FINANCIAL ABUSE OF ELDERS AND OTHER AT-RISK ADULTS

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I. FINANCIAL ABUSE AND EXPLOITATION OF ELDERS AND OTHER AT-RISK ADULTS

A. The scope of the societal plague

1. In June 2011, the MetLife Mature Market Institute, in collaboration with the **National Committee for the Prevention of Elder Abuse ("NCPEA")** and the Center for Gerontology at Virginia Polytechnic Institute and State University, released *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation and Predation Against America's Elders* (hereafter referred to as the "2011 MetLife Study") (available at https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf). The 2011 MetLife Study analyzed data collected during the period from April through June 2010. It was designed to update a previous study released by MetLife in 2009, *Broken Trust: Elders, Family and Finances* (hereinafter referred to as the "2009 MetLife Study"), which analyzed data collected from April through June 2008 (available at https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf). The key findings of the 2011 MetLife Study include the following.

a. The ***annual*** financial loss by victims of elder financial abuse is estimated to be at least **$2.9 billion**, a 12% increase from the $2.6 billion estimated in 2008.

b. **Women** were nearly twice as likely as men to be victims of elder financial abuse. Most victims were between the ages of 80 and 89, **lived alone**, and required some level of help with either health care, other activities of daily living, or home maintenance.

c. The goal of the perpetrators was generally achieved through **deceit**, threats and emotional manipulation of the elder. "In addition, physical and sexual violence frequently occurred within the vortex of elemental greed and disregard for the victim that surrounded financial abuse." 2011 MetLife Study at 3.

d. Elder financial abuse can be classified into three types of crimes.

(1) Crimes of occasion or opportunity are "incidents of financial abuse or exploitation that occur because the victim is merely in the way of what the perpetrator wants." *Id*. at 4.

(2) Crimes of desperation are those "in which family members or friends become so desperate for money that they will do whatever it takes to get it." *Id*.

(3) Crimes of predation or occupation occur "when trust is engendered for the specific intention of financial abuse later. A relationship is built, either through a bond of trust created through developing a relationship (romantic or otherwise) or as a trusted professional advisor, and then used to financially exploit the victim." *Id*.

e. The 2011 MetLife Study concludes that "despite growing public awareness from a parade of high-profile financial abuse victims, it remains under-reported, under-recognized and under-prosecuted." *Id*. at 23. Elder financial abuse continues to be the **"Crime of the 21st Century,"** one that is often at the heart of other forms of elder mistreatment." *Id*. at 5.

f. Although elder financial abuse sometimes occurs in isolation, "the interrelationship between financial, physical, sexual and emotional victimizations of elders is undeniable." *Id*. at 18. The "dehumanization of victims that takes place in the process of financial abuse . . . creates **an avenue to further victimization**." *Id*. at 17.

(1) Elders who have experienced abuse, even modest abuse, have a **300% higher risk of death** when compared to those who have not been abused. *See* Dong X. *et al.* (2009), *Elder self-neglect and abuse and mortality risk in a community-dwelling population*, Journal of the American Medical Association, 302 (5), 517-526.

(2) A recent study commissioned by the **United States Government Accountability Office ("GAO")** estimated that 14.1% of non-institutionalized older adults had experienced physical, psychological or sexual abuse, neglect or financial exploitation in the year preceding the issuance of the report. *See Stronger Federal Leadership Could Enhance National Response to Elder Abuse* (GAO-11-208, March 2011) (available at http://www.gao.gov/assets/320/316224.pdf).

(3) A recent study co-authored by researchers at Georgia State University and the Georgia Department of Human Services, Division of Aging Services, included the following statistic: "Elder abuse, in all its forms, **affects between two and five million American adults** over the age of 65." *See* S. Strasser *et al., A Survey of Georgia Adult Protective Service Staff: Implications for Older Adult Injury Prevention and Policy*, Western Journal of Emergency Medicine, Vol. XII, No. 3 (July 2011) (available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3117614/pdf/wjem12_3p0357.pdf).

(4) The *Washington Post* estimates that **one in six adults** over the age of 65 has been the victim of a financial crime. *See* Singletary, M., *Financial Crimes Against Seniors a Growing Problem*, The Washington Post (September 15, 2012) (available at http://www.washingtonpost.com/business/financial-crimes-against-seniors-a-growing-problem/2012/09/15/b2349d52-fabe-11e1-8252-5f89566a35ac_story.html).

2. In 2015, TrueLink Financial, a for-profit company that purports to offer fraud protection systems and products for seniors, published the *TrueLink Report on Elder Financial Abuse 2015* (available at https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf) (the "TrueLink Report"). The TrueLink Report estimates that **36.9% of seniors are affected** by financial abuse in a five-year period, amounting to **$36.48 billion annually**.

3. According to the TrueLink Report, the **non-financial effects** of elder financial abuse include 6.7% of victims **postponing necessary medical care**, and 4.2**% reducing nutritional intake** (*e.g.* skipping meals) because of budgetary shortfalls. Many victims also suffer depression, anxiety, and loss of independence. The **caregivers** of elder victims also experience loss: 27.9% report **depression**, stress or anxiety from dealing with the elder's financial loss; 18.2% report increased **conflict** with family and friends; 13.9% report a sense of **hopelessness**; 7.3% experience a loss of career advancement or work hours; and 9.1% experience **damage to their marriages** or significant relationships. *Id*. at 18-19.

B. The definition of "elder"

1. There is no generally accepted age at which a person becomes an "elder."

a. Membership in **AARP (formerly known as the American Association of Retired Persons)** is open to persons **50 years of age and older**. *See* www.aarp.org. In a 2010 report on adult guardianships, the GAO also defined "seniors" as adults aged 50 and older. *See Guardianships: Cases of Financial Exploitation, Neglect and Abuse of Seniors* (GAO-10-1046, September 2010) (available at http://www.gao.gov/new.items/d101046.pdf).

b. The **Centers for Disease Control and Prevention ("CDC")** defines elders as persons **60 years of age or older**. *See* www.cdc.gov/violenceprevention/elderabuse/definitions.html. Numerous state statutes also utilize this age in defining an elder. *See, e.g.*, FLA. STAT. ANN. § 415.102 (27). The Elder Justice Act (discussed in Section IV.A, below) defines an elder as an individual age 60 or older. 42 U.S.C. § 1397j(5).

c. The **Office for Older Americans** of the Consumer Financial Protection Bureau is "dedicated to the financial health of Americans **age 62 or older**." *See* www.consumerfinance.gov.

d. Numerous state statutes define elders as persons **65 years of age or older**. *See, e.g.*, GA. CODE ANN. §§ 30-5-3(7.1) and 16-5-100(4).

2. The 2010 U.S. Census recorded the greatest number and proportion of people age 65 and older in all of decennial census history: 40.3 million people, **13% of the total population**. *See* Carrie A. Warner, *The Older Population: 2010*, U.S. Department of Commerce, U.S. Census Bureau, Washington, D.C. (Publication C2010BR-09) (available at http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf). It is projected that by 2050, people age 65 and older will comprise 20% of the total U.S. population. *See* data and statistics site maintained by the **National Center on Elder Abuse ("NCEA")** of the Administration on Aging of the U.S. Department of Health and Human Services. http://www.ncea.aoa.gov.

3. In addition to our elders (however defined), approximately 56.7 million of the 303.9 million people in the U.S. civilian non-institutionalized population, representing 18.7% of this group, **reported a disability** as part of the 2010 Census. *See* Matthew W. Brault, *Americans with Disabilities: 2010*, *Current Population Reports*, P70-131, U.S. Census Bureau, Washington, D.C., Issued July 2012 (available at http://www.census.gov/prod/2012pubs/p70-131.pdf). Another 4.1 million institutionalized people (*i.e.* living in correctional institutions or nursing homes) have disabilities, but were not included in the Brault report. Some type of disability was reported by 35% of men and 38% of women age 65 or older in 2011.

a. These **"at-risk" adults with disabilities** are also often more susceptible to financial exploitation as a consequence of their disabling conditions. Nationally, 30% of adults with disabilities who utilized personal assistance services for support with their activities of daily living report one or more types of elder abuse (*i.e.* physical, verbal or financial) by their primary care provider. *See* Oktay, J. and Tompkins, C., *Personal Assistance Providers' Mistreatment of Disabled Adults*, Health & Social Work, 29 (3), 177-188 (2004).

4. For ease of reference in the balance of this presentation, the victims of financial abuse and exploitation discussed shall generally be referred to as "elders," but other at-risk adults with disabilities of all ages shall be considered part of this vulnerable population for purposes of the discussion. Since women are nearly twice as likely as men to be the victims of elder financial abuse (as discussed in Section I.A.1.b, above), the gender of these elders shall be assumed to be female.

C. The definition of financial abuse and exploitation

1. The **NCEA** defines elder financial abuse or exploitation as the "illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder." *See* http://ncea.aoa.gov/faq/index.aspx. Additional definitions of these terms on the NCEA site include "theft, fraud, misuse, or neglect of authority or use of undue influence as a lever to gain control over an older person's money or property."

2. The federal **Older Americans Act** defines exploitation as 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." 42 U.S.C. § 3001 *et seq*. (2006).

3. The **CDC** defines financial abuse or exploitation as "the unauthorized or improper use of the resources of an elder for monetary or personal benefit, profit, or gain. Examples include forgery; misuse or theft of money or possessions; use of coercion or deception to surrender finances or property; or improper use of guardianship or power of attorney." *See* http://www.cdc.gov/violenceprevention/elderabuse/definitions.html. The CDC laments that "a set of universally accepted definitions does not exist," because many definitions are crafted "to reflect the unique statutes or conditions present in specific locations (*e.g*. states, counties, or cities)" or "specifically for research purposes." *Id*.

4. A recent report by the **GAO** defined elder financial exploitation as "the illegal or improper use of an older adult's funds, property, or assets." *See* GAO, *Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation* (GAO-13-110) (Washington, D.C., November 15, 2012) ("2012 GAO Report"), at 1 (available at www.gao.gov/assets/660/650074.pdf).

5. **State definitions** of elder financial abuse or exploitation vary widely.

a. Georgia defines exploitation as "the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for another's profit or advantage." *See* GA. CODE ANN. §§ 30-5-3(9) and 16-5-100(6).

b. Under Florida law, exploitation may include, but is not limited to: (1) breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property; (2) unauthorized taking of personal assets; (3) misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or (4) intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance. *See* FLA. STAT. ANN. § 415.101 (8).

6. The 2015 TrueLink Report defines elder financial abuse as "any time someone took financial advantage of an elder adult in a way that would **not have been possible when the senior was younger**." *Id*. at 6.

a. Of the estimated $36.48 billion lost to elder financial abuse each year, the TrueLink Report concludes that **$16.99 billion is attributed to financial exploitation**, defined as "someone engaging in abusive action openly, expecting to avoid law enforcement actions on technicalities . . . behavior that relies on misrepresentations that are just within the bounds of the law and takes advantage of a

person's vulnerability and confusion." *Id*. at 15. Such exploitation is frequently connected with products sold on TV, by phone or by mail solicitation; services that are misrepresented in marketing materials with small-font disclaimers; and deliberate set-ups based on lists of prospective customers that include primarily persons with documented memory impairments. This type of financial abuse uses pressure tactics or misleading language to lead seniors to **make financial mistakes "voluntarily."**

b. **$12.76 billion** of the annual $36.48 billion loss is attributable to **criminal fraud**, defined as "any money-taking activity perpetrated by a criminal who is concealing his or her identity to avoid getting caught." *Id*. at 11. This category was divided into two sub-categories: **scams that cost seniors $9.85 billion annually, and identity theft that results in annual losses to seniors of $2.91 billion.** Included in this category are "sweetheart," "grandparent" and "Nigerian Prince" scams; fake lotteries and government grants; fraudulent applications for credit cards, bank accounts or loans; fraudulent home equity loans recorded on real estate; and the unauthorized use of misappropriated credit card or checking account numbers.

c. The final sub-category, **abuse by those in a position of trust,** accounts for losses of **$6.67 billion annually**, and is often combined with physical abuse or neglect. The amount lost to a trusted party is on average larger than losses incurred through the other types of financial abuse. Included in this category are frequent "borrowing" of funds from an elder who does not recall the "loans," and re-writing the elder's Will, Trust or Power of Attorney in favor of the perpetrator.

7. The 2009 MetLife Study reported that **financial abuse accounts for 30% to 50% of all forms of elder abuse**, and is regarded as the third most commonly substantiated type of elder abuse (after neglect and emotional/psychological abuse). *Id*. at 8, citing Choi, N.G., and Mayer, J. (2000), *Elder Abuse, Neglect and Exploitation: Risk Factors and Prevention Strategies*, Journal of Gerontological Social Work, 33 (2), 5-25.

D. <u>Perpetrators of elder financial abuse</u>

1. The 2011 MetLife Study reported that 51% of the cases considered involved elder financial abuse by **strangers**, including home repair scams, telemarketing scams, and strangers committing robbery and burglary. *Id*. at 8. The 2012 GAO Report includes mail or internet scams and identity theft among the financial abuse perpetrated by strangers. *Id*. at 5. The 2011 MetLife Study theorizes that stranger elder abuse is more likely to be reported and publicized than abuse by known perpetrators. *Id*. at 7.

2. **Family, friends, neighbors, in-home caregivers** and other known persons (*e.g*. Agents acting under Powers of Attorney) accounted for 34% of the perpetrators included in the 2011 MetLife Study. *Id*. at 8. The 2012 GAO Report also includes in this category legal guardians appointed by state courts and Representative Payees under the auspices of the Social Security Administration. *Id*. at 4.

a. There are numerous factors that materially **increase the risk** of a person known to the elder engaging in elder financial abuse. Those include (i) use of drugs or alcohol, (ii) high stress levels and low coping resources, (iii) lack of social support, including respite care options, (iv) high emotional or financial dependence on the elder, (v) lack of elder care training, and (vi) depression. *See* http://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf.

3. **Business and financial service providers** accounted for 12% of the perpetrators reported in the 2011 MetLife Study, including insurance advisors, bankers, attorneys, building contractors, and nursing home administrators. *Id*. at 8. The 2012 GAO Report also includes securities brokers and dealers, financial advisors, and "others in the financial services industry" in this category. *Id*. at 5. These perpetrators were involved with predatory lending, identity theft, embezzlement, or the sale of fraudulent investments or other financial products or services which were unsuitable for an elder's circumstances (*e.g*. long-term annuities). They also often held themselves out as "senior specialists" having particular expertise in advising older adults. "Free lunch" investment seminars are also frequently used by unscrupulous financial "professionals" to sell inappropriate investment products to elders. *See* SEC, FINRA and NASAA, "*Protecting Senior Investors: Report on Examinations of Securities Firms Providing "Free Lunch" Sales Seminars*" (2007) (available at www.sec.gov/spotlight/seniors/freelunchreport.pdf .

4. The 2011 MetLife Study reported a fourth category of elder financial abuse: **Medicare and Medicaid fraud** which, while only 4% of the total cases considered, amounted to 58% of the total losses sustained. *Id*. at 8.

5. The 2011 MetLife Study reported that **60%** of the perpetrators of elder financial abuse were **male**. *Id*. at 10.

E. Commonly cited reasons for elder financial abuse

1. The incidence of **Alzheimer's disease, and other dementias** that undermine judgment, increases with age. *See* 2012 GAO Report, at 5, citing Hebert *et al., Alzheimer's Disease in the U.S. Population*, Archives of Neurology, 60 (August 2003): 1119-1122.

a. Approximately 5.3 million Americans have some kind of dementia, including 200,000 under the age of 65. Close to one-half of all people over age 85 have Alzheimer's disease or another kind of dementia. By 2050, up to 16 million people will have the disease. Nearly two-thirds of those with Alzheimer's disease are women. *See* Alzheimer's Association, http://www.alz.org/facts/overview.asp. Research indicates that people with dementia are at greater risk of elder abuse than those without the condition. *See* C. Cooney, R. Howard and B. Lewlor, (2006), *Abuse of Vulnerable People with Dementia by Their Carers: Can We Identify Those Most at Risk?* International Journal of Geriatric Psychiatry, 21(6), 564-571.

2. **Diminished financial capacity** is more prevalent as one ages (*i.e.* the ability to manage money and financial assets to meet one's needs effectively).

See 2012 GAO Report at 5, citing Agarwal *et al., The Age of Reason: Financial Decisions Over the Life Cycle with Implications for Regulation*, Brookings Papers on Economic Activity 2 (Washington, D.C., 2009), 51-117.

3. Elders have become largely **socially isolated**. *See* 2011 MetLife Study, at 23, citing J. Bendix (2009, March), *Exploiting the Elderly*, RN, 42-46. Extended, multi-generational families are no longer common in our mobile society. Adult children no longer feel responsible for caring for elderly parents. Approximately 28% of non-institutionalized elders live alone. Thus, there are fewer persons in an elder's life who can realistically detect suspected financial abuse, and perpetrators can more readily create "an environment of manipulation, intimidation and fear" for the elder. *See Protecting Mom & Dad's Money*, Consumer Reports, January 2013 (available at www.consumerreports.org/cro/magazine/2013/01/protecting-mom-dad-s-money.htm).

4. Family members who become **dependent on an elder for financial support** increasingly live with their elders permanently. *See* 2011 MetLife Study at 22, citing J. Garre-Olmo *et al.* (2009), *Prevalence and Risk Factors of Suspected Elder Abuse Subtypes in People Aged 75 and Older*, Journal of the American Geriatrics Society, 57, 815-822. Once entrenched in the lives of elders, these people have myriad opportunities to engage in financial abuse and exploitation.

5. A recent study funded by the National Institutes of Health National Institute on Aging suggests that the area of the brain known as the **"anterior insula" changes with age** and adversely impacts "gut feelings" about the trustworthiness of potential predators. "The older adults do not have as strong an anterior insula early-warning signal; their brains are not saying "be wary" as the brains of younger adults are." *See* http://www.nih.gov/researchmatters/december2012/12172012trust.htm.

6. Elders with **clinical depression** are statistically more likely to be victims of financial abuse or exploitation. *See* 2011 MetLife Study at 16, citing S. R. Beach *et al.* (2010), *Financial Exploitation and Psychological Mistreatment Among Older Adults*, The Gerontologist, 50 (6), 744-757.

7. **Financial illiteracy** is pervasive among Americans in general, and is especially marked among elders. *See* 2011 MetLife Study, at 16, citing L.A. Catalano *et al.* (2010), *Financial Abuse of Elderly Investors: Protecting the Vulnerable*, Journal of Securities Law, Regulation, and Compliance, 3(1), 5-23.

II. DETECTION AND REPORTING OF ELDER FINANCIAL ABUSE

A. Indicators of elder financial abuse

1. "Indicators" of elder financial abuse are signs or other clues that a person has been victimized by a perpetrator. Any one of the below indicators may be attributable to other causes; however, **patterns or clusters of indicators** may indicate an elder financial abuse problem, according to the NCPEA. *See*

http://preventelderabuse.org/elderabuse/fin_abuse.html. One or more of the following common indicators occur frequently in documented cases of elder financial abuse.

a. Unpaid bills, eviction notices, or notices to discontinue utilities or other household services.

b. Withdrawals from bank accounts or transfers between accounts that the elder cannot explain.

c. Bank statements and canceled checks are no longer delivered to the elder's home.

d. New "best friends" in the elder's life.

e. Newly executed legal documents (*e.g.* a Power of Attorney) that the elder did not comprehend when signed.

f. Unusual activity in the elder's bank accounts (*e.g.* large unexplained withdrawals, frequent transfers between accounts, or numerous ATM withdrawals).

g. The care the elder receives is not commensurate with the size of her resources.

h. Third parties (*e.g.* caregivers or relatives) express excessive interest in the amount of money being spent on the elder.

i. The elder's belongings or other assets are missing.

j. Suspicious signatures on the elder's checks or other documents.

k. The elder does not possess any documentation about her financial affairs or arrangements.

l. The elder or her caregiver has implausible explanations about the state of her financial affairs.

m. The elder is unaware of, or does not understand, the financial arrangements that have been made for her.

n. Excessively large "reimbursements" or "gifts" to family members or friends.

o. New authorized signers on the elder's accounts.

p. Changes in banks or attorneys used by the elder for many years.

q. Large, unexplained charges to the elder's credit cards.

r. Missing or unaccounted for government benefits (*e.g*. monthly checks for Social Security, veterans benefits, SSI or SSDI, or Supplemental Nutrition Assistance (a/k/a "food stamps")).

2. The 2009 MetLife Study suggests the following additional indicators of elder financial abuse. *Id*. at 22-23.

a. The elder manifests an unusual degree of fear or submissiveness to a caregiver.

b. Isolation of the elder from family, friends, community, and other stable relationships (*e.g*. the elder is never alone or allowed to discuss finances without the caregiver present).

c. The elder appears intimidated and threatened (*e.g*. never looks at people directly).

d. The elder exhibits withdrawn behavior or a disheveled appearance.

e. The elder expresses anxiety about her ability to meet her financial obligations.

f. Significant changes in the elder's personal spending patterns (*e.g*. she purchases a new car even though she has not driven in many months or years).

g. Third parties develop a new close bond with the elder and exert influence over the elder's decisions.

h. Third parties withhold information from the elder or make false promises.

i. Third parties suddenly acquire expensive possessions.

j. Third parties exhibit defensiveness or hostility during appointments or phone calls with the elder.

k. Third parties are reluctant to leave the side of the elder during appointments.

l. Unexplained decreases in the number of the elder's bank or investment accounts.

m. An increase in the number of the elder's credit card accounts.

B. Reporting of elder financial abuse

1. The NCEA of the Administration on Aging, in summarizing a series of research studies on the incidence and prevalence of elder abuse and neglect (of all types), concluded that while data from state **Adult Protective Services ("APS")** agencies shows an increase in the reporting of elder abuse, an overwhelming number of cases go undetected, unreported, and untreated each year.

a. One such study estimated that only **one of every 14 cases** of elder abuse ever comes to the attention of the authorities. *See* http://www.ncea.aoa.gov/Library/Data/index.aspx, citing Bonnie, R. and Wallace, R. (Eds.), *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America* (Washington, D.C., The National Academies Press 2003) (available at http://www.nap.edu/openbook.php?isbn=0309084342).

b. Another study found that **for every case of elder abuse referred to social service, law enforcement, or legal authorities 24 cases were not so referred**. *See* Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University and New York City Department for the Aging (2011), *Under the Radar: New York State Elder Abuse Prevalence Study* (available at http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf).

2. The most cited reason for the under-reporting of elder financial abuse is that the **victims themselves refuse to report the abuse** to relevant authorities. The 2009 MetLife Study suggests some of the following reasons as the basis for an elder's refusal to report her victimization. *Id*. at 21.

a. The elder does not want her abusing family member to go to jail or to face public embarrassment.

b. The elder does not want government interference in her personal life.

c. The elder feels partially responsible for what has happened.

d. The elder believes that the abuse is simply part of doing business or taking risks.

e. The elder feels that admitting vulnerability will result in her being placed in a nursing home or other facility.

f. The elder fears that the abuser will harm her even more if it is reported.

g. The elder believes that no one will help remedy the abuse, or that any help will be "too little, too late."

h. The elder fears that prosecuting the abuse will be prohibitively expensive.

i. The elder may not recall the abuse because of dementia or other impairments.

3. Another factor underlying the significant under-reporting of elder financial abuse includes the **reluctance of third parties to get involved** for some of the following reasons. *Id*. at 21.

a. They do not know if they are "mandatory reporters" under their state laws. (*See* Section II.B.4, below.)

b. They do not want to compromise professional relationships.

c. They are unclear on the issue of "who is the client?" (*i.e*. the elder or her family members).

d. They wish to avoid adverse publicity to themselves or their organizations.

e. They do not want to incriminate fellow professionals or employees.

f. They want to avoid involvement in a criminal investigation or lawsuit.

g. They are uneducated about business ethics and practices relating to elder financial abuse.

h. They are untrained on the distinction between "normal aging" and elder abuse.

4. "**Mandatory reporters**" of elder financial abuse can vary significantly from state to state.

a. For example, Georgia law provides that the following persons having reasonable cause to believe that a disabled adult or elder person has been the victim of abuse, other than by accidental means, or has been neglected or exploited, are mandatory reporters of such suspected abuse, neglect, or exploitation.

(1) Any person required to report child abuse.

(2) Physical therapists.

(3) Occupational therapists.

(4) Day-care personnel.

(5) Coroners.

(6) Medical examiners.

(7) Emergency medical services personnel.

(8) Certified emergency medical technicians, cardiac technicians, paramedics, or first responders.

(9) Employees of a public or private agency engaged in professional health related services to elder persons or disabled adults.

(10) Clergy members (outside of the confessional).

(11) Any employee of a financial institution or investment company (which includes brokers and financial planners) having reasonable cause to believe that a disabled adult or elder person has been exploited (for assets not being held or managed in a fiduciary capacity). *See* GA. CODE ANN. § 30-5-4(a)(1).

(a) Twenty states and the District of Columbia specifically designate the **employees of financial institutions as mandatory reporters** of elder financial abuse. *See, e.g.*, FLA. STAT. ANN. § 415.1034(a)(8). Numerous other states recommend and encourage, but do not require, the employees of financial institutions to report suspected elder financial abuse. *See* Appendix for a chart on "Mandatory Reporting of Elder Abuse by Banks."

(b) A significant number of states provide that **"any person"** with "reasonable cause to believe or suspect" that an elder has been the victim of abuse, neglect or exploitation shall report same to the relevant authorities. *Id*. "Any person" theoretically includes an employee of a financial institution.

(c) There are currently **no federal requirements** that banks or other financial institutions train employees to recognize or report elder financial abuse, "even though they are well-positioned to identify and report it because they are able to observe it first hand." *See* GAO, *Elder Justice: Federal Government Has Taken Some Steps But Could Do More to Combat Elder Financial Exploitation*, Testimony of Kay E. Brown, Director of Education, Workforce and Income Security, before the Subcommittee on Commerce, Manufacturing and Trade, Committee on Energy and Commerce, House of Representatives (GAO-13-626T) (Washington, D.C., May 16, 2013) (available at www.gao.gov/assets/660/654663.pdf).

b. Attorneys are mandatory reporters under the laws of Arizona, Mississippi, and Ohio. *See* Appendix for a chart on "Mandatory Reporting of Elder Abuse by Attorneys."

(1) Montana designates attorneys as mandatory reporters "unless the attorney acquired knowledge of the facts required to be reported from a client, and the attorney-client privilege applies." *Id*.

(2) Texas takes the position that there is no such exception for a person "whose knowledge concerning possible abuse, neglect or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker and mental health professional." *Id*.

(3) A significant number of states provide that **"any person"** with "reasonable cause to believe or suspect" that an elder has been the victim of abuse, neglect or exploitation shall report same to the relevant authorities. *Id*. This type of provision would conceivably include attorneys.

c. Penalties for the failure of mandatory reporters to report suspected elder financial abuse range from no penalty at all, to monetary fines, to jail time. *See*, *e.g*. GA. CODE ANN. § 30-5-8(a)(2), which provides that the failure of a mandatory reporter to report the suspected exploitation of an elder or disabled person constitutes a misdemeanor.

d. In general, anyone who makes a report of suspected elder abuse, who testifies in any judicial proceeding arising from the report, who provides protective services, or who participates in a required investigation shall be **immune from any civil or criminal liability** on account of such report, testimony or participation, unless such person acted in bad faith, with a malicious purpose, or was a party to the abuse. *See*, *e.g*., GA. CODE ANN. § 30-5-4(c).

5. APS agencies provide a **"first-responder" mechanism** for investigating reports of elder financial abuse outside of a long-term care setting. (*See* Section II.B.6, below, for a discussion of Long-Term Care Ombudsman programs which investigate complaints in nursing homes and other long-term care settings.) **All 50 states and the District of Columbia have an APS agency** to investigate reports of elder abuse, neglect or exploitation, as required by Title XX of the Social Security Act. *See* Appendix for a compilation of all state APS websites and state statutory authority for same. However, if the elder does not consent to the investigation (*e.g*. for any of the reasons noted in Section II.B.2, above), then APS cannot pursue it further. *See*, *e.g*., GA. CODE ANN. § 30-5-5(3) (specifying that a person or her guardian must consent, or not withdraw consent, to APS investigative services).

a. The stated mission of an APS program is generally "to insure the safety and well-being of elders and adults with disabilities who are in danger of being mistreated or neglected, are unable to take care of themselves or protect themselves from harm, and have no one to assist them." *See* statement of NCEA ethical principles and best practices guidelines at http://www.ncea.aoa.gov/Stop_Abuse/Partners/APS/Guidelines.aspx. The primary guiding value of an APS program is as follows: "Every action taken by Adult Protective Services must balance the duty to protect the safety of the vulnerable adult with the adult's right to self-determination." *Id*.

b. The **general process** for generating an **APS investigation** of alleged financial abuse of an elder includes the following. *Id*.

(1) A **report is made** to APS by someone who suspects elder abuse, exploitation, or neglect. The reporter may call an abuse "hotline" or a state APS office. The NCEA maintains a database of all state APS contacts, which can be accessed by calling the Elder Care Locator service at 1-800-677-1116 during regular business hours, or by visiting http://www.ncea.aoa.gov/Stop_Abuse/Get_Help/State/index.aspx. The reporting person is **protected from both civil and criminal liability**.

(2) If the case meets all eligibility criteria (*e.g.*, age of victim, type of abuse, victim's vulnerability), APS assigns a **priority response time** to the report based on the level of victim risk; involves emergency responders, if necessary; and assigns the report to APS for investigation.

(3) APS staff contacts the elder victim within the state-regulated timeframe (keyed to the urgency of the situation) to assess any immediate risk, and to **investigate and substantiate** the alleged abuse (with the assistance of law enforcement, if necessary). Caseworkers then assess the current risk factors for the victim, including her ability to understand her risks and to give informed consent to further investigation and provision of protective services.

(4) If the **victim consents**, the APS caseworker develops a service plan, which may include both short-term emergency services (shelter, meals, transportation, home health services, medical or mental health services) and long-term services that are monitored by APS to assure that the risks to the victim are reduced or eliminated. **Substantiated criminal activity** is referred to the prosecuting attorney.

(5) If the victim has the capacity to understand her circumstances and **refuses an investigation** or protective services, the APS caseworker may refer her to other resources before closing the case. However, if APS has been able to substantiate that an elder has been abused, neglected, or exploited by another person, it is required to report this to law enforcement even if the victim does not consent to the report.

c. Notwithstanding the broad authority of APS agencies to investigate alleged elder financial abuse, **third parties may effectively deny, or interfere with, APS access** to the alleged victim. Similarly, once an elder is found to be in need of protective services, third parties may interfere with the provision of such services to the elder.

(1) The law in some states allows APS to petition for an expedited court hearing by the judge of the Probate Court (or other court with jurisdiction over alleged incapacitated adults) of the county in which the elder resides or is found, and the issuance of an order authorizing the investigation, or the provision of protective services, as the case may be, and **prohibiting interference** therewith. *See*, *e.g.*, GA. CODE ANN. § 30-5-5. A willful violation of such an order is subject to punishment for contempt of court. GA. CODE ANN. § 16-5-102(c) further provides that any person who willfully and knowingly obstructs or impedes an APS investigation, upon conviction, shall be guilty of a "misdemeanor of a high and aggravated nature."

d. APS may also elect to **initiate the filing of a guardianship** or conservatorship for an elder as a last resort to protect an elder. However, state law may preclude APS from qualifying as a conservator, in which case the court would have discretion to appoint a "public" conservator to serve in this role, either an individual or a social services agency representative.

e. While the **demand for APS services** has increased dramatically, program funding has either remained level or decreased in recent years. *See* GAO, *Stronger Federal Leadership Could Enhance National Response to Elder Abuse* (GAO-11-208, March 2011) (available at http://www.gao.gov/assets/320/316224.pdf). In Georgia, APS case referrals in 2012 were up 22% from 2011 and up 67% from 2008. *See At Risk Adult Abuse, Neglect and Exploitation in Georgia: Review and Recommendations* (May 15, 2013), Georgia Association of Chiefs of Police, Ad Hoc Committee On At Risk Adult Abuse, Neglect and Exploitation (available at http://www.gachiefs.com/pdfs/White%20Papers_Committee%20Reports/AtRiskAdultAbuseWhitePaper.pdf).

6. The federal Older Americans Act mandates the establishment of a **Long-Term Care Ombudsman ("LTCO")** program in all 50 states and the District of Columbia. 42 U.S.C. § 3058g. (The term "ombudsman" is Swedish for "citizen's representative.") The LTCO is "dedicated to enhancing the lives of long-term care residents through advocacy, education and resolution of resident complaints, including those related to abuse, neglect and exploitation." *See* NCEA site at http://www.ncea.aoa.gov/Stop_Abuse/Partners/LTC_Ombudsman/index.aspx. *See* also Appendix for a compilation of all state LTCO websites.

a. Included in the scope of **long-term care facilities** subject to LTCO oversight are the following.

(1) Skilled nursing facilities ("nursing homes").

(2) Assisted living facilities.

(3) "Board and care" homes (often referred to as "personal care homes" or "host homes").

(4) Intermediate care facilities for those with intellectual disabilities.

(5) Other community living arrangements (*e.g.* group homes).

See National Long-Term Care Ombudsman Resource Center website http://ltcombudsman.org/about/about-ombudsman.

b. The LTCO program is usually operated under the auspices of the "State Unit on Aging" or local "Areas on Aging," which are part of the "Aging Services Network" mandated by the Older Americans Act and developed by the U.S.

Department of Health and Human Services ("HHS") Administration on Aging ("AoA"). 42 U.S.C. § 3002(5). In April 2012, HHS established the Administration for Community Living, which consolidated the AoA, the Office on Disability, and the Administration on Developmental Disabilities.

c. Complaints to the LTCO may be initiated by a call to the State Unit on Aging, the Regional Area Agency on Aging, or State LTCO Office, by either the resident herself, or on behalf of the resident by a friend, family member or other third party. The NCEA maintains a database of all state LTCO contacts (state, regional and local), which can be accessed by calling the Elder Care Locator service at 1-800-677-1116 during regular business hours, or by visiting http://www.ncea.aoa.gov/Stop_Abuse/Get_Help/State/index.aspx. Residents can also initiate a complaint in person when LTCO staff make periodic site visits to the facilities in their jurisdiction.

d. Complaints of residents are **informally investigated by LTCO** personnel and resolved, if possible, by informal techniques such as mediation, conciliation, and persuasion. If the complaint is not resolved informally, or if the nature of the complaint is so serious that it requires the involvement of a regulatory agency or law enforcement (*e.g.* alleged physical or sexual abuse or licensing violations), the matter is referred to the appropriate agency for formal investigation and resolution. LTCO staff will engage in the necessary follow-up to assure that the formal investigation proceeds towards resolution of the resident's complaint.

(1) All complaints lodged with the LTCO must be kept **confidential**, unless the resident authorizes the release of her name. It is against the law for a facility to retaliate or discriminate against a resident for making a complaint to the LTCO. Any person who makes a complaint in good faith is **protected from civil and criminal liability**.

e. As with third-party interference with APS investigations and the provision of protective services (discussed in Section II.B.5.c, above), the LTCO may petition the Probate Court (or other court with jurisdiction over alleged incapacitated adults) for the issuance of an order **prohibiting interference** with same, a willful violation of which is subject to punishment for contempt of court.

f. In addition to the largely voluntary nature of many complaints lodged with the LTCO by, or on behalf of, residents of long-term care facilities, state law provides that certain persons having reasonable cause to believe that a resident or former resident has been abused or exploited while residing in a facility are **mandatory reporters** of such abuse or exploitation. *See* Section II.B.4, above, for examples of typical mandatory reporters. Such reports are directed to be filed with the state Medicaid program and an appropriate law enforcement agency or prosecuting attorney.

(1) State law typically **precludes public disclosure** of the identity of the resident, the alleged perpetrator and the reporter unless required to be revealed in court proceedings, or upon the written consent of the person whose

identity is to be revealed, or as otherwise required by law. Retaliation or discrimination against a mandatory reporter is also prohibited.

7. The Older Americans Act provides funding for state **legal services programs** designed to address the needs of elders. *See* 42 U.S.C. § 3058j(6), 42 U.S.C. § 3030d(a)(25)(2)(d), and 42 U.S.C. § 3027(a)(11). In the context of elder financial abuse, such programs can provide no-cost access to the justice system by offering advocacy, advice and legal representation to persons **60 years of age** or older, including access to an attorney. Due to limited budgetary resources, these legal services programs accept only a small percentage of the cases referred to them. The staff of these programs also routinely present community education programs addressing topics of interest to elders, including consumer fraud and financial exploitation. This type of community education often helps prevent elder financial abuse from occurring.

a. Some states also maintain a **"Senior Legal Hotline,"** which provides brief telephone assistance and advice on civil legal matters to, and on behalf of, persons **60 years of age** and older. Attorneys are available to answer legal questions during regular business hours. Additional resources are sometimes available by collaborating with APS programs if the case involves elder abuse and neglect, adult guardianship or conservatorship matters, or elder financial exploitation.

b. Increasingly, **private law firms are offering *pro bono*** legal services to the victims of elder financial abuse. Holland and Knight, which represented Mickey Rooney in a well-publicized civil lawsuit for financial abuse against his step-son, Christopher Aber, has created "The Mickey Rooney Elder Abuse Pro Bono Project." Attorneys agree to pursue elder abuse cases that otherwise would not be pursued. The initiative is reportedly being replicated in law firms across the country.

c. **Law schools** are also increasingly providing free legal services to victims of elder financial abuse. *See, e.g.* the Georgia State University Law School Investor Advocacy Clinic, which serves victims of modest means who have sustained losses of under $100,000. http://law.gsu.edu/clinics/investor-advocacy-clinic/.

III. REMEDIES FOR ELDER FINANCIAL ABUSE

A. Criminal prosecution

Although the APS statutes and programs in all 50 states and the District of Columbia recognize elder financial abuse as a reportable action (as discussed in Section II.B.5, above), not all states specifically recognize elder financial abuse or exploitation as a distinct crime. In those states, however, basic criminal laws against **theft, fraud, deception, larceny, forgery, and embezzlement** can be invoked to prosecute elder financial abuse and seek restitution for the elder. *See* Appendix for a listing of states with **criminal statutes specific to elder financial abuse**, taken from a recent American Bar Association presentation *Financial Elder Abuse – Strategies for Litigating a Case From Start to Finish – Lessons from Mickey Rooney*, ABA Young Lawyers Division, 2012 Spring Conference, Minneapolis, MN, presented by Hon. Jay M.

Quam, Vivian L. Thoreen and Robert Barton (available at http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/ylds13financialelderabuse.authcheckdam.pdf). The burden of proof for a conviction under such statutes is typically "beyond a reasonable doubt." *See, e.g.* GA. CODE ANN. § 16-5-102(a) which provides that any person who knowingly and willfully exploits a disabled or elder person shall be guilty of a felony punishable by imprisonment of up to 20 years, a fine of up to $50,000, or both.

1. Frequently, however, **prosecutors refuse to pursue** elder financial abuse actions for a variety of reasons.

a. Insufficient support of APS investigations by law enforcement personnel.

b. Limited budget resources.

c. The effect of the incapacity or death of the victim on the ability to marshal sufficient probative evidence.

d. The refusal of the victim to cooperate with the development of the case, for the myriad reasons outlined in Section II.B.2, above.

2. **Specially trained multi-disciplinary teams** of criminal justice and social service professionals are increasingly being trained and deployed to enhance state efforts to prosecute elder financial abuse. Collaboration between and among the following disciplines promises to increase the effectiveness of state efforts to convict and punish the perpetrators of elder financial abuse.

a. APS, State Units on Aging, and LTCO offices.

b. State and local law enforcement agencies.

c. Policy makers.

d. Financial and banking industries.

e. Legal professionals.

f. Social services agencies and social workers.

g. Medical and mental health care providers.

h. Public health officials.

i. Medical examiners and coroners.

j. State insurance, banking, and securities regulators.

k. District Attorneys and state Attorneys General.

l. Consumer protection agencies.

(1) An example of a **successful multi-disciplinary team** established by the Georgia Department of Human Services Division of Aging Services, Forensic Special Investigations Unit, is the "At-Risk Adult Crime Tactics" ("ACT") Specialist Program. Over 800 ACT specialists are working in Georgia, with promising results at the local, state and federal levels to combat and prosecute the abuse, neglect and exploitation ("ANE") of at-risk adults. An ANE work group comprised of representatives of local agencies (*e.g.* county and city police departments, county District Attorney's Offices), state agencies (*e.g.* the Georgia Bureau of Investigation, APS, LTCO, Medicaid, Inspector General, Georgia Association of Chiefs of Police, Georgia Criminal Justice Coordinating Council), and federal agencies (*e.g.* the FBI; the Offices of Inspector General of the Social Security Administration, HHS, FDA, VA; and the United States Attorney's Office) meets bi-annually to identify and address obstacles to preventing and prosecuting crimes against at-risk adults. **Recommended solutions** include the following.

(a) Increased public education and awareness of ANE of at-risk adults.

(b) Mandatory training of criminal justice personnel at all levels (*e.g.* law enforcement, prosecutors, judges) on ANE of at-risk adults.

(c) Expedited investigation and prosecution of crimes against at-risk adults.

(d) Development and codification of evidence preservation procedures designed to enhance prosecution of ANE crimes against at-risk adults.

(e) Development of multi-disciplinary cooperation and collaboration between law enforcement and non-law enforcement government agencies to ensure equal protection for at-risk adult victims.

(f) Facilitation of information sharing between and among government agencies to support investigations and enforcement.

(g) Statutory changes to enable law enforcement to obtain financial records related to abuse and exploitation in a no-cost or low-cost manner.

(h) Development of funding resources to implement the foregoing recommendations.

(2) The activities of the Georgia Department of Human Services Division of Aging Services to combat the societal plague of ANE of at-risk adults

is documented in a recent public television production *Elder Abuse: Hiding in Plain Sight* (available at http://www.gpb.org/elder-abuse).

3. Additional challenges are presented by the growing number of **interstate and international** mass marketing fraud cases. Such cases include "grandparent scams," foreign lottery scams and internet scams. Coordination among local law enforcement authorities in multiple jurisdictions (domestic and international) is labor-intensive and problematic. Lines of communication between local agencies and the numerous federal agencies that have authority to investigate and prosecute interstate and international scams is either informal or non-existent. *See* 2012 GAO Report, at 29. **Federal agencies** involved in combating interstate and international financial crimes include the following. *Id*. at 30.

a. Consumer Protection Financial Bureau.

b. Federal Trade Commission.

c. Securities and Exchange Commission.

d. Postal Inspection Service.

e. Federal Bureau of Investigation.

f. Department of Justice.

g. Department of the Treasury.

(1) "Federal elder justice programs are administered and funded through a complex intergovernmental structure. The **Older Americans Act of 1965** (42 U.S.C. § 3001 *et seq.*) established the Administration on Aging ("AoA") within the Department of Health and Human Services ("HHS") as the chief federal advocate for older Americans, and assigned responsibility for elder abuse prevention to the AoA. In April 2012, HHS established the **Administration for Community Living**, which brought together the AoA, the Office of Disability and the Administration on Developmental Disabilities to better align the federal programs that address the community living service and support needs of both the aging and disability populations." *See* GAO, *Elder Justice: More Federal Coordination and Public Awareness Needed* (GAO-13-498)(Washington, D.C., July 10, 2013), at 4 (available at www.gao.gov/assets/660/655820.pdf). In July 2015, the **50th anniversary** of the Older Americans Act of 1965, the bipartisan Older Americans Act Reauthorization Act of 2015 was introduced in the United States Senate, as S. 192, 114th Cong., sess. 1 (2015).

(2) The **Department of Justice** supports HHS elder justice programs and activities by pursuing civil and criminal prosecutions of elder abuse and neglect, as well as health care fraud matters. *Id.* at 7. The **Consumer Financial Protection Bureau** (an independent Bureau within the Federal Reserve System) is charged with combating elder financial abuse through its recently established **Office of Financial Protection for Older Americans** (authorized by 12 U.S.C. §

5493(g)(3)) ("OFPOA"). *Id*. at 8. The functions of the OFPOA must include activities designed to facilitate the financial literacy of persons age 62 and older to protect them from unfair, deceptive, and abusive practices. *See* 12 U.S.C. § 5493(g)(1).

B. Civil remedies

Private civil actions for elder financial abuse under state law could include a complaint for **restitution, compensatory damages, and punitive damages** under one or more of the following. *See* also Appendix for a table of state statutes authorizing civil remedies. The burden of proof for civil claims is usually "preponderance of the evidence."

1. Specific statutory causes of action for elder financial abuse or exploitation.

2. Fraud or constructive fraud on the elder.

3. Breach of fiduciary duty or aiding and abetting a breach of fiduciary duty to the elder.

4. Negligence.

5. Rescission of transactions that damaged the elder.

6. Conversion of assets stolen from the elder.

7. Actions for an **equitable accounting** of the actions of a fiduciary charged with managing the property of the elder, whether as a Trustee or an agent (*e.g*. under a Power of Attorney). Section 116 of the **Uniform Power of Attorney Act ("UPOAA")** allows for certain persons to petition a court only "to construe" a Power of Attorney or "to review the agent's conduct" thereunder, and to grant appropriate relief, but only if the Principal lacks the capacity to revoke the Agent's authority or the Power of Attorney. The persons who may petition for this judicial relief include the following.

a. The Principal or the Agent.

b. A guardian, conservator, or other fiduciary acting for the Principal.

c. A person authorized to make health care decisions for the Principal.

d. The Principal's spouse, parent, or descendant.

e. An individual who would qualify as a presumptive heir of the Principal.

f. A person named as a beneficiary to receive any property, benefit, or contractual right upon the Principal's death or as a beneficiary of a trust created by or for the Principal that has a financial interest in the Principal's estate.

g. A governmental agency having regulatory authority to protect the welfare of the Principal.

h. The Principal's caregiver or another person that demonstrates sufficient interest in the Principal's welfare.

i. A person asked to accept the Power of Attorney.

(1) In contrast to the breadth of Section 116 of the UPOAA, Section 114(h) of the UPOAA narrowly limits the persons who can request an Agent to account for *specific transactions* conducted on the Principal's behalf (thus preserving the Principal's financial privacy).

8. On June 15, 2015 (World Elder Abuse Awareness Day), the Huguette Clark Family Fund for Protection of Elders awarded a significant grant to the National Center for Victims of Crime to develop **model civil statutes that address elder financial exploitation**. It is believed that civil statutory provisions to redress elder financial exploitation will provide victims with the greatest chance to recover stolen assets. Previous grants from the Fund supported programs to train APS workers, to help banks implement federal guidelines for sharing customer information with investigatory agencies in cases of suspected financial exploitation of the elderly, and to convene national specialists to formulate specific proposals to prevent elder abuse.

C. Disinheritance statutes

Several states (including Arizona, California, Illinois, Maryland, Oregon, and Washington) have enacted so-called "disinheritance statutes," modeled after the more commonly encountered "slayer statutes." These laws **preclude a convicted perpetrator** of elder financial abuse from receiving benefits as a consequence of the death of the elder victim. The abuser is deemed to predecease the victim for purposes of some or all of the following.

1. Inheritance under a Will or probate avoidance Living Trust.

2. Inheritance under intestate statutes.

3. Receipt of life insurance proceeds as a designated beneficiary.

4. Elective share, statutory share, or homestead rights.

5. Fiduciary appointments under documents executed by the elder victim.

6. Benefitting as a permissible appointee of a power of appointment.

D. Registries of persons convicted of elder abuse

Increasingly, APS agencies are creating and maintaining a registry of convicted elder abuse offenders that can be used to ascertain whether a prospective in-home caregiver (or other person with access to the elder) might have a history of, or propensity for, elder abuse. *See* 2012 GAO Report, at 20, footnote 42.

E. Probate Court remedies

The Probate Court (or other state court with jurisdiction over alleged incapacitated adults) generally has the power to order any one or more of the following actions and remedies for elder financial abuse, each of which typically has its own procedural and evidentiary requirements.

1. Appointment of a limited or full conservator for the elder, with court-supervised responsibility for managing the elder's assets, as a **"defensive" protective measure**.

a. During the pendency of a conservatorship proceeding, which can be a time-consuming proposition, consideration should be given to obtaining one or more of the following temporary remedies.

(1) Temporary restraining order to prevent irreparable harm to the elder and her assets.

(2) Preliminary injunction to preserve the elder's assets while the conservatorship action is pending, coupled with court-ordered disbursements for the elder's benefit during the pendency of the action.

(3) Recordation of a *lis pendens* (Latin for "litigation pending") in the deed records of any county in which the elder owns real property, putting third parties on notice of possible claims against, or title issues with respect to, the elder's real estate assets.

b. Practitioners have reported a disturbing recent trend of filing **"offensive" or "attack" conservatorship proceedings**. *See* Vivian L. Thoreen and Dana G. Fitzsimons, Jr., *Elder Financial Abuse: Protecting the Aging Client from the Den of Thieves*, 46th Annual Heckerling Institute on Estate Planning, Jan. 2012. [N.B. Mr. Fitzsimons is now Senior Vice President and Fiduciary Counsel at Bessemer Trust in Atlanta, Georgia.] "These suits are offensive in that they are being used as a sword rather than a shield, converting court processes designed to protect elderly persons into a tool for depriving elderly persons of control of their own property." *Id*. at III-E-65. Cited examples include the following.

(1) "A child, alienated from an elderly affluent parent and likely to be disinherited, seeks control of the parent's assets to frustrate the parent's estate plan by draining its assets. Another example is the child, angry about being excluded from the parent's lifetime giving, seeking to block generosity to other family

members or charities, or to compel "gifts" to himself against the will of the parent. In even more distasteful circumstances, the child may seek to restrict the parent's lavish lifestyle or to limit expensive care so as to preserve a future inheritance." *Id*.

c. Another disturbing offensive tactic that has emerged in recent years is that of **"granny snatching"** (*i.e*. removing an elder from her home state to another jurisdiction for the sole purpose of filing a guardianship or conservatorship proceeding there based on the elder's physical presence in that jurisdiction). This tactic has been curtailed in recent years as the vast majority of states have enacted the **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA")** in some form, promulgated in 2007. *See* Section IV.F, below, for further discussion of the UAGPPJA.

2. In the context of a conservatorship, the **revocation, suspension, or modification** of the elder's **previously executed Powers of Attorney**.

a. In jurisdictions which have adopted the **Uniform Durable Power of Attorney Act ("UDPOAA")**, originally promulgated in 1979, the appointment of a conservator or guardian of the property for the Principal vests in that person the same power to revoke or amend a Power of Attorney as the Principal would have had if not incapacitated. *See* UDPOAA (U.L.A.) § 3(a) (1987). This Act has been adopted in some form by 36 states, the District of Columbia, and the Virgin Islands.

b. In jurisdictions which have adopted the newer **UPOAA**, originally promulgated in 2006, the appointment of a conservator or guardian of the property **does not affect** a previously executed Power of Attorney unless the Agent's authority is limited, suspended, or terminated by the Court. *See* UPOAA (U.L.A.) § 108(b). This Act has been adopted in some form by Alabama, Arkansas, Colorado, Idaho, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, the U.S. Virgin Islands, Virginia, West Virginia, and Wisconsin.

c. The law in many states (*e.g*. Georgia) provides that a statutory Durable Power of Attorney will be **revoked automatically** in the event a conservator is subsequently appointed. *See* GA. CODE ANN. § 10-6-142. Similarly, state law may provide that a custom-drafted, non-statutory Durable Power of Attorney will be revoked automatically by the court appointment of a conservator for the Principal. *See, e.g*. GA. CODE ANN. § 10-6-36. Otherwise, in the case of a custom-drafted, non-statutory, Durable Power of Attorney, the general law of agency governs. *See, e.g*. GA. CODE ANN. § 10-6-33, which provides that the "appointment of a new agent for the performance of the same act" (or the death of either the Principal or the Agent) revokes the authority of an Agent.

d. The law in some states provides that the **mere initiation of judicial proceedings** to determine the Principal's incapacity or for the appointment of a guardian results in the **"suspension"** of the authority granted under a Power of Attorney until the petition is dismissed or withdrawn, or the court enters an order authorizing the Agent to continue to exercise one or more powers granted under the Power of Attorney. *See, e.g*., FLA. STAT. ANN. § 709.2109(3).

3. The posting of **bond and surety** for persons handling the elder's financial affairs.

4. Specific **court-supervised financial budgets** to govern the costs of the elder's care.

5. **Constructive trust** imposed upon assets of the elder that have been improperly taken.

6. **Invalidation of deeds or contracts** executed by the elder while laboring under a proven incapacity.

7. **Invalidation of post-incapacity Wills** executed by the elder, especially if procured in contravention of a court order appointing a conservator for the elder.

8. Creation of revocable trusts or "Will substitutes" for the elder under the authority of the conservatorship statute or under the doctrine of **"substituted judgment."**

9. **Invalidation of post-incapacity gifts**, or prior gifts induced by fraud, coercion or abuse.

A full discussion of most of the foregoing list of court remedies can be found in *Elder Financial Abuse, Guardianship Litigation and the Pre-Death Will Contest*, by Dana G. Fitzsimons, Jr. and Meghan L. Gehr, 45th Annual Heckerling Institute on Estate Planning, Jan. 2011.

IV. PREVENTION OF ELDER FINANCIAL ABUSE

A. Federal initiatives

1. Elder Justice Act

On March 23, 2010, the **Elder Justice Act ("EJA")** was signed into law by President Obama as part of the Affordable Care Act (a/k/a "Obamacare"). *See* Patient Protection and Affordable Care Act, Pub. L. 111-148 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. 111-152 (2010), collectively referred to as the Affordable Care Act. The EJA creates a new Subtitle H to Title XX of the Social Security Act, largely codified at 42 U.S.C. § 1397j to § 1397m. The **EJA is the first comprehensive national legislation directed at elder abuse**. The EJA is a four-pronged initiative intended to accomplish the following.

a. Enhance national coordination of elder justice activities and research.

b. Establish forensic centers to develop expertise and jurisprudence in elder abuse, neglect, and exploitation.

c. Strengthen adult protective services.

d. Enhance the capacity of long-term care settings to prevent and respond to elder abuse, neglect, and exploitation. *See* Brian W. Lindberg, Charles P. Sabatino, Esq. and Robert B. Blancato, *Bringing National Action to a National Disgrace: The History of the Elder Justice Act*, NAELA Journal, Vol. VII, No. 1, Spring 2011, 105, at 115.

e. The EJA authorizations expired in October 2014. Pending federal legislation (H.R. 988 – 114th Congress (2015-2016)) would reauthorize the EJA for another five years through 2019.

2. Elder Justice Coordinating Council

In recognition of the importance of coordinating the many federal, state, and local agencies and entities with jurisdiction over myriad aspects of elder abuse, neglect, and exploitation, Section 2021 of the EJA establishes the **Elder Justice Coordinating Council ("EJCC").** *See* Sections 2021 to 2024 of the EJA, 42 U.S.C. § 1397k. Current members of the EJCC include the following.

a. Secretary, U.S. Department of Health and Human Services.

b. Attorney General, U.S. Department of Justice.

c. Director, Consumer Financial Protection Bureau.

d. CEO, Corporation for National & Community Service.

e. Secretary, Department of Housing and Urban Development.

f. Secretary, Department of Labor.

g. Secretary, Department of the Treasury.

h. Secretary, Department of Veterans Affairs.

i. Office of the Chairman, Federal Trade Commission.

j. Chief Postal Inspector, U.S. Postal Inspection Service.

k. Commissioner, Social Security Administration.

l. Chairman, Securities and Exchange Commission.

(1) The EJCC held its inaugural meeting in October 2012, followed by three sessions in May, September and November of 2013, and one in April of 2014. For further information regarding the current initiatives and proposals of the EJCC, *see* http://aoa.acl.gov/AoA_Programs/Elder_Rights/EJCC/index.aspx. *See also* the Appendix for selected other federal initiatives to combat elder financial abuse.

(2) The EJCC is required to make recommendations to the Secretary of the Department of Health and Human Services every two years to report on the coordination of elder justice activities by relevant federal agencies, and to report to Congress on accomplishments, challenges and recommendations for legislative action. The EJCC submitted a 232-page **report to Congress in June 2015**, covering its activities and accomplishments for the period October 2012 through September 2014, and making recommendations for legislation, model laws, and other action. The "Department of Health and Human Services Elder Justice Coordinating Council 2012-2014 Report to Congress" (the "EJCC Report") is available at http://aoa.acl.gov/AoA_Programs/Elder_Rights/EJCC/docs/EJCC-2012-2014-report-to-congress.pdf. The EJCC Report outlines **eight recommendations** for federal action to address elder abuse, neglect, and financial exploitation, as follows.

(a) Support the **investigation and prosecution** of elder abuse, neglect and financial exploitation cases by providing training and resources to federal, estate, and local investigators and prosecutors.

(b) Support and protect elder abuse victims by improving identification of elder abuse and enhancing **response and outreach to victims**.

(c) Develop a **national APS system** based upon standardized data collection and a core set of service provision standards and best practices.

(d) Establish a **coordinated research agenda** across federal agencies to identify best practices for prevention of and intervention in elder abuse and elder financial exploitation.

(e) Develop a comprehensive, strategic, and broad-based **national public awareness campaign**, with clear and consistent messaging to raise awareness and understanding of elder abuse, neglect and exploitation.

(f) Develop training to **educate stakeholders** across multiple sectors and disciplines on preventing, detecting, intervening in, and responding to elder abuse, neglect, and exploitation.

(g) Prevent, detect, and respond to elder financial exploitation through federal **enforcement activities, policy initiatives, coordination,** oversight, and education, and by collaborating with industry to enhance fraud detection and provide resources for victims.

(h) Improve the ability of APS and first responders to **screen for diminished capacity**, diminished financial capacity, and vulnerability to or victimization of financial exploitation. *See* EJCC Report, Figure 3, at 3.

B. Multi-disciplinary team of professional advisors

Assembling a multi-disciplinary team of allied professionals to advise an elder on a consistent periodic basis can contribute significantly to the prevention of elder financial abuse. Key members of such a team could include the following.

1. Estate planning attorney.

2. Elder law attorney.

3. Geriatric care manager.

4. Life care planner.

5. Investment advisor.

6. Government benefits specialist.

7. Home accessibility specialist.

8. Accountant.

9. Household manager.

10. Bookkeeper or bill payer service.

11. Elder mediator (see Section IV.G, below).

a. While the compensation of all of these allied professionals can be costly, the end result of their team efforts could save the elder multiples of that cost if significant financial abuse and exploitation is forestalled.

C. Defensive use of the General Durable Power of Attorney

1. The **General Durable Power of Attorney ("GDPOA")** has often been described as **"the most effective burglary tool since the crowbar."** The GDPOA is a technique whereby the Principal authorizes an Agent to act on her behalf until that authority is revoked by the Principal during her lifetime or upon her death. The authority granted under a GDPOA is "durable" (*i.e.* it survives the Principal's subsequent incapacity or disability). *See*, *e.g.*, Uniform Probate Code (U.L.A.) § 5-501. While clients appreciate the simplicity and privacy afforded by this non-court-supervised alternative to a conservatorship, this lack of formal oversight and accountability can facilitate hard-to-detect abuse of the broad authority typically embodied in a GDPOA.

a. Some clients are alarmed by the prospect of a GDPOA that vests immediate authority in the Agent, preferring instead the concept of **"springing"** authority which vests in the Agent only upon a written determination of designated persons that the Principal cannot manage her financial affairs. The persons charged

with rendering the triggering disability determination often include one or more physicians. The "springing" GDPOA can be **problematic** for several reasons.

(1) If the Principal is not comfortable vesting immediate authority in her Agent, she should probably reconsider her choice of Agent. An insistence on springing authority often manifests an **inherent mistrust** in the person designated as Agent, calling into question the appropriateness of the appointment.

(2) If one or more physicians are charged with responsibility for rendering the necessary disability determination, they may feel constrained by the provisions of **HIPAA prohibiting the release** of the Principal's protected health care information and may refuse to participate in the triggering event. A broad HIPAA waiver may assuage such concerns, but anecdotal reports of physician non-compliance still persist.

(3) The law of some states **prohibits** "springing" GDPOAs entirely. *See, e.g.*, FLA. STAT. ANN. § 709-2108(3).

2. Many commonly granted powers under a GDPOA can be used by an unscrupulous Agent to completely defeat the Principal's estate plan (often referred to as **"hot powers"**), including the following.

a. Tax-motivated transfers.

b. Gifts.

c. Exercise of powers of appointment vested in the Principal.

d. Sale of assets subject to a specific bequest or devise in the Principal's estate planning documents.

e. Change of beneficiary designations for the Principal's non-probate assets (*e.g.* life insurance, retirement plans and accounts, or investment accounts with "Transfer on Death" or "Pay on Death" designations).

f. Creation of joint interests embodying a "right of survivorship."

g. Transfer of assets to a trust that avoids the probate process.

3. In his paper, *Great Power Comes With Great Responsibility: Practical Suggestions for Powers of Attorney* (presented at the 58th Annual Estate Planning Institute, February 8-9, 2013, Athens, Georgia), Craig M. Frankel, Esq., a fiduciary litigator with Gaslowitz Frankel LLC in Atlanta, Georgia, makes the following suggestions for minimizing the damage that can be wrought by the illicit exercise of the above powers by an unscrupulous Agent.

a. The drafting attorney should conduct a full and frank discussion with the Principal regarding the scope of each and every power set forth

under the GDPOA and the **"worst case scenario" for the illicit use of each power** to determine if any given power could prove more problematic than helpful.

b. The GDPOA could require the Principal to **"opt in" to each and every power** granted under a GDPOA (especially the "hot powers" noted above) by initialing each power in the body of the document, as well as signing at the end of the document. While time-consuming (and costly to the client if her attorney bills by the hour), this exercise could protect both the drafting attorney and the ultimate intended beneficiaries of the Principal's estate plan.

(1) This "opt-in" concept is a requirement for many statutory GDPOAs, *e.g.* Georgia (*see* GA. CODE ANN. §10-6-142) and all Florida GDPOAs (*see* FLA. STAT. ANN. § 709.2202). Furthermore, § 201(a) of the UPOAA requires each of the following "hot powers" to be specifically granted in a GDPOA, which may be exercised by the Agent only if "the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject."

(a) Create, amend, revoke, or terminate an *inter vivos* trust.

(b) Make a gift.

(c) Create or change rights of survivorship.

(d) Create or change a beneficiary designation.

(e) Delegate authority granted under a GDPOA.

(f) Waive the Principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

(g) Exercise fiduciary powers that the Principal has authority to delegate.

(h) Disclaim property, including a power of appointment.

(i) Section 114(b)(6) of the UPOAA imposes upon the Agent a qualified duty to preserve the Principal's estate plan to the extent the Agent has knowledge of that plan and if such preservation is in the Principal's best interest. Factors to be considered in this best interest analysis include the value and nature of the Principal's property; her foreseeable obligations and maintenance needs; her tax minimization objectives; and her need to qualify for government assistance. *See* § 114(b)(6)(A)-(D) of the UPOAA.

c. The GDPOA could **require notice** to the Principal's heirs or beneficiaries who would be adversely impacted by the exercise of a given power. Alternatively, such notice could be given to one or more of the Principal's independent

professional advisors (*e.g.* an attorney or accountant), who could be required to provide a written statement that the proposed transaction is in the Principal's best interest and consistent with her intent.

d. With respect to the exercise of a **gifting power**, the GDPOA could require **notice to the Principal** prior to effectuating any gifts. The GDPOA could also require the Agent to consider the Principal's prior gifting history and patterns, and require that gifts be made equally to all of the Principal's heirs or beneficiaries (if, in fact, that would be consistent with the Principal's prior gifting behavior). The GDPOA could also limit gifts by reference to the Principal's net worth at the time of the proposed gift.

(1) Not surprisingly, **abuse by an Agent of a gifting power** under a GDPOA accounts for a large percentage of reported elder financial abuse. *See*, Andrew H. Hook and Thomas D. Begley, Jr., *The Role of Estate Planners in Preventing Power of Attorney Abuse*, Estate Planning, Vol. 40, No. 3 (March 2013), 42 at 45.

e. With respect to the exercise of the "hot powers" listed above, consider requiring a **determination by the Principal's professional advisors** that the proposed exercise of the power by the Agent (i) is necessary for the Principal's tax or Medicaid planning purposes, or to preserve a beneficiary's eligibility for government benefits, (ii) does not materially alter the Principal's pre-existing estate plan, or (iii) furthers another legitimate purpose that is in the best interest of the Principal and her heirs or beneficiaries. Consider requiring notice to those who would be impacted by the exercise of the powers.

f. Consider setting forth in the GDPOA the **Agent's duties and responsibilities** (signed and acknowledged by the Agent), including the following.

(1) A duty of loyalty, good faith, and due care.

(2) The requirement to keep the Principal's property separate from that of the Agent.

(3) The requirement to clearly denote any of the Principal's property titled in the Agent's capacity as such (*e.g.* "John Doe, Agent and Attorney-in-Fact for Jane Smith, Principal, under GDPOA dated 1/2/13").

(4) The requirement to keep a contemporaneous record of each transaction undertaken by the Agent on behalf of the Principal, and a **running account** of all receipts and disbursements as Agent, together with a full annual (or more frequent) **accounting** to the Principal, her conservator (if any), other persons designated in the GDPOA to receive this information (*see* additional discussion of "standing," below), and to the Principal's Executor or other Personal Representative within 90 days of the Principal's death.

(5) A prohibition against the Agent using his authority under the GDPOA to engage in **"self-dealing" or conflicts of interest** that inure to the benefit of the Agent, including any specific examples the Principal wishes to identify in advance (*e.g.* investments in the Agent's personal business or improvements to the Agent's personal residence or properties).

(a) There is an ongoing debate between proponents of "the traditional **"sole interest" test** of loyalty applied to trustees, and a **"best interest" test** that would permit mutually beneficial transactions" in which both the Agent and the Principal derive benefit. *See* Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 Stetson L. Rev. 7 (Fall 2007), at 26. Section 114(d) of the UPOAA provides that "[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal."

(b) The GDPOA should clearly outline whether and how the **Agent is to be compensated for his services** while acting as Agent and reimbursed for reasonable out-of-pocket expenses incurred in the course of rendering such services. While it may be reasonable for a family member to serve as Agent without compensation, professionals or business colleagues of the Principal may legitimately expect to be compensated for the time they spend handling the Principal's affairs to the extent it precludes their attending to other client or business matters. Allowing the Agent to be compensated in accordance with his **regular hourly rate** charged to clients generally, or by means of a **fee based on the value** of the assets under management by the Agent for the Principal, are two common approaches. Fairly compensating an Agent might encourage him to be more attentive and diligent in the exercise of his duties and responsibilities.

g. Consider the advisability of **appointing Co-Agents** to provide immediate oversight to the agency relationship, with unanimous consent of the Co-Agents required before any action can be taken under the authority of the GDPOA.

(1) The reluctance to appoint a person to serve as sole Agent may indicate an inherent **lack of trust** on the part of the Principal (in which case, she should reconsider her designation of the person to serve even as a Co-Agent). It is obvious that the prudent choice of trustworthy Agents is integral to the success of the GDPOA technique. Mere relationship (by blood or otherwise) is an insufficient basis for vesting such broad authority in a person. The Principal should be realistically mindful of the **characteristics of those who perpetrate elder financial abuse** (*see, e.g.*, Section I.E.2.a, above) in assessing appropriate candidates to serve as Agent or Co-Agent under her GDPOA.

h. Consider including in the GDPOA a provision that **expands** the class of persons who would otherwise have **legal standing** to take the following steps. *See, e.g.*, § 116 of the UPOAA, discussed at Section III, B.7, above.

(1) Request information about the Agent's actions.

(2) Request an informal accounting or a formal judicial accounting.

(3) Initiate judicial action to review the Agent's actions, remove the Agent if malfeasance is discovered, and recoup any losses to make the Principal whole.

i. Consider including a **HIPAA waiver** in the GDPOA. This would facilitate communication between the Agent and the Principal's health care providers concerning matters of mutual interest or concern (*e.g.* funding the expense of the Principal's assisted living or other long-term care facility, or compensating paid caregivers and other allied professionals rendering health-related services for the benefit of the Principal). Also consider mandating cooperation between the Agent and the Principal's health care agent acting under an advance directive for health care or durable power of attorney for health care, as required by § 114(b)(5) of the UPOAA.

D. Use of Revocable Living Trusts instead of Powers of Attorney

In many jurisdictions, estate planners recommend the use of a **"revocable living trust" ("RLT")**. A RLT is typically established *and funded* during the elder's lifetime as a "Will substitute" to avoid the cumbersome or expensive state probate process attendant to using a Will as the primary means of disposing of assets at death.

1. The RLT technique requires that title to the elder's assets be transferred to and **held in the name of the Trustee** of the RLT during the elder's lifetime, a front-end process that can itself be cumbersome and expensive.

a. As the name implies, the elder retains the **right to revoke**, amend, or otherwise alter the provisions of the RLT during her lifetime (while competent to do so), by a written instrument executed with the same formalities as the original RLT agreement. If there are significant concerns about the elder being subjected to the undue influence of a third person, it may be advisable to require the consent of the Trustee (or another designated third party) to effectuate a revocation, amendment, or alteration of the RLT agreement.

b. The **elder is often the initial Trustee** or a Co-Trustee of the RLT, with a successor Trustee to take office if the elder becomes incapacitated (as defined and determined in accordance with the provisions of the RLT), upon which it becomes irrevocable.

c. During the elder's lifetime, she is the **sole or primary beneficiary**, along with any secondary permissible beneficiaries designated in the RLT. Upon the elder's death, the provisions of the RLT direct the disposition of the remaining assets, thus obviating the need for a probated Will as to those assets.

2. Even in jurisdictions that rely primarily on a probated Will to dispose of a decedent's assets, a RLT can be an excellent tool in the elder's arsenal of

disability planning documents. For example, the elder may choose to use a GDPOA as the "line of first defense" in planning for the informal management of her assets if she becomes incapacitated during her lifetime, while the unfunded **RLT is on "stand-by"** if the GDPOA fails to achieve its intended purpose. This approach avoids the need to retitle her assets in the name of the RLT unless and **until the RLT is activated**. Such activation is typically necessary or advisable in the following scenarios.

a. None of the persons nominated under the GDPOA to serve as Agent, or successor Agent, are available, willing, or able to serve as such.

b. A failsafe **corporate Agent refuses to serve** under the auspices of the GDPOA (a very common stance taken by banks and trust companies).

c. Third parties refuse to accept the GDPOA for myriad reasons, including most frequently that **the document is "too old"** for their comfort. (Anecdotally, practitioners report pushback from third parties if a GDPOA is more than six months old, even if there is nothing in relevant state law requiring a more "recent" or "updated" document.) For reasons that are not entirely clear, third parties are much less anxious about an "old" RLT than an "old" GDPOA.

d. Once activated, the **RLT can be funded** by the person otherwise serving under the GDPOA (or by a corporate Agent that refuses to serve under a GDPOA but is willing to serve under a RLT), pursuant to an express power in the GDPOA authorizing the retitling of the elder's assets into the RLT (which is typically executed immediately prior to the execution of the GDPOA and referenced specifically in the GDPOA).

(1) Where the RLT is not being used to "avoid probate" upon the elder's death, but only as an alternative vehicle for managing the elder's assets during a period of incapacity while she is living, the provisions of the RLT typically direct that any property remaining in the RLT at the death of the elder must be distributed to the Executor of her Will (or other personal representative) for disposition thereunder.

3. Whether a funded RLT is the primary dispositive instrument upon the elder's death, or simply a stand-by vehicle for managing her assets during a period of incapacity, there are numerous benefits to **utilizing a funded RLT to combat elder financial abuse** during her lifetime.

a. The RLT will **never fail for lack of a Trustee**. *See, e.g.*, GA. CODE ANN. § 53-12-201(b).

(1) Using a RLT can also minimize the adverse impact of **serially executed GDPOAs** (*e.g.* whereby the elder's competing relatives bring her to a series of different lawyers for the purpose of revoking prior GDPOAs in favor of others and executing a new GDPOA in favor of the person accompanying the elder to the attorney's office).

b. The Trustee of a RLT can serve as the **gatekeeper** with respect to the elder's assets, restricting the access of those persons who would be tempted to engage in financial abuse or exploitation of the elder. Ideally, then, the elder should not serve as the sole initial Trustee of the RLT, lest a perpetrator gain inappropriate access to the assets of the RLT before her diminished capacity is suspected or verified.

(1) If the RLT is essentially unfunded unless and until the elder's incapacity is verified, as described below, the prospect of Co-Trustees does not alarm most clients. However, even if the RLT is a fully-funded probate avoidance Will substitute, the **benefits of Co-Trustees** from inception are significant, including the following.

(a) The Co-Trustee provides a **"second set of eyes"** to assist the elder in evaluating any financial proposals from third parties and making the necessary follow-up decisions while the elder is able and inclined to participate in these determinations. As the elder's inclination or capacity to be involved in such matters declines (whether because of age, infirmity, or general disinterest), **the Co-Trustee can gradually take more responsibility as the elder cedes it**. Many elders are unwilling to cede total responsibility for financial matters upon the initial funding of a RLT, but are willing to gradually relinquish daily involvement with RLT affairs on their own time table, thus preserving their independence and self-determination for as long as possible.

(b) The Co-Trustee who succeeds the elder upon a finding of incapacity is already knowledgeable about the elder's financial affairs and needs, thus **facilitating the transition** when the elder steps down as a Co-Trustee.

(c) There is no need to re-title the elder's assets in the name of the remaining Co-Trustee as successor-in-interest when the elder steps down as Co-Trustee, avoiding the delay attendant to that often time-consuming process, again enhancing the seamless nature of the transition.

c. The provisions of a funded RLT that apply during the client's lifetime can be customized and detailed to **address the client's most significant personal concerns**, including that her assets be used to support her in her accustomed standard of living (and not a lesser standard envisioned by those who would inherit what is left upon the elder's demise).

(1) Health care management issues are a critical concern of many elders, who fear that their adult children (or other beneficiaries or heirs-apparent) will eschew expensive in-home caregivers in favor of nursing home care paid for by government benefit programs, to assure a larger inheritance upon the death of the elder. (As an aside, the assets in a RLT are fully countable for purposes of means-tested government benefits such as Medicaid.) The RLT provisions could require the Trustee to implement the following directives.

(a) Direct the Trustee to hire a professional **Geriatric Care Manager ("GCM")** to develop and implement a care plan that allows the elder to "age in place" at home with the necessary private in-home caregivers. Most GCMs can also assist in identifying potential exploitation risks facing the elder. *See* http://www.caremanager.org.

(i) GCMs are also increasingly willing to serve as the elder's health care agent under a Health Care Directive or Power of Attorney for Health Care. This approach can help remove the elder's heirs-apparent or post-death beneficiaries from a conflict-of-interest position when it becomes necessary to fund the elder's care as directed by the independent third-party health care agent.

(b) Allow the GCM to oversee the **hiring and monitoring of in-home caregivers**, including arranging for multiple background checks and reference follow-ups, and to provide relevant input to the Trustee on appropriate compensation for same.

(c) Direct the Trustee to retain a **payroll service or agent** to assure proper tax withholding, procure appropriate workers compensation coverage, and address similar administrative issues for the elder's paid caregivers.

(d) Instruct the Trustee on tangential considerations designed to **assure a quality of care** as close as possible to what the elder would experience if she lived with a loving and responsible adult child in the community. For example, the Trustee could be instructed to arrange for trusted companions to accompany the elder on social outings, for meals at favorite restaurants, to weekly religious services, or to facilitate visits to the homes of friends or relatives. *See* Janet L. Kuhn, *Using Revocable Living Trusts to Plan for the Possible Incapacity of Affluent Clients*, The Elder Law Report, Vol. XXIV, No. 5, December 2012.

(2) Where the elder wishes to **age in place at her home** (which is typically held as an asset of the RLT), the Trustee could be directed to retain the services of a **management company** to handle both routine maintenance and emergency service calls, as well as domestic services such as housekeeping, landscaping, and weather-related seasonal services (*e.g.* snow removal), at the expense of the RLT.

(3) While the elder is the primary (and often the sole) beneficiary of the RLT during her lifetime, the RLT could clearly remind the Trustee (and any remainder beneficiaries) that the **elder's interests are to be preferred**, even to the point of exhausting the property of the RLT and effectively eliminating the interest of any remainder beneficiaries.

(a) If the elder is still responsible for caring for an **incapacitated adult child with special needs**, provisions for that child's care should also be included in the RLT. "Special Needs Trust" provisions embedded in the RLT are designed to maximize governmental funding sources while the RLT supplements those needs not fully provided for by such programs. *See* Katherine N.

Barr, Richard E. Davis and Kristen M. Lewis, *Top 15 Tips for Estate Planners When Planning for Special Needs*, 24 Prob. & Prop. 38 (Mar./Apr. 2010) (available at http://www.sgrlaw.com/dictator/media/306/p_pmarapr10_barr_davis_lewis.pdf.)

(4) The RLT could also include provisions allowing the Trustee to make **gifts from the assets of the RLT** during the elder's life to continue her prior gifting program without jeopardizing the funding of her care for the balance of her lifetime. The RLT should specify that any **gifting analysis** include, at a minimum, a consideration of the following factors.

(a) The value of all of the elder's assets (both titled in the RLT and otherwise) and other resources (*e.g.* other trusts, pensions or retirement plans of which she is the designated beneficiary).

(b) The probable expense of the elder's care, support, and maintenance for the remainder of her lifetime (and that of any secondary lifetime beneficiaries, such as a dependent adult child with special needs). The GCM can often facilitate this analysis.

(c) The identity of the proposed gift recipients, and whether they are the natural objects of the elder's bounty by relationship or prior gifting behavior.

(d) The estate planning and income tax benefits to be derived by the proposed gifts, as well as the possible harm to any interested party if the gifts are made. The Trustee could be instructed to consult with the elder's attorney and accountant on this consideration, and to receive a written opinion that the proposed gift is sensible under the circumstances, and is not inconsistent with the elder's estate plan, among other considerations.

(e) Any previous history of similar transfers by the elder as part of a regular giving program.

(f) Whether the Trustee should take into consideration the other resources of the recipient of the proposed gift.

(g) Any limits on the amount of the proposed gift (*e.g.* the annual gift tax exclusion amount under IRC § 2503(b)(1)).

(5) In order for the foregoing RLT provisions to be effectuated as the elder intends (*i.e.* full use of the elder's assets to fund a comfortable and fulfilling lifestyle), it is imperative that a line-up of **disinterested Trustees** be identified at the outset (*i.e.* persons who have no interest (as a remainder beneficiary of the RLT or otherwise) in the assets which remain in the RLT upon the elder's death). Human nature being what it is, even the best intentioned remainder beneficiary or heir could be tempted to skimp on distributions for the elder during her lifetime to help assure a larger benefit for himself upon the death of the elder.

(a) Options for disinterested Trustees are as varied as the particular facts of each client's life, and may ultimately be determined by the size of the RLT principal (since most corporate Trustees have relatively high minimums). Increasingly, private estate planning or elder law attorneys are agreeing to serve as Trustee of their clients' RLTs, or as Co-Trustee with a corporate fiduciary. Such professionals are typically compensated by reference to the regular hourly rate they would otherwise charge to their clients.

(6) The RLT should provide for very specific events that will trigger the appointment of a successor trustee in the event of the **elder's incapacity**.

(a) If the elder has close family members and friends who are a regular part of her life (and would recognize when the elder's mental capacity has diminished), those persons could be vested with the power to determine that the elder is no longer capable of managing her affairs. Such a **"disability committee"** could also be vested with the authority to determine that the elder has been restored to capacity (often an unlikely, but nevertheless theoretically possible, scenario). Consideration might be given to including the elder's primary attending physician as a member of the disability committee (however, thanks to HIPAA, many physicians are reluctant to cooperate in this regard). The disability committee could be authorized to render its determinations by majority vote, or alternatively, unanimous consent could be required.

(b) For clients who cannot rely upon the input of well-intentioned family or friends to trigger a disability finding, a second option may be to require **two physicians** to render the necessary determination. Ideally, the elder's primary care physician and a second physician who is board-certified in the medical specialty at the root of the elder's disabling condition would render the necessary determination of incapacity.

(i) To allay any concerns about HIPAA violations in the course of discharging this duty, the elder and her attorney would be well-advised to secure the ***advance*** **consent** of these physicians to undertake the determination required of them by this approach, and to communicate the determination to the elder and to any Co-Trustee or successor Trustee of the RLT. Such consents may require a custom-drafted release and indemnification of the elder's physicians and staff or a formal HIPAA waiver.

(ii) A **HIPAA waiver** should also be extended to any Co-Trustee or successor Trustee of the RLT to facilitate communications with the elder's health care providers (*e.g.* in the course of funding the expense of the elder's caregivers and any other allied professionals rendering related services for the benefit of the elder).

d. Although a RLT is typically employed to minimize or eliminate the need for a court-appointed conservator, it is possible that a **conservatorship proceeding** could be instituted involuntarily with respect to the

elder (*e.g.* a "defensive" action by an eager APS staff, or an "offensive" action by a disgruntled heir-apparent or beneficiary). Options for dealing with the unexpected appointment of a conservator for the elder might include the following.

(1) The RLT could provide that **any court-appointed conservator** becomes vested with the **same power to alter, amend, or revoke** the RLT previously vested in the elder while competent, provided that any such alteration, amendment or revocation is for the *sole benefit* of the elder (and those dependent upon her for support, such as an adult child with special needs).

(a) If the state conservatorship laws provide for limited tax-motivated transfers by conservators for purposes of minimizing the transfer tax liability of the conservatee, the RLT might also specifically reference such gifting as a permissible use of the RLT assets as a limited exception to the sole benefit requirement noted above.

(2) In sharp contrast, the RLT could instead provide that any court-appointed **conservator would have no access** to, or authority over, the assets of the RLT, which becomes irrevocable upon a judicial determination of incapacity. Furthermore, the RLT could include a provision requesting the court to limit its order to the determination of incapacity necessary to trigger the appointment and authority of a successor Trustee of the RLT (*e.g.* where the elder serves as the initial Trustee or Co-Trustee of the RLT for so long as she retains capacity). *See* Kuhn at 5. *Query* whether the court appointing a conservator for the elder could disregard such provisions and order the RLT revoked in its entirety such that all of the assets would become part of the elder's conservatorship estate, if the court found this to be in the elder's best interest.

e. To encourage third parties to accept the authority of the successor Trustee(s) upon a trigger finding that the elder is incapacitated, Kuhn suggests that the RLT specifically authorize the Trustee to **release limited information** concerning the RLT, including the following.

(1) Certified copies of the written determinations of the physicians or other disability committee members who determined that the elder was incapacitated in accordance with the provisions of the RLT.

(2) Excerpts from the RLT identifying the successor Trustee(s), the method for determining the elder's incapacity and the trigger effect of that determination on the authority or appointment of the successor Trustee(s), as well as the relevant powers of the Trustee(s).

(3) The first and signature pages of the RLT.

f. Persons who should be entitled to receive **periodic reports and informal accountings** from the Trustee of a RLT regarding the administration of the RLT (other than the elder) could include the following.

(1) Each member of the **disability committee** charged with rendering a determination regarding the elder's capacity.

(2) **Designated third parties** with no other interest or role in the administration of the RLT other than to monitor receipts, disbursements, and investments of the RLT.

(3) Any additional **persons selected by the elder** to expand those with standing to challenge the actions of the Trustee. *See* discussion in Section IV.C.3.h, above.

E. Enhanced screening of potential conservators, and monitoring of same once appointed

1. If the informal options for handling the finances of an incapacitated elder, discussed above, are unavailable or ineffective, it may be necessary to secure a court-appointed conservator for the elder. Notwithstanding the procedural safeguards embodied in the statutes of all 50 states and the District of Columbia concerning the appointment of conservators and their monitoring after appointment, **egregious abuse by court-appointed conservators** contributes significantly to the plague of elder financial abuse.

2. The GAO, in its 2010 Report to the Chairman of the Special Committee on Aging of the U.S. Senate, *Guardianships: Cases of Financial Exploitation, Neglect and Abuse of Seniors* (GAO-10-1046) (available at http://www.gao.gov/products/GAO-10-1046), made the following findings and recommendations.

a. State courts appointing persons to serve as conservators for incapacitated adults fail to adequately review the **criminal and financial backgrounds** of prospective conservators, resulting in the appointment of persons who were categorically unsuitable to handle the financial affairs of vulnerable seniors.

(1) Numerous cases of elder financial abuse by court-appointed conservators could have been preempted by two simple background check techniques that were not required by state law (and thus not conducted): (i) a **credit check**, and (ii) a **fingerprint check**. *Id.* at 8.

(a) Even if state law does not require such security background checks, *query* whether an interested party in a court proceeding could request or require such measures prior to the appointment of a conservator for an incapacitated adult.

b. State courts fail to **adequately monitor** conservators after their appointment, allowing the financial abuse of vulnerable seniors to continue unabated. *Id.* Common monitoring lapses include the following.

(1) Failure to require and review **statutorily mandated reports** and accountings.

(2) Failure to **sanction delinquent or malfeasant conservators** using readily available statutory penalties, such as removal from office, contempt orders, denial of compensation, or surcharge on posted bond. *See also* Naomi Karp and Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 Stetson L. Rev. 143 (Fall 2007), summarizing the findings of an AARP Public Policy Institute report of the same title (available at http://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf) (the "AARP Report").

(3) Failure to develop court **staff proficiency** in reviewing filed reports and accountings, and lack of **comprehensive review criteria**.

c. State courts fail to **communicate with federal agencies** about abusive conservators. In many situations, the same person who is serving as a state court-appointed conservator is also simultaneously serving as a **Representative Payee** for the elder's Social Security benefits, Veterans Administration benefits, or federal retirement benefits under the Office of Personnel Management. Such failure to share information often results in allowing the malfeasant conservator continued easy access to a regular stream of federal cash benefits, which are typically not subject to state conservatorship reporting but are subject to a separate (generally cursory) federal reporting system. *Id*. at 9.

d. Certain state **"certification" programs** for prospective conservators fail to undertake basic background check and identity verification steps prior to "certifying" a person as one suitable to handle the affairs of vulnerable elders.

3. The AARP Report summarized by Karp and Wood, and their follow-up report *Guarding the Guardians: Promising Practices for Court Monitoring* (the "AARP Follow-Up Report") (available at http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf) included the following conclusions and recommendations. *Id*. at 32-35.

a. The "traditional passive stance of probate courts" is at odds with the active monitoring of conservators required to fully protect society's most vulnerable members. AARP Report at 32.

b. **Monitoring practices** of state courts show wide variation in areas such as court assistance to conservators in fulfilling their reporting duties; notification procedures for upcoming or missed filing deadlines; penalties for late or missed filings; designation and quality of court report reviewers; and development of criteria for such review.

(1) "Forward-looking" courts, with **adaptable monitoring** techniques, "dedicate staff time to monitoring, use specific means of safeguarding assets, use a stepped range of sanctions for failure of the [conservator] to timely file a report or account, use trained volunteers in some capacity, and frequently use or seek to use automated databases or other technology in oversight." *See* AARP Follow-Up Report at 10-11.

c. State court compliance with statutory **mandatory reporting** requirements is currently inconsistent. Best practices should include required prospective plans for the elder's personal arrangements (*e.g*. residential, health care, and social) and estate management; filing of the first required report within three months of appointment and annually thereafter; use of "stepped" sanctions for failure to file required reports (*e.g*. written notice, show cause hearing, fines, arrest); required court approval of reports; required court approval of specified transactions likely to be abused (*e.g*. sale of the elder's home, implementation of a gifting program); required bonding of liquid assets and income, and a willingness to "call in" the bond to redress financial malfeasance by the conservator.

d. Use of **technology** in monitoring the reports of conservators is currently minimal. Greater use of web-based reporting techniques "could effect a paradigm shift" in successful monitoring practices. Computer programs could track required reports coming due or not filed on time, and highlight "red flags" in cases likely to present non-compliance issues before they materialize (*e.g*. the elder has no involved family or friends; a large conservatorship estate; multiple ATM transactions on conservatorship accounts; the conservator has health, financial or personal problems; the conservator hires and fires multiple attorneys; the conservator has minimal financial experience). Such technology could also easily be used to **develop a database** that could facilitate research and policy development on conservatorships at both the state and national levels.

e. **Training for conservators** has increased, but remains a compelling need. Basic training of conservators by court staff and allied professionals (*e.g*. attorneys, local bar associations) could help avoid many inadvertent derelictions of duty by conservators. Compliance with reporting responsibilities could be facilitated by providing standard forms (with samples of correctly completed forms), handbooks, videos, classes and other training tools, and designated court staff to provide hands-on assistance to conservators experiencing difficulties with their reports.

f. **Verification** of filed conservator reports and accounts is currently frequently lacking. Best practices would include the hiring and training of court staff who specialize in reviewing and verifying all reports (and supporting documentation) pursuant to specific checklists and criteria (including soliciting the ongoing input of the elder's court-appointed attorney during the term of the conservatorship).

g. The **role of volunteers in monitoring** is currently minimal, yet offers great potential. Such volunteers could be trained to call conservators about overdue reports; review and verify filed reports and accountings; make personal visits to persons under conservatorship; and informally investigate complaints about conservators. While recruiting, training and supervising such volunteers would require a significant investment of resources, such monitoring could prove to be a meaningful tool in combating elder financial abuse.

h. **Collaboration** between state courts and community entities is infrequent, yet could significantly enhance monitoring oversight. APS and

LTCO programs often cross paths with persons serving as conservators for those vulnerable adults referred for protection or services. Developing stronger relationships between and among the courts and such state agencies and enhanced coordination with the federal agencies that administer cash benefit programs (*e.g.* SSI, SSDI, retirement, and pension programs) could significantly reduce the incidences of wrongfully diverted government payments and assets belonging to elders. Hiring court staff with specific knowledge of federal, state, and local resources and programs that serve and support elders could meaningfully increase the number of elders who actually receive the intended benefits.

F. Adoption of Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

The UAGPPJA has been enacted in a vast majority of states and the District of Columbia (with legislation recently introduced in Georgia, North Carolina and Texas). The States of Florida, Kansas, Louisiana, Michigan, Wisconsin, and the U.S. Virgin Islands, have neither enacted nor proposed the enactment of the UAGPPJA. *See* Appendix for a full list of the adopters and statutory citations. The UAGPPJA addresses three **primary jurisdictional difficulties** that arise in the context of multi-state or international guardianship and conservatorship cases or proceedings: (i) determining which state has jurisdiction to appoint a guardian or conservator, (ii) transferring an existing guardianship or conservatorship from one state or county to another, and (iii) recognizing and giving full faith and credit to a guardianship or conservatorship order from another state. In addition to curtailing the distasteful tactic of "granny snatching" discussed in Section III.E.1.c, above, the UAGPPJA has significant **potential to reduce elder abuse** in general. *See* Lori A. Steigel and Erica F. Wood, *Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, Bifocal, e-Journal of the ABA Commission on Law and Aging, Vol. 30, No. 3 (Feb. 2009) (available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_ea_nine_ways.authcheckdam.pdf. Steigel and Wood highlight the following beneficial consequences if the UAGPPJA were to be adopted by all of the states.

1. The UAGPPJA could **reduce incidents of "granny snatching"** by eliminating an elder's mere physical presence as the determining factor for jurisdiction in a guardianship, conservatorship or protective proceedings matter. *See* § 201.

2. The UAGPPJA enables a court to decline to exercise jurisdiction because of **"unjustifiable conduct"** (*e.g.* "granny snatching") and to penalize such conduct. *See* § 207.

3. The UAGPPJA requires a court to **consider elder abuse** when determining the appropriate forum. Section 206 of the UAGPPJA lists various factors that must be taken into account, including "whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation."

4. The UAGPPJA **facilitates the monitoring** of guardianships and conservatorships. Section 206 of the UAGPPJA requires a court to realistically assess "the court's ability to monitor the conduct of the guardian or conservator" if jurisdiction were accepted and a guardian or conservator were appointed by that court.

5. The UAGPPJA could **heighten awareness of elder abuse** in a state in which the elder was physically present for at least six consecutive months immediately preceding the filing of an action in another. *See* § 208.

6. The UAGPPJA **facilitates cross-border communication** between and among courts, designed to reveal evidence of abusive conduct by interested parties (*e.g*. persons seeking to be appointed as a guardian or conservator for the elder). *See* § 104.

7. The UAGPPJA **enhances information gathering and release** among courts making critical decisions in the context of a guardianship or conservatorship. Section 105 of the UAGPPJA authorizes appropriate investigations and the release of information gleaned by such investigators (*e.g*. criminal, financial, and medical).

8. The UAGPPJA creates **expedited transfer procedures** designed to remove an elder from abusive situations. Section 301 of the UAGPPJA requires a court to consider whether "plans for the care and services" for the elder are "reasonable and sufficient," and whether "adequate arrangements will be made for the management" of the elder's property, in its determination to transfer a guardianship or conservatorship to another jurisdiction.

9. The UAGPPJA establishes **multi-state registration procedures** that could aid in the detection and monitoring of abuse. Sections 401 and 402 of the UAGPPJA permit a guardian and conservator to register the court order appointing him in another state, allowing him to act on the elder's behalf in that state. The person seeking to register the order must notify the court that appointed him, allowing the appointing court to inquire into the reason for the requested actions in the other state and the opportunity to share any concerns with the court in the other state.

10. The foregoing is neatly summarized by Stiegel and Wood as follows.

"...[S]everal of the UAGPPJA provisions could help courts take action to detect situations where elder abuse is occurring or may be likely to occur – and then prevent or stop the problem. Courts could communicate and coordinate with courts in other states to learn about relevant evidence, abuse, or criminal behavior by parties involved in the case; ensure that interested persons in other states have the opportunity to provide relevant information about abuse or contest the proceeding; decline to exercise jurisdiction over a case because the respondent is in the state due to granny snatching or other unjustifiable conduct; consider evidence of elder abuse and the court's ability to monitor a guardianship when determining whether it should exercise jurisdiction; and transfer guardianship to another state in an orderly and timely fashion to protect an older person from an abusive situation or ensure protection is provided." *Id*. at 5-6.

G. Elder Mediation

Elders, their families and their advisors are increasingly using mediation as a tool to prevent escalating conflict that could lead to financial abuse. Elder mediation refers to the process where **one or more of the participants is at least 60 years of age**. Many local, state and national organizations endorse the use of elder mediation in appropriate matters, including the AARP and the ABA Commission on Law and Aging. Mediation often results in faster resolution of disputes, allows the voice of the elder to be heard, and affords greater privacy to the parties than litigation.

1. The Center for Social Gerontology ("TCSG") "since its inception in 1972, has been a non-profit research, training and social policy organization dedicated to promoting the individual autonomy of older persons and advancing their well-being in society." *See* http://www.tcsg.org/welcome.htm. In the early 1990s, TCSG pioneered research and program initiatives in the newly developing field of elder mediation, initially in the context of adult guardianships and conservatorship proceedings. Its efforts have led to many successful elder mediation programs in courts throughout the country (*e.g.*, Arizona, California, Florida, Georgia, Hawaii, Michigan, New Hampshire, Utah, and Washington).

a. As with any type of mediation, elder mediation is a ***voluntary*** alternative dispute resolution process. Although a court may require parties to attend mediation, it cannot order them to reach an agreement.

2. Professor Mary F. Radford, in her thoughtful call to action *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 Stetson L. Rev. 611 (2002), makes a persuasive case for the use of elder mediation at all stages of an adult guardianship or conservatorship proceeding: pre-petition; initial filing of the petition; during the administration of the guardianship or conservatorship; and upon termination of the guardianship or conservatorship. She discusses how elder mediation can resolve many of the issues and disputes that surround the proposed appointment of a guardian or conservator, and may even facilitate the creation of an alternative structure to handle the care and finances of the adult that obviates the need for a guardianship or conservatorship. *Id*. at 665.

3. Professor Radford notes, however, that "[i]n adult guardianship cases, an important goal of pre-mediation intake is to **screen out cases that involve alleged abuse** of the adult under the theory that such cases belong in the courts rather than in mediation." *Id*. at 678.

a. The 2001 Joint Conference on Legal/Ethical Issues in the Progression of Dementia, covered by Erica Wood in *Dispute Resolution and Dementia: Seeking Solutions*, 35 Ga. L. Rev. 785 (2001), also recommended that "[n]o participant in mediation should be prohibited from reporting known or suspected elder abuse to adult protective services." *Id*. at 682-683, citing *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423 (2001), at 448.

b. Professor Radford also notes that TCSG has adopted a policy that it will not mediate cases in which there are allegations of abuse, based upon the belief that disputes "when such issues are alleged are generally better left in the court setting." *Id*. at 683, footnote 378.

4. Some of the myriad issues that may be **appropriate for elder mediation** in the context of forestalling potential elder financial abuse could include the following.

a. Less-restrictive alternatives to a court-supervised conservatorship for the management of the elder's care and finances (*e.g.* a RLT or GDPOA).

b. Identifying the proper persons to serve in fiduciary supportive roles for the benefit of the elder (*e.g.* as Trustee under a RLT or as Agent under a GDPOA).

c. Resolving disagreements between Co-Agents or Co-Trustees.

d. Identifying which allied professionals (*e.g.* investment advisors, attorneys, and accountants) will be retained to serve the elder's professional services needs.

e. Coping strategies to deal with the consequences of the elder's diminishing capacity in areas of financial management.

f. Assessing the financial implications of various residential options for the elder (*e.g.* aging in place at home with private caregivers versus a high-end "continuing care retirement community") and the options for funding the costs of same (*e.g.* the proposed sale of the elder's home or other investments).

g. The elder's problems with consumer credit or inappropriate spending.

5. The **largest obstacles** to the widespread use of elder mediation include the following.

a. There is still a general **lack of awareness** that elder mediation can be a viable option for resolving conflicts that can forestall elder financial abuse. Elders, their families, and their professional advisors (*e.g.* all of the allied professionals listed in Section IV.B, above) must be educated on the merits of this alternative. Similarly, relevant state and local agencies that interface regularly with elders (*e.g.* APS, LTCO, court staff) must also be advised of the benefits of this tool.

b. There is a **paucity of qualified mediators** who are trained in the finer points of elder mediation, including the following issues identified by Professor Radford in her article.

(1) Education in the **substantive areas** of the law involved in elder cases, including conservatorship, trust, and agency (*i.e.* alternatives to conservatorship).

(2) Awareness and basic understanding of **senior services programs** and government benefits.

(3) The development and application of **specialized mediation standards** and training where an elder participant is suffering from diminished capacity.

(4) Knowledge and implementation of processes that **accommodate elders** with sensory deficiencies (*e.g.* visual or hearing impairments, or mental, cognitive, or social limitations that may be part of aging).

(5) Understanding the interplay between the elder's **autonomy** and her **"best interest."**

(6) **Clarification of the roles** to be played by an elder's attorney or court-appointed Guardian ad Litem during the mediation.

(7) Identifying the **persons who should participate** in the mediation, whether or not they would otherwise have standing in the context of a judicial proceeding (*e.g.* the elder's long-time live-in companion).

(8) Securing the parties' agreement to limited exceptions to the otherwise **confidential** nature of mediation proceedings.

6. Elder mediation "offers the opportunity to go beyond the surface issues and explore the family dynamics behind the problem. Mediation gives the parties an opportunity to vent, and when done successfully will go beneath the issues to uncover the real needs of each party, as opposed to each party's announced purported positions." *See* Antonio J. Martinez and Robert W. Shaw, *Mediation: It's Not Just When the Marriage Breaks Up*, NYSBA Trusts and Estates Law Section Newsletter, Vol. 46, No. 3 (Fall 2013) (available at http://old.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=142469).

Conclusion

Elder financial abuse is a societal plague that impacts persons in all social classes and economic strata: from a *pro bono* client living alone in her government subsidized studio apartment, to Brooke Astor in her opulent Park Avenue home surrounded by "caring" family members. 2013 was the "Year of Elder Abuse Prevention," sponsored by the Administration on Aging, an agency of the Administration for Community Living, to protect elders and raise awareness about elder abuse, neglect, and exploitation. June 15,

2015 was the tenth anniversary of "World Elder Abuse Awareness Day." Yet, the plague remains.

The following is excerpted from an article by Phillip C. Marshall, "*Beyond Brooke: Brooke Astor and the Cause of Elder Justice,*" published in *Bifocal*, a Journal of the ABA Commission on Law and Aging, Vol. 36, No. 3, January-February 2015, at 67-71.

> "To be complacent about elder justice is to be complicit in elder abuse.
>
> In fact, our national negligence is a proximate cause of elder abuse.
>
> When our elders lose their sight, it's natural; when we turn a blind eye to their plight, it's negligent.
>
> When our elders lose their hearing, it's natural; when we are deaf to their cries for help, it's negligent.
>
> When our elders lose their voice, it's natural; when we choose not to voice our concerns, it's negligent.
>
> And when our elder's capacity is reduced, it's natural; when their physical and financial assets are reduced, without consent, it's criminal."

Readers of this outline may be ideally situated to inform clients, friends and family members about the scope and devastating impact of elder financial abuse. Educating the multi-disciplinary allied professionals who serve our elders is a critical first step towards stemming the rising tide of elder abuse.

* All links current as of 9/8/2015.

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