN. § 46-456 (2015)), while other states do not limit their causes of action in these ways.

153. Brisk & Flynn, *supra* note 71, at 13. 720 ILCS 5/17-56; see Pearson, *supra* note 150.

154. Compare MINN. STAT. § 626.557(20) (providing that, if successful in an action for financial exploitation, "the vulnerable adult is entitled to recover reasonable attorney fees and costs."), with UTAH CODE ANN. § 62A-3-314(3) ("If the plaintiff prevails in an action [for financial exploitation], the court *may* order that the defendant pay the costs and reasonable attorney fees of the plaintiff.") (emphasis added); see Moskowitz, *supra* note 45, at 106 ("Several states provide a civil cause of action against the perpetrator and shift plaintiff's attorney's fees to a losing defendant.").

tively void.<sup>155</sup> In Illinois, anyone criminally convicted of or found civilly liable for financial exploitation is automatically barred from inheriting from the abuse victim.<sup>156</sup>

Attorneys should also be familiar with their state's consumer protection laws, since many victims suffer abuse by sellers of goods or services, or victims might have problems paying for goods or services they need because of financial abuse they have suffered. Many actions brought under consumer protection laws, unlike many contract and common law claims, allow for the recovery of attorney's fees and double or treble damages by prevailing parties.<sup>157</sup>

#### **E. Ask for Attorney's Fees Whenever Possible**

Given the statistics on how many people suffer financial abuse, there are certainly enough financial exploitation cases that legal aid organizations and pro bono attorneys cannot handle them all. The only way to come close to serving all of the legal needs of elderly victims of financial exploitation is for some percentage of private attorneys to start making financial exploitation cases a significant portion of their practices. But, private attorneys are not going to take on financial abuse cases if they are not profitable. That is why attorneys who do take on cases need to make sure that they ask for attorney's fees whenever possible, and that they think about all causes of action they could bring that might carry an award of attorney's fees with them. As discussed above, in states where financial exploitation is its own cause of action,<sup>158</sup> attorney's fees can and should be requested under that statute.<sup>159</sup> But, in states without a civil cause of action for elder financial abuse, and in situations where there is no contractual right to attorney's fees, attorneys should try to find torts or statutory claims that would al-

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155. ME. REV. STAT. ANN. tit. 33, §§ 1021-1022 (2014).

156. 755 ILCS 5/2-6.2(b) (2015).

157. Brisk & Flynn, *supra* note 71, at 13-14.

158. *See id.* at 14 (discussing California and Illinois statutes that provide a cause of action for financial exploitation).

159. *See id.* at 6, 14 (discussing recovery of attorney's fees authorized under California's Elder and Dependent Adult Civil Protection Act, the need for the for-profit bar to be able to represent elderly clients in financial abuse cases without incurring financial losses, and the need for attorneys to advocate for special laws that allow for the recovery of attorney fees to increase the likelihood of qualified attorneys serving these clients).

low them to obtain an award of attorney's fees from the opposing party.

#### **F. Be Flexible About Fee Arrangements**

The EFJC provides its services free of charge, and it never expects to receive any money, even in cases where attorney's fees are available.<sup>160</sup> However, if there is any hope of serving the legal needs of all victims of financial exploitation, private attorneys are going to need to be able to make money off of financial abuse cases so that these cases are viewed as part of a financially sustainable practice. As discussed above, part of the reason seniors who have been financially abused have such difficulty finding legal representation is that they have necessarily lost money, so they may not have the money to pay a large up-front retainer. Thanks to social security and pensions, though, most seniors have a steady, guaranteed income stream that may allow them to pay legal bills over a more extended period of time. Also, if an attorney is able to recover lost funds for his or her client, the client may be able to part with a portion of that money to compensate the attorney for legal services. And, of course, if the attorney wins, he or she may be able to obtain an award of attorney's fees from an opposing party, depending on the counts on which the client prevails.

Attorneys should consider whether it would be feasible for clients to pay them to do discrete tasks rather than signing a retainer for indefinite representation. As mentioned above, the EFJC frequently enters into Investigate and Advise Agreements with clients that only obligate the Clinic to investigate the facts of the case and give the client an opinion as to what his or her legal options might be. The EFJC also occasionally signs retainer agreements with clients that limit the Clinic's obligations to sending a demand letter and negotiating a settlement with the opposing party. This is helpful when the Clinic is not sure the case is one it would be able to effectively litigate or the client is not sure he or she would want to go to court. These types of limited retainers reduce the chances

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160. The EFJC does request attorney's fees from the opposing party in our cases whenever possible. However, we have yet to obtain an award of attorney's fees in any of our cases, primarily because most of our cases have been resolved via settlements rather than at trial.

that attorneys will be dragged into long-term litigation that the attorney does not want to take on or for which the client cannot pay.

#### **G. Be Realistic About Expectations for Recovery with the Client and Yourself**

As discussed above, achieving a full recovery for victims of financial exploitation is often impossible. Research indicates that less than fifteen percent of victims recover stolen assets.<sup>161</sup> As in all cases, when describing the likelihood of success of a financial exploitation case, the attorney should provide whatever concrete information is necessary for the client to make an informed choice, but should avoid making any promises about the outcome.<sup>162</sup> Attorneys should do their best to describe to their clients in realistic terms not only the likelihood of a full recovery, but also the steps necessary to get there. It is much easier on both the client and the attorney to make a decision early to not pursue a case than to make that same decision after a great deal of blood, sweat, and tears have been expended by the client and the attorney. While the EFJC is willing to represent victims of financial exploitation no matter what the chances of recovery are and believes strongly that there are benefits for clients and society as a whole in doing so, private attorneys who need to make money off of a case may not have the same luxury unless the victim is able to pay out of pocket for legal fees.

#### **H. Expedite Litigation**

With all seniors who have been victims of financial exploitation, but especially with victims suffering cognitive or physical decline, it is important to expedite the often glacial pace of civil litigation. Abusers who took advantage of the victim because of the victim's assumed or real infirmities often try to drag cases out, particularly if the abuser possesses or has disposed of an asset that the senior is trying to recover.<sup>163</sup> Also, abusers may hope that elderly victims will die or become incapacitated before trial, which may

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161. Jackson & Hafemeister, *supra* note 60, at 291.

162. French et al., *supra* note 112, at 30.

163. Jackson & Hafemeister, *supra* note 60, at 2.

make recovery of some or all damages impossible.<sup>164</sup> It is important for attorneys representing victims to recognize that their client's memory, cognition, physical health, and will to proceed may decline over the course of protracted litigation. In recognition of this, some states allow seniors to request expedited trials in cases of financial abuse.<sup>165</sup> In states where expedited litigation is not guaranteed, attorneys should fight efforts by opposing parties to drag out litigation and delay trials. At the same time, attorneys need to start preparing for trial right away so they can be ready to try the case quickly if the judge grants a request for an expedited trial.

#### **I. Use State Agencies and Consumer Organizations to Your and Your Client's Benefit**

When seniors are exploited through scams or consumer transactions, complaints to relevant state agencies or consumer watchdog organizations can be helpful to avoid litigation when possible, prevail in litigation when necessary, and prevent others from being similarly victimized. If a senior has been taken advantage of by a legitimate business, filing a truthful complaint with a state attorney general's office, a licensing or regulatory agency, or a consumer protection organization like the Better Business Bureau can induce the business to return money or rectify a bad situation for the senior before a civil action ever has to be filed. The fear of investigation by an attorney general's office, review by a licensing or regulatory agency, or the threat of poor ratings from watchdog organizations can be very motivating for a business. These consumer protection agencies and organizations may also be willing to mediate the dispute between the senior and the business, which could lead to a resolution that requires very little attorney intervention. Complaints to government agencies may also lead to enforcement actions that could include injunctive relief for

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164. Obviously if a victim dies, proving the case may be impossible if the client's testimony has not been preserved. But many states also prohibit recovery for pain and suffering if the plaintiff dies before trial. See Moskowitz, *supra* note 116, at 213. California and Arizona are two states where this is not the case. See CAL. WELF. & INST. CODE § 15657(a); In re: Denton, 945 P.2d 1283, 1285 (Ariz. 1997) (en banc).

165. See *e.g.*, CAL. CODE CIV. PROC. § 36 (2015).

the victim, freezing of the abusive company's assets to ensure that money is available to recover, and restitution to the victim.<sup>166</sup>

Even if the submission of a complaint to a government agency or consumer organization does not lead to a resolution of a case, such a complaint can help in litigating a case.<sup>167</sup> Most consumer protection complaint processes require the complainant to report a problem by phone, letter, or online submission.<sup>168</sup> They then give the company that is the subject of the complaint an opportunity to respond in writing.<sup>169</sup> This response forces the company to memorialize facts and commit to a position, both of which can be used by the complainant's attorney to further investigate facts and potential witnesses, plan litigation strategy, and question or impeach representatives of the business when they testify. Also, agencies and organizations with whom a client lodges a complaint may be able to provide the attorney with information on other complaints they have received about the business in question, and this infor-

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166. See Moskowitz, *supra* note 116, at 218.

167. The ABA Model Rules of Professional Conduct, while not explicitly addressing threats to report misconduct, do prohibit threats of criminal prosecution to gain an advantage in civil litigation under some circumstances. ABA STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, FORMAL OPINION 92-363 (July 6, 1992) (discussing extortion as an attempt to obtain property that is not honestly claimed as restitution for harm resulting from conduct relating to the accusations). However, in the same opinion the Committee also stated, "The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process . . . [T]he Model Penal Code does not criminalize threats of prosecution where the 'property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.'" *Id.* Some states' rules of professional conduct are more explicit on this subject. See, e.g., CAL. RULES OF PROF'L CONDUCT RULE 5-100 (2015). These opinions and rules seem to suggest that attorneys should not threaten to file complaints to government agencies, but that actually filing complaints in situations where you are seeking compensation for clients' losses is not unethical or otherwise prohibited. Attorneys are encouraged, however, to review their respective states' rules of professional conduct and the comments thereto for more clarification of whether and how they should file a complaint with a government agency in a particular case.

168. See, e.g., *Filing a Consumer Complaint*, ILL. ATT'Y GEN., <http://www.illinoisattorneygeneral.gov/consumers/filecomplain.html> (last visited Nov. 4, 2015).

169. *What complaints do we handle?*, BETTER BUS. BUREAU, <https://www.bbb.org/consumer-complaints/file-a-complaint/get-started> (last visited Nov. 18, 2015).



mation can be used to gather additional information from other people who have had similar experiences and to determine if there is a pattern of conduct that might help prove the client's account of what occurred in his or her case. And of course, complaints to any of these agencies or organizations can prevent others from falling victim to similar scams or deceptive business practices.

**J. Make Sure You Are Familiar with the Rules of Professional Responsibility and the Basics of Determining Capacity**

It is important for attorneys handling cases of financial exploitation to clarify early on who the client is and to always keep that in mind throughout the representation.<sup>170</sup> This can be especially difficult in situations where family members are highly involved in a senior's life, are very concerned about the abuse he or she has suffered, or have a personal stake in the outcome of a case.<sup>171</sup> It can be challenging for attorneys to navigate situations where someone else is paying for an attorney's representation of the victim. Nonetheless, establishing right away who the client is with everyone involved is vital because it is to the client that the attorney owes duties of competence, diligence, loyalty, and confidentiality, and it is only communications with the client that are subject to the attorney-client privilege.<sup>172</sup>

Maintaining client confidentiality and attorney-client privilege can be difficult when seniors need to be accompanied by family members to meetings with attorneys, want to have their family members included in consultations with the attorney, and want their loved ones updated on all details and strategy in a case. Unless the senior has been officially appointed a guardian, the senior is the client and has the right to make all decisions in the case.<sup>173</sup> If a guardianship is in place, the attorney should attempt to verify what type of guardianship the senior is under to ensure that the guardian does, in fact, have the right to make decisions for the senior with regard to legal representation and litigation. Even if the guardian is going to be making the decisions in the case, it is important for the attorney to try to maintain a normal attorney-client

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170. French et al., *supra* note 112, at 7.

171. *Id.*

172. *Id.*

173. *Id.* at 8.

relationship with the client and afford the client the same attention and respect he or she would if there was no guardian.<sup>174</sup> Of course, if the guardian is the person accused of abusing the senior, attorneys should immediately file a motion to terminate the guardianship or substitute a new guardian so that they can proceed with the representation of the abused senior against the original guardian.

If no guardianship is in place, attorneys should take all possible steps to maintain the attorney-client privilege and requisite confidentiality in the case.<sup>175</sup> Attorneys should always meet initially with the senior alone to ensure that other family members, whether they are the alleged abusers or not, are not exerting undue influence on the senior at the initial meeting or substituting their goals and desires for those of the abuse victim.<sup>176</sup> This will also maintain the attorney-client privilege and set a tone with the client and the family members that information exchanged between the attorney and the client is confidential. It is important to explain to the client the attorney-client privilege and confidentiality and the advantages they provide in litigation, and to fully inform clients who want attorneys to communicate with their family members or advocates the consequences of doing so.<sup>177</sup>

It is also essential for attorneys handling elder financial exploitation cases to always be on the lookout for signs of diminished capacity,<sup>178</sup> and to know what to do when they believe that a client is no longer able to make decisions about his or her case. Many elderly people do not suffer from any cognitive decline, but aging is often accompanied by declining memory and other cognitive deficits that can lead to poor decision making.<sup>179</sup> Capacity, however, is not something that a person either has or does not have, but instead is a continuum of abilities.<sup>180</sup> People may be more capable of making certain decisions than others, and this variance may be due to cognitive decline,<sup>181</sup> but it could also be attributed to a static intellectual condition or simply life experi-

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174. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (AM. BAR ASS'N 1983).

175. French et al., *supra* note 112, at 19.

176. *Id.* at 8; Brisk & Flynn, *supra* note 71, at 9.

177. French et al., *supra* note 112, at 8-9.

178. *Id.* at 19.

179. Brisk, *supra* note 111, at 88.

180. French et al., *supra* note 112, at 19-20.

181. See *id.*

ence.<sup>182</sup> It may be that a person who is alleging that he or she did not have the capacity to enter into a contract may still be fully capable of making decisions regarding his or her legal case.<sup>183</sup> Nonetheless, attorneys should be aware of signs of diminished capacity and be prepared to take the appropriate steps to protect their clients when necessary.<sup>184</sup> These steps should be specific to the client's needs, be the least restrictive alternatives possible, be in the client's best interests, and not do the client harm or make worse the client's situation.<sup>185</sup> Guardianships should be pursued only as a last resort.<sup>186</sup>

#### **K. Familiarize Yourself with Collections Procedure and Bankruptcy Court**

In some financial exploitation cases, it is much easier to obtain a judgment against an abuser than it is to actually recover money for the victim. In fact, in the case of Margaret summarized in Case 3 above, even though the EFJC was able to obtain a \$14,000 judgment against the unqualified roofers who destroyed Margaret's home, she has yet to see any of the money owed to her under that judgment. When the defendants did not pay up immediately upon entry of the judgment, the EFJC started collections actions against them. The EFJC attended a collections citation hearing for one of the defendants, at which the court found that he did not have any assets or income that Margaret could access and thus was judgment proof.

The other defendant avoided the collections process by filing for Chapter 13 bankruptcy. Prior to starting the EFJC, I had never done any bankruptcy work, and many of the EFJC's students have never taken a bankruptcy class. However, the EFJC students assigned to Margaret's case taught themselves bankruptcy procedure, with the informal assistance of the outstanding bankruptcy experts at the University of Illinois College of Law, and the students, in turn, taught it to me. The EFJC has fought hard for Margaret in bankruptcy court by filing both objections to the defend-

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182. *See id.* at 18.

183. *Id.* at 20.

184. *Id.* at 23.

185. *Id.*

186. *Id.* at 26.

ant's discharge plan and an adversary complaint. Our hope has been to try to keep the money owed to Margaret from being discharged for pennies on the dollar or to leverage a settlement offer from the other party. This strategy was previously successful in one other EFJC case where the defendant filed for Chapter 7 bankruptcy upon receiving the Clinic's complaint.

While there are attorneys who specialize in collections and bankruptcy, and attorneys litigating financial exploitation cases may want to refer clients out to those people, it is nonetheless important for attorneys litigating abuse cases to understand the basics of collections and bankruptcy so that they can properly advise clients about the outcomes they can realistically expect if they pursue their cases, obtain any information important to potential collections and bankruptcy proceedings in the course of litigation, and prepare clients for what might be coming after a judgment is obtained.

## VII. Conclusion

Elder financial exploitation is a growing problem, but as an area of focus for legal practice, it is almost wholly unrecognized. This means that opportunities abound for attorneys to establish expertise and a reputation in this subset of elder law litigation. As described above, attorneys venturing into this new frontier may encounter some pitfalls, and there are a number of skills and competencies that attorneys should learn to best serve their clients. However, with the recent increase in laws establishing a civil cause of action for financial exploitation,<sup>187</sup> and with those laws in many instances providing for multiple damages, attorney's fees, and other potential damages,<sup>188</sup> it is becoming increasingly possible for private attorneys to build a sustainable and profitable practice focused at least in part on elder financial exploitation. Although the EFJC at the University of Illinois College of Law has made a difference for seniors in Illinois, there are many, many more victims of financial abuse across the country who have no access to civil representation. Hopefully, by providing attorneys some exposure to elder financial exploitation, sharing the experiences of the EFJC, and offering the tips and insights above, this Article will encour-

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187. See Dessin, *supra* note 119, at 425; see also Sirrs, *supra* note 117.

188. Dessin, *supra* note 119, at 388, 391, 415.

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age new and experienced attorneys to consider engaging in this exciting and burgeoning practice area. The financial future of millions of seniors may depend on more attorneys taking up this mantle.