



PUTTING VICTIMS IN THE
DRIVER'S SEAT –
CIVIL LEGAL AID'S ROLE
COMBATTING ELDER ABUSE

INDIANA LEGAL SERVICES, INC.

The LAVA Project

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Disclosure

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Types of Elder Abuse

- Physical
- Sexual
- Psychological or emotional
- Neglect
- Financial Exploitation

What is Financial Exploitation?

Financial exploitation means using a person's money or property without permission, in a fraudulent manner, or in a manner which is not in the best interest of the individual.

Financial exploitation can take away or limit an older person's resources, choices, and options.

Who is considered an elder?

- For purposes of civil legal remedies, look to state law to see who is defined as an elder. In Indiana, an elder is defined as someone who is at least 60 years of age. Some states have a threshold age of 65.
- State laws that protect elders against financial exploitation define who the law protects and vary from state to state.
- In addition to age, consider whether your potential client is a vulnerable adult. Each state defines vulnerable adult differently.

Elder Abuse is under-reported

- Approximately 1 in 10 people over the age of 60 have experienced some form of elder abuse.
- It is estimated that only 1 in 14 cases of abuse are reported to authorities.
- Victims do not report due to fear or shame, fear of loss of independence, or a lack of understanding of how to report.

Source: National Council on Aging

- Victims have a multitude of vulnerability factors which make reporting difficult.
- Victims may not see themselves as a victim of a crime, especially when the crime is perpetrated by a loved one or family member.

Impact of senior financial exploitation

- Victims of financial exploitation who become destitute as a result of the exploitation experience a mortality rate three times higher than those seniors who are not victims.
- Victims of elder abuse have additional health care problems, including, but not limited to, depression, anxiety, chronic pain, high blood pressure, and heart problems.

Source: US Department of Health and Human Services

- The crime of financial exploitation is often magnified when the senior attempts to get help and is unable to obtain it.

The Blurred Line Between Criminal and Civil Offenses

- Civil and criminal law may overlap or coincide.
 - Pursuing one action does not preclude the other.
- On the civil side, we are blessed with a lower burden of proof.
 - Beyond a reasonable doubt v. preponderance of the evidence.
 - If a prosecutor does not find cause to file charges, it does not mean there is no abuse, and it does not preclude filing a civil action.
- An agent under a power of attorney does not have immunity.
 - A POA is often used as the “weapon” in a crime.
- A guardian does not have immunity.

Why Civil-Legal Remedies?

- Civil legal representation can stop crime.
- Civil legal representation can reverse the negative effects of crime.
- Civil legal representation can ease the negative effects of crime.
- Civil legal representation can prevent crime.
- Civil legal representation empowers victims.

But first, we need a client.

Let's Talk About Capacity

With the over-80 population rapidly increasing and the aging baby boomers reaching their 60's and 70's, more attorneys will face a growing challenge: older clients with problems in decision-making capacity. The lessons in working with older adults transfer to working with vulnerable adults.

LAVA clients must have capacity. The capacity may be limited.

No capacity ----- Limited Capacity ----- Full Capacity

The challenge is that capacity can be, and is often, fluid.

Capacity – Not Always a Clear Line

- A dementia and/or Alzheimer's diagnosis does not necessarily render an individual incapable of making their own decisions.

The disease is progressive.

The disease is not the same for everyone.

- There are many conditions which can cause symptoms relating to lack of capacity. Many conditions are often reversible. Some examples include:

Adverse drug event (seniors are at increased risk)

Depression

Vitamin B12 deficiency

Urinary tract infection

Trauma

Dehydration/renal failure

Low oxygen

Infection

Capacity – A More Detailed Analysis

One Example:

Individual is described as having dementia, deaf and blind by her children.

Deafness and blindness does not mean an individual is incapacitated. However, in this particular example, the individual's hearing aids and glasses had been "misplaced."

Add denying access to assistive devices to the list of conditions that can mimic incapacity.

The individual's medical record showed depression, possible negative drug interactions, and two vitamin deficiencies that could have led to symptoms that looked like dementia.

Observe the Following Principles:

- One-on-One consultation.
- Focus on the client's decisional abilities.
- Do not be misled by cooperativeness, affability or social skills of client.
- Do not be misled by cooperativeness, affability or social skills of persons close to client.
- Pay attention to changes in the client over time.
- Consider whether mitigating factors may explain recent changes.
- Avoid ageist stereotypes.
- Avoid stereotypes about disabilities.

Diminished Capacity

Look to your state's ethic's rules for guidance on your relationship with your client.

Indiana Rules of Professional Conduct, Rule 1.14(a)

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.

The representation of client's with diminished capacity – challenges

- Documentation of lack of capacity.
 - Court declaration. (guardianship, conservatorship)
 - Physician diagnosis/opinion.
- Representation may take more time and effort.
 - Meetings in person.
 - Travel to client's home.
 - Fluidity of capacity.
- Divisive family and friends.
- Client challenges in assisting in the case.
- Ethics.

Our elder and vulnerable adult population deserve equal access to justice. Civil legal representation should not be denied because representation comes with challenges. The denial of representation furthers the abuse.

Empowerment – the Client is the Driver

- In a civil legal proceeding, the attorney works for the client and the client directs the case.
- The civil legal service attorney's job is to advocate for the client as the client desires.
- Empower the client – who is also a crime victim – by advising them of their rights and their civil legal options, then ***listen*** to what the client wants.

Empowerment – Crime Victims often have Difficult Legal Problems that can't be Solved Through the Criminal Justice System

In a civil lawsuit, a client gets to:

- Hold perpetrator accountable.
- Tell their story.
- Publicly confront the perpetrator.
- Put the community on notice about deceptive practices.
- Strip the perpetrator of power or secrecy.
- Seek compensation for damages.
- Seek return of money and property.
- Seek additional damages as allowed by state law.

Empowerment – The Client may take you on a Short Drive or a Long Journey

- Legal Advice
- Document Preparation, such as a Revocation of a Power of Attorney.
- Negotiation
- Demands
- Litigation
- Assistance navigating the criminal justice system gaining restitution.
- Assistance to victims of violent crime to file an application for victim compensation.

Case Examples – Taking property that is not yours is theft, even if it belongs to your mom

- Property Theft/Conversion (Real and Personal)
 - Complaint for Replevin
 - Ask a Judge to order the defendant to return property.
 - Complaint for Declaratory Relief
 - Ask a Judge to void a fraudulently obtained deed or other documents.
 - Complaint for Damages
 - Ask a Judge to award compensatory damages.
 - Corrective Affidavit of Heirship
 - Sometimes, it's a simple fix.
 - Restoration of Public Benefits

Case Examples – Crimes by Fiduciaries

- Power of Attorney
 - Revocation of Power of Attorney; Prepare new Power of Attorney
 - Education on duties and responsibilities of Agent under POA.
 - Education on rights as the principal.
 - Request Accounting.
 - Complaint to Compel Accounting; recover assets.
- Guardianship
 - Termination or Modification of Guardianship.
 - Request Accounting and recover assets.
 - Substitute or remove guardian.

Case Examples – Fraud, Scams, and Identity Theft

- Home Improvement Scams, Car Sale Scams, Home Security Scams
 - Complaint for damages
 - Violations of state laws specific to contractor or consumer fraud
 - Seek special damages as allowed by state law
- General Scams
 - Stop the damage
 - Education and information – empowerment
 - Bankruptcy
- Identity Theft
 - Work with businesses where fraud took place to reverse damages
 - Defense in collection (student loan fraud, co-signing)
 - Education, precautions, and credit repair

Case Examples – Housing

- Eviction of unwanted “guest”
 - Protective Orders
 - Is the guest a tenant
 - Has client created conditions where law implies a landlord/tenant relationship
 - Demand letter; Complaint for possession
- Eviction Defense
- Preservation of safe home environment
 - Protective Orders

Case Examples – Domestic Violence

- Dating or formerly dating relationship
 - Protective Order
 - Civil Lawsuit
- Spousal Abuse
 - Divorce
 - Protective Order
- Violence by Children or other family members
 - Evict abuser
 - Protective Order

Power Laws to use in a multitude of ways – Does your state have them?

- Indiana Senior Consumer Protection Act – check your state laws!
- Fraud and Misrepresentation
- Civil Trespass
- Indiana’s Relief for Crime Victims Statute
- Conversion
- Civil Penalties under various laws, such as the Home Improvement Contract Act

Example of a Power Play

- **COUNT IV – INDIANA SENIOR CONSUMER PROTECTION ACT, I.C. 24-4.6-6 et. seq.**
- Plaintiff incorporates by reference, as though fully stated herein, the allegations contained in Paragraphs 1 through 17, and assert this count in the alternative.
- Plaintiff is a “senior consumer” as defined by the Indiana Senior Consumer Protection Act, IC 24-4.6-6-6, hereinafter, “ISCPA”.
- Defendant is a “person in a position of trust and confidence” as defined by the ISCPA.
- Defendant violated the ISCPA by financially exploiting Plaintiff using fraud, deception, and intimidation to obtain control over Plaintiff’s property.
- Defendant specifically committed fraud, deception, and intimidation against Plaintiff by presenting Plaintiff with a deed of conveyance when was under the influence of powerful medication and presenting him with the false dichotomy of signing the deed or being transferred to a nursing home. Further, Defendant committed fraud, deception and intimidation against Plaintiff by taking his personal property and money from his bank account.
- WHEREFORE, Plaintiff respectfully requests judgment in his favor and against the Defendant, for the conveyance of the property to be set aside, for the return of all personal property or the reasonable market value for property which the Defendant may have disposed of, for attorney fees, for treble damages, \$10,000.00 as a civil penalty, pre- and post-judgment interest, costs, and for all other just and appropriate relief.

Example of a Power Play

- **COUNT V – CIVIL ACTION BY CRIME VICTIM**

- Plaintiff incorporates by reference, as though fully stated herein, the allegations contained in Paragraphs 1 through 17, and assert this count in the alternative.
- Under Indiana’s Relief for Crime Victims Statute, I.C. 34-24-3 et. seq., the taking of Plaintiff’s real and personal property allows Plaintiff a right to claim treble damages, attorney fees, the costs of the action, travel costs, and compensation for time spent in the proceeding.
- WHEREFORE, Plaintiff respectfully requests judgment in his favor and against the Defendant, for the conveyance of the property to be set aside, for the return of all personal property or the reasonable market value for property which the Defendant may have disposed of, for an amount sufficient to compensate him for his injuries and losses, for attorney fees, for treble damages, pre- and post-judgment interest, costs, travel costs, and compensation for time spent in the proceeding and for all other just and appropriate relief.

Public Education

- Who
 - Victim Advocate Groups
 - Groups providing services to seniors
 - Social and volunteer groups consisting of seniors
- What
 - Avoiding scams
 - Authority and limitations of Powers of Attorney
 - Rights of adult under guardianship
 - Signs of financial abuse (for potential victims, family members, and caregivers)

Partner and Collaborate

- Adult Protective Services
- Medical/Legal Partnerships
- Centers on Aging

Provide referrals between groups

Coordinate services between expertise groups

Amplify community outreach

- IN-CASE

Together, we can strengthen our common systems and our resources to make vulnerable adults safe and empowered members of our society.

Questions and Discussion