Judges Guide: Abuse in Later Life

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

This project was supported by Grant No 2014-WF-AX-0045 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

ABOUT THIS PROJECT

This project was supported by Grant No 2014-WF-AX-0045 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

JUDICIAL COUNCIL OF CALIFORNIA

Ms. Millicent Tidwell, Chief Operating Officer
Operations and Programs Division
Ms. Diane Nunn, Director
Center for Families, Children & the Courts

VIOLENCE AGAINST WOMEN EDUCATION PROJECT (VAWEP) STAFF

Ms. Bonnie Hough
Managing Attorney and VAWEP Project Director
Ms. Bobbie Welling
Former Supervising Attorney
Ms. Jennifer Walter
Supervising Attorney
Ms. Eve Hershcopf
Attorney and Project Manager
Ms. Penny Davis
Senior Court Services Analyst

AUTHORS, 2015 EDITION

Ms.Candace J. Heisler
Attorney, Heisler & Associates
All chapters other than Chapter 12
Hon. Julie Conger (Ret.)
Judge of the Superior Court of California
County of Alameda
Chapter 12

PLANNING COMMITTEE

Hon. Mary Ann Grilli, Chair
Superior Court of California, County of Santa Clara
Hon. Susan M. Breall, Judge
Superior Court of California, County of San Francisco
Ms. Emberly Cross, Coordinating Attorney
Cooperative Restraining Order Clinic
Hon. Lewis A. Davis, Judge
Superior Court of California, County of Contra Costa
Hon. Becky Lynn Dugan, Judge
Superior Court of California, County of Riverside
Hon. Harry M. Elias, Judge
Superior Court of California, County of San Diego
Hon. Sherrill A. Ellsworth, (Ret.)
Superior Court of California, County of Riverside
Hon. Scott M. Gordon, Judge
Superior Court of California, County of Los Angeles
Hon. Arlan L. Harrell, Judge
Superior Court of California, County of Fresno
Ms. Sandra Henriquez, Executive Director
California Coalition Against Sexual Assault (CALCASA)
Hon. Joni Hiramoto, Judge
Superior Court of California, County of Contra Costa
Hon. Sam Lavorato, Jr., Judge
Superior Court of California, County of Monterey
Mr. Rick Layon
Layon and Holck
Ms. Kathy Moore, MSW, Director
California Partnership to End Domestic Violence
Ms. Nancy O'Malley, District Attorney
Alameda County
Ms. Lynda Smallenberger, Executive Director
Kene Me-Wu Family Healing Center, Inc.
Deputy Roena Spiller
San Mateo County Sheriff's Office
Mr. Mark Varela, Chief Probation Officer
Ventura County Probation Agency
Hon. Glenda Veasey, Commissioner
Superior Court of California, County of Los Angeles
Mr. Martin Vranicar, Jr., Assistant Chief Executive Officer
California District Attorneys Association
Hon. Christine Williams, Chief Judge
Northern California Intertribal Court System (NCIC), and
Shingle Springs Tribal Court

For additional information about VAWEP activities, editorial comments, and inquiries, please contact:
Bonnie Hough, Managing Attorney and VAWEP Project Manager
415-865-7668,
e-mail bonnie.hough@jud.ca.gov
fax 415-865-7217

© 2015 by Judicial Council of California
Published December 2015

This report is also available on the California Courts website: http://www2.courtinfo.ca.gov/protem/pubs/dv-elders.pdf. For additional copies or more information about this report, please call the Center for Families, Children & the Courts at 415-865-4262 or write to:

Judicial Council of California
Operations and Programs Division
Center for Families, Children & the Courts
Attention: Violence Against Women Education Project
455 Golden Gate Avenue
San Francisco, California 94102-3660.

FOREWORD 2015

Abuse in later life is a growing concern both in California and nationally, primarily because of the growing number of older adults. According to the U.S. Administration on Aging, as of 2013 the population of Californians over 65 years of age was 4.6 million, 12.1 percent of all age groups in the state. Elder abuse arises in various forms, including domestic violence in later life, physical and emotional abuse, sexual abuse, abuse or neglect by a caregiver, and financial exploitation. Abuse may be an underlying allegation in a number of case types, including criminal cases; both criminal and civil cases involving domestic violence or proceedings requesting restraining or protective orders; and probate and conservatorship cases.

California and other states, as well as national court-related organizations, have responded by providing support for the development of elder courts, delivering judicial and staff education, distributing publications, developing recommended practices and procedures and increasing access and public awareness.

Although other publications have been distributed relating to specific topics, this bench guide marks the first California comprehensive publication on elder abuse designed specifically for judicial officers. This guide is a work in progress. Original Chapters 7, 8 and 12 (former Chapter 11) of this publication were completed in 2014 and have been updated in the current edition. Current Chapter 11, *Elder Abuse in Tribal Communities*, was originally published as a separate publication in 2014. Future chapters are noted in the Table of Contents. The drafting, preparation, and distribution of the guide were made possible by grant funding.

We encourage those who use this book to comment and make suggestions on the form provided so that the guide can be as useful to California judges as possible.

ACKNOWLEDGMENTS

We gratefully acknowledge the dedicated commitment of time and expertise by the Violence Against Women Education Project Planning Committee members; the authors, Ms. Candace Heisler and Judge Julie Conger; and staff members who contributed to the development of this bench guide. Special thanks go to Judge Mitchell Beckloff, Judge Joyce Cram, Judge Reva Goetz, and attorneys Jayne Lee and Bobbie Welling who reviewed various components of the draft. We sincerely appreciate the generous support of the California Governor's Office of Emergency Services and the Office on Violence Against Women, U.S. Department of Justice.

VIOLENCE AGAINST WOMEN EDUCATION PROJECT

Domestic violence and sexual assault are critical issues facing family, criminal, and juvenile courts in California. The Violence Against Women Education Project (VAWEP) is an initiative designed to provide the courts with information, educational materials, and training on the court's role in responding to these cases. VAWEP is a collaborative project of the Judicial Council's Operations and Programs Division, housed in two of its staff offices: the Center for Families, Children & the Courts (CFCC) and Center for Judiciary Education and Research (CJER). The project is funded by the California Governor's Office of Emergency Services (CalOES) with resources from the federal Office on Violence Against Women (OVW), U.S. Department of Justice. The project's planning committee—comprised of judicial officers, attorneys, victim advocates, and other experts—guides the project staff in identifying key training issues and developing appropriate educational programming. Major efforts for the development and augmentation of educational events and curricula related to domestic violence and sexual assault are currently under way.

CONTENTS

CHAPTER

An Overview of and Introduction to Elder Abuse 1

Definitions of Elder Abuse and Settings in Which Abuse Occurs 2

Forms of Elder Abuse 3

Medical-Legal Considerations [Reserved] 4

Risk Factors and Indicators of Elder Abuse 5

The Impact of Elder Abuse 6

Allegations of Elder Abuse in Criminal Cases 7

Restraining Orders 8

Abuse of Powers of Attorney [Reserved] 9

Probate and Conservatorship Proceedings [Reserved] 10

Elder Abuse in Tribal Communities 11

Judicial Ethics and Court Leadership 12

Chapter 1
AN OVERVIEW OF AND INTRODUCTION TO ELDER ABUSE

[§1.1] CHAPTER OVERVIEW

[§1.2] INTRODUCTION TO ELDER ABUSE

[§1.3] THE AGING OF AMERICA: NATIONAL STATISTICS

[§1.4] CALIFORNIA'S AGING POPULATION

[§1.5] HOW SERIOUS IS THE PROBLEM OF ELDER ABUSE? PREVALENCE AND INCIDENCE

[§1.5.1] ELDER ABUSE REPORTS IN CALIFORNIA

[§1.6] COURT SETTINGS FOR ADDRESSING ELDER ABUSE CASES

[§1.7] THE ELDER ABUSE VICTIM AND LITIGANT IN COURT

[§1.7.1] ALTERNATIVE DISPUTE RESOLUTION

[§1.8] COURT RESPONSES TO ELDER ABUSE

[§1.9] SUMMARY POINTS FOR JUDICIAL OFFICERS

> *"The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy, and the handicapped."*
> *Hubert H. Humphrey, 1977*

[§1.1] CHAPTER OVERVIEW

This chapter will introduce the concept of elder abuse and provide examples, describe the aging of the population in America and specifically in California, discuss the prevalence and incidence of elder abuse, and describe the court settings and the types of legal actions that may be used to address elder abuse. The chapter will also consider the elder litigant in court and the use of alternative dispute resolution methods in elder abuse matters.

[§1.2] INTRODUCTION TO ELDER ABUSE

Elder abuse is a new name for an old phenomenon. As awareness of elder abuse has grown, and with the "graying" of the United States' population, state legal and public health systems have increasingly been called upon to recognize elder abuse, respond to it, and provide remedies to ameliorate its effects. Elder abuse, once seen as a social services problem, is now seen as a justice, health care, economic security, and societal problem that is estimated to affect

4-6 percent of older people.[1] Elder abuse is also viewed as a violation of human rights that results in loss of dignity and respect. The phenomenon is so complex that no single discipline or profession can adequately address it, but the courts have a significant and unique role to play in providing justice for elder abuse victims.

With the aging of the population in the United States and California, more cases of elder abuse will appear in many different court settings. Elder abuse is no longer considered just a social problem involving stressed caregivers who were doing the best they could, but is viewed as a criminal and civil justice matter. Older litigants, their families and their representatives are now asking the courts for legal protection and offender accountability. Courts in California will necessarily need to be prepared to respond to the increasing number of complex elder abuse matters brought before them.

Elder abuse has long been described in Greek mythology, *e.g.*, Oedipus and the murder of his father, English literature, *e.g.*, Shakespeare's King Lear, and law, *e.g.*, Sir Francis Bacon's description of the case of Mr. Death, in what might be described as a "sweetheart scam" in which an 80-year-old man was wooed by a much younger woman who, following their marriage, abused and neglected him.[2]

The more recent history of elder abuse dates to the mid-1970s when the phenomenon of "granny battering" was first identified by medical professionals and researchers: "I think it is about time that all of us realized that elderly people too are at times deliberately battered. I have personal knowledge of cases in which it has been possible to confirm that elderly patients have been battered by relatives before admission to hospital and in which there has been no doubt that the battering was deliberate."[3]

In the past fifty years, national and international awareness of elder abuse has grown. More cases than ever before are being identified and more victims and their families are seeking redress from the courts. Elder abuse cuts across all sectors of society. The recent notable cases of heiresses Brooke Astor and Huguette Clark[4] have shown that fame and fortune are not protectors against elder abuse. In California, few have forgotten the searing testimony of Mickey Rooney before the United States Senate, who, while in his nineties, was left penniless and in debt at the hands of family.

---

[1] World Health Organization, *Elder Abuse: Fact Sheet No. 357* (December 2014) <http://www.who.int/mediacentre/factsheets/fs357/en/> (as of May 4, 2015).
[2] Heisler, *Elder Abuse*, in Victims of Crime (3rd ed. 2007) p. 161.
[3] Burston, Letter: Granny-battering (September 6, 1975) 3 British Medical Journal 592.
[4] For a view of elder abuse by the grandson of Brooke Astor, please see Marshall, Philip C. *Beyond Brooke: Brooke Astor and the Cause of Elder Justice* (February 2015) 36(3) Bifocal 67-71 <http://www.americanbar.org/publications/bifocal/vol_36/issue_3_february2015/beyond_brooke.html> (as of October 27, 2015).

Although elder abuse can be a problem for the rich and famous, it is even more catastrophic for people of modest means. Courts confront abuse cases involving situations such as the following:

- An elderly husband who has physically, sexually and psychologically abused his wife throughout their decades-long marriage.
- The son who convinced his mother that he alone could care for her in her later years and then neglected her to the point that she died in great pain of untreated septic pressure ulcers.
- The elderly resident of a nursing home whose repeated calls for help were ignored by staff who considered him a "problematic and demanding patient." Left unassisted, he tried to get out of bed, became caught in the side bedrails and died of asphyxia.
- The elderly woman living on Social Security whose check is forcibly taken from her each month by her substance-abusing son.
- The elderly man who is left emotionally broken and penniless by a sweetheart scam committed by someone he thought loved and cared for him.
- The elderly widow whose life savings are taken through undue influence by a trusted advisor.
- The elderly couple who are followed home from a neighborhood bank by a stranger who assaults and robs them as they open the door to their apartment building.

Judges will need to become familiar with relevant laws and significant remedies such as those included in the Elder Abuse Restraining Order (EARO) (Welf & I C §15657.03); the prosecution of cases under Pen C §368 (Crimes Against Elders and Dependent Adults); the white collar crime enhancement for large - loss criminal financial abuse (Pen C §186.12); and the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15657-15657.08).[5]

[§1.3] THE AGING OF AMERICA: NATIONAL STATISTICS

The number of older adults living today is greater than ever before in history. About one in seven Americans is at least 65 years old. Between 2002 and 2012, the number of older Americans increased by 7.6 million (21 percent). In comparison, the under-65 population increased by only 7 percent. There were 43.1 million persons 65 years or older in 2012, and by 2040 there will be close to 79.7 million. In 2012, persons 65+ represented 13.7 percent of the population; in contrast, in 2040 the percentage is expected to reach 21 percent. [6]

---

[5] EADACPA provides for enhanced civil remedies for specific forms of elder abuse, including financial abuse. Judges handling cases involving these matters must understand the specifics of such actions but a discussion of civil remedies is beyond the scope of this Bench Guide.

[6] U.S. Administration on Aging, *A Profile of Older Americans: 2013* (2014) U.S. Department of Health and Human Services, Administration for Community Living <http://aoa.gov/AoARoot/Aging_Statistics/Profile/index.aspx> (as of October 28, 2015).

Older members of racial and ethnic minority communities have increased from 6.1 million in 2002 (17 percent of the elderly population) to 8.9 million in 2012 (21 percent of the elderly population). Their numbers will also continue to grow to some 20.2 million (28 percent of the elderly) by 2030. While the white, non-Hispanic population age 65 and older will increase by 54 percent by 2030, the racial and ethnic minority elder populations will increase by 126 percent.[7]

The fastest growing segment of the elderly population, those aged 85 and older will more than double from 5.9 million (2012) to 14.1 million (2040),[8] and this growth raises special concerns. "Those 85 and older have a significantly higher rate of severe chronic health conditions and functional limitations that result in the need for more health and supportive services. The rapid growth of this age group has many implications for individuals, families, communities, and government."[9] Advancing age increases the likelihood of medical and cognitive limitations and dependence on others for assistance; dependency is one of the risk factor for elder abuse. (For more information on risk factors please refer to Chapter 5 of this Bench Guide.)

Although 70 percent of older adults have no cognitive difficulties, it is estimated that 2.9 percent of people aged 65-74 have Alzheimer's disease, the most common form of dementia. Dementia increases the need for assistance from others and the likelihood of placement in a long term care facility where the disease may cause aggressive and other problematic behaviors. Dependency on others and the behaviors associated with dementia and nursing home placement are all risk factors for abuse.[10]

As courts deal with increasing numbers of older litigants and witnesses, the impact of these age-related changes will have to be anticipated and accommodated by judges and court staff handling elder abuse cases and other types of cases involving older adults.

[§1.4] CALIFORNIA'S AGING POPULATION

California has a large and growing older population, so the state can expect to experience an increase in elder abuse and elder abuse cases. California is home to more persons age 65 and older than any other state.[11] Currently, there are approximately 4.6 million Californians age 65

---

[7] U.S. Administration on Aging, *A Profile of Older Americans: 2013, supra*.
[8] U.S. Administration on Aging, *A Profile of Older Americans: 2013, supra*.
[9] California Department of Aging, *California State Plan on Aging – 2013-2017* (2013) <http://www.aging.ca.gov/AboutCDA/Docs/California_State_Plan.pdf> (as of October 28, 2015).
[10] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed?* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 446-500. See also Pillemer & Bachman-Prehn, *Helping and Hurting: Predictors of Maltreatment of Patients in Nursing Homes* (1991) 13 Research on Aging 74-95.
[11] U.S. Administration on Aging, *A Profile of Older Americans: 2013, supra*.

and older, 12.1 percent of all age groups in the state. The percentage of California's older adults living below the poverty level is 10.40 percent, a particularly high rate among western states.[12]

California's senior population will continue to grow. In 2000, older Californians numbered approximately 3.6 million. By 2020, the number will increase to an estimated 6.3 million; by 2040, the number is projected to reach 10.5 million. The percentage increase in persons aged 65 and older will grow from 11 percent (2000), to 14 percent (2020), to 19 percent (2040).[13] Between 2010 and 2060 it is estimated that the population will increase as follows:

- Persons age 65 to 74: 3.2 million, a 140 percent increase
- Persons age 75-84: 2.7 million, a 203 percent increase
- Persons age 85 and older: 1.9 million, a 316 percent increase

These percentage changes are far greater than those for all younger age groups.[14]

Nearly two-thirds of older Californians live in the Los Angeles Basin and the San Francisco Bay Area; this trend is expected to continue for the next 40 years. Yet the largest increases in the size of the older population are predicted for parts of the Central Valley and Southern California: by 2030, the number of older people is expected to double in Kern, Kings, Merced, San Benito, San Bernardino, Riverside and Imperial Counties.[15]

Like the rest of the United States, the size of minority elderly communities in California is projected to increase. In 2010 the White, non-Hispanic population 60 and older constituted 60 percent of the state's older population. By 2040 the percentage will drop to 36.1 percent. The Hispanic/Latino population will increase from 18.8 percent in 2010 to 37.5 percent in 2040. Older Asian adults will increase from 13 percent in 2010 to 16.8 percent of the population in 2040.[16] By 2030, the number of older members of the lesbian, gay, bisexual, and transgender (LGBT) community is expected to nearly double.[17]

California is home to 10 percent of all persons with Alzheimer's disease living in the U.S. In California, one in six persons aged 55 and older will develop a dementing illness; one in

---

[12] U.S. Administration on Aging, *A Profile of Older Americans: 2013*, *supra*.
[13] Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation* (February 2008) <www.Courts.ca.gov/documents/courtabused-eldersreport.pdf> (as of October 28, 2015).
[14] California Department of Finance, *Report P-1 Summary Population Projection by Major Age Groups* (December 2014) <http://www.dof.ca.gov/research/demographic/reports/projections/P-1/> (as of May 4, 2015).
[15] California Department of Aging, *California State Plan on Aging -- 2013-2017*, *supra* at 10.
[16] California Commission on Aging, *Demographics of California's Senior Population*, <www.cprs.org/index.php?option=com_docman&task=doc> (as of May 12, 2015).
[17] The Policy Institute of the National Gay and Lesbian Task Force, *Make Room for All: Diversity, Cultural Competency and Discrimination in an Aging America* (2006).

eight will develop Alzheimer's disease.[18] In 2015, it is estimated that nearly 700,000 Californians aged 55 and older have Alzheimer's disease. By 2030, that number is projected to increase by 69 percent to more than 1.1 million older Californians.[19]

[§1.5] HOW SERIOUS IS THE PROBLEM OF ELDER ABUSE? PREVALENCE AND INCIDENCE

Our knowledge of elder abuse is hampered by limited research, an absence of an agreed-upon definition, lack of consensus about its forms and, until very recently, little federal leadership or funding. In fact, for every federal dollar spent on family violence, 97 cents are spent on child welfare; two cents are spent on intimate partner violence; and one cent is spent on elder abuse.[20] Several recent large-scale national studies make the case that elder abuse is prevalent and significantly under-reported.

Researchers[21] reviewed 353 published studies in nine countries and found elder abuse prevalence rates in the seven studies with the best methodologies, as follows:

- Physical abuse, between 1.2 and 4.3 percent;
- Financial abuse, between 1.3 and 5 percent;
- Emotional/verbal abuse, between 0.8 and 10.8 percent; and
- Neglect, between 0.2 and 4.3 percent.

In 2008, Laumann and colleagues conducted the National Social Life, Health and Aging Project (NSHAP) study. They sampled 3005 persons aged 57 to 85 and found a 9 percent prevalence rate for verbal abuse; a 3.5 percent prevalence rate for financial abuse; and a 0.2 percent prevalence rate for physical abuse.[22] More recently, researchers conducted a telephonic survey of 5777 cognitively intact Americans over age 60 and found an elder abuse prevalence rate of 11.4 percent in the year prior to the study, including financial abuse committed by a family member (5.2 percent) and sexual abuse (0.6 percent).[23] A study of elder sexual abuse reviewed data from 18 states (not including California), and found a prevalence rate of 0.9

---

[18] Ross et al., *Alzheimer's Disease Facts and Figures in California: Current Status and Future Projections* (2009) <http://alz.org/CAdata/FullReport2009.pdf> (as of June 20, 2015).
[19] Ross et al., *Alzheimer's Disease Facts and Figures in California: Current Status and Future Projections*, *supra*.
[20] Kathleen Quinn, address to the 17th Annual Conference of the Virginia Coalition for the Prevention of Elder Abuse (2011) Closing Plenary Session.
[21] Cooper et al., *The Prevalence of Elder Abuse and Neglect: A Systematic Review* (2008) 37(2) Age and Ageing, 151–160.
[22] Laumann et al., *Elder Mistreatment in the United States: Prevalence Estimates From a Nationally Representative Study* (2008) 63 Journal of Gerontology 248–254.
[23] Acierno et al., *National Elder Mistreatment Study* (2009) <www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf> (as of December 29, 2015). See also Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study* (February 2010) 100(2) American Journal of Public Health 292–297.

percent for sexual abuse in the year prior to the study. This finding is significantly higher than rates of sexual abuse in either the 1996 National Elder Abuse Incidence Study (0.3 percent) or the National Elder Mistreatment Study (0.6 percent).[24]

A recent study in New York found a significant gap between the rate of elder abuse reported by older persons and the number of cases referred to agencies with the capacity and/or responsibility to assist older victims of abuse. For every case of any form of elder abuse that was referred to an agency, another 24 went unreported to the appropriate agency. Rates of detection of financial exploitation were much lower than for other forms of elder abuse, with only one in 44 instances detected.[25]

Notably, all of these studies surveyed cognitively-intact persons who were able to give informed consent to participate. To date, for legal and ethical reasons, few studies have been conducted of persons who are not cognitively intact, live in institutional settings or are involuntarily hospitalized or incarcerated. Persons with cognitive impairments appear to be at greater risk for abuse than older adults without such impairments. Studies[26] have found rates of abuse of persons with dementia by caregivers to be between 34 and 62 percent. It is likely that rates of elder abuse, as reflected in the national studies of community-dwelling older adults, underestimate the rates of elder abuse across all segments of the population.

[§1.5.1] ELDER ABUSE REPORTS IN CALIFORNIA

There are no California-specific studies of elder abuse rates. The primary source of data on California elder abuse is program data from the Adult Protective Services (APS) agency, collected from the county-based offices located throughout the state. Data confirms a steady increase in the number of reports. In fiscal year (FY) 2011-2012, APS programs received 118,914 reports of suspected elder and dependent adult abuse. In FY 2013-2014 the number

---

[24] Cannell et al., *U.S. Population Estimates and Correlates of Sexual Abuse of Community-Dwelling Older Adults* (2014) 26(4) Journal of Elder Abuse and Neglect 398-413.

[25] Lifespan of Greater Rochester, Inc. et al., *Under the Radar: New York State Elder Abuse Prevalence Study. Self-Reported Prevalence and Documented Case Surveys, Final Report* (May 2011).

[26] See Burnight & Mosqueda, *Theoretical Model Development in Elder Mistreatment* (2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/234488.pdf> (as of December 29, 2015); Cooney et al., *Abuse of Vulnerable People With Dementia By Their Carers: Can We Identify Those Most At Risk?* (2006) 21 International Journal of Geriatric Psychiatry 564–571; Cooper et al., *The Prevalence of Elder Abuse and Neglect: A Systematic Review*, *supra*; and Yan & Kwok, *Abuse of Older Chinese With Dementia By Family Caregivers: An Inquiry Into The Role of Caregiver Burden* (2010) 26(5) International Journal of Geriatric Psychiatry 527-35.

grew to 126,931, an 8.3 percent increase.[27] In 2012, 50 percent of reports to APS were for self-neglect, while over 30 percent were for suspected financial abuse.[28]

[§1.6] COURT SETTINGS FOR ADDRESSING ELDER ABUSE CASES

Given the aging population of California and the United States, and the pervasive nature of elder abuse, many cases of elder abuse are being brought before the courts, although these cases are not always identified as such. "…[T]he courts deal with elder abuse daily—often in the guise of other case types, such as adult guardianships, civil commitments, and domestic violence."[29] This may help to explain why elder abuse cases often go unrecognized by courts. In a study conducted by the National Center for State Courts, three-quarters of respondents ranked the court's identification of elder abuse issues as "fair" or "poor."[30]

Elders come into the courts under various conditions and case types that may involve elements of elder abuse. Examples include:

- an elder with presumed capacity who was a hoarder of possessions and animals brought to court on an eviction action. In reality, the elder had a caregiver who was neglecting and financially exploiting her.
- foreclosure cases, which may involve elders who, as judges later discover, have been victims of predatory lending.[31]

---

[27] California Department of Social Services, Administrative Division, *APS Confirmed Abuse Perpetrated by Others* (January 2015) <http://www.cdss.ca.gov/research/res/pdf/daptrends/SOC242AnnJuris.pdfCases> (as of May 12, 2015).

[28] Nielsen, *Elder Abuse and the Role of Adult Protective Services in California*, PowerPoint presentation, citing to <http://www.cdss.ca.gov/research/res/pdf/SOC242/2013/SOC242May13.pdf> (as of June 20, 2015), from <socialwelfare.berkeley.edu/sites/default/files/users/gregmerrill/Elder%20Abuse%20and%20the%20Role%20of%20Adult%20Protective%20Services%20in%20California,%20Fall%202013.pdf>.

[29] Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation*, *supra* at 10.

[30] Uekert, *Elders and the Courts: Results from a Needs Assessment Survey* (April 14, 2009) <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/266> (as of October 28, 2015).

[31] Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation*, *supra* at 8.

Elder abuse cases can appear in virtually any court setting and in a variety of actions. For example:

Court Setting	Type of Action

Family Court	• Court orders
	  ○ Domestic Violence Prevention Act
	  ○ Elder Abuse Restraining Orders
	  ○ Emergency Protective Orders (not stalking)
	• Dissolution and annulment of marriage
	• Adult adoptions
	• Guardianship (e.g., unrelated person seeks to be adopted by an older person with assets in order to gain control of the assets)

Civil Court	• Lawsuits to quiet title • Suits for damages • Elder Abuse Restraining Orders • Elder abuse lawsuits • Unlawful detainer (*e.g.*, elder is trying to evict an adult child who is stealing from the elder, threatening to harm the elder, has a mental health problem or substance abuse problem)
Juvenile Court	• Elder abuse (proceedings under Welf & I C §602 alleging a minor committed an act under Pen C §§368 or 243.25 against an elder or dependent adult) • Welf & I C §601 Beyond Parental Control (BPC) (*e.g.*, grandparents trying to control and parent their grandchildren who have emotional, mental health and/or behavioral problems) • Juvenile adoptions by grandparents or other elder relatives
Criminal Court	• Prosecutions under Pen C §368 for physical abuse, neglect by a caregiver, infliction of unjustified physical pain or mental suffering, financial abuse, or false imprisonment of an elder or dependent adult • Probation revocation actions • Criminal Protective Orders • Stalking Emergency Protective Order (EPO)

Probate Court	• Wills and estates • Conservatorship • Health care decisions (for persons unable to make their own decisions who are without surrogate decision makers) • Elder Abuse Restraining Orders (parallel conservatorship proceeding)

Many elder abuse cases present courts with unique issues including complex and subtle questions related to the elder's executive functioning and capacity, and whether an older person is capable of representing him/herself. Such questions make it important for courts to better identify elder abuse matters and have a process in place to effectively handle such cases.

Courts may see a marked increase in elder abuse allegations or cases due to the following factors:[32]

- Increasing numbers of older adults;
- Expansion of public awareness and education campaigns leading to greater recognition and reporting of elder abuse;
- Mandated reporting laws;
- Enhanced professional training;
- Development of multidisciplinary teams and forensic centers focused on elder abuse;
- Family Justice Centers that are broadening their services to assist older victims of family violence;
- Development of specialized elder abuse units in law enforcement and prosecutors' offices; and
- Passage of laws such as the Elder Abuse Restraining Order, laws addressing undue influence and parallel white collar crime proceedings, and the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA).

[§1.7] THE ELDER ABUSE VICTIM AND LITIGANT IN COURT

"Although the demographics on aging will impel judicial systems to accommodate larger numbers of older adults in the courtroom, it is the special needs of many elders that present the administrative challenge for court administrators or judges."[33] Many older litigants have limitations that affect their ability to participate in the court process. Court staff and judges should not assume or generalize that because of advanced age a particular litigant will

[32] Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation*, *supra*.

[33] Rothman, *Judicial Responses to the Growing Incidence of Crime Among Elders with Dementia and Mental Illness*, Statement for the U.S. Senate Special Committee on Aging (2004) <http://www2.fiu.edu/~coa/downloads/elder%20justice/US_Senate_3-11-04_Final.pdf> (as of December 29, 2015).

necessarily have any of these limitations. However, it is not uncommon for older adults to have the following deficits:

- Hearing loss;
- Vision problems;
- Limited endurance;
- Negative effects of medication;
- Mobility issues; and/or
- "Sundowning", a state of confusion affecting persons with dementia usually occurring at the end of the day, causing behaviors such as confusion, pacing and wandering, anxiety, and/or aggression. The cause is unknown. Confusion may be related to "fatigue, low lighting, increased shadows, disruption of the body's internal clock, and difficulty separating reality from dreams".[34]

The court can employ a number of legal measures to ensure that older litigants have access to justice. For example:

Authority	**Action**
Pen C §1048	Case setting priority in criminal cases
Pen C §868.5	Support persons
Pen C §1127g; CALJIC No. 331	Jury instructions (criminal cases)
CCP §36	Case setting priority in civil matters
California Rules of Court, rule 1.100(a)(3)	Accommodations

Accommodations can take a variety of forms such as:

- Establishing a calendar to hear elder abuse related matters;
- Scheduling elder abuse matters mid- to late-morning;
- Using methods to obtain testimony, including cross examination, of elder witnesses such as conditional examinations (criminal cases) and telephonic hearings (civil cases);
- Reducing delays and continuances;
- Reconfiguring the courtroom to assist witnesses who use walkers, wheelchairs, or other assistive devices;
- Taking more frequent recesses;
- Providing hearing devices and/or other amplification systems to assist witnesses with hearing deficits;
- Using video teleconferencing such as Skype in lieu of courtroom testimony;
- Providing interpretation/translation services as needed;
- Having the ability to permit testimony using assistive technology; and/or

[34] Mayo Clinic, *Sundowning: Late-day confusion* <http://www.mayoclinic.org/diseases-conditions/alzheimers-disease/expert-answers/sundowning/faq-20058511> (as of December 29, 2015).

- Using "Discovery Protective Orders" in civil cases to allow the court to set limits on the method and manner of discovery, *e.g.*, a protective order in the context of discovery could limit the testimony time for the deponent, specify who may be present, etc.

(See also California Rules of Court, rule 1.100.)

[§1.7.1] ALTERNATIVE DISPUTE RESOLUTION

Not all potential elder abuse issues can be resolved in a courtroom. Some matters lend themselves to methods of alternative dispute resolution (ADR). Such efforts have been undertaken since the 1980s.[35] But the use of ADR when aging is an issue must involve neutrals/mediators who are prepared and qualified to assure and protect the elder's autonomy and rights so the mediation process does not limit those rights nor marginalize the elder's preferences.

The neutral must be impartial, while protecting the elder's rights to self-determination, confidentiality, and safety. The challenges are especially difficult when the elder has cognitive limitations, there is long-standing family conflict or dysfunction, or the family or elder needs to but is not able to have difficult discussions about meeting the elder's caregiving needs. Mediation can be helpful in deciding what is a less restrictive alternative to conservatorship, what powers can be retained by the elder, who will serve as conservator, where the elder will live or who will provide care.[36]

The court, in considering the use of conflict resolution in elder abuse and elder care situations, should consider the neutral's qualifications:

- in both mediation and other ADR programs;
- in working with elder abuse victims;
- in working with people with cognitive limitations; and
- in dealing with family dysfunction and family violence matters.

The court should also consider:

- How will the elder's safety be protected?
- How will the elder's confidentiality be protected?
- How will the elder's health needs be accommodated?
- What findings has the court already made?

---

[35] Wood, *Dispute Resolution and Aging: What is the Nexus and Where Do We Stand?* (2015) 36(3) Bifocal 73-78 <http://www.americanbar.org/publications/bifocal/vol_36/issue_3_february2015/dispute_resolution_and_aging.html>.

[36] Wood, *Dispute Resolution and Aging: What is the Nexus and Where Do We Stand?*, *supra*.

- Should the court monitor the ADR process?
- What safeguards should be implemented to intervene if the ADR process is not effective?

(See California Rules of Court, rules 10.780-10.783 on ADR programs.)

[§1.8] COURT RESPONSES TO ELDER ABUSE

Beyond addressing the needs of individual elderly litigants, courts should generally consider practices and approaches to improve the court's management of elder abuse matters. The 2006 survey from the National Center for State Courts invited respondents to suggest ways the courts could improve their effectiveness in dealing with elder abuse issues.[37] The recommendations[38] include providing:

- adequate accommodations to those needing them;
- improved identification and tracking of elder abuse matters across courts, calendars, and departments;
- improved information from the court to the public;
- coordination between the courts and local agencies such as APS and law enforcement;
- assurance that qualified experts on elders and elder abuse conduct court assessments;
- court level advocates to assist victims and serve as a conduit to community services and resources;
- training and education for judges and court staff;
- opportunities for courts to convene or participate in community elder fatality review teams or committees to evaluate systemic responses and gaps;
- "elder-friendly" courthouses with trained staff to assist older adults, with safe and "elder-friendly" waiting areas;
- elder courts and/or calendars;[39]
- training and education materials for persons seeking appointment as conservators;[40]
- enhanced court information systems to better track elder abuse matters in whatever court they appear;[41] and
- court navigator or case manager positions to assist victims of elder abuse.

---

[37] Uekert, *Elders and the Courts: Results from a Needs Assessment Survey*, *supra*.
[38] For other examples of programs, please see Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation*, *supra*.
[39] In recent years Ventura County has developed such a calendar. Alameda and Contra Costa Counties have developed Elder Courts.
[40] The San Francisco Probate Court has developed such materials.
[41] Van Duizend, *The Implications of an Aging Population for the State Courts*, in Future Trends in State Courts: 2008.

The National Center for State Courts has developed a website for materials related to elder abuse and the courts: www.elderandcourts.org. Materials include an elder abuse training curriculum and elder abuse toolkits for the courts. The toolkit includes:

- Sample Bench Card;
- Court Collaboration Guide;
- Proposed Performance Measures for Courts; and
- Sample checklists for use by courts.

[§1.9] SUMMARY POINTS FOR JUDICIAL OFFICERS

- The population of the United States, including California, is aging.
- As Americans live longer they are at increased risk for chronic and debilitating medical and cognitive conditions, which is more likely to increase their dependence on others.
- There is a link between dependency and the risk of elder abuse.
- Victims of elder abuse will turn to courts for protection and relief in increasing numbers.
- Elder abuse matters may appear in virtually any court setting and are often not identified as elder abuse.
- Older litigants may require accommodations and use of special procedures to assure they have access to justice.
- Alternative dispute resolution may be helpful in certain cases but special consideration should be given to appropriate situations and to the qualifications of neutrals.

Chapter 2
DEFINITIONS OF ELDER ABUSE AND SETTINGS IN WHICH ABUSE OCCURS

[§2.1] CHAPTER OVERVIEW

[§2.2] WHAT IS ELDER ABUSE?

[§2.2.1] AGE AND VULNERABILITY BASED DEFINITIONS

[§2.2.2] RELATIONSHIP DEFINITIONS

[§2.2.3] CONDUCT INCLUDED IN THE DEFINITION OF ELDER ABUSE

[§2.3] CULTURAL BELIEFS RELATED TO DEFINING ELDER ABUSE

[§2.4] SETTINGS IN WHICH ELDER ABUSE OCCURS

[§2.4.1] ABUSE, NEGLECT AND EXPLOITATION IN LONG TERM CARE FACILITIES

[§2.5] SUMMARY POINTS FOR JUDICIAL OFFICERS

[§2.1] CHAPTER OVERVIEW

There is no single, universally accepted statutory definition or sociological framework for elder abuse. Efforts to define elder abuse have focused on identifying its unique aspects to distinguish elder abuse from all other conduct that may cause harm to an older person.

This chapter will discuss various definitions of elder abuse, reference how cultural views and perceptions may change the ways that elder abuse is defined, and describe settings where elder abuse occurs. Appendices will address sociological and behavioral definitions and types of long term care facilities.

[§2.2] WHAT IS ELDER ABUSE?

There is no universally-accepted definition of the point at which a person becomes "elderly" or what is encompassed by the term "elder abuse". Definitions of elder abuse typically include an age designation and conduct that is recognized as harming or putting an elder at risk of harm. Some definitions also require proof of vulnerability and a specified relationship between the victim and the perpetrator, such as that of intimate partner, family member, caregiver-care recipient, or person who stands in a position of fiduciary with an older adult, such as an attorney-in-fact, conservator, or trustee.

Judges will necessarily be guided by the definitions included in various statutes that address crimes specific to elder and dependent adult abuse, including:

- Pen C §368 (elder abuse);
- Welf & I C §15656 (elder abuse);

- Pen C §243.25 (battery on an elder); and
- Welf & I C §15630(h) (failure to report).

Judges will also want to consider statutes that provide civil causes of action such as the elder abuse restraining order under Welf & I C §15657.03; and the Elder Abuse and Dependent Adult Civil Protection Act under Welf & I C §15657.

Many definitions of "elder abuse" encompass two critical aspects of the term: "that some injury, deprivation, or dangerous condition has occurred to the elder person and that someone else bears responsibility for causing the condition or failing to prevent it."[1] Other definitions of elder abuse have been challenged because they include acts in which there is no third-party abuser, such as self-neglect, or are used to describe any abusive or neglectful actions committed against an older person, including stranger crimes. "Ordinary predatory victimization of elders merits empirical attention as a species of criminal behavior, but should not be regarded as a component of the distinct domain of elder mistreatment."[2]

[§2.2.1] AGE AND VULNERABILITY BASED DEFINITIONS

Just as there is no single definition of elder abuse, there is no single accepted age for when a person becomes an "elder". For example, the Older Americans Act of 1965 (42 USC §3002(38)) defines an older adult as a person 60 years of age or older. The United States Department of Justice, Office on Violence Against Women's Enhanced Training and Services to End Abuse in Later Life Program defines its target population as persons 50 and above. Many tribal communities define an elder as age 50 or 55. Social Security and Medicare programs use the age of 65.

California's law provides protections both for elders aged 65 and older, and for younger, dependent adults via Pen C §§368(g), (h) and Welf & I C §§15610.23, 15610.27. California is in the minority of states with a purely age-based definition of an elder as aged 65 and older. This age is irrespective of that person's level of functioning and/or the presence of a disability, although California does recognize younger dependent adults as a separate category of protected persons.

Many states do not use an age-based definition at all but make services and special legal protections available to all adults, age 18 and older. Often they also require that the person aged 18 and older be "vulnerable", "impaired", or "disabled" due to a medical or cognitive disability that restricts that person's ability to provide for his or her basic needs or protect his or her legal rights. California's "dependent adult" category for persons at least 18 years of age but less than age 65 is an example of this combination of age and vulnerability or disability elements.

---

[1] Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (Bonnie & Wallace edits., 2003), p. 40.
[2] Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, *supra* at 40.

[§2.2.2] RELATIONSHIP DEFINITIONS

Some definitions of elder abuse require that there be a relationship of trust between the abuser and victim, defined as "a care-giving relationship or other familial, social, or professional relationship where a person bears or has assumed responsibility for protecting the interests of the older person or where expectations of care or protection arise by law or social convention."[3] Examples include spouses, domestic partners, caregivers, attorneys in fact, conservators, and those in attorney-client relationships. In some states adult children owe a legal duty of care to their aging parents ("filial duty").[4] California is not a filial duty state.

In an attempt to more fully describe trust relationships, the Polyvictimization Project of the National Committee for the Prevention of Elder Abuse expanded the definition of trusted relationships to include "a personal, professional, or care recipient relationship in which there is a societal expectation of trust… (including) individuals with special access to older adults such as intimate partners, other family members, fiduciaries, paid or unpaid care or service providers, and resident(s) or service recipients in care settings."[5]

The inclusion of a relationship of trust as an element of elder abuse means that acts by strangers such as a sexual assault, home invasion robbery, or street mugging, even when the elder has been targeted by a stranger offender because of the age of the elder, do not fall within the definition. This definition also excludes most scams and confidence schemes committed by career criminals and others who prey on older adults. In contrast, the Elder Justice Roadmap Project concluded that predatory conduct directed at older persons based on age or disability should be included in the definition of "relationships" for elder abuse.[6]

Most California elder abuse statutes do not require a caretaker relationship between the victim and perpetrator. Those that do require a relationship of trust include neglect, abandonment, and some financial exploitation. See Pen C §§368(b), (c) and (e). For the statutes relating to abandonment, neglect by a caretaker, and abduction, see Welf & I C §§15610.05, 15610.06, and 15610.57 respectively. The caretaker definition includes both "hands-on" care providers and those who stand in a position of trust with an elder. Pen C §368(i); Welf & I C 15656(d).

---

[3] Panel to Review Risk and Prevalence of Elder Abuse and Neglect, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, *supra* at 39.

[4] Some 30 states impose a duty on adult children to provide care for their elderly parents. Moskowitz, *On Golden Pond: Integrating Legal Issues of the Elderly into Family Law* (2001) 30 Stetson L. Rev. 1427, 1453; see also Stiegel et al., *Neglect of Older Persons: An Introduction to Legal Issues Related to Caregiver Duty and Liability* (2007) <http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/neglect_of_older_persons.authcheckdam.pdf> (as of December 30, 2015).

[5] Ramsey-Klawsnik & Heisler, *Polyvictimization in Later Life* (May/June 2014) Victimization of the Elderly and Disabled, 15-16.

[6] Connolly et al., *The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis* (2014) <http://ncea.acl.gov/Library/Gov_Report/docs/EJRP_Roadmap.pdf> (as of October 23, 2015).

[§2.2.3] CONDUCT INCLUDED IN THE DEFINITION OF ELDER ABUSE

Elder abuse typically means an act or failure to act when there is a duty to act causing physical, emotional/psychological, and/or economic harm. California law recognizes these forms of elder abuse, though not all forms or acts are crimes:

- Physical
- Sexual
- Psychological/emotional
- Caretaker neglect
- Self-neglect
- Abduction
- Abandonment

These forms of elder abuse are discussed in greater detail in Chapter 3 of this Bench Guide.

Several sociological definitions of elder abuse, covering both criminal and non-criminal conduct, have also been developed. These non-statutory definitions provide a way of framing and distinguishing elder abuse from any possible act or failure to act that is directed at an older person. A chart describing several of these definitions is included as Appendix A at the end of this chapter.

[§2.3] CULTURAL BELIEFS RELATED TO DEFINING ELDER ABUSE

The most common definitions and characterizations of elder abuse in the United States may not match the cultural beliefs and values of some immigrants and other minority groups. Those cultures may perceive the existence and severity of elder abuse differently from the way elder abuse is viewed by the dominant culture. For example, psychological abuse and neglect may be seen as more hurtful than physical or other forms of abuse,[7] and some ethnic or cultural groups regard disrespect as one of the most significant types of abuse.[8]

Many factors affect immigrants' attitudes about and vulnerability to elder abuse victimization, including the amount of time each person has been in the United States, age when coming to the US, reasons for migrating, and settlement experiences. Research suggests that these factors may create conflict between parents and adult children, especially around

---

[7] Anetzberger et al., *Defining Elder Mistreatment in Four Ethnic Groups Across Two Generations* (1996) 11(2) Journal of Cross-Cultural Gerontology 187-212; and Zannettino et al., *The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People from Culturally and Linguistically Diverse Communities in Australia* (2015) 27(1) Journal of Elder Abuse and Neglect 74-89.

[8] Tam & Neysmith, *Disrespect and Isolation: Elder Abuse in Chinese Communities* (2006) 25(2) Canadian Journal on Ageing 141-151.

expectations for care and support of older family members.[9] Concerns about the immigration status of the victim, abuser, or extended family may be barriers for reporting abuse, seeking redress, or participating in justice system processes.

Cultural traditions and beliefs may affect what is considered to be abuse. For example, in a study of the role of cultural values in Korean and Chinese elderly, researchers describe five inter-related dimensions of values and beliefs that provide a "contextualized understanding" of elder abuse. [10] While this study focused on two specific groups, the findings may be applicable to many older immigrant victims of abuse. These dimensions include: collectivism and family harmony; filial piety, gender roles and male dominance; spiritual and religious beliefs; and immigration and acculturation.[11]

There is also considerable variation across cultural, ethnic, and racial groups about what constitutes financial exploitation. In some groups it is the norm to share resources with the family unit even if, from the dominant culture's perspective, this works to the elder's detriment.[12]

Awareness of cultural beliefs may be helpful to the court when:

- Assessing credibility of a party or witness;
- Understanding why elder abuse was not reported;
- Understanding why a party may be reluctant to participate in the judicial process;
- Understanding why a party appears to protect an abuser or minimize the abuser's conduct;
- Developing court-community relationships to enhance access to justice; and
- Assuring that court-appointed experts and programs understand the cultural experience of victim and abusers.

For information on Native American tribal practices and beliefs, please refer to chapter 11, "Elder Abuse in Tribal Communities: A Guide for California State Judges;" also available at <http://www.courts.ca.gov/documents/Elder_Abuse_Tribal_Communities.pdf>. See also,

---

[9] Lee & Eaton, *Financial abuse in elderly Korean immigrants: mixed analysis of the role of culture on perception and help-seeking intention* (Jul. 2009) 52(5) Journal of Gerontological Social Work 463-88.

[10] Lee et al., *Elder Mistreatment, Culture, and Help-Seeking: A Cross-Cultural Comparison of Older Chinese and Korean Immigrants* (2014) 14(3) Journal of Elder Abuse and Neglect, 244-269.

[11] Lee et al., *Elder Mistreatment, Culture, and Help-Seeking: A Cross-Cultural Comparison of Older Chinese and Korean Immigrants, supra* at 253.

[12] Moon, *Perceptions of Elder Abuse Among Various Cultural Groups* (2000) 24(2) Generations 75-80; Brown, *Patterns of Abuse among Native American Elderly* in Understanding Elder Abuse in Minority Communities (Tatara edit., 1999) pp. 143-159; Hudson and Carlson, *Elder Abuse: Its Meaning to Caucasians, African Americans, and Native Americans* in Understanding Elder Abuse in Minority Communities (Tatara edit., 1999) pp. 187–204.

resources available on the California Courts website under the heading *Federal Indian Law-Domestic Violence*, <http://www.courts.ca.gov/27542.htm> (as of October 25, 2015).

[§2.4] SETTINGS IN WHICH ELDER ABUSE OCCURS

Elder abuse occurs wherever older adults are located. Most older adults live in their own homes in community settings (estimated at between 80 and 96.9% of older adults). In contrast, only about 1.5 million people, or 3.4% of the population aged 65 and older, live in institutional settings such as nursing homes. That percentage increases dramatically with age (1% for persons 65-74 years; 3% for persons 75-84 years, and 10% for persons 85+).[13] Increasingly, some older adults live only temporarily in a facility and will move from a facility back to their own homes in the community. Over 40% of people 65 and older will enter a nursing home before they die, and have an average stay of two years.[14]

Abuse that occurs in the elder's home or where they carry out their life activities is described as abuse in a "community or domestic setting." Most abuse occurs in community (home) settings rather than institutional settings,[15] which is not surprising since the vast majority of older adults reside in community settings.[16] Some 89.3% of reports to Adult Protective Services programs across the United States occur in domestic settings.[17]

Abuse that occurs in a long term care facility is defined as abuse in an "institutional or facility setting." There are differences in the nature and characteristics of abuse in the two settings; these will be highlighted throughout this Bench Guide. For descriptions of long term care and the facilities in which it is provided, please see Appendix B at the end of this chapter.

---

[13] Administration on Aging, Administration for Community Living, U.S. Department of Health and Human Services, *A Profile of Older Americans: 2013* <http://www.aoa.gov/aging_statistics/Profile/2013/docs/2013_Profile.pdf> (as of December 30, 2015).

[14] Murtaugh et al., *The Amount, Distribution, and Timing of Lifetime Nursing Home Use* (1997) 35(3) Medical Care 204–18; National Care Planning Council, *About Nursing Homes* <https://www.longtermcarelink.net/eldercare/nursing_home.htm> (as of October 25, 2015).

[15] Kosberg & Nahmiash, *Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect* in Abuse, Neglect, and Exploitation of Older Persons: Strategies for Assessment and Intervention (Baumhover & Beall, edits., 1996) pp. 31-49.

[16] Falk & Hoffman, *The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships* (2014) 30 Clinics in Geriatric Medicine 851, 861; Jackson & Hafemeister, *Understanding Elder Abuse: New Directions for Developing the Theories of Elder Abuse Occurring in Domestic Settings* (June 2013) National Institute of Justice: Research in Brief, p. 3 <https://www.ncjrs.gov/pdffiles1/nij/241731.pdf> (as of October 25, 2015).

[17] Teaster et al., *The 2004 Survey of State Adult Protective Services: Abuse of Persons 60 Years of Age and Older* (2006).

[§2.4.1] ABUSE, NEGLECT AND EXPLOITATION IN LONG TERM CARE FACILITIES

Although the full extent of abuse in long term care facilities is unknown, the limited research suggests that abuse, neglect and exploitation are prevalent. One study surveyed nursing home staff and found in the year prior to the study 36% of staff members had seen at least one incident of physical abuse and 81% had seen at least one incident of psychological abuse.[18] More surprisingly, perhaps, 19% acknowledged committing one or more acts of physical abuse and 40% admitting committing one or more acts of psychological abuse.

In a study of 77 certified nursing assistants (CNAs) working in 31 different facilities researchers found that 11% had seen staff threatening to or actually throwing objects at residents; 25% witnessed staff unnecessarily isolating a resident; 21% witnessed unnecessary use of restraints of residents; 11% saw residents denied food as punishment; 21% saw a resident pushed, grabbed, shoved, or pinched by staff in anger; 12% witnessed staff slap patients; 7% saw patients kicked or struck with a fist; and 4% saw staff throw items at residents or strike them with objects.[19] In another study, more than half of nursing home staff members admitted to physically or psychologically abusing or neglecting older residents during the previous year. Two-thirds of the study's reported incidents involved neglect.[20]

A survey of 80 Atlanta residents in long term care facilities conducted by the Long Term Care Ombudsman Program found that 44% of residents reported being abused and 38% stated they had seen another resident abused. 95% reported being neglected or witnessing other residents being neglected.[21] According to the National Center on Elder Abuse, abuse reports for long term care facilities are as follows:[22]

- Physical abuse 29%
- Sexual Abuse 7%
- Psychological Abuse 21%

---

[18] Pillemer & Moore, *Abuse of Patients in Nursing Homes: Findings From a Survey of Staff* (1989) 29(3) The Gerontologist 314-320.

[19] Hearing before the Senate Special Committee on Aging on Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation, testimony of Marie-Therese Connolly, Senior Scholar at the Woodrow Wilson International Center for Scholars, and the Director of Life Long Justice (March 2, 2011) <http://www.aging.senate.gov/imo/media/doc/hr230mc.pdf> (as of December 30, 2015), citing MacDonald, Make a Difference: Abuse/Neglect Pilot Project (2000).

[20] Ben Natan & Lowenstein, *Study of factors that affect abuse of older people in nursing homes* (2010) 17(8) Nursing Management 20-24.

[21] Hearing before the Senate Special Committee on Aging on Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation, testimony of Marie-Therese Connolly, *supra*, citing *The Silenced Voice Speaks Out: A Study of Abuse and Neglect of Nursing Home Residents* (2000).

[22] National Center on Elder Abuse, *Abuse of Residents of Long Term Care Facilities, Research Brief* <http://www.ncea.aoa.gov/resources/publication/docs/ncea_ltcf_researchbrief_2013.pdf> (as of October 27, 2015).

- Financial Abuse 7%
- Gross Neglect 14%
- Resident on Resident Abuse 22%

[§2.5] SUMMARY POINTS FOR JUDICIAL OFFICERS

- Statutory definitions of elder abuse are of greatest relevance for judicial officers; there is no single, universally-accepted legal or sociological definition of elder abuse.
- Cultural traditions, values, and experiences shape how various groups define and perceive what constitutes elder abuse.
- Elder abuse occurs in community settings as well as institutional/facility settings.
- Abuse of all types is pervasive in long-term care facilities.

Appendix A
Definitions of Elder Abuse

Source of Definition	Definition
National Research Council	"Elder mistreatment": "intentional actions that cause harm or create serious risk of harm, whether or not intended, to a vulnerable adult by a caregiver or other person who stands in a position of trust to the elder, or failure by a caregiver to satisfy the elder's basic needs or to protect the elder from harm."
Centers for Disease Control and Prevention (CDC)	"An intentional act or failure to act by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a serious risk of harm to an older adult."
New York City Elder Abuse Center	Elder abuse: "a single or repeated act, or lack of appropriate actions, which causes harm, risk of harm, or distress to an individual 60 years or older and occurs a) within any relationship where there is an expectation of trust; or b) when the targeted act is directed towards an elder person by virtue of age or disabilities. Elder abuse can be intentional or unintentional, can take various forms, and includes but is not limited to physical, psychological, emotional, or sexual abuse, neglect, abandonment, and financial exploitation."
United States Department of Justice Roadmap Project	Elder abuse: "physical, sexual or psychological abuse, as well as neglect, abandonment and financial exploitation of an older person by another person or entity that occurs in any setting (e.g., home, community or facility), either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability."

The lack of a common definition or framework for defining elder abuse has made it difficult to conduct research on elder abuse, assess its costs, understand the dynamics and risk factors, compare studies and findings, develop interventions that protect and provide critical remedies and services for victims, and create appropriate interventions for perpetrators. The court may encounter one or more of these definitions through testimony from expert witnesses and arguments from counsel. Experts may disagree or discount one or more definitions or argue that a particular definition does not apply in a specific case. An awareness of the existence of different definitions may assist a trier of fact in evaluating testimony and evaluating witness credibility.

Appendix B
What is Long Term Care?

Long term care is an umbrella term that includes three categories of facilities in California: nursing homes; continuing care communities; and residential care facilities for older adults. Each type is required to be licensed in order to operate legally. This chart describes each type of facility.

Type Facility	Features	Licensing Agency
Nursing Homes	Several types: • **Skilled Nursing Facilities** (SNFs) are health facilities that provide skilled nursing and supportive care to those requiring such care on an extended basis. • **Distinct Part/Skilled Nursing Facility (DP/SNF)** is a hospital–based facility, usually operated in a designated unit within a hospital. • **Intermediate Care Facilities (ICFs)** is a less skilled level of nursing homes that provide inpatient care to persons not requiring continuous nursing care, but needing nursing supervision and supportive care. • **Institutes for Mental Disease (IMDs)**, provide care for residents with mental health disorders. In California, these skilled nursing facilities are designated as special treatment programs (SNF/STPs).	• All four types of nursing homes listed here are licensed by the California Department of Public Health (DPH) and meet California nursing home standards. • If they accept Medicare and Medi-Cal funds, they must also be licensed by federal authorities

Continuing Care Retirement Communities (CCRC)	• Provide housing (independent living), assisted living, and nursing care, usually in one location. • Residents pay a large fee at admission and sign a contract that entitles them to future care, sometimes for life.	• Primarily regulated by the California Department of Social Services, Community Care Licensing Division. • CCRCs that operate a skilled nursing facility also must be licensed by the California Department of Public Health.
Residential Care Facilities for the Elderly (RCFE)	• Serve persons age 60 and older who are unable to live independently but who do not need 24 hour care. • Considered non-medical facilities and may not have nurses or doctors on staff. • May be called assisted living, board and care homes, etc. • Provide room, board, housekeeping, supervision, and personal care assistance with basic activities like personal hygiene, dressing, eating, and walking. Many RCFEs centrally store and distribute medications for residents to self-administer.	• Licensed by California Department of Social Services, Community Care Licensing (CCL).

*Chart created from information from the following sources: California Advocates for Nursing Home Reform (CANHR), *Residential Care / Assisted Living: What Is Residential Care for the Elderly?* (undated) <http://www.canhr.org/RCFE/rcfe_what.htm> (as of April 19, 2015); and California Advocates for Nursing Home Reform (CANHR), *What is a Nursing Home in California?* (2015) <http://www.canhr.org/factsheets/nh_fs/html/fs_WhatisaNH.htm> (as of April 19, 2015).

Chapter 3
FORMS OF ELDER ABUSE

[§3. 1] CHAPTER OVERVIEW

[§3.2] FORMS OF ELDER ABUSE

[§3.3] CO-OCCURRING FORMS OF ABUSE AND POLYVICTIMIZATION

[§3.3.1] ABUSE IN LATER LIFE/ELDER DOMESTIC VIOLENCE

[§3.4] SPECIFIC FORMS OF ABUSE

[§3.4.1] PHYSICAL ABUSE

[§3.4.1.1] IDENTIFYING PHYSICAL ABUSE

[§3.4.1.2] MISUSE OF RESTRAINTS

[§3.4.1.3] STRANGULATION AND SUFFOCATION

[§3.4.2] SEXUAL ABUSE

[§3.4.3] PSYCHOLOGICAL/EMOTIONAL ABUSE

[§3.4.4] FINANCIAL EXPLOITATION

[§3.4.4.1] REPORTING FINANCIAL EXPLOITATION

[§3.4.4.2] CAPACITY

[§3.4.4.3] UNDUE INFLUENCE

[§3.4.4.4] FINANCIAL ABUSE IN LONG-TERM CARE FACILITIES

[§3.4.5] NEGLECT BY CAREGIVER/CARE PROVIDER

[§3.4.5.1] CAREGIVER STRESS

[§3.4.5.2] ASSESSING MEDICAL EVIDENCE OF NEGLECT

[§3.4.5.3] NEGLECT IN FACILITIES

[§3.4.6] ABANDONMENT

[§3.4.7] SELF-NEGLECT

[§3.4.7.1] HOARDING

[§3.5] CHAPTER SUMMARY POINTS

[§3. 1] CHAPTER OVERVIEW

This chapter will discuss various forms of elder abuse, highlight the occurrence of polyvictimization (co-occurring forms of abuse, neglect or exploitation), and offer a framework for understanding evidence of abuse presented in court. The elder abuse field has not developed a single, universally accepted description of the forms of abuse. While virtually every jurisdiction's compilation of forms of abuse includes physical abuse, the conduct included in

specific definitions varies widely across entities and statutory schemes. For example, some jurisdictions include sexual abuse within physical abuse, and also include improper use of medication and other restraints as physical abuse. Some definitions include abandonment within the category of caregiver neglect; other definitions categorize abduction as a form of elder abuse, and still others include self-neglect as elder abuse for some purposes.

The California Penal Code lists five forms of criminal conduct under Pen C §368: physical abuse; emotional/psychological abuse; neglect by a caretaker; financial abuse (including financial abuse by a caretaker); and false imprisonment. Welf & I C §§15600 et seq includes six forms of reportable abuse: physical abuse as defined in §15610.63; abandonment; abduction; isolation; financial abuse; and neglect, including self-neglect. There are other legal and social science definitions of the forms of abuse, and tribal communities may add other categories.

[§3.2] FORMS OF ELDER ABUSE

The following chart highlights different approaches to describing forms of elder abuse. Courts hearing cases involving elder abuse will need to determine the applicable statutory scheme used to define a particular form or type of abuse.

Source	**Included Forms**
Elder Abuse (Pen C §368)	• **Physical abuse**: Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain • **Emotional/Psychological abuse**: Inflicts unjustifiable mental suffering (on an elder or dependent adult) • **Neglect by a caretaker**: Person having the care or custody of any elder, willfully causes or permits the person or health of the elder to be injured, or willfully causes or permits the elder to be placed in a situation in which his or her person or health is endangered • **Financial abuse**: *Any person* who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder, and who knows or reasonably should know that the victim is an elder • **Financial abuse by a caretaker**: Any *caretaker* of an elder who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of that elder • **False Imprisonment**: Any person who commits the false imprisonment of an elder by the use of violence, menace, fraud, or deceit

Elder Abuse Restraining Order (Welf & I C §15657.03)	"Abuse of an elder or a dependent adult" means **either** of the following: (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. (Welf & I C §15610.07)
Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §15657)	• **Physical abuse** as defined in Section 15610.63, or • **Neglect** as defined in Section 15610.57
Elder Abuse Reporting Law (Welf & I C §§15600 et seq; §15630(b)(1))	• **Physical abuse**, as defined in Section 15610.63, • **Abandonment** • **Abduction** • **Isolation** • **Financial abuse**, or • **Neglect**, including self-neglect
National Center on Elder Abuse[1] (NCEA)	• **Physical Abuse**: inflicting physical pain or injury on a senior, e.g. slapping, bruising, or restraining by physical or chemical means. • **Sexual Abuse**: non-consensual sexual contact of any kind. • **Neglect**: the failure by those responsible to provide food, shelter, health care, or protection for a vulnerable elder. • **Exploitation**: the illegal taking, misuse, or concealment of funds, property, or assets of a senior for someone else's benefit. • **Emotional Abuse**: inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts, e.g. humiliating, intimidating, or threatening. • **Abandonment**: desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person. • **Self-neglect**: characterized as the failure of a person to perform essential, self-care tasks and that such failure threatens his/her own health or safety.

[1] <http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/EA_Prevention/whatIsEA.aspx> (as of November 19, 2015).

Some Tribal and Other Cultural Communities	Additional forms of abuse may include: • "Spiritual or ritual" abuse • Denial of access to ceremonies • Denial of access to healers when ill • Excluding an elder from family gatherings • Cursing • Disrespecting the elder **For more information, please refer to chapter 11, "Elder Abuse in Tribal Communities: A Guide for California State Judges;" also available at: <www.courts.ca.gov/documents/Elder_Abuse_Tribal_Communities.pdf>.**

The following sections will describe specific forms of abuse, including co-occurring forms (polyvictimization) and special considerations.

[§3.3] CO-OCCURRING FORMS OF ABUSE AND POLYVICTIMIZATION

It is common for more than one kind of abuse to occur in a single case. Co-occurring forms of abuse are often interrelated and intertwined, and may be called hybrid, cascading, or multi-faceted abuse; more recently, "polyvictimization," a term first used in the child abuse literature, has been applied to elder abuse.

Polyvictimization is "when a person aged 60 or older is harmed through multiple co-occurring or sequential types of elder abuse by one or more perpetrators with whom the older adult has a personal, professional or care recipient relationship in which there is a societal expectation of trust. Perpetrators of polyvictimization in later life include individuals with special access to older adults such as: intimate partners; other family members; fiduciaries; paid or unpaid care or service providers, resident(s) or service recipients in care settings."[2]

U.S. studies have estimated that 30% to 40% of older abuse victims experience multiple forms of victimization by the same offender. In one study, 34% of the county's investigated adult protective services reports involved financial exploitation accompanied by either neglect or physical abuse.[3] International studies have found that between 10.5% and 50% of older victims experience two or more forms of abuse, and there is some evidence that rates of polyvictimization differ by the combination of types of abuse.[4]

---

[2] Ramsey-Klawsnik & Heisler, *Polyvictimization in Later Life* in Victimization of the Elderly and Disabled (2014) 3-4, 15-16.

[3] U.S. Department of Justice, *Financial Exploitation* <http://www.justice.gov/elderjustice/research/prevalence-and-diversity.html> (as of April 24, 2015).

[4] U.S. Department of Justice, *Prevalence and Diversity* <http://www.justice.gov/elderjustice/research/prevalence-and-diversity.html> (as of December 7, 2015).

A study of 129 persons with dementia and their caregivers residing in the community found that elder abuse occurred in nearly half of the cases, and that more than one form of abuse had been committed in 31% of the cases. All care recipients who were physically abused were also psychologically abused, neglected, or both.[5] An earlier study of 289 cases investigated by adult protective services in Cleveland found that when psychological abuse or neglect was present, other forms co-occurred in 89.7% of cases.[6]

Polyvictimization occurs in both community-based and long term care settings. In one study, 15% of the older adults residing in a long-term care facility experienced two or more forms of elder abuse simultaneously. Residents who needed assistance with a larger number of activities of daily living (ADLs) were at greater risk of suffering multiple forms of elder abuse. If a resident had been financially exploited, his or her risk for physical abuse, emotional abuse, and neglect increased substantially.[7] Another study reviewed allegations of sexual abuse allegedly committed against residents living in facilities: 45% reported they had been sexually assaulted; 13% had been threatened by their abusers; and 19% had been victims of other forms of abuse.[8]

This information on the frequency of polyvictimization reinforces the value of having courts that are handling cases involving allegations of one type of elder abuse inquire about other forms of abuse for purposes of fact finding, crafting effective orders and remedies, and protecting victims.

Polyvictimization can also take the form of "cascading" abuse in which one or more forms of abuse triggers subsequent abuse committed by other perpetrators. For example, a woman who had been sexually assaulted was then neglected in her healthcare facility when the staff "confined (her) to her room for days to prevent further sexual assault by another resident."[9]

Victims of polyvictimization suffer more serious and complex trauma than victims of repeated incidents of the same form of abuse. A study of older men found the impact of various types of domestic abuse was similar to that experienced by female victims, i.e., older male victims of different forms of domestic abuse were more likely to have poor mental health outcomes than older men who had not experienced intimate partner abuse.[10] Another study compared "pure" financial exploitation (only form of abuse occurring) with "hybrid" financial

---

[5] Wiglesworth et al., *Screening for Abuse and Neglect of People with Dementia* (2010) 58 Journal of the American Geriatric Society 493-500.
[6] Anetzberger, *Psychological Abuse and Neglect: A Cross-Cultural Concern to Older Americans* in Understanding and Combating Elder Abuse in Minority Communities (1998) 141-151.
[7] U.S. Department of Justice, *Financial Exploitation, supra*.
[8] Ramsey-Klawsnik et al., *Sexual Predators Who Target Elders: Findings From The First National Study of Sexual Abuse in Care Facilities* (2008) 20 Journal of Elder Abuse & Neglect 353-376.
[9] Ramsey-Klawsnik & Teaster, *Recommendations and practice guidelines from a recent comprehensive study on sexual abuse in institutions* (2012) 36(3) Generations 55.
[10] Reid et al., *Intimate partner violence among men: Prevalence, chronicity, and health effects* (2008) 34 American Journal of Preventive Medicine 478-485.

exploitation (co-occurring with physical abuse or neglect) and found that victims of "hybrid" financial exploitation were less healthy overall than victims of "pure" financial exploitation.[11]

In light of this information, courts should consider whether multiple forms of abuse are present and who may be responsible for committing the abuse. Such information will assist the court in determining:

- whether a particular person may be an appropriate conservator or surrogate decision maker;
- the types of protective orders that may be needed in a particular case;
- the appropriateness of punitive damages in specific cases;
- whether to impose orders of restitution and the nature of that restitution; and
- the impact of the abuse on the victim. (For more information on the impact of elder abuse, please refer to Chapter 5.)

[§3.3.1] ABUSE IN LATER LIFE/ELDER DOMESTIC VIOLENCE

"Abuse in later life" is a term used to describe abuse of an older person that occurs in the context of an ongoing relationship in which there is an expectation of trust. Perpetrators typically include intimate partners, children and other family members, as well as trusted close associates, and caregivers. It includes aspects of both domestic violence and elder abuse.

Characteristics typical of the domestic violence component include:

- Abusers use power and control dynamics which may be accompanied by the abuser's sense of entitlement or greed.
- The abuse may be a continuation of domestic violence begun in younger life.
- The abuse involves victims who have the emotional bonds commonly seen in domestic violence relationships, and who may protect their abusers, minimize the abuse, and be committed to the continuation of the relationships.

Characteristics typical of the elder abuse component include:

- The abuse may include neglect and financial exploitation of the elder.
- Victims may have physical and cognitive limitations.
- Victim may be dependent on their abusers for assistance.
- Victims may have few options or community resources and services available to assist them.

Most often these abusers are intimate partners in long and abusive marriages. However, these tactics may be used by a partner in a new relationship or by adult children against an

[11] Jackson & Hafemeister, *Pure financial exploitation vs. hybrid financial exploitation co-occurring with physical abuse and/or neglect of elderly persons* 2(3) Psychology of Violence 285-296.

elderly parent. The interpersonal dynamics in these cases may make it difficult for a victim to report abuse, seek legal protection, and give testimony against the abuser.

Physical, sexual, financial, emotional and psychological abuse may all be used against older victims. The "Abuse in Later Life" wheel (below) was developed in consultation with victims and may be helpful in understanding the breadth of tactics used to perpetrate abuse against elders.

Created by the National Clearinghouse on Abuse in Later Life (NCALL), a project of the Wisconsin Coalition Against Domestic Violence (WCADV).
307 S. Paterson St., Suite 1, Madison, WI 53703(608) 255-0539 , www.ncall.us/www.wcadv.org
This diagram adapted from the Power and Control/Equality wheels developed by the
Domestic Abuse Intervention Project, Duluth, MN

Victims of abuse in later life report that the outer rim behaviors of physical and sexual abuse occur intermittently while the inner spokes of psychological and emotional abuse describe acts that occur frequently. Abusers may take advantage of the older victim's weaknesses by neglecting their needs and undermining their personal values and other strengths, such as spiritual beliefs and observance of traditions, in order to maintain control and power over them. Abusers may undermine elders' self-esteem by insulting them and telling them they are without value (emotional abuse) as well as undermining victims' belief in their ability to manage their lives and trust their judgment (psychological abuse). Abusers may also financially exploit and take control of the older adult's assets and decision making.

One study analyzed data from 3622 respondents to the National Violence Against Women Survey (all aged 55 and older) and found that older persons experience domestic

violence and stalking at approximately the same rate as younger adults.[12] Women are more likely to be stalked and physically assaulted than men throughout their lifespans. Income is not significantly associated with either stalking or domestic violence. Almost half of victims did not drink alcohol at all in the year before the survey and reported similar frequency for their partners.

Courts hearing cases of abuse in later life may want to consider:

- Can the court reduce contact between the parties while the action is pending? (See e.g., Pen C §136.2.) Does the court have a safe waiting area? Can the defendant be kept in court while the victim is allowed to leave?
- Should the court issue no-contact orders while actions are pending? (See e.g., Pen C §136.2.)
- Are there procedures to expedite the taking of the victim's testimony? (See e.g., Pen C §§1335-1345.)
- Can testimony be taken via telephone or teleconferencing?
- Will a victim be better able to provide information and participate in the process if allowed to have a support person and/or an advocate? (See e.g., Pen C §868.5.)
- Can the court minimize delays in hearing the case by denying unnecessary continuances and giving the case calendar priority? (See e.g., Pen C §1048; CCP §36.) By promptly calling the case? By scheduling specific times for the case to be heard?
- Would expert testimony on the effects of living with elder abuse/abuse in later life be relevant on issues to be decided by the fact finder?
- Can the court assist in creating bench-bar or peer support programs for older litigants? For more information please refer to this Bench Guide, Chapter 1, Section 1.7.

[§3.4] SPECIFIC FORMS OF ABUSE

[§3.4.1] PHYSICAL ABUSE

Physical abuse of an elder is defined as the infliction of physical pain or injury on an older adult and includes such acts as assault, battery, injuring with a weapon, kidnapping, and murder. It is most typically committed by male perpetrators.[13] The definition of physical abuse also includes the particularly dangerous and often overlooked acts of strangulation and suffocation, and the improper use of restraints. These less obvious examples of physical abuse are discussed more fully below.[14]

---

[12] Jasinski and Dietz, *Domestic Violence and Stalking Among Older Adults: An Assessment of Risk Markers* (2003) 15(1) Journal of Elder Abuse and Neglect 3-18.

[13] See Krienert et al., *Elderly in America: A Descriptive Study of Elder Abuse Examining National Incident-Based Reporting System (NIBRS) Data: 2000–2005* (2009) 21(4) Journal of Elder Abuse and Neglect 325–345; Gorbien & Eisenstein, *Elder Abuse and Neglect: An Overview* (2005) 21(2) Clinics in Geriatric Medicine 279–292; Holt, *Elder Sexual Assault In Britain: Preliminary Findings* (1993) 5(2) Journal of Elder Abuse and Neglect 63–71; and Cohen, *Homicide-Suicide in Older Persons* (1998) 155 American Journal of Psychiatry 390–396.

[14] Physical abuse does not include non-targeted violence by persons who are unable to control their behavior due to frontal lobe injury caused by dementing illnesses, Huntington's Cholera,

Identification of abuse injuries is often complicated by a lack of specific injuries that can only be explained by physical abuse, by the inability to age bruises by their color, normal age-related changes to skin, and by the effects of medications and underlying medical conditions.[15]

[§3.4.1.1] IDENTIFYING PHYSICAL ABUSE

Identifying physical abuse is complicated by significant underreporting by physicians. Two-thirds of physical abuse cases are not reported by doctors,[16] though physical abuse is included in virtually all state reporting laws, including California's. A Michigan study found that physicians only report 2% of physical abuse allegations.[17] When physicians do report, elderly victims who are male, African-American, have penetrating injuries, or have drug or substance abuse problems are less likely to be referred to adult protective services.[18]

Physicians attribute their failure to report to lacking information about physical abuse and not understanding their reporting responsibilities.[19] Physicians are well-situated to report because the elderly are twice as likely to use medical services as compared to all other age groups.[20] Patients tend to trust their doctors and will confide in them if given the opportunity. In addition, most clinical practice standards include seeing the patient alone for at least part of a medical appointment.

In addition to under reporting by physicians, detection of physical abuse and injuries is difficult in older adults and may require expert testimony from qualified medical personnel.

---

medication, alcohol, steroids, brain trauma, and brain tumors. (See Brower & Price, *Neuropsychiatry of Frontal Lobe Dysfunction in Violent and Criminal Behaviour: A Critical Review* (2001) 71 Journal of Neurology, Neurosurgery & Psychiatry 720-726; and Baguley et al., *Aggressive Behaviour Following Traumatic Brain Injury: How Common is Common?* (Jan./Feb. 2006) 21(1) Journal of Head Trauma Rehabilitation 45-56.) Most often, organic-based violence is a matter that can and should be addressed through the mental health system, though occasionally cases are seen in the criminal justice system or in conservatorship proceedings.

[15] Dyer et al., *The Clinical and Medical Forensics of Elder Abuse and Neglect* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003), 339-381; and Mosqueda et al. *The Life Cycle of Bruises in Older Adults* (Aug. 2005) 53 (8) Journal of the American Geriatrics Society 1339-43.

[16] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality* (2014) 26(1) Journal of Elder Abuse and Neglect, 1-11.

[17] Rosenblatt et al., *Reporting Mistreatment of Older Adults: The Role of Physicians* (1996) 44(1) Journal of the American Geriatrics Society 65-70.

[18] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality, supra*.

[19] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality, supra*.

[20] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality, supra*.

Physical abuse is not well characterized in the medical literature, particularly those most serious cases where the older adult must be hospitalized.[21]

Elder abuse injuries may be mistaken for or ascribed to normal conditions of aging, underlying disease states, or the result of an accident such as a fall.[22] Non-abuse explanations may include:

- Apparent "injuries" may not be caused by trauma and abuse but may result from thinning skin related to sun exposure and loss of collagen.
- Underlying medical conditions can cause conditions that mimic abuse.
- Some medications including blood thinners can cause bleeding under the skin which may mirror injuries from abuse.[23]

Factors that may assist medical personnel in distinguishing abuse from non-abuse causes include:

- Presence of numerous injuries;
- Injuries of varying ages;
- Injuries to different areas of the body; and
- Injuries to different planes of the body.[24]

In developing protocols for assessing potential elder abuse, research has concluded that bruises cannot be precisely and reliably aged by their color because time frames for color changes are highly variable in older adults.[25] Location, extent, severity, and number of injuries are much more medically significant. Injuries to the head and neck, fractures to the head, spine or trunk, and internal injuries are suggestive of abuse.[26]

---

[21] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality, supra*.

[22] See Dyer et al., *The Clinical and Medical Forensics of Elder Abuse and Neglect*, *supra*; Lachs & Pillemer, *Abuse and Neglect of Elderly Persons* (1995) 332 New England Journal of Medicine 437–43; and LoFaso & Rosen, *Medical and Laboratory Indicators of Elder Abuse and Neglect* (2014) 30 Clinics in Geriatric Medicine 713-728.

[23] Gibbs et al., Geriatric Pocket Doc: A Resource for Non-Physicians (1st ed. 2012) p. 61.

[24] Collins, *Elder Abuse* in Encyclopedia of Forensic Sciences (2013), 116-22; and Howe et al., *Investigation of Elder Deaths* (2014) 4(3) Academic Forensic Pathology 290-304.

[25] Mosqueda et al., *The Life Cycle of Bruises in Older Adults, supra*; and Parai & Milroy, *Histological Aging of Bruising: A Histological and Ongoing Challenge* (2015) 5(2) Academic Forensic Pathology 266-272.

[26] National Research Council, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003), at 119.

For more information on assessing bruises, please refer to: Judicial Council of California & Center of Excellence on Elder Abuse and Neglect, Elder Abuse Pocket Reference: A Medical/Legal Resource for California Judicial Officers (2012) <http://www.courts.ca.gov/documents/ElderAbusePDoc.pdf> (as of December 9, 2015) pp. 41-44.

[§3.4.1.2] MISUSE OF RESTRAINTS

The Centers for Medicare and Medicaid Services (CMS) defines a restraint as "any manual method, physical or mechanical device, material, or equipment that immobilizes the ability of a patient to move his or her arms, legs, body, or head freely...or a drug or medication when it is used as a restriction to manage the patient's freedom of movement and is not a standard treatment of dosage for the patient's condition."[27]

Prolonged or improper use of restraints can cause abrasions, contusions, ulcers, injuries, chemical lethargy, and death. Restraints limit an elder's movements and can lead to poor circulation, deep venous thrombosis, and pulmonary thrombo-embolism.[28] They may also be used as a powerful tool of abuse, power and control, domination, and intimidation.

[§3.4.1.3] STRANGULATION AND SUFFOCATION

Cases involving elder suffocation and strangulation can be easily overlooked as they may occur without leaving any external injuries or other signs.[29] Both produce injury and, potentially, death by asphyxiation, i.e., loss of oxygen and cell death in organs required to sustain life.[30]

Strangulation refers to pressure applied to the neck which reduces blood flow through the brain or constriction of breathing through the throat causing asphyxia. Suffocation is obstruction or restriction of breathing by external mechanical forces either through smothering or compression.[31]

---

[27] 42 C.F.R. 482-13 (2011).
[28] Howe et al., *Investigation of Elder Deaths*, *supra* at 296.
[29] Sadler, *Concealed homicidal strangulation first discovered at necropsy* (1994) 47 Journal of Clinical Pathology 679-680; and Hawley, *Death by Strangulation or Suffocation* in The Investigation and Prosecution of Strangulation Cases, California District Attorneys Association and Training Institute on Strangulation Prevention (2013), 63-80.
[30] Hawley, *Death by Strangulation or Suffocation, supra* at 63.
[31] Hawley, *Death by Strangulation or Suffocation, supra* at 64.

Victims of strangulation may have the following signs and symptoms:

Category of Sign or Symptom	Signs and Symptoms
Physical	• Dizziness • Nausea • Sore throat and difficulty swallowing* • Throat and neck injuries • Breathing difficulties* (gasping, may sound like asthma) • Voice changes* • Ringing in the ears • Vision changes
Neurological	• Drooping eyelid • Facial droop • Weakness on left or right side • Loss of sensation or feeling • Memory loss • Paralysis • Altered state of consciousness
Psychological	• Post-traumatic stress disorder (PTSD) • Depression • Suicide ideation • Insomnia

*Most commonly reported.[32]

Many victims report multiple incidents of strangulation. Multiple incidents are associated with more adverse health consequences.[33] Lethality is more likely in older adults due to underlying medical conditions, likelihood of multiple incidents recently and over the lifespan, and lowered suspicion of professionals who respond to these cases.

For more information on assessing strangulation, refer to: Judicial Council of California & Center of Excellence on Elder Abuse and Neglect, Elder Abuse Pocket Reference: A Medical/Legal Resource for California Judicial Officers, *supra* at 44-45; and Chapter 6 of this Bench Guide, "The Impact of Elder Abuse".

---

[32] Strack et al., *A Review of 300 Attempted Strangulation Cases: Criminal Legal Issues* (2001) 21 Journal of Emergency Medicine, 303-309; and Strack & McClane, *How to Improve Your Investigation and Prosecution of Strangulation Cases* (May 1999) <http://www.ncdsv.org/images/strangulation_article.pdf> (as of January 10, 2008).

[33] Smith et al., *Frequency and Relationship of Reported Symptomology in Victims of Intimate Partner Violence: The Effect of Multiple Strangulation Attacks* (2001) 21 Journal of Emergency Medicine 323-329.

[§3.4.2] SEXUAL ABUSE

Sexual abuse is defined as non-consensual sexual contact. It includes sexual contact with persons who are legally unable to give consent. The California reporting law includes sexual abuse as a reportable form of elder abuse. Although the crime of elder abuse (Pen C §368) does not specifically list sexual abuse, it would be included in the crime of infliction of physical abuse in addition to more specific sexual assault crimes.

Acts of sexual abuse take many forms. These have been categorized as "hands-off"; "hands-on"; and "harmful genital practices."[34] "Hands-off" refers to non-consensual sexualized conduct in which no touching occurs between the victim and perpetrator. Examples include forcing an older person to view pornography; voyeurism; and taking unwanted sexualized photographs of an older person. "Hands-on" refers to non-consensual contact of a sexual nature and includes common sexual assault crimes such as sexual battery, rape, forcible oral copulation and sodomy. It also includes human trafficking which may involve older victims. "Harmful genital practices" refers to contacts with the victim's genitalia usually as part of caregiving which are unnecessary, intrusive, obsessive, or painful and are not part of a victim's care plan. Examples include insertion of fingers into the victim's rectum or vagina, application or insertion of creams, enemas, soap and wash cloths when not medically required and use of alcohol when in contact with vaginal areas. Perpetrators of harmful genital practices are typically caregivers who will claim that their actions were medically necessary or that the victim misunderstood what was being done due to dementia or delirium.[35]

Sexual abuse of the elderly may be accompanied by homicide, which usually occurs in the victim's home. Some perpetrators appear to target older women who live alone and may be less able to defend themselves if attacked. In these cases, the violence may be far greater than necessary to overcome the victim's resistance. Perpetrators often have criminal records but only about 20% have a history of sexual offenses. Well over 90% of perpetrators have a substance abuse history.[36]

Sexual assault of elders is rarely reported. When sexual assault involves people residing in facilities, even when it is reported, victims are rarely believed. Barriers to reporting include: medical conditions that prevent or impede reporting; concern about social stigma and socialization that prevents older adults from discussing sexual matters; fear of retribution; and the response of professionals when an older person attempts to report, such as misinterpreting the

---

[34] Ramsey-Klawsnik, *Assessing Physical and Sexual Abuse in Health Care Settings* in Abuse, Neglect, and Exploitation of Older Persons: Strategies for Assessment and Intervention (Baumhover & Beall edits., 1996).

[35] Ramsey-Klawsnik, *Assessing Physical and Sexual Abuse in Health Care Settings*, *supra*; and Ramsey-Klawsnik, *Sexual Violence In Later Life: A Technical Assistance Guide For Advocates* (2010) <http://www.nsvrc.org/sites/default/files/publications_SVlaterlife_Guide.pdf> (as of December 7, 2015).

[36] Safarik et al., *Sexual Homicide of Elderly Females: Linking Offender Characteristics to Victim and Crime Scene Attributes* (2002) 17 Journal of Interpersonal Violence 500–525.

disclosure as part of a dementing illness and discounting physical evidence as "normal" for an older person.[37]

Medical and legal responses to elderly victims of sexual assault are frequently different and often less vigorous than the response to younger victims. These responses are made more difficult by the reality that older victims are less likely to report sexual abuse or be offered forensic medical examinations. They are more likely to feel isolated, be dependent on others for care, and fear removal from their residences if they do report.[38]

Elderly victims of sexual abuse often sustain significant injuries. Normal aging is associated with decreased estrogen levels, less lubrication, and thinning genital tissues, placing older victims at high risk for genital trauma and other physical and psychosocial injuries.[39] Because of these age-related changes, older sexual abuse victims are more likely to be hospitalized after an assault.[40]

For more information on victims and perpetrators of sexual abuse, see Chapter 2 of this Bench Guide.

[§3.4.3] PSYCHOLOGICAL/EMOTIONAL ABUSE

Psychological (also called emotional) abuse describes the infliction of mental pain, anguish, or distress on an older person through verbal or nonverbal acts, e.g. humiliating, intimidating, or threatening him or her.[41] In California, psychological/emotional abuse is called mental suffering and is defined in Welf & I C §15610.53 as follows:

> *"Mental suffering" means fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or*

---

[37] Burgess et al., *Comparing routes of reporting in elder sexual abuse cases* (2008) 20 Journal of Elder Abuse & Neglect 336-352.
[38] Cannell et al., *U.S. Population Estimates and Correlates of Sexual Abuse of Community-Dwelling Older Adults* (2014) 26(4) Journal of Elder Abuse and Neglect 398-413, 399.
[39] See Brown et al., *Abuse* (Aug. 2004) 29(8) Nurse Practitioner 23–31; Poulos & Sheridan, *Genital Injuries In Post-Menopausal Women After Sexual Assault* (2008) 20(4) Journal of Elder Abuse and Neglect 323–335; Cook et al., *Older women survivors of physical and sexual violence: A systematic review of the qualitative literature* (2011) 20(7) *Journal of Women's Health* 1075–1087; and Ramsey-Klawsnik, *Sexual violence in later life: Research brief* (2010) <http://www.nsvrc.org/sites/default/files/publications_SVlaterlife_ResearchBrief.pdf> (as of November 23, 2015).
[40] Eckert & Sugar, *Older victims of sexual assault: An under-recognized population* (2008) 198 American Journal of Obstetrics and Gynecology 688.e.1–688.e.7.
[41] National Center on Elder Abuse, *Forms of Abuse* <http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/EA_Prevention/whatIsEA.aspx> (as of November 23, 2015).

cause severe depression or serious emotional distress of the elder or dependent adult.

Types of psychological abuse include:

- **Isolation** (social and sensory deprivation which prevent an older adult from having contact with the external world);
- **Threats and intimidation** (including specific threats of harm as well as giving the older adult the silent treatment);
- **Insensitivity and disrespect** (confusing the older person, making them doubt their sanity, ignoring effects of illness and pain, discounting the older person's feelings, speaking for the elder); and
- **Shaming and blaming** (including demeaning, blaming, yelling and swearing at the elder).[42]

Psychological abuse typically co-occurs with other forms of elder abuse and is often used to facilitate those other forms.[43] One study found that in 89.7% of cases, psychological abuse co-occurred with neglect and financial abuse.[44] Evidence that psychological abuse has occurred or is occurring may come from behavioral clues from the victim, perpetrator, or both.[45]

Women are more often victims of psychological abuse than men, and victims with dementia are at high risk for psychological abuse. In one study of elders with dementia and their caregivers, researchers found that elder mistreatment occurred in 47.3% of cases; of those, 88.5% experienced psychological abuse.[46]

Psychological abuse is pervasive:

- A systemic literature review of 58 empirical studies of interpersonal violence, including physical, sexual, and psychological abuse, involving community dwelling women aged 65 and older (conducted between January 1980 and December 2009) found prevalence estimates from 6% to 59% over the lifetime; from 6% to 18% since turning age 50; and from 0.8% to 11% in the year prior to the study. Emotional or psychological abuse was the most prevalent form across all three time frames.[47]

---

[42] Conrad et al., *Conceptual Model and Map of Psychological Abuse of Older Adults* (2011) 23(2) Journal of Elder Abuse and Neglect 147-168; and National Center on Elder Abuse, *Forms of Abuse, supra*.
[43] Conrad et al., *Conceptual Model and Map of Psychological Abuse of Older Adults, supra*.
[44] Anetzberger, *Psychological Abuse and Neglect: A Cross-Cultural Concern to Older Americans, supra*.
[45] Heisler, *Elder Abuse* in Victims of Crime, 4th Edition (Davis et al. edits., 2013) 174.
[46] Wiglesworth et al., *Screening for Abuse and Neglect of People with Dementia, supra*.
[47] Cook et al., *Older women survivors of physical and sexual violence: A systematic review of the qualitative literature, supra*.

- The National Elder Mistreatment Study found a rate of verbal abuse of 4.6%,[48] while the National Social Life, Health and Aging Project (NSHAP), using a different definition of psychological or emotional abuse, found a rate of 9%.[49]

For a discussion of the impact of psychological or emotional abuse, please refer to Chapter 6 of this Bench Guide. A discussion of indicators is found in Chapter 5 of this Bench Guide.

[§3.4.4] FINANCIAL EXPLOITATION

Financial abuse or exploitation generally describes the illegal or improper use of an elder's funds, property, or assets.[50] It includes situations in which the elder is unable to give legal consent or where consent has been obtained using fraud, deceit, threats, manipulation, trickery, duress or the use or threatened use of violence.[51]

Financial abuse is believed to be the most prevalent form of elder abuse, and recent high profile cases involving Brooke Astor and Mickey Rooney have garnered public attention and raised awareness. Financial abuse is the most frequently or second most frequently self-reported form of elder abuse.[52] Some 3-5% of older adults are estimated to have been victims of financial abuse at the hands of a family member in the past year.[53] The U.S. Government Accountability Office (GAO) in 2012 cited it as "an epidemic with society-wide repercussions."[54]

"The typical U.S. household headed by a person age 65 or older has a net worth 46 times greater than a household headed by someone under 35… While people typically accumulate assets as they age, this wealth gap is now more than double what it was in 2005 and nearly five times the 10-to-1 disparity a quarter-century ago, after adjusting for inflation."[55] Persons over 50 control more than 70% of the nation's private wealth[56] and persons 65 and older hold $15 trillion

---

[48] Acierno et al., *Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The National Elder Mistreatment Study* (Feb. 2010) 100(2) American Journal of Public Health 292–297.
[49] Laumann et al., *Elder mistreatment in the United States: Prevalence estimates from a nationally representative study* (2008) 63 Journal of Gerontology 248–254.
[50] National Center on Elder Abuse, *Forms of Abuse*, *supra*.
[51] Heisler, *Elder Abuse*, *supra*.
[52] Acierno et al., *Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The National Elder Mistreatment Study*, *supra*.
[53] Acierno et al., *Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The National Elder Mistreatment Study*, *supra*.
[54] Government Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation* (Nov. 15, 2012) <www.gao.gov/products/GAO-13-110> (as of November 24, 2015).
[55] Yen, *U.S. Wealth Gap Between Young And Old Is Widest Ever* (Nov. 8, 2011) USA Today <http://usatoday30.usatoday.com/money/economy/income/story/2011-11-06/wealth-gap-young-old/51098910/1> (as of December 7, 2015).
[56] MetLife Mature Market Institute et al., *Broken trust: Elders, family, and finances* (Mar. 2009)

in assets.[57] Older persons, especially elderly women, are perceived to be financially unsophisticated and less able to recognize financial abuse when it occurs. Perpetrators believe their acts of financial exploitation involve high gain with little risk of detection, reporting, and accountability if caught.[58]

Elder financial exploitation is committed by a wide range of perpetrators who engage in a variety of conduct from small dollar-value thefts to international scams. The GAO has suggested these categories to illustrate the breadth of financial abuse:[59]

Type of Perpetrator	**Method of Taking**
Family members, friends, in-home caregivers, legal guardians, representative payees, etc.	• Theft of cash or other valuables • Withdrawals from bank accounts or use of credit cards • Transfer of deeds • Misuse of an older adult's power of attorney • Misappropriation of an incapacitated older adult's income or assets • Identity theft
Financial services providers (brokers, financial advisors, insurance agents, or others in the financial services industry)	• Sale of fraudulent investments (Ponzi or pyramid schemes) • Sale of financial products or services unsuitable for an older adult's circumstances, such as long-term annuities
Strangers	• Lottery, mail, telephone, or Internet scams • Door-to-door home repair scams • Identity theft

Researchers studied 47 cases of financial abuse and concluded that they fit into two categories: "pure" and "hybrid." In "pure" financial abuse cases, only financial abuse occurs.

<http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>.

[57] Glaciel, *Senators, congressmen introduce legislation to protect senior investors from fraud* [Press release] (Sept. 10, 2009) < http://www.aging.senate.gov/press-releases/senators-congressmen-introduce-legislation-to-protect-senior-investors-from-fraud> (as of November 24, 2015); and Hanson, *Seniors Get Fleeced Out of Billions of Dollars Every Year—And Most of It Goes Unreported* (Nov. 2009) Credit Union Magazine 29.

[58] Hafemeister, *Financial abuse of the elderly in domestic settings* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 382-445.

[59] Government Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation*, *supra*.

Perpetrators are more likely to be non-relatives who are not financially dependent on the elderly victim. Victims often are physically healthy, the acts occur over a shorter duration, the conduct is primarily fraud, and there is a lower dollar loss per case.[60] Such cases typically appear before the court in fraud and theft criminal cases.

In contrast, "hybrid" cases involve financial abuse that co-occurs with physical abuse and/or neglect. Perpetrators are more likely to be relatives who are financially dependent on the elderly victim. The victim is typically financially independent but physically dependent on the perpetrator, the acts occur over a longer time frame and primarily involve theft, and victims typically sustain a greater dollar loss per case. These cases are complicated by family dynamics, interpersonal relationships, and greater difficulty obtaining restitution.[61]

Financial elder abuse is often a series of events (a process) rather than a single incident. It can be difficult to establish the entire chain of events. Confounding issues in financial abuse include the elder's capacity at present and when prior critical events occurred; ability to consent and the presence of actual rather than apparent consent; extent of legal authority to act on behalf of an older adult under powers of attorney and conservatorships; manipulation through undue influence and other tactics; cultural beliefs; and interpersonal relationships between victims and their exploiters.

These issues often play out in court as defenses or justifications when one side argues the acts are not criminal or subject to a civil cause of action, but rather that the elder simply exercised his/her right to make a choice, whether or not such a choice was "wise." Questions that will be relevant for the court include:

- Is the conduct an unwise but legitimate transaction or is it exploitative?
- Is there actual legal consent or consent obtained through fraud, duress or undue influence?
- Does the older adult believe the "taker" has a right to at least some of the assets?
- Did the conduct begin in the older adult's best interest and over time become exploitative?[62]

[§3.4.4.1] REPORTING FINANCIAL EXPLOITATION

Victims may not realize what has occurred either because of cognitive decline or underlying medical conditions. Even if they do recognize financial abuse has occurred, they may be unable to report due to embarrassment, fear of loss of independence, lack of trust in the justice system, or isolation from sources of help, information, transportation, or a means to report the abuse.

---

[60] Jackson & Hafemeister, *Pure financial exploitation vs. hybrid financial exploitation co-occurring with physical abuse and/or neglect of elderly persons*, *supra*.
[61] Jackson & Hafemeister, *Pure financial exploitation vs. hybrid financial exploitation co-occurring with physical abuse and/or neglect of elderly persons*, *supra*.
[62] Hafemeister, *Financial abuse of the elderly in domestic settings*, *supra*.

[§3.4.4.2] CAPACITY

Older adults are presumed to have capacity to handle their financial affairs as they choose even if their actions are "unwise" or unfair to heirs. Because of family dynamics and friendships, elders may choose to benefit some to the exclusion of others. They may want to compensate for care, support, and assistance or may wish to help a child who is not doing well financially. Courts are expected to decide these kinds of issues, weigh capacity, evaluate the motivations of those bringing actions, and consider influences that have led to the elder's gift or other action.

Capacity is affected by cognitive changes that may have begun long before there was a suspicion or diagnosis of illness, including a dementing illness. New medical understanding of issues such as mild cognitive impairment (MCI) are changing the understanding of financial decision making capacity and the ability to manage one's financial affairs. MCI results in subtle changes in brain function which impair the ability to understand and manage financial matters and appropriately exercise decision making. Changes due to MCI appear long before a diagnosis of dementia.

For information on assessing cognition and capacity, please refer to: Judicial Council of California & Center of Excellence on Elder Abuse and Neglect, Elder Abuse Pocket Reference: A Medical/Legal Resource for California Judicial Officers, *supra*, "Capacity and Competency," at 19; "Undue Influence" at 21, and "Assessing Cognition" at 50.

See also American Bar Association Commission on Law and Aging et al., *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (2006) <https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf> (as of November 24, 2015).

[§3.4.4.3] UNDUE INFLUENCE

"Undue influence" is defined in the Welfare and Institutions Code for probate matters, including conservatorships, will contests, and other Probate Code matters, as well as for actions under the Elder Abuse and Dependent Adult Civil Protection Act **(**EADACPA). It is defined in CC §1575 for contractual and other civil matters. The definition for elder abuse reporting and for all Probate Code matters is set forth in Welf & I C §15610.70. (See Prob C §86.) Welf & I C §15610.70 defines "undue influence" as "(E)xcessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will, and results in inequity."

Practice Tip: The statute identifies four types of information the court <u>shall</u> consider in determining whether a result was produced by undue influence:

(1) **The vulnerability of the victim**. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) **The influencer's apparent authority**. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) **The actions or tactics used by the influencer**. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4**)** **The equity of the result.** Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship. Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

Please refer to Chapter 6 of this Bench Guide for a discussion of the impact of financial abuse.

[§3.4.4.4] FINANCIAL ABUSE IN LONG-TERM CARE FACILITIES

The extent of financial exploitation in long-term care facilities is not well documented. Residents in long-term care facilities generally are women with physical and cognitive impairments. Some also have mental illness. These characteristics may increase their vulnerability to elder abuse and neglect and financial exploitation. One study reported that of the 29% of residents who experienced some form of elder abuse, 9% of those residents experienced financial exploitation.[63] Another study which focused only on theft estimated that some 20% of residents were victims of personal theft.[64] More than 5% of reports to the long term care ombudsman program are for financial exploitation.[65]

Examples of financial abuse in long-term care facilities include theft or unexplained disappearance of goods (e.g., food, clothing, money, valuables), misappropriation (not paying the nursing home bill and keeping the money), unexplained transfer of resident funds, limiting access to petty cash account, and changes to a resident's will. Theft of personal property may not involve items of great monetary value but in the context of residents who may have little other than their most treasured possessions, the loss of a sentimental object can be devastating.

Financial exploitation in long-term care facilities shares similarities with financial exploitation in community settings but differs in other respects. For example, risk factors associated with elder abuse occurring in a long-term care facility such as cognitive impairment, a need for assistance with activities of daily living (ADLs), difficulties with physical functioning, behavior problems, and age are not considered risk factors for financial abuse in community settings.[66]

---

[63] U.S. Department of Justice, *Financial Exploitation*, *supra*.
[64] U.S. Department of Justice, *Financial Exploitation*, *supra*.
[65] U.S. Department of Justice, *Financial Exploitation*, *supra*.
[66] U.S. Department of Justice, *Financial Exploitation*, *supra*.

[§3.4.5] NEGLECT BY CAREGIVER/CARE PROVIDER

Neglect is the failure by those responsible to provide food, shelter, health care, or protection for a vulnerable elder to carry out those duties.[67] By definition, neglect involves a person who requires care and a second person with a duty to provide that care. The caregiver's duty to provide care may arise because he or she is directly providing paid or unpaid personal care, or because of a legal duty to provide care through third parties, such as a conservator of the person, a financial manager, or an attorney in fact who is responsible for locating and paying another person to provide care. The gravamen of neglect is the failure to do something, an omission, as compared with all other forms of abuse. Proving the failure to act and demonstrating when there is a duty to act can be difficult. For a discussion of "duty of care" please see chapter 7, Criminal Law, sections 7.4 (Definitions) and 7.5 (Neglect and Criminal Negligence).

Neglect was the second most prevalent form of abuse found in the National Elder Mistreatment Study (5.1%).[68] Victims of neglect typically are persons who are physically and/or cognitively compromised and unable to manage without help from others. Unlike victims of other forms of abuse, many neglect victims reside in care facilities and have a dementing illness. As a result, they may be unable to recognize what is occurring, may be unable to report, and may be unable to provide an account of what has happened. Many will die before a case is brought to court. In contrast to other forms of abuse, most perpetrators are female. This may be due to the reality that most caregiving is provided by women, particularly in institutional settings.

Identification of neglect presents complex and confounding legal and ethical issues which can challenge a court tasked with decision making when neglect is alleged. Examples are:

- Since adults with decision-making capacity have the right to make their own decisions, they can decide to refuse food and water necessary to maintain health. If they are legally able to refuse food and water and become incapacitated and ill, does the authority to make decisions for the older adults shift to someone else?
- If a caregiver withholds food and water based on the elder's wishes prior to be becoming incapacitated, is that neglect?
- What is sufficient proof (documentation) to justify a finding of a caregiver's failure to act?
- Is the standard the same in an institutional setting as in an elder's home?

[§3.4.5.1] CAREGIVER STRESS

Caregivers who have neglected people entrusted to their care may allege that their neglect (or abuse) was the result of the stress associated with providing care. It is certainly true that caregiving is hard and demanding work. But the stress of caregiving needs to be separated from

---

[67] National Center on Elder Abuse, *Forms of Abuse*, *supra*.

[68] Acierno et al., *Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The National Elder Mistreatment Study*, *supra*.

the response to that stress. Caregiver stress was an early theory of why elder abuse occurs and was widely accepted for a time. Suggested interventions focused on reducing the caregiver's stress rather than on the safety and needs of the older adult.

With time and research, the caregiver stress theory has become less persuasive. More recent research does not support caregiver stress as a primary cause of elder abuse. "Notwithstanding the popular image of abuse arising from dependent victims and stressed caregivers, evidence is accumulating that neither caregiver stress levels nor victim levels of dependency may be core factors leading to elder abuse."[69] In many situations the abuse more typically mirrors the type of abuse suffered by younger battered women.[70]

Courts may deal with cases in which caregiver stress is offered as a mitigating factor or justification for neglect (or abuse). In evaluating such claims the court may want to consider:

- Are the care needs of the victim being met?
- Is the victim safe with this caregiver?
- Should this person continue to have contact with or access to the victim?
- Should this person have contact with other elderly or frail adults while under the court's supervision? Should this person be permitted to work in or volunteer at a location where elderly adults live or meet?
- Is this party using power and control dynamics? If so, should a batterer's program be considered? Is there a need to sentence to state prison because of the nature of the defendant's actions, past history, etc.?
- What kind of counseling or other program will assist this party while holding him or her accountable for the actions taken?

[§3.4.5.2] ASSESSING MEDICAL EVIDENCE OF NEGLECT

Neglect of an elder may result in medical conditions, including the development of pressure ulcers, also called bedsores or decubitus ulcers. Pressure ulcers are caused by friction and pressure due to remaining in one position for too long. They typically occur over bony structures, such as the sacrum, hip, and heels, in contact with a solid surface such as a bed or wheelchair. Because older adults or persons with disabilities sometimes cannot change positions by themselves, caregivers must turn patients frequently. Preventative measures may include the use of range of motion exercises, nutritional supplements, and special bedding and pressure bandages to reduce friction. Absent such efforts, pressure ulcers are likely to form, and the ulcers will evolve from superficial to deep without prompt and continuing care. The amount of time for a pressure ulcer to progress from superficial (stage 1) to deep (stages 3 and 4) is highly variable.

The presence of pressure ulcers alone will **not** establish or prove that neglect has occurred. Ulcers can develop even with good care due to "acute illness, neurological disease,

[69] Wolf *Introduction: The Nature and Scope of Elder Abuse* (2000) 24(2) Generations 9.
[70] Brandl et al., Elder Abuse Detection and Intervention (2007).

peripheral vascular disease, incontinence, and poor nutritional status…."[71] When ulcers do appear, prompt medical care is required. Healing can take weeks to months. However, the presence of untreated ulcers, deep ulcers in multiple locations, infected and necrotic ulcers, and failure to follow medical advice for care of a patient are all indicative of caregiver neglect.[72]

[§3.4.5.3] NEGLECT IN FACILITIES

Many neglect victims reside in various long term care facilities and may have no family or friends who maintain regular contact. While few studies have been conducted about neglect of residents in long term care facilities, some information is known. Reports of neglect (and abuse) are widespread across long term care settings.[73] Neglect typically takes one of two forms: 1) failure to provide needed care and services; and 2) performing a task inappropriately (one person performing a task when two are required for patient safety or a staff member performing a function for which s/he is not qualified and supervised).

Studies of neglect have found high risk for such neglectful acts as:

- Leaving a patient in their own excrement.
- Not turning or repositioning a resident.
- Shutting off resident call lights or disregarding resident calls for assistance.
- Not assisting with eating or drinking, resulting in malnutrition and dehydration.
- Placing a patient in bath water that was too hot.
- Not assisting with range of motion exercises to prevent contractures.
- Improper handling of patients.[74]

Neglect in long term care facilities is under-reported. Facility management may disbelieve reports from residents and may have concerns about liability if they do report. They may also refrain from reporting in order to protect staff and the facility's reputation. Employees may fear losing their jobs if they report. Families of residents are reluctant to report for fear of retribution against their relative and fear of having their relative asked to leave or being evicted for reporting.[75] Neglect in long-term care facilities is associated with stressful working

---

[71] Dyer et al., *The Clinical and Medical Forensics of Elder Abuse and Neglect*, *supra* at 349.
[72] Dyer et al., *The Clinical and Medical Forensics of Elder Abuse and Neglect*, *supra* at 350.
[73] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 469.
[74] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed*, *supra* at 463-64.
[75] Government Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation*, *supra*; and Rosen et al., *Resident-to-Resident Aggression in Long-Term Care Facilities: An Understudied Problem* (Mar. 1, 2008) 13(2) Aggression and Violent Behavior 77–87.

environments, chronic understaffing, staff burnout, a high turnover rate, and a combination of resident combativeness and aggression, and inadequate staff training on how to respond to it.[76]

[§3.4.6] ABANDONMENT

Abandonment is the desertion of a vulnerable elder by a person who has assumed responsibility for the care or custody of that person. It is a separate form of abuse in the Elder Abuse Reporting Law but is often treated as a form of neglect. Like neglect it requires that there be someone with a duty of care to the older adult. In recent years there have been media reports of confused older adults being left at race tracks, malls, and hospitals by family members who did not want to continue to provide care.

Abandonment cases may be filed in Probate Court as conservatorship proceedings to establish a new conservatorship or to remove an existing conservator or brought to criminal court as neglect or homicide cases. If abandonment is accompanied by financial exploitation, the charge may also be financial abuse.

[§3.4.7] SELF-NEGLECT

The National Association of Adult Protective Services Administrators (NAAPSA), now called the National Adult Protective Services Association (NAPSA), offered this framework for understanding self-neglect: "Self-neglect is the result of an adult's inability, due to physical and/or mental impairments or a diminished capacity, to perform essential self-care tasks including: providing essential food, clothing, shelter, and medical care; obtaining goods and services necessary to maintain physical health, mental health, emotional well-being, and general safety; and/or managing financial affairs."[77] This framework was included in the Elder Justice Act of 2010 which provided this definition: "The term 'self-neglect' means an adult's inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including -- (A) obtaining essential food, clothing, shelter, and medical care; (B) obtaining goods and services necessary to maintain physical health, mental health, or general safety; or (C) managing one's own financial affairs."[78] Self-neglect "results from an individual's difficulty in obtaining, maintaining, and/or managing the necessities of life independently."[79]

---

[76] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed*, *supra* at 484; and Institute of Medicine and National Research Council, *Measuring and Conceptualizing Elder Abuse* in Elder Abuse and Its Prevention: Workshop Summary (2013), chapter 2, 2-1 to 2-9.

[77] Brandl et al., Elder Abuse Detection and Intervention, *supra* at 33.

[78] Elder Justice Act of 2009, Public Act 111-148, Title VI, Subsection H, Section 2011(18) <http://www.ncea.aoa.gov/Resources/Publication/docs/ELDER_JUSTICE_ACT_2010.pdf> (as of January 10, 2016).

[79] Rathbone-McCuan & Bricker-Jenkins, *Self-Neglect and Adult Protective Services* in Social Counselor Certification Resource Handbook, Nashville, TN Department of Social Services (1989), 301 (cited in Longres, *Self-Neglect Among the Elderly* (1995) 7(1) Journal of Elder Abuse and Neglect 69-86).

There is controversy as to whether self-neglect is elder abuse; many argue that it is not because there is no third-party perpetrator. It differs from the standard definition of neglect in that there is no caretaker and the primary source of risk to the older adult is not created by another person. While the debate about whether self-neglect is elder abuse continues, across the United States self-neglect remains the most common form of abuse reported to adult protective services. Self-neglect may be related to an underlying medical or mental health condition or may be a way of living that a person chooses for him/herself. It can take many different forms:

- Living without utilities;
- Not taking needed medications;
- Not caring for one's person;
- Not caring for one's home;
- Living in squalor;
- Hoarding and collecting large quantities of items; and/or
- Hoarding of animals.

Self-neglect is independently associated with impairments in conducting instrumental activities of daily living.[80] Instrumental activities of daily living include the ability to use the telephone, go shopping, do food preparation, housekeeping and laundry, take responsibility for one's own transportation, and handle one's own finances.[81]

Self-neglect is associated with cognitive impairment and symptoms of depression. Mental health and physical health conditions interact. Self-neglect is associated with behavioral and environmental risk factors.[82] Some examples include:

---

[80] Naik et al., *Impairment in Instrumental Activities of Daily Living and the Geriatric Syndrome of Self-Neglect* (2008) 48(3) Gerontologist 388-393.
[81] Lawton & Brody, *Assessment of Older People: Self-Maintaining and Instrumental Activities of Daily Living* (1969) 9 Gerontologist 179-186.
[82] Iris et al., *Observational Measure of Elder Self-Neglect* (2014) 26(1) Journal of Elder Abuse and Neglect 1-33.

Behavioral Risk Factor	Environmental Risk Factor
• Does not socialize with others, self-isolating	• Unsafe or unsanitary appearance of residence or yard; odors of garbage or human or animal waste
• Lacks sufficient care to meet needs	• Fire and/or safety hazards at residence
• Does not follow up on preventive or diagnostic medical care; ignores signs and symptoms of disease	• Hoarding
• Poor personal hygiene	• Living conditions create hazards to the older adult or others
• Symptoms of mental illness	• Accumulation of unopened mail
• Refuses to use needed and available assistive devices	• Bathing, sinks, and toileting facilities unsafe, unsanitary or inoperable
• Dressed inappropriately for the weather	• Vermin, animal droppings on floor or walls

Declines in personal care may precede declines in maintenance of the physical environment. Behavioral/personal indicators occur more often and are less serious than environmental indicators. Behavioral indicators may be precursors of the more serious environmental self-neglect.[83]

In some situations self-neglect may be an outcome of elder abuse. A victim of sexual abuse may self-neglect because of depression and symptoms of post-traumatic stress disorder. A victim of financial abuse may not take medications needed to maintain health because he or she no longer has sufficient funds to pay for them or may no longer care for his or her home because he or she lacks money to do so. It is helpful for courts handling such cases to inquire if the self-neglect is a recent change in life style or has occurred throughout the person's life.

An extreme form of self-neglect is living in severe squalor. It is defined as living in conditions "so unsanitary and unhygienic that feelings of revulsion are elicited in visitors due to the accumulation of dirt, grime, and waste."[84] Squalor dwelling includes living in unsanitary living conditions that pose a danger to the elder or the surrounding community and includes living in an unsafe structure, severe cluttering or hoarding, insect or rodent infestations, visible human or animal waste, rotting food, and lack of running water or utilities. It goes far beyond excessive collecting and hoarding and is associated with co-morbidities such as dementia and mental illness.[85] In a small study of squalor-dwelling elders, researchers found all had

[83] Iris et al., *The Development of a Conceptual Model for Understanding Elder Self-Neglect* (2010) 50(3) The Gerontologist 303-313; and Iris et al., *Observational Measure of Elder Self-Neglect, supra*.
[84] Aamodt et al., *Cognitive Profiles of Elder Adult Protective Services Clients Living in Squalor* (2015) 27(1) Journal of Elder Abuse and Neglect 66.
[85] Snowdon & Halliday, *A Study of Severe Domestic Squalor: 173 Cases Referred to an Old Age Psychiatry Service* (2011) 23 International Psychogeriatrics 308-314.

significant problems with executive functioning.[86] Living in squalor is not explained by age-related changes or decline. Instead it appears to be related to problems in the frontal lobe of the brain and impaired neural processes that mediate perceptions of disgust in the brain.[87]

Self-neglect is associated with a significantly increased risk of 1-year mortality (the number of people who died within a population) (5.82-fold increase, irrespective of the elder's physical or cognitive functioning). By comparison, abuse is associated with a 39% increase in morbidity (the state of being diseased or unhealthy).[88]

[§3.4.7.1] HOARDING

Hoarding is the acquisition of large numbers of possessions and overwhelming difficulty discarding them when they are no longer needed or useful at a level that interferes with everyday lives, tasks, and relationships.[89] It includes compulsively acquiring free items such newspapers, circulars, napkins, and straws; compulsively buying items because they are bargains or to have extras or to give as gifts "some day"; and distress caused by the overwhelming amount of possessions.

Researchers believe that hoarding is caused by the inability to discard things and co-occurring mental health disorders and/or substance abuse problems. Treatment of hoarding behavior is complicated; cleaning up is often deleterious to the hoarder's mental health. Communities that recognize the complexity of hoarding have created Hoarding Task Forces where representatives of mental health, protective services, code enforcement, and others work together to attempt to resolve problem locations while reducing risk to the health and wellbeing of the older adult hoarder.

Diagnostic criteria for hoarding disorder from the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders include:

- Difficulty throwing out or parting with things, regardless of actual value.
- A need to save these items, and the thought of discarding them causes emotional upset.
- Possessions crowd and clutter living areas and make the space unusable.
- The hoarding causes the person significant distress or problems functioning at work, socially or in other important areas, such as maintaining a safe living environment.

---

[86] Gregory et al., *Living in Squalor: Neuropsychological Function, Emotional Processing, and Squalor Perception in Patients Found Living in Squalor* (2011) 23 International Psychogeriatrics 724-731.
[87] Aamodt et al., *Cognitive Profiles of Elder Adult Protective Services Clients Living in Squalor, supra*.
[88] Dong et al., *Elder Self-neglect and Abuse Mortality Risk in a Community-Dwelling Population* (Aug. 5, 2009) 302(5) Journal of the American Medical Association (JAMA) 517-526.
[89] Mental Health Association of San Francisco, Institute on Compulsive Hoarding and Cluttering *What is Hoarding Behavior?* <http://mentalhealthsf.org/programs/ichc/about-hoarding/> (as of May 13, 2015).

- The hoarding is not due to a medical condition, such as a brain injury, nor is it a symptom of a mental disorder such as decreased energy from major depression.[90]

Adults have a right to live as they choose, independently and without interference. A court may act when a person loses decision-making capacity or when the actions of an elder who is self-neglecting cause suffering (such as animal abuse) or create a public nuisance or danger (e.g., fire hazard to other apartment dwellers or pest infestations in a neighborhood).

These are often frustrating cases which courts are not able to easily resolve. Adult protective services may attempt to offer help, including clean up, in-home support, or alternative housing. Most self-neglecting elders will refuse offers of help. Because of the wide array of diagnoses that may apply to hoarders such as obsessive-compulsive disorder, Diogenes syndrome ("senior squalor" syndrome), dementia, depression, and others, there is no single accepted intervention. Some may eventually accept community services when offered over time, usually more than once, and without force or threats of dire consequences for refusing those services. Mental health counseling, cognitive behavioral therapy and medications will be helpful for some hoarders.[91] Care must be taken when considering involuntary cleanup of the premises as the accumulated items often represent a source of comfort and emotional attachment to the individual. Forced removal of such items can elevate anxiety levels, which is why such involuntary actions may be futile and even damaging to the elder's mental health.[92]

[§3.5] CHAPTER SUMMARY POINTS

- Elder abuse can take many forms: physical, sexual, emotional/psychological, financial exploitation, false imprisonment/isolation, neglect, and/or abandonment.
- Multiple forms of abuse often co-occur and may be interrelated. Because of the likelihood of polyvictimization, even if the presenting matter involves only a single form of abuse, courts may find it helpful to ask about and be alert to evidence of other forms of abuse for a fuller picture of the facts, the relationship between the parties, and the scope of relief that may be most appropriate.
- A single type of abuse may take many different forms. For example, financial abuse and exploitation may involve theft, fraud, misuse of legal authority, and/or undue influence.
- What may appear to be abuse or neglect may in fact be due to causes unrelated to abuse and neglect. For example, pressure ulcers may not be sufficient in and of themselves to prove neglect; bruises cannot reliably be aged by color; and what appears to be abuse

---

[90] American Psychiatric Association, *Obsessive Compulsive and Related Disorders* (2013) <http://www.dsm5.org/Documents/Obsessive%20Compulsive%20Disorders%20Fact%20Sheet.pdf> (as of January 11, 2016).
[91] Steketee & Frost, Compulsive Hoarding and Acquiring: A Therapist Guide (2007).
[92] See e.g., Right at Home, *Elderly Hoarding* (May 17, 2011) <http://www.rightathome.net/chicago-southwest-suburbs/blog/elderly-hoarding/2015> (as of January 11, 2016); and Metropolitan Boston Housing Partnership, *Rethinking Hoarding Intervention: MBHP's analysis of the Hoarding Intervention and Tenancy Preservation Project* (Jan. 2015) <http://www.philadelphiahoarding.org/resources/MBHP-Hoarding-Report-2015_FINAL.pdf> (as of January 11, 2016).

may in fact be an outcome of age-related changes, medication, or an underlying medical condition.

- Caregiver stress is sometimes offered as an explanation for abuse and neglect. While caregiving certainly can be stressful, most caregivers do not neglect or physically abuse the people for whom they care. Caregiver stress is not a legal justification for nor defense to abuse and neglect.

Chapter 4

MEDICAL-LEGAL CONSIDERATIONS [RESERVED]

Chapter 5
RISK FACTORS AND INDICATORS OF ELDER ABUSE

[§5.1] CHAPTER OVERVIEW

[§5.2] RISK FACTORS FOR ELDER ABUSE

[§5.2.1] RISK FACTORS ASSOCIATED WITH VICTIMS

[§5.2.2] RISK FACTORS ASSOCIATED WITH ABUSE AND NEGLECT IN LONG TERM CARE FACILITIES

[§5.2.3] RISK FACTORS ASSOCIATED WITH PERPETRATORS

[§5.2.4] DOMESTIC VIOLENCE AND OTHER RISK FACTORS ASSOCIATED WITH HOMICIDE-SUICIDE

[§5.2.5] RISK FACTORS ASSOCIATED WITH SELF-NEGLECT

[§5.3] ROLE OF SUBSTANCE ABUSE

[§5.4] INDICATORS OF ELDER ABUSE

[§5.4.1] CHART OF INDICATORS BY FORM OF ABUSE

[§5.4.2] BEHAVIORAL INDICATORS BY VICTIMS AND PERPETRATORS

[§5.5] RISK FACTORS, INDICATORS AND COURT ORDERS

[§5.6] SUMMARY POINTS FOR JUDICIAL OFFICERS

[§5.1] CHAPTER OVERVIEW

Risk factors are "experiences, behaviors, aspects of lifestyle or environment, or personal characteristics" that increase the chances that elder abuse will occur.[1] Indicators are circumstances that are associated with cases of elder abuse. Neither risk factors nor indicators, in and of themselves, prove that abuse has occurred. Instead, their presence combined with other evidence should raise concern that elder abuse may have occurred and may provide corroborating information when abuse is suspected.

Once elder abuse has been established, consideration of risk factors may be helpful to the court when assessing what intervention may be tailored to address specific concerns. For example, if the perpetrator has a substance abuse problem, the court might consider whether ordering participation in a drug treatment program could reduce the risk of future abuse. Or, if family dysfunction or family conflict is present, reducing risk to the elder may require that an abusive spouse or child not be appointed as conservator.

[1] National Research Council, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003), at 89.

[§5.2] RISK FACTORS FOR ELDER ABUSE

Many studies have been conducted to identify risk factors for elder abuse. A 2013 review of studies evaluating risk factors for elder abuse identified four categories of risk factors:[2]

1. the *elder person* (cognitive impairment, behavioral problems, psychiatric illness or psychological problems, functional dependency, poor physical health, frailty, low income/wealth, trauma, past abuse, and ethnicity);
2. the *perpetrator* (caregiver burden or stress, and psychiatric illness or psychological problems);
3. the *relationship* (family disharmony, poor or conflictual relationships); and
4. the *environment* (low social support and living with others (except for financial abuse).

This section will examine risk factors in terms of victim and perpetrator characteristics. It will incorporate relationship and environmental factors within these two categories.

[2] Johannesen & LoGiudice, *Elder Abuse: A Systemic review of Risk Factors in Community-Dwelling Elders* (2013) 42 Age and Ageing 292-298 <http://ageing.oxfordjournals.org/content/42/3/292.full.pdf+html> (as of December 1, 2015).

[§5.2.1] RISK FACTORS ASSOCIATED WITH VICTIMS

Victim Characteristic	Risk Factor

Victim's Gender and Race	• Female gender is a risk factor.
	  ○ Most reported cases of elder abuse involve female victims.
	  ○ Elderly men are abused at a greater per capita rate than elderly women.[3]
	• Women are more likely to be victims of physical, sexual, financial, psychological abuse and neglect. Men are more likely to be victims of abandonment.[4]
	• No difference in susceptibility to scams between men and women.[5]
	• Race: is a risk factor.
	  ○ Being African-American appears to increase the risk of elder abuse, including financial abuse.[6]
	  ○ One study indicates that African-American elders have an increased likelihood of being emotionally/psychologically abused by informal, female caregivers.[7]
	• Non-white elders are at increased risk for facility abuse and neglect.[8]

[3] Pillemer and Finkelhor, *The Prevalence of Elder Abuse: A Random Survey Sample* (1988) 28(10) The Gerontologist 51; and Brandl et al., Elder Abuse Detection and Intervention (2007).
[4] Heisler, *Elder Abuse* in Victims of Crime, 3rd Edition (Davis et al. edits., 2007) 161-188.
[5] James et al., *Correlates of Susceptibility to Scams in Older Adults Without Dementia* (2014) 26(2) Journal of Elder Abuse and Neglect 107-122.
[6] Lachs et al., *A Prospective Community-Based Pilot Study of Risk Factors for the Investigation of Elder Mistreatment*, (1994) 42(2) Journal of the American Geriatrics Society 169-173; and Lachs et al., *Risk Factors for Elder Abuse and Neglect: A Nine-Year Observational Study* (1997) 37(4) The Gerontologist 469-474.
[7] Dimah, *Patterns of Elder Abuse and Neglect in an Illinois Elder Abuse Provider Agency: A Comparative Study* (2001) 13(1) Journal of Elder Abuse and Neglect 27-44.
[8] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 446-500.

Victim Characteristic	Risk Factor
Victim's Age	• The risk of abuse increases with age. Elders age 80 and older are two to three times more likely to be victims of all forms of elder abuse.[9] Victims of financial abuse tend to be over age 80.[10] Persons 85 and older are most susceptible to scams.[11]
Relationships and History	• Increased risk is associated with previous traumatic experiences including domestic and other interpersonal violence.[12] • Violence committed by intimate partners tends to lessen with age while abuse by other family members increases.[13]

Victim's Health Status and Dependency	• Increased risk of abuse is associated with:
	  ○ Cognitive disabilities. Persons with cognitive disabilities have the highest rate of violent victimizations, including sexual assault, compared to any other disability type. Rates of serious violent victimizations against persons with multiple disabilities increased from 24 per 1000 in 2009 to 35 per 1000 in 2013.[14]
	  ○ Debilitating physical and cognitive conditions requiring assistance from others with activities of daily living. (The risk is unclear for financial abuse; studies' findings are mixed).[15]

[9] National Center on Elder Abuse, *The National Elder Abuse Incidence Study* <http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf> (as of December 2, 2015). It may be that frailty, impairment, and dependency are the real risk factors but because these increase with age, age may be mistakenly identified as the risk factor.

[10] National Center on Elder Abuse, *The National Elder Abuse Incidence Study*, *supra*. Some studies have found that old age is a risk factor for financial abuse while other studies have found that victims of financial exploitation are often younger than victims of other forms of abuse.

[11] James et al., *Correlates of Susceptibility to Scams in Older Adults Without Dementia*, *supra*.

[12] Acierno et al., *National Elder Mistreatment Study* (2009) <www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf> (as of December 2, 2015); and Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study* (2010) 100(2) American Journal of Public Health 292–297.

[13] Klein et al., *A Statewide Profile of Abuse of Older Women and the Criminal Justice Response, Summary* (2008) <https://www.ncjrs.gov/pdffiles1/nij/grants/222460.pdf> (as of December 2, 2015).

[14] Harrell, *Crime Against Persons with Disabilities, 2009-2013 – Statistical Tables* (May 2015) U.S. Department of Justice, Bureau of Justice Statistics, NCJ 248676 <http://www.bjs.gov/content/pub/pdf/capd0913st.pdf> (as of December 2, 2015).

[15] Gorbien and Eisenstein, *Elder Abuse and Neglect: An Overview* 21(2) Clinics in Geriatric Medicine 279-292; Acierno et al., *National Elder Mistreatment Study*, *supra*; Lachs et al., *Risk*

	○ Impaired ability to care for oneself, defend oneself or escape the situation.[16] ○ Dementia (includes risk of financial abuse).[17] Early stage dementia is associated with increased risk for financial abuse; moderate stage dementia is associated with increased risk of physical abuse; advanced stage is associated with increased risk of neglect. Psychological abuse occurs at all stages.[18] ○ Depression (includes risk of financial abuse).[19] ○ Psychiatric illness.[20] • Younger elderly (age 65 to 74) in poor health are more likely to be abused (physical, psychological, and financially exploited, and neglected) than those over age 75.[21] • Older immigrants (because they may be dependent on others for translation, financial transactions, bill paying, and services).[22]

Factors for Elder Abuse and Neglect: A Nine-Year Observational Study, *supra*; and James et al., *Correlates of Susceptibility to Scams in Older Adults Without Dementia*, *supra*.

[16] Heisler, *Elder Abuse*, *supra* at 168.

[17] Wiglesworth et al., *Screening for Abuse and Neglect of People with Dementia* (2010) 58 Journal of the American Geriatrics Society 493–500.

[18] Burnight & Mosqueda, *Theoretical Model Development in Elder Mistreatment* (2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/234488.pdf> (as of December 2, 2015).

[19] Dyer et al., *The High Prevalence of Depression and Dementia in Elder Abuse or Neglect* (2000) 48(2) Journal of the American Geriatrics Society 205-208.

[20] Friedman et al., *A Case Control Study of Severe Physical Abuse of the Elderly* (2011) 59(3) Journal of the American Geriatrics Society 417-422; and Heisler, *Elder Abuse*, *supra*.

[21] Biggs et al., *Mistreatment of Older People in the United Kingdom: Findings from the First National Prevalence Study* (2009) 21(1) Journal of Elder Abuse and Neglect 1–14; Amstadler et al., *Do Incident and Perpetrator Characteristics of Elder Mistreatment Differ by Gender of the Victim? Results from the National Elder Mistreatment Study* (2011) 23(1) Journal of Elder Abuse and Neglect 43–57; and Laumann et al., *Elder Mistreatment in the United States: Prevalence Estimates from a Nationally Representative Study* (2008) 63 Journal of Gerontology 248–254.

[22] Zannettino et al., *The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of Older People from Culturally and Linguistically Diverse Communities in Australia* (2015) 27(1) Journal of Elder Abuse and Neglect 74-89.

Victim Characteristic	Risk Factor

Socio-Economic Factors	• Increased risk of abuse is associated with:
	  ○ Social isolation and low social supports.[23]
	  ○ Shared living arrangements.[24]
	  ○ Grieving and recent loss of spouse or other family members.[25]
	  ○ Poverty and lower household income.
	  ○ Lack of financial expertise.[26]
	  ○ Marital status, especially for domestic violence.[27]
	• Increased risk in caregiving situations:
	  ○ Poor relationship between caregiver and care recipient.
	  ○ Care recipient's physical aggression and combativeness.
	  ○ Care recipient's poor functional status, and severe cognitive impairment.[28]
	• Increased risk in long term care facilities for:
	  ○ Residents without family, friends, or advocates ("unbefriended elders").
	  ○ Elders living on public assistance.
	  ○ Residents who are aggressive.[29]
	• Female victims of abuse in rural settings are more likely to suffer physical and psychological abuse and financial abuse than urban women.[30]

[23] National Research Council, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America, *supra*; Acierno et al., *National Elder Mistreatment Study*, *supra*; and Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, *supra*.
[24] See National Research Council, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America, *supra* at 92.
[25] Brandl et al., Elder Abuse Detection and Intervention at 82.
[26] See Hafemeister, *Financial Abuse of the Elderly in Domestic Settings* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 382-445; and James et al., *Correlates of Susceptibility to Scams in Older Adults Without Dementia*, *supra*. Older female victims often have not previously handled financial matters, are unfamiliar with modern banking and financial transactions, and may be unaware of the value of significant assets, such as the family residence, even if owned for decades.
[27] Yon et al., *A National Comparison of Spousal Abuse in Mid and Old Age* (2014) 26(1) Journal of Elder Abuse and Neglect 80-105. It is unclear if the risk is related to financial abuse; 60% of reported cases of physical abuse are committed by spouses.
[28] Burnight & Mosqueda, *Theoretical Model Development in Elder Mistreatment*, *supra*; and Reis & Nahmiash, *Validation of the Indicators of Abuse (IOA) Screen* (1998) 38 The Gerontologist 471-480.
[29] Brandl et al., Elder Abuse Detection and Intervention at 82.
[30] Dimah & Dimah, *Elder Abuse and Neglect Among Rural and Urban Women* (2003) 15(1) Journal of Elder Abuse and Neglect 75-93.

	○ Urban women are more likely to be victims of neglect. ○ Both groups are most often abused by adult children. • Elders living in rural areas have higher self-reported rates of emotional and financial spousal abuse.[31]

[§5.2.2] RISK FACTORS ASSOCIATED WITH ABUSE AND NEGLECT IN LONG TERM CARE FACILITIES

Risk factors for abuse and neglect of residents in long term care facilities include:

- Stressful working conditions due to staffing shortages and other factors. (Understaffing in nursing homes results in neglect of residents and a 22% increase in hospitalizations.)[32]
- Staff burnout.
- The combination of residents' aggressive behaviors with inadequate staff training on managing problematic behaviors.[33]
- Poor hiring and staff screening.
- Lack of management oversight and supervision.

[31] Yon et al., *A National Comparison of Spousal Abuse in Mid and Old Age*, *supra*.
[32] Centers for Medicare and Medicaid Services, *Appropriateness of Minimum Nurse Staff Ratios in Nursing Homes, Phase II Final Report* (2001) 1-7.
[33] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed*, *supra*; Pillemer & Moore, *Abuse of Patients in Nursing Homes: Findings from a Survey of Staff* (1989) 29 The Gerontologist 314-320; and Pillemer & Bachman-Prehn, *Helping and Hurting: Predictors of Maltreatment of Patients in Nursing Homes* (1991) 13 Research on Aging 74-95.

[§5.2.3] RISK FACTORS ASSOCIATED WITH PERPETRATORS

Perpetrator Characteristic	Risk Factor
Gender	• Abusers are more often male.[34]
Age	• Male abusers tend to be younger than their victims. • Abusers in long term care facilities who are staff are younger than non-abusers and likely to have negative attitudes about residents.[35]
Relationship	• In community settings, most abusers are family members.[36] • Some surveys indicate spouses most often are abusers, while others identify adult children as the most typical abuser.[37] • 42% of elder murders are committed by adult children; 24% are committed by spouses.[38] • The majority of elder homicide-suicides are committed by male intimate partners.[39]
Socio-Economic	• Family member abusers likely to be unemployed, unmarried and dependent on their victims financially, emotionally, and for housing.[40]

[34] Brandl et al., Elder Abuse Detection and Intervention at 86.
[35] Pillemer & Moore, *Abuse of Patients in Nursing Homes: Findings from a Survey of Staff*, *supra*.
[36] Dimah & Dimah, *Elder Abuse and Neglect Among Rural and Urban Women*, *supra*.
[37] Brandl et al., Elder Abuse Detection and Intervention at 85.
[38] Dawson & Langan, *Murder in Families* (1994) U.S. Department of Justice, Bureau of Justice Statistics.
[39] Cohen, *Homicide-suicide in older persons* (1998) 155 American Journal of Psychiatry 390–396.
[40] Brandl et al., Elder Abuse Detection and Intervention at 85.

Perpetrator Characteristic	Risk Factor

Health and Mental Health	• Abusers are likely to have mental health and behavioral health problems.[41]
	• Abusers are likely to have histories of violence and/or antisocial behaviors outside the home.[42]
	• Abusers are likely to abuse alcohol. (See Section 5.3 for fuller discussion.)
	• Abusive family caregivers tend to suffer from depression.
	• Abusive caregivers of elders with Alzheimer's Disease had higher scores for "hostility" (in cases of physical and psychological abuse).[43]
	• Perpetrators of homicide-suicide have high rates of untreated psychiatric conditions, especially depression.[44]
	• Employees in long term care facilities who abuse and neglect residents are likely to view residents as children in need of discipline and to suffer from:
	  ○ Burnout;
	  ○ Emotional and physical exhaustion; and
	  ○ Stressful personal lives.[45]

[§5.2.4] DOMESTIC VIOLENCE AND OTHER RISK FACTORS ASSOCIATED WITH HOMICIDE-SUICIDE

While older adults comprise the segment of the population least likely to be murdered, they are disproportionately affected by homicide-suicide. Research conducted by Cohen and colleagues for more than 25 years reveals that the incidence of homicide-suicide is higher in those age 55 years and older than in persons younger than 55 years.[46] Most incidents involve married couples, the perpetrator is nearly always the male partner, and firearms are most often the weapon of choice.[47] In a quarter to a third of the cases there is a history of domestic violence.

---

[41] Brandl et al., Elder Abuse Detection and Intervention at 85; and National Research Council, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America, *supra*.
[42] Lachs & Pillemer, *Abuse and Neglect of Elderly Persons* (1995) 332(7) The New England Journal of Medicine 437-443.
[43] Quayhagen et al., *Coping with Dementia: Family Caregivers Burnout and Abuse* (1997) 3 Journal of Mental Health and Aging 357-364.
[44] Cohen, *Homicide-suicide in older persons*, *supra*.
[45] Hawes, *Elder Abuse and Neglect in Residential Long-Term Care Settings: What is Known and What Information is Needed*, *supra*.
[46] Malphurs & Cohen, *A State-Wide Case Control Study of Spousal Homicide-Suicide in Older Persons* (2001) 9(1) American Journal of Geriatric Psychiatry 49-57.
[47] Cohen, *Homicide-suicide in older persons*, *supra*; and Cohen, *An update on homicide-suicide in older persons: 1995–2000* (2000) 6(3) Journal of Mental Health and Aging 195-197.

The cases described in these sources are not what some call "mercy killings" or suicide pacts; many victims were asleep, were shot in the back of the head or body; or had defensive wounds. Perpetrators typically were not demented though many had underlying and untreated depression. Most perpetrators were described as having controlling, dominant personalities, viewing separation from the partner as a threat to the integrity of the relationship.

This chart[48] describes some of the risk factors associated with homicide-suicide.

Risk Factor	**Examples**
Age	• Male's advanced age • Male older than victim
Male's Personality Characteristics	• Controlling personality • Angry, hopeless • Fears loss of control • Depressed, suicidal • Substance abuse
Social Factors	• History of domestic violence • Male is caregiver • One or both parties is in declining health (or male fears that he is in declining health) • Couple is isolated
Precipitating Event	• Pending hospitalization or institutionalization of either spouse • Availability of a firearm

Courts may want to consider information regarding risk factors when handling matters involving older defendants, especially where there may be a history of domestic violence. Courts may have the opportunity to request or review medical and/or mental health evaluations. If information is provided that the defendant or respondent may have underlying depression which is not currently being treated or has not responded to treatment the court may wish to consider ordering such treatment.

The presence of risk factors may assist the court in determining whether to issue orders to separate the parties or prohibit contact, or to include firearms prohibitions and other orders. Note that firearms prohibitions may be statutorily required under certain circumstances, e.g. when a restraining order is issued in a domestic violence context.[49]

---

[48] Chart drawn from Cohen, *Homicide-suicide in older persons*, *supra*; Cohen, *An update on homicide-suicide in older persons: 1995–2000*, *supra*; and Malphurs & Cohen, *A State-Wide Case Control Study of Spousal Homicide-Suicide in Older Persons*, *supra*.

[49] See for example, Fam C §6389, CCP §527.9, Welf & I C §15657.03, and Pen C §136.2.

[§5.2.5] RISK FACTORS ASSOCIATED WITH SELF-NEGLECT

Self-neglect and neglect by a caretaker share similar risk factors such as cognitive and functional impairment, isolation, poor social support, and impaired decision-making capacities.[50] Risk factors for self-neglect include:

- living alone;
- mental illness (which is often untreated);
- dementia;
- social isolation from family due to absence of family or estrangement from family; and
- substance abuse.[51]

[§5.3] ROLE OF SUBSTANCE ABUSE

Substance abuse can be a risk factor for the victim, the perpetrator, or both. Seventeen percent of older adults are believed to abuse alcohol and other drugs. Alcohol abuse is related to social isolation which is also a risk factor for abuse.[52]

Older adults are especially susceptible to alcohol and drug abuse because of age-related changes in the body's physiology resulting in changes in drug tolerance. Older adults can overdose on medication dosages that were effective in younger years but are too strong for the older adult, and they may also have ill-effects from drug interactions for chronic medical conditions.[53] Elders with alcohol disorders are 70% more likely to self-neglect and have cognitive and functional deficits.[54]

There is increased risk of elder physical and sexual abuse when the perpetrator drinks heavily.[55] "The likelihood of substance abuse problems is higher in elder mistreatment

---

[50] Burnett et al., *Community-Based Risk Assessment of Elder Mistreatment and Self-Neglect: Evidence of Construct Validity and Measurement Invariance Across Gender and Ethnicity* (2014) 5(3) Journal of the Society for Social Work and Research 291-319 <http://www.jstor.org/stable/10.1086/677654> (as of December 7, 2015).

[51] Longres et al., *Self-Neglect Among the Elderly* (2015) 7(1) Journal of Elder Abuse and Neglect 69-86.

[52] Spensley, *The Role of Social Isolation of Elders in Recidivism of Self Neglect Cases at San Francisco Adult Protective Services* (2008) 20(1) Journal of Elder Abuse and Neglect 43-61; and Ernst et al., *Informing Evidence Based Practice: A Review of Research Analyzing Adult Protective Services Data* (2014) 26(5) Journal of Elder Abuse and Neglect 458-494.

[53] 2015 White House Conference on Aging Staff, *Healthy Aging Policy Brief* <http://www.whitehouseconferenceonaging.gov/blog/policy/post/healthy-aging-policy-brief> (as of December 11, 2015).

[54] Choi and Mayer, *Elder Abuse, Neglect, and Exploitation: Risk Factors and Prevention Strategies* (2000) 33(2) Journal of Gerontological Social Work 5-25; and Ernst et al., *Informing Evidence Based Practice: A Review of Research Analyzing Adult Protective Services Data*, *supra*.

[55] Yon et al., *A National Comparison of Spousal Abuse in Mid and Old Age*, *supra*.

perpetrators than in the general population, ranging from 21% to 56%, depending on the type of abuse, versus 11% in the general population. In the National Elder Mistreatment Study, perpetrator substance abuse rates were 26% in emotional abuse cases, 65.9% in physical mistreatment cases, and 22.8% in sexual abuse cases."[56]

Substance abuse is associated with increased violent behavior[57] and may exacerbate neglect of caregiving responsibilities.[58] Substance abusing caregivers are more likely to commit physical and emotional abuse rather than neglect.[59] In addition, caregivers may use alcohol to make victims more compliant or to exploit them financially.[60] Elder abuse victims are more likely to use alcohol and other drugs if the perpetrator also does.[61]

[§5.4] INDICATORS OF ELDER ABUSE

This section will list indicators of abuse by form. It will also describe behavioral indicators which cut across specific forms. These lists are necessarily limited to key indicators rather than all possible indicators.

---

[56] Heisler, *Elder Abuse*, *supra* at 168-69.
[57] World Health Organization, *Preventing violence by reducing the availability and harmful use of alcohol* in Violence Prevention: The Evidence (2010) <http://www.who.int/violence_injury_prevention/violence/4th_milestones_meeting/evidence_briefings_all.pdf> (as of December 8, 2015).
[58] World Health Organization, *Interpersonal Violence and Alcohol* (2006) <http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/pb_violencealcohol.pdf> (as of December 8, 2015).
[59] Hwalek et al., *The Association of Elder Abuse and Substance Abuse in the Illinois Elder Abuse System* (1996) 36(5) The Gerontologist 694-700.
[60] World Health Organization, *Interpersonal Violence and Alcohol*, *supra*.
[61] Hwalek et al., *The Association of Elder Abuse and Substance Abuse in the Illinois Elder Abuse System*, *supra*.

[§5.4.1] CHART OF INDICATORS BY FORM OF ABUSE[62]

Form of Abuse	Indicators Include:
Physical Abuse	• Cuts, bruises, welts and injuries in varying stages of healing or on multiple planes of the body, patterned, clustered on the trunk from repeated shaking • Bone fractures, especially face and skull • Petechiae (red dots from broken capillaries) above neck (strangulation) and throughout body (suffocation) • Rope burns, ligature marks, or injuries from restraint • Bite marks • Burns (location and pattern are especially significant) • Over- or under-use of medications • Untreated injuries or delayed seeking of medical care • Repeated changes of doctors and medical providers (doctor or hospital hopping) • Internal injuries
Sexual Abuse	• Difficulty walking or sitting • Genital itching or pain • Unexplained venereal disease, STDs or genital infections • Bruises around breasts, inner thighs, or genitalia • Unexplained vaginal or anal bleeding • Torn, stained or bloody underwear or bedding
Financial Abuse	• Sudden changes in bank accounts or banking practices, including unexplained large withdrawals of money • Abrupt changes to wills, trusts, or other financial documents • Unexplained disappearance of funds or valuable possessions • Substandard or lack of care when the elder should be financially able to pay for such services • Unexplained sudden transfers of assets or property • Excessive interest by previously uninvolved family member or "new best friend" in the older person's assets • Completion of documents or transactions that the elder does not understand or was rushed to complete • Missing mail • Unpaid bills or notice of utility shut off, eviction or foreclosure • Unexplained redirection of mail to a new address which is not the victim's

[62] Modified from Brandl et al., Elder Abuse Detection and Intervention at 65-73.

Form of Abuse	Indicators Include:
Psychological/Emotional Abuse	• Emotional distress or agitation • Depression or suicidal ideation • Hypervigilance in the presence of specific persons • Withdrawn, non-communicative, or non-responsive behaviors • Unusual or regressive behaviors (often attributed to dementia by abusers) • Residence is kept dark all the time • No radio, television, newspapers, or calendars for elder to use • No access to news and information • Isolated from family, friends, and activities • Injured or missing pets • Personal items of significance damaged or missing • Self-mutilation
Neglect by Caregiver	• Dehydration • Malnutrition • Hyperthermia or hypothermia • Hazardous or unsafe living environment • Inadequate or inappropriate clothing • Absence of needed glasses, hearing aids, dentures, prostheses, or assistive devices • Unexplained deterioration of health • Untreated medical problems, including pressure ulcers • "Failure to thrive" • Lack of routine medical care and/or medications • Changes in medical routine including number and regularity of appointments, changes in longtime doctors • Missing care provider (caregiver neglect only)

Self-Neglect	• All of the indicators listed under caregiver neglect, plus:
	  ○ Presence of many animals, in poor condition or dead
	  ○ Unsafe environment due to excessive amounts of trash, papers, and possessions
	  ○ Animal, pest and vermin infestations

Abandonment	• Missing caregiver • Cognitively impaired elder left in a hospital without identification or caregiver contact information • Confused elder put on bus with one way ticket out of area • Elder with significant dementia left at a mall or other public location without identification

[§5.4.2] BEHAVIORAL INDICATORS BY VICTIMS AND PERPETRATORS

Victims may be unable or unwilling to verbally disclose their abuse. They may still provide important information that is corroborative of an allegation of abuse. Information revealed through behavioral indicators may assist the court with fact finding and assessing witness credibility, may provide information about why there was a delay in reporting or non-reporting, and may explain why an abused elder minimizes the abuse, self blames, or protects the abuser.

Examples include:

- Implausible explanations for what has occurred.
- Unexplained behavior changes such as a person with advanced dementia who hides under a bed, tries to flee from a residence, refuses to be bathed when she or he had done so willingly previously, or changes in demeanor when a certain person enters room.
- Regressive behaviors such as curling up in the fetal position, rocking, biting, or sucking fingers.
- Agitation.
- Elder is unaware that others have attempted to contact the elder.
- Depression or unexpected sadness.
- Defers to the perpetrator when contacted by professionals.
- Coded disclosures in which the person hints at what has occurred. (E.g., an elderly woman called a hotline and asked if she could be pregnant. A forensic medical examination and a criminal investigation established she had been sexually assaulted by her son.)
- Missed appointments, late seeking of medical care, or not seeking medical care when care is obviously needed.
- Changes in sleep patterns, sleep disturbances or sleeplessness.

Perpetrator behaviors may also provide indicators of abuse. Examples include:

- Acting overly attentive towards the elder.
- Minimizing what has occurred.
- Offering implausible explanations for what has occurred.
- Preventing third parties from meeting alone with the elder.
- Interfering with or sabotaging existing relationships between the elder and others.
- Cutting off outside contact with the elder by removing telephones and television, refusing to take to religious services and other observances, etc.
- Speaking for the elder.
- Denying the elder access to health care or other needs.
- Objectifying the elder, treating him or her as a child, or viewing the elder as a child.

[§5.5] RISK FACTORS, INDICATORS AND COURT ORDERS

Awareness of risk factors and indicators may help courts handling all types of legal cases to fashion remedies that enhance the elder's wellbeing and safety and reduce the conditions and

circumstances that enable perpetrators to commit abuse. "A judge who is able to recognize indicators of elder abuse and who understands its dynamics will, within the bounds of the fair and equitable administration of justice, play an important role in preventing further victimization of an abused older person."[63]

The availability of legal interventions is a significant factor associated with case resolution, especially in financial abuse matters.[64] Unfavorable outcomes in elder physical abuse and domestic violence situations are associated with living with the perpetrator, being female, and being married.[65] Favorable outcomes for victims of abuse by family members are associated with changes in living arrangements, including separation from the abuser. For example:

- Can the court create opportunities to reduce elder isolation? If the perpetrator is isolating a victim or preventing third parties from having access to, or private time alone with, an elder abuse victim, the court may want to consider:

    - Ordering that the abuser not prevent the elder's contact with third parties or ordering a perpetrator who will continue to live with an elder to permit private visits between the elder and other named persons at certain times and frequency;
    - Ordering that the abuser not reside with the victim;
    - Limiting the abuser's contact with the victim to specific times and frequency, with or without third party supervision; and/or
    - Ordering an abuser to complete a batterer's intervention program, mental health counseling, or substance abuse treatment (or any combination).

- To reduce the abuser's financial dependence on the elder and to address other risk factors the court may wish to consider ordering an abuser to:

    - Complete a GED or vocational educational course;
    - Obtain and maintain employment;
    - Avoid places where alcohol is the chief item for sale;
    - Submit to alcohol and other drug testing;
    - Comply with a prohibition on the abuser living with the elder; and/or
    - Attend counseling as needed, including residential treatment.

- To ensure that an elder victim's needs are met by persons other than the abuser, the court may wish to consider:

---

[63] Judicial Council of California, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation* (February 2008) <www.Courts.ca.gov/documents/courtabused-eldersreport.pdf> (as of October 28, 2015), at 9.
[64] Brownell & Wolden, *Elder Abuse Intervention Strategies: Social Service or Criminal Justice?* (2002) 40 Journal of Gerontological Social Work 83-100.
[65] Rizzo et al., *A Systemic Evaluation of a Multidisciplinary Social Work-Lawyer Elder Mistreatment Intervention Model* (2015) 27(1) Journal of Elder Abuse and Neglect 1-18.

- Ensuring that elder abuse victims have access to victim-witness assistance program staff;
- Ensuring that the elder has a counselor or access to peer counselors to encourage the involvement of community agencies to meet victim needs for financial management (e.g., money management programs or representative payee programs);
- Encouraging the involvement of community organizations to meet the victim's needs for social activities and break social isolation (e.g., adult day programs, senior centers, faith-based activities for older adults, community library and volunteer programs)
- Providing in the courtroom "elder-friendly" materials from community organizations that describe the programs available for victims and concerned others;
- Linking the victim with the community's network for aging services such as meals on wheels, transportation to appointments, activities, and even home repairs; and/or
- Inquiring if the victim's case has been referred to the local Adult Protective Services Agency. Some courts are comfortable with such an inquiry while others view this as beyond the court's appropriate authority and role. If the court wishes to inquire about referral to or involvement of APS, it may be appropriate to appoint counsel or a guardian ad litem for the elder, or have court staff make the referral. [Note: Referrals to APS, like those to CPS, do not violate the canons of judicial ethics.]

- To ensure that the court's orders are complied with, the court may wish to:

  - Calendar periodic monitoring or progress hearings; and/or
  - Consider requiring supervised probation for a period of time for persons placed on probation.

[§5.6] SUMMARY POINTS FOR JUDICIAL OFFICERS

- Risk factors and indicators, by themselves, do not prove that abuse has occurred, but they can provide valuable corroborative evidence
- Information about risk factors and indicators can inform the court's decisions in making appropriate orders to address both the circumstances that enabled the abuse and may have prevented or delayed its early detection, and the needs of the parties.
- Information about risk factors and indicators may be used by courts in educating its own staff and experts engaged by the court, and in ensuring that court processes reduce the likelihood of the continuation of abuse.

Chapter 6
THE IMPACT OF ELDER ABUSE

[§6.1] CHAPTER OVERVIEW

[§6.2] WHY JUDGES NEED TO KNOW ABOUT THE IMPACT OF ELDER ABUSE ON ITS VICTIMS

[§6.3] MEDICAL AND HEALTH CONSEQUENCES OF ELDER ABUSE

[§6.3.1] INJURY AND HOSPITALIZATION

[§6.3.2] LONG TERM HEALTH CONSEQUENCES

[§6.3.3] RISK OF PREMATURE DEATH

[§6.4] PSYCHOLOGICAL IMPACT OF ELDER ABUSE

[§6.4.1] PSYCHOLOGICAL IMPACT ON VICTIMS WITH DEMENTIA

[§6.5] LOSS OF HOME

[§6.6] FINANCIAL IMPACT ON VICTIMS OF ELDER ABUSE

[§6.7] COSTS OF ELDER ABUSE

[§6.8] COURT PROCEDURES TO MITIGATE IMPACTS OF ELDER ABUSE

[§6.9] SUMMARY POINTS FOR JUDICIAL OFFICERS

[§6.1] CHAPTER OVERVIEW

Elder abuse is pervasive, costly, and often devastating to its victims. Victims of elder abuse suffer catastrophic losses; such losses may arise from any form of abuse, perpetrated in any type of setting, by someone known to the elder or by a stranger.[1]

In addition to enormous financial costs, elder abuse exacts physical, health and psychological costs from its victims. The victim's quality of life "can be jeopardized in the form of declining functional abilities, progressive dependency, a sense of helplessness, social isolation, and a cycle of worsening stress and psychological decline."[2] This chapter examines the effects and impact of elder abuse on victims and the greater community, and concludes with suggestions for how courts might address and ameliorate these consequences.

---

[1] Connolly et al., *The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis* (2014) <http://ncea.acl.gov/Library/Gov_Report/docs/EJRP_Roadmap.pdf> (as of October 23, 2015), at 44.

[2] Dong, *Medical Implications of Elder Abuse and Neglect* (2005) 1(2) Clinics in Geriatric Medicine 293.

[§6.2] WHY JUDGES NEED TO KNOW ABOUT THE IMPACT OF ELDER ABUSE ON ITS VICTIMS

The effects of elder abuse can be devastating. An understanding of the varied consequences may be helpful when a court is determining economic losses, making decisions on bail, ruling on whether proffered evidence is relevant, weighing the probative effect of expert testimony, evaluating witness credibility, making sentencing decisions (such as determining whether to permit contact between a victim and a defendant and/or ordering restitution), evaluating the appropriateness of punitive damages, and assessing what conditions should be included in a civil or criminal court order or judgment.

More specifically, the court may want to consider:

- Is there a concern that further victimization will occur if the defendant is allowed to have contact with a victim either during the pendency of a criminal case or between the issuance of a temporary restraining order and the order to show cause hearing?
- How and when can the court receive information about the impact of elder abuse on a particular victim?
- What procedures are available to expedite the taking of testimony of an older victim in a criminal matter?
- What procedures are available to allow older litigants to give testimony in non-criminal cases?
- What court procedures are most helpful to parties who are not mobile including those residing in long term care or hospital settings?
- Will providing support persons, advocates, or others lessen the trauma of the court process in an elder abuse case?
- In what kinds of proceedings is evidence of the impact of elder abuse on a specific victim relevant and admissible?
- In what proceedings is expert testimony about the impact of elder abuse admissible? Is such testimony admissible as to elder abuse victims in general or about this victim in particular?
- Do court-appointed experts rendering opinions about an elder abuse victim (whether in criminal, civil or probate matters) have expertise in the effects of trauma on memory and decision-making?
- Do court-appointed experts rendering opinions about an elder abuse victim have expertise in the impact of post-traumatic stress disorder (PTSD) on behavior, memory, and decision-making? Can or should victims be assessed for PTSD related to their victimization? In what situations? For what purpose(s)?
- Are there medical costs that should be included in a restitution order or award of damages?
- Should future medical costs be ordered as part of a judgment?
- Should the defendant be ordered to pay ongoing trauma-informed, victim-focused counseling costs?

- Should and can a court condition a sentence or early termination of probation or supervised probation on whether a defendant is willing to pay significant restitution to the victim at the time of sentencing? At a particular point in the probation term?
- Should the defendant be monitored for compliance with restitution orders?

[§6.3] MEDICAL AND HEALTH CONSEQUENCES OF ELDER ABUSE

Elder abuse can inflict devastating injuries resulting in short and long term damage and, in some cases, even death. Even less severe abuse can have a significant impact on elders, as described below.

[§6.3.1] INJURY AND HOSPITALIZATION

"(E)lder abuse can induce fractures, depression, dementia, malnutrition, and death."[3] Injuries from physical and sexual abuse and neglect of elders may be misidentified as caused by or related to underlying medical conditions rather than abuse, may be slower to heal than for younger abuse victims, and may result in permanent disabilities. In a study of 284 elder sexual abuse cases, half of the victims sustained visible injuries; eleven victims had been strangled; seventeen victims were hospitalized in an Intensive Care Unit following their assault; and four died during the assaults. In eleven of the cases a weapon was used.[4]

Financial abuse alone does not result in physical injury, but when it accompanies another form of abuse, the result can be permanent disability. A MetLife Mature Market Institute study documented a case in which a caregiver couple providing assistance to an elderly woman not only financially exploited her but neglected her to the point that she weighed only 80 pounds, was malnourished, and had developed pressure ulcers infected with maggots and gangrene such that she had to have her feet amputated.[5]

All forms of elder abuse significantly increase the victim's likelihood of hospitalization. Dong and Simon found that compared to non-abused elders, elders abused due to caregiver neglect increased their likelihood of hospitalization by 277%; psychological abuse by 180%; physical abuse by 191%; and financial exploitation by 156%. When two or more forms of elder abuse were present, the likelihood of hospitalization increased by 201%.[6]

---

[3] Dong, *Medical Implications of Elder Abuse and Neglect*, *supra* at 293.
[4] Burgess et al., *Comparing routes of reporting in elder sexual abuse cases* (2008) 20 Journal of Elder Abuse & Neglect 336-352.
[5] MetLife Mature Market Institute et al., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* (June 2011) <http://www.metlife.com/mmi/research/elder-financial-abuse.html#key%20findings> (as of December 20, 2015), at 17.
[6] Dong & Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons* (2013) 173(10) JAMA Internal Medicine 911-917.

[§6.3.2] LONG TERM HEALTH CONSEQUENCES

Elder abuse causes long term health consequences for many victims, particularly for victims of strangulation and/or head trauma. Studies of elderly victims of multiple strangulation incidents have found that victims suffer debilitating chronic headaches and migraines, sustain traumatic brain injuries (TBI) from head trauma, have impaired executive functioning and, as a result, have difficulty managing their lives or finances and struggle with making significant decisions. Victims suffer heart attacks and strokes from damage to blood vessels at significantly higher rates than those who have not been strangled and suffocated, as well as increased rates of asthma, arthritis, and depression.[7] Due to underlying chronic medical conditions, victims who are strangled or suffocated in later life appear to be at higher risk for premature death than younger victims experiencing a similar attack.

Head trauma also results in significant cognitive impairment for elderly victims. In a sample of 40 older women with likely Alzheimer's Disease referred to a memory disorder clinic, 17.5% reported spousal abuse with head trauma.[8] These results suggest that "the odds of cognitive impairment/dementia for women experiencing spousal abuse with head trauma may be four times as high as those not abused."[9]

[§6.3.3] RISK OF PREMATURE DEATH

The risk of premature death from elder abuse also rises significantly. One study found that the risk of premature death for victims of elder abuse and neglect is three times higher than for non-victims.[10] In another study, victims of physical abuse died sooner than non-victims, especially in the first year after the abuse.[11] Research over a 13-year period concluded that elder abuse victimization results in premature morbidity from the trauma of physical injuries as well as

---

[7] See generally Nicolaidis & Liebschutz, *Chronic Physical Symptoms in Survivors of Intimate Partner Violence* in Intimate Partner Violence (Mitchell & Anglin edits., 2009) 133-145; Warshaw et al., *Mental Health Consequences of Intimate Partner Violence* in Intimate Partner Violence (Mitchell & Anglin edits., 2009) 147-171; Wilson, *Traumatic Brain Injury and Intimate Partner Violence* in Intimate Partner Violence (Mitchell & Anglin edits., 2009) 183-199; Taliaferro et al., *Strangulation in Intimate Partner Violence* in Intimate Partner Violence (Mitchell & Anglin edits., 2009) 217-236; and Strack et al., *Why Didn't Anyone Tell Me? Health Consequences of Strangulation Assaults for Survivors* (Aug./Sept. 2014) 19(6) Domestic Violence Reports 87-90.

[8] Leung et al., *Evaluating Spousal Abuse as a Potential Risk Factor for Alzheimer's Disease: Rationale, Needs and Challenges* (2006) 27 Neuroepidemiology 13-16.

[9] Cook et al., *Older Women Survivors of Physical and Sexual Violence: A Systematic Review of the Qualitative Literature* (2011) 20(7) Journal of Women's Health 1077.

[10] Dong, *Medical Implications of Elder Abuse and Neglect*, *supra*.

[11] Friedman et al., *A Description of Cases of Severe Physical Abuse in the Elderly and 1-Year Mortality* (2014) 26(1) Journal of Elder Abuse and Neglect 1-11.

the emotional and psychological toll of elder abuse,[12] and is not limited to those elders with diminished cognitive and physical function.[13]

[§6.4] PSYCHOLOGICAL IMPACT OF ELDER ABUSE

All forms of elder abuse result in suffering. Victims of elder abuse suffer increased levels of emotional and psychological distress, which may manifest in the form of disturbed eating and sleeping, non-compliance with medical treatment, declining functional abilities, progressive dependency, a sense of helplessness, social isolation, stress, withdrawal, psychological decline, and depression.[14] While psychological/emotional abuse leaves no marks, some victims describe it as worse than physical abuse. For example, a participant in one study stated that "…the psychological mistreatment is felt and it goes on destroying one from the inside… because it starts damaging a person's mind. Our entire life is damaged because of emotional violence."[15]

When abuse is at the hands of trusted and loved family members, the emotional and psychological effects are complex. "Assault is more psychologically injurious when inflicted by someone expected to provide love, protection, and support."[16] Elder victims may want to end the abuse, and may have suffered serious trauma from that abuse. Nonetheless, victims may experience complicated and ambivalent feelings towards their abusers making it difficult for them to accept assistance from the judicial system, adult protective services, the aging network, health care providers, or other service providers.

Older women who have been physically or sexually abused are more likely to have substance abuse problems, depression, and posttraumatic stress disorder (PTSD). Verbal/emotional abuse causes poor social functioning, reduced quality of life, and increased mental health symptoms, including depression.[17]

Female victims who have experienced prior abuse are nearly twice as likely to experience depression and anxiety as non-abused older women. Two or more victimizations are associated with higher rates of depression and emotional distress for the victims than those women with one

---

[12] Lachs et al., *The Mortality of Elder Mistreatment* (1998) 280 JAMA: The Journal of the American Medical Association 428–432.
[13] National Academies Committee on National Statistics, *Meeting on Research Issues in Elder Mistreatment and Abuse and Financial Fraud: Meeting Report* (June 22, 2010) <http://www.nia.nih.gov/sites/default/files/meeting-report_1.pdf> (as of December 20, 2015).
[14] Comijs et al., *Psychological Distress in Victims of Elder Mistreatment: The Effects of Social Support and Coping* 54B Journal of Gerontology: Psychological Sciences 240–245; and Dong, *Medical Implications of Elder Abuse and Neglect*, *supra*.
[15] Dunlop et al., *Domestic Violence Against Older Women: Final Technical Report* (2005) <https://www.ncjrs.gov/pdffiles1/nij/grants/212349.pdf> (as of December 23, 2015).
[16] Ramsey-Klawsnik, *Sexual Abuse Within the Family* (2003) 15(1) Journal of Elder Abuse and Neglect 57.
[17] Fulmer et al., *Verbal Mistreatment of the Elderly* (2014) 26(4) Journal of Elder Abuse and Neglect 351-364.

or no prior trauma experiences. Those who have suffered multiple assaults experience a "dose effect, doubling or tripling the likelihood" of depressive symptoms or emotional distress.[18]

[§6.4.1] PSYCHOLOGICAL IMPACT ON VICTIMS WITH DEMENTIA

There is ample research evidence that victims with dementia, like victims who do not have dementia, are aware of and affected by their abuse. A study demonstrated that victims of elder abuse suffer psychological harm, even if they have dementia and are unable to verbally describe what has occurred. There was **no** significant difference in symptoms between those with dementia and those without.[19] Both groups exhibited:

- Sleep disturbances;
- Incontinence;
- Increased anxiety;
- Crying spells;
- Withdrawal;
- Depressive symptoms;
- Increased startle reflex;
- Agitation;
- Restlessness;
- Decreased enjoyment in activities that had previously been enjoyed;
- Intrusive memories; and
- Attempts to leave locations in which assaults had occurred.

Practice Tip:

On occasion, courts hear arguments that suggest that a victim of elder abuse with dementia does not experience psychological or physical pain, is unaware of what has happened, and therefore is not affected by, is less affected by the abuse, or does not "suffer" when victimized. Courts may wish to evaluate such claims with caution since they can have the effect of dehumanizing the victim, minimizing the conduct, and creating an environment where abuse is considered acceptable because the victim has dementia.

[§6.5] LOSS OF HOME

Many victims of elder abuse lose their pre-abuse home and independence. Violent crime victimization increases the risk of nursing home placement (even after adjusting for variables such as physical and cognitive limitations and social isolation). Victims of elder abuse are three times more likely to be admitted to a hospital[20] and four times more likely to be admitted to a

---

[18] Cook et al., *Older Women Survivors of Physical and Sexual Violence: A Systematic Review of the Qualitative Literature*, *supra* at 1077.
[19] Burgess et al., *Comparing routes of reporting in elder sexual abuse cases*, *supra*.
[20] Dong & Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, *supra*.

nursing home.[21] Those who suffer poly-victimization are twice as likely to have their living arrangements changed as compared to victims of a single form of abuse.[22]

The loss of home may occur when victims leave home to avoid further abuse, lose their homes through financial and other exploitation, are placed into a facility due to care needs resulting from abuse, or are removed from a group care setting after disclosing abuse (whether or not the report of abuse is believed). In one study, a female resident of an assisted living facility reported being sexually assaulted by a male resident. Following her report to the facility, the victim was diagnosed with paranoia, placed on psychotropic medication, and transferred to another facility. Subsequently, the same offender was observed sexually assaulting a second female resident.[23]

The victim's change of residence may be traumatic. If the move is to a more restrictive environment it may violate the older person's lifelong preferences. Many victims who are involuntarily placed in nursing homes view themselves as doubly victimized -- first by the perpetrator and then by the system that made the placement. Victims may become hopeless, depressed and give up. Unfortunately, placement in a facility may not assure the victim's safety. In institutional settings, residents who have been victimized by other residents are at increased risk for repeated victimization.[24]

[§6.6] FINANCIAL IMPACT ON VICTIMS OF ELDER ABUSE

The consequences of financial elder abuse can be as profound as those of violent victimizations.[25] Older persons have little or no ability to rebuild financial assets or recoup losses. They may have saved throughout their lives to have money for their later years. Once their money or other assets are taken, elders may lose their independence and security, become dependent on family members for support, or have to rely on public assistance and social welfare programs, with significant reductions in their quality of life. It is estimated that 954,000 elders skip meals as a result of financial exploitation.[26]

---

[21] Lachs et al., *Adult Protective Service Use and Nursing Home Placement* (2002) 42(6) The Gerontologist 734-739.
[22] Jackson & Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response* (Feb. 2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf> (as of December 23, 2015).
[23] Ramsey-Klawsnik, *Elder Sexual Abuse Perpetrated by Residents in Care Settings* (Mar./Apr. 2004) 6(6) Victimization of the Elderly and Disabled 81, 93-95.
[24] Lachs & Pillemer, *Elder Abuse* (2004) 364(9441) The Lancet 1263-1272.
[25] Deem, *Notes from the field: Observations in working with the forgotten victims of personal financial crime*s (2000) 12(2) Journal of Elder Abuse & Neglect 33–48; and Dessin, *Financial abuse of the elderly* (2000) 36 Idaho Law Review 203–226.
[26] True Link, *The True Link Report on Elder Financial Abuse 2015* (Jan. 2015) <https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf> (as of December 24, 2015).

Some victims lose the ability to trust themselves and others, or lose confidence in their own abilities to manage their lives and financial matters. They fear re-victimization and discovery of their victimization by family members. They may have increased conflict with their families resulting in increased isolation and loneliness, depression, hopelessness, and even suicide.[27]

For older adults who live on modest incomes or rely on Social Security payments for their survival, even a small dollar loss can be devastating, leaving a victim unable to afford basic necessities such as rent, utilities, food, and/or medications. The loss may narrow the world of an elder who is now unable to afford even modest costs of socializing with others or attending religious or cultural observances. As the elder victim's world narrows, abusers may be able to increase control over the victim.

Hybrid financial exploitation cases, those in which financial abuse co-occurs with physical abuse or neglect, typically result in worse outcomes for victims; in one study, 86% were unable to recover any of their losses.[28]

A recent study commissioned by the Financial Industry Regulatory Authority's FINRA Investor Education Foundation studied the "non-traditional" costs of financial abuse committed using fraud and found nearly two-thirds of self-reported victims experienced at least one non-financial cost of fraud including severe stress (most common), anxiety, difficulty sleeping, and depression. Persons who suffered larger losses experienced more indirect financial costs including late fees, legal fees, and bounced check fees. The study indicated that 29% of elder victims expended more than $1,000 in indirect costs, and 9% sought bankruptcy protection.[29]

[§6.7] COSTS OF ELDER ABUSE

As suggested by its impact, elder abuse is a costly problem. Approximately 5 million older adults are victims of elder abuse each year costing many billions annually.[30] While the exact costs are not known, expenses associated with elder abuse impact the victim, family members, and the community. Costs may include: health and medical expenses; costs to community services and justice systems; institutional settings and care expenses; labor costs; and

---

[27] Hafemeister, *Financial Abuse of the Elderly in Domestic Settings* in Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (Bonnie & Wallace edits., 2003) 382–445.

[28] Jackson & Hafemeister, *Financial Abuse of Elderly People vs. Other Forms of Elder Abuse: Assessing Their Dynamics, Risk Factors, and Society's Response*, *supra* at 18.

[29] Applied Research & Consulting LLC, Non-Traditional Costs of Financial Fraud: Report of Survey Findings (Mar. 2015) < http://www.saveandinvest.org/sites/default/files/Non-Traditional-Costs-Of-Financial-Fraud-Survey-Findings.pdf> (as of December 23, 2015).

[30] Connolly et al., *The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis*, *supra* at 8.

business, taxes, and intangibles such as decreased quality of life, loss of independence, and increased stress.[31]

Many "adverse events" that occur in long term care facilities are the result of neglect and abuse related to inadequate treatment, care, and staffing. These impacts of elder abuse cost the government, and ultimately the taxpayers who fund Medicare and Medicaid, some $2.8 billion each year in Medicare hospital costs, and additional significant Medicaid costs.[32] Estimates for costs of elder abuse:[33]

- Direct medical costs of elder abuse and neglect, estimated to be approximately $5.3 billion.[34]
- Financial exploitation, including thefts and scams, estimated to cost elderly victims some $40 billion each year.
- Two studies of financial abuse costs estimated losses in 2010 to be $2.9 billion, a 12% increase over 2008's cost estimate of $2.6 billion.[35]
- A recent study concluded that older adults lose $36.48 billion annually to financial abuse: $16.99 billion to financial exploitation (defined as instances in which misleading or confusing language is used, often with social pressure and tactics to take advantage of cognitive decline and memory loss); $12.76 billion to identity theft and scams; and $6.67 billion to deceit or theft by someone in a trusting relationship with the older adult.[36]
- Persons with cognitive impairments suffer 100% greater economic losses than persons without such impairments.[37]

---

[31] Spencer, *Exploring the Social and Economic Costs of Abuse in Later Life* (1999) unpublished report.

[32] Office of Inspector General, Department of Health and Human Services, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries* (2014); and Office of Inspector General, Department of Health and Human Services, *Medicaid Fraud Control Units Fiscal Year 2013 Annual Report* (2014).

[33] See Heisler, *Elder Abuse* in Victims of Crime, 3rd Edition (Davis et al. edits., 2007) 165-66.

[34] Mouton et al., *Prevalence and 3-year incidence of abuse among postmenopausal women* (Apr. 2004) 94(4) American Journal of Public Health 605-12.

[35] MetLife Mature Market Institute et al., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders*, *supra*; and MetLife Mature Market Institute et al., *Broken Trust: Elders, Family, and Finances* (Mar. 2009) <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf> (as of December 23, 2015).

[36] True Link, *The True Link Report on Elder Financial Abuse 2015*, *supra*.

[37] Gunther, *The 2011 Utah Cost of Financial Exploitation* (2011) <http://victimsofcrime.org/docs/default-source/financial-fraud/2011-economic-cost-of-financial-exploitation.pdf?sfvrsn=2> (as of January 5, 2016); and Gunther, *The Utah Cost of Financial Exploitation* (Mar./Apr. 2011) 32(4) Bifocal 46-54.

[§6.8] COURT PROCEDURES TO MITIGATE IMPACTS OF ELDER ABUSE

Courts can mitigate some of the impact of elder abuse in order to provide victims of elder abuse with access to justice across court settings. Courts may wish to consider implementing:

Case Management:

- Develop or evaluate an existing procedure to identify elder abuse cases.
- Schedule elder abuse matters for times of day when elderly adults are typically most functional, such as late morning.
- Weigh the impact of elder abuse on its victims against the reasons offered for requesting a continuance to determine if good cause exists for granting continuances.
- Expedite trial and hearing dates in elder abuse cases.
- Consider establishing an elder court or calendar to hear elder abuse matters.
- If there is no specialized elder court or calendar, consider assigning all matters involving an elder to one court and having those cases heard at the same time.

Court Referrals:

- Ensure that court evaluators, mediators and arbitrators are trained in understanding trauma in older victims and the dynamics of elder abuse.
- Ensure that experts relied on by the court for capacity assessments are skilled in evaluating capacity in older victims of abuse and trauma, including victims from under-represented communities.

Court Hearings:

- Use the court's authority to prevent older victims of abuse who are providing testimony from being embarrassed or humiliated by counsel, either party, or those present in the courtroom.[1]
- Ensure that the victim's constitutional rights are protected throughout the court process, including those enumerated in Cal Const art 1, §28.
- Consider ways to obtain victim participation via closed circuit teleconferencing, telephonic hearings, Skype or voice over technology (VOIP) in non-criminal matters.[1]
- Provide an expedited process to conduct conditional examinations of elder abuse victims in criminal cases when requested by the defense or prosecution, and upon a proper showing of the need for such a process.[1]
- Consider ways to make the court process less intimidating to an elderly victim who is frightened or has dementia, such as:
    - Not requiring the victim to testify from the witness stand;
    - Having the court conduct proceedings while seated at the same level as the witness;
    - Moving court staff to positions closer to or further from the witness as needed; or
    - Taking more frequent breaks.
- Allow victims to receive assistance from support persons.

- Ensure that assistive technology is available for victims, e.g., sound amplification systems, court reporter who types questions in real time and large font so that the witness is able to read them before answering, and court materials in large font.[1]

For more information on accommodating older adults in the courtroom, please refer to this Bench Guide, Chapter 7 and Chapter 8.

[§6.9] SUMMARY POINTS FOR JUDICIAL OFFICERS

- Consideration of the impact of elder abuse can inform the court's decision-making at many stages of the proceedings.
- Elder abuse exacts physical, psychological, and financial costs from its victims.
- Victims with dementia are affected by elder abuse even if they are not able to speak.
- Courts can play an important role in mitigating the effects of abuse on victims.

Chapter 7
ALLEGATIONS OF ELDER ABUSE IN CRIMINAL CASES

[§7.1] ELDER ABUSE CRIMES OVERVIEW

[§7.2] CALIFORNIA PENAL CODE §368

[§7.2.1] CALIFORNIA PENAL CODE §368(B)

[§7.2.2] CALIFORNIA PENAL CODE §368(C)

[§7.2.3] CALIFORNIA PENAL CODE §368(D) & (E)

[§7.2.4] CALIFORNIA PENAL CODE §368(F)

[§7.3] LEGISLATIVE INTENT AND STATUTORY CONSTRUCTION

[§7.4] DEFINITIONS

[§7.5] NEGLECT AND CRIMINAL NEGLIGENCE

[§7.6] CRIMINAL INTENT

[§7.7] CONTINUING OFFENSE

[§7.8] ELDER FINANCIAL ABUSE UNDER PENAL CODE §368(D) AND (E)

[§7.9] STATUTE OF LIMITATIONS

[§7.10] OTHER ELDER ABUSE-RELATED CRIMES: PENAL CODE §243.25; WELFARE AND INSTITUTIONS CODE §§15656 AND 15630(H)

[§7.10.1] CALIFORNIA PENAL CODE §243.25

[§7.10.2] CALIFORNIA WELFARE AND INSTITUTIONS CODE §15656

[§7.10.3] CALIFORNIA WELFARE AND INSTITUTIONS CODE §15630(H)

[§7.11] PROCEDURE TO FREEZE AND SEIZE ASSETS UNDER CALIFORNIA PENAL CODE §186.12

[§7.12] PRETRIAL PROCEDURES AND PROCEEDINGS

[§7.12.1] THE OLDER DEFENDANT

[§7.12.2]ELDER ABUSE CASES INVOLVING DOMESTIC VIOLENCE RELATIONSHIPS

[§7.12.3] PRE-ARRAIGNMENT RELEASE

[§7.12.3.1] RESTRICTIONS WHEN DOMESTIC VIOLENCE, SERIOUS OR VIOLENT FELONY CHARGED

[§7.12.3.2] OTHER CASES

[§7.12.3.3] SPECIAL CONSIDERATIONS IN ELDER ABUSE

[§7.12.4] ASSESSING RISK AND LETHALITY

[§7.12.5] CONDITIONS OF RELEASE

[§7.12.5.1] PRETRIAL RELEASE CHECKLIST

[§7.13] CRIMINAL PROTECTIVE ORDERS ISSUED UNDER PENAL CODE §136.2

[§7.13.1] CASES OTHER THAN THOSE INVOLVING DOMESTIC VIOLENCE

[§7.13.2] CASES INVOLVING DOMESTIC VIOLENCE CRIMES

[§7.13.3] PROCEDURES ONCE CRIMINAL PROTECTIVE ORDER ISSUED

[§7.13.4] VIOLATIONS OF CRIMINAL PROTECTIVE ORDERS

[§7.13.5] INCONSISTENT ORDERS

[§7.13.6] WHEN PROTECTED PARTY INITIATES CONTACT WITH THE RESTRAINED PARTY

[§7.13.7] COORDINATION OF ORDERS WITH OTHER COURTS

[§7.13.8] FULL FAITH AND CREDIT

[§7.14] PROCEDURES TO MEMORIALIZE TESTIMONY

[§7.14.1] CONDITIONAL EXAMINATIONS

[§7.14.1.1] GROUNDS FOR SEEKING

[§7.14.1.2] PROCEDURES

[§7.15] TRIAL ISSUES

[§7.15.1] DISCOVERY OF ADULT PROTECTIVE SERVICES RECORDS

[§7.15.2] TRIAL SETTING

[§7.15.3] JURY SELECTION

[§7.15.4] COMPETENCY TO TESTIFY

[§7.15.5] THE IMPACT OF *CRAWFORD V WASHINGTON* ON ELDER ABUSE CASES

[§7.15.5.1] OVERVIEW OF *CRAWFORD V WASHINGTON*

[§7.15.5.2] FORFEITURE BY WRONGDOING

[§7.15.5.3] EVIDENCE CODE §1380

[§7.15.6] ADMISSIBILITY OF EVIDENCE OF PRIOR BAD ACTS IN AN ELDER ABUSE CASES

[§7.15.7] EXPERT WITNESS TESTIMONY

[§7.15.8] VICTIM PROTECTION AND RIGHTS

[§7.15.9] JURY INSTRUCTIONS AND RELATED CASE LAW

[§7.15.10] SENTENCING

[§7.15.10.1] SENTENCING LIMITATIONS: PENAL CODE §§1203.09 AND 667.9.

[§7.15.10.1.1] PENAL CODE §1203.09

[§7.15.10.1.2] PENAL CODE §667.9 [§7.15.10.2] SENTENCING FOR VIOLATIONS OF PENAL CODE §368

[§7.15.10.2] CONCURRENT OR CONSECUTIVE SENTENCING

[§7.15.10.3] PROBATION TERMS

[§7.15.10.3.1] RESTITUTION

[§7.15.10.3.2] POST CONVICTION CRIMINAL PROTECTIVE ORDER (NO CONTACT; STAY AWAY ORDERS)

[§7.15.10.3.3] OTHER ORDERS

[§7.15.10.3.4] MONITORING HEARINGS

[§7.1] ELDER ABUSE CRIMES OVERVIEW

There are many criminal charges that may be brought in an elder or dependent adult abuse case. Statutory crimes involving assaults, kidnapping, murder, sexual assault, thefts, weapons, and threats are often alleged. In addition, conduct may also involve domestic violence relationships under Pen C §13700 (abuse through violence and threats of violence committed against a current and former spouse; current and former cohabitant; parents of a child in common; or current and former dating and engaged persons) and charges such as Pen C §§273.5 and 243(e)(1). For a full discussion of domestic violence please refer to the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (2012).

This chapter will consider crimes specific to elder and dependent adult abuse, including Pen C §368 (elder abuse); Welf & I C §15656 (elder abuse); Pen C §243.25 (battery on an elder); and Welf & I C §15630(h) (failure to report).

[§7.2] CALIFORNIA PENAL CODE §368

Pen C §368, first enacted in 1983, criminalizes physical abuse, infliction of unjustified physical pain or mental suffering, caretaker neglect, financial exploitation, and false imprisonment of an elder or dependent adult. Some crimes within Pen C **§**368 can only be committed by a caretaker; others can be committed by "any person." Pen C §368 includes both active acts of abuse such as assaultive conduct and passive forms such as neglect which is gross, reckless, or a culpable departure from the ordinary standard of care. *People v Heitzman* (1994) 9 C4th 189, 37 CR2d 236.

Crimes which can be committed by "any person" require proof that the defendant knew or reasonably should have known that the alleged victim is an elder or dependent adult. Crimes which require a caretaker relationship do not require proof that defendant had knowledge of the victim's status as an elder or dependent adult.

[§7.2.1] CALIFORNIA PENAL CODE §368(B)

Pen C §368(b)(1) provides: "Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars ($6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years."

"Mental suffering" is defined in Welf & I C §15610.53 as "fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult."

The victim does not actually have to suffer great bodily injury. Analogizing to child abuse case law, courts have held that Pen C §273a (felony child endangerment) does not require that the victim actually sustain great bodily injury. *People v Cortes* (1999) 71 CA4th 62, 80, 83 CR2d 519.

In *People v Racy* (2007) 148 CA4th 1327, 56 CR3d 455, sufficient proof supported the jury finding that the circumstances were likely to result in great bodily injury or death, even without expert testimony that a stun gun was likely to produce great bodily injury or death. Defendant zapped victim, a 74-year-old man, in the leg with a stun gun, then followed victim into the bedroom. While victim was in a defensive position, defendant zapped the stun gun repeatedly in the air, tipped the victim over onto the bed, tore his pocket and stole his wallet. (*Note:* the conviction was reversed due to instructional error.)

Pen C §368(b)(2) provides for an enhanced penalty when, "in the commission of an offense described in paragraph (1), the victim suffers great bodily injury," as defined in §12022.7. "[T]he defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.

(B) Five years if the victim is 70 years of age or older."

Pen C §368(b)(3) provides for an enhanced penalty when, "in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim." "[T]he defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.

(B) Seven years if the victim is 70 years of age or older."

Elder abuse sentence enhancements under Pen C §§368(b)(2) and (b)(3) were inapplicable to defendants convicted of second degree murder and involuntary manslaughter in the death of a 69-year-old man where neither crime was a predicate offense under the elder abuse statute and defendants were not separately charged with elder abuse. The legislature intended the enhancement to apply only to the predicate offense in Pen C §368. "The reasonable interpretation of such a construction is that the crime and the enhancements are meant to be interlocking. The enhancements are not freestanding and have no application except to the crime created in subdivision (b)(1)." *People v Adams* (2001) 93 CA4th 1192, 1198, 113 CR2d 722.

[§7.2.2] CALIFORNIA PENAL CODE §368(C)

Pen C §368(c) creates a misdemeanor crime for any violation of Pen C §368(b)(1) under circumstances or conditions *other than* those likely to produce great bodily harm or death. A first conviction is punished as a standard misdemeanor. A second or subsequent violation is punishable by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in a county jail not to exceed one year, or by both. Misdemeanor elder abuse under Pen C §368(c) is a lesser included offense of felony elder abuse. *People v Racy*, *supra*, 148 CA4th 1327.

[§7.2.3] CALIFORNIA PENAL CODE §368(D) & (E)

Pen C §§368(d) and (e) criminalize some forms of financial exploitation against elder and dependent adults. Pen C §368(d) applies to anyone who is not a caretaker; §368(e) applies only to caretakers. If the crime is committed by someone who is not a caretaker, the prosecution must prove that defendant knows or reasonably should know that the victim is an elder or a dependent adult. There is no similar knowledge requirement when there is a caretaker relationship between victim and defendant. Pen C §§368(d) and (e) criminalize a person or caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates §530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult.

If the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars ($950), the punishment is a fine not exceeding two thousand, five hundred dollars ($2,500), or by imprisonment in a county jail not exceeding one year, or by both, or by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to §1170(h) for two, three, or four years, or by both. If the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars ($950), the maximum punishment is

a fine not exceeding one thousand dollars ($1,000), imprisonment in a county jail not exceeding one year, or both.

[§7.2.4] CALIFORNIA PENAL CODE §368(F)

Pen C §368(f) is the crime of false imprisonment of an elder or dependent adult by the use of violence, menace, fraud, or deceit. It is a non-wobbling felony and is punishable by imprisonment pursuant to §1170(h) for two, three, or four years.

[§7.3] LEGISLATIVE INTENT AND STATUTORY CONSTRUCTION

Pen C §368 was enacted to address the special needs of older adults and dependent adults who were victims of all forms of abuse. The legislative findings include: "that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf." Pen C §368(a).

The statute imposing criminal liability for abuse was enacted to protect the members of a vulnerable class from abusive situations in which serious injury or death is likely to occur. *Guardian North Bay, Inc. v Superior Court (Myers)* (2001) 94 CA4th 963, 114 CR2d 748.

In interpreting the provisions of Pen C §368, its legislative history is instructive. "… (T)he legislative history reflects that the language of section 368(a) derives verbatim from the felony child abuse statute, section 273a. It is therefore appropriate to review the decisions interpreting that statute to ascertain the reach of the statute at issue here." *People v Heitzman, supra*, 9 C4th 189, 204-205 (internal citations omitted); see also *Roman v Superior Court* (2003) 113 CA4th 27, 5 CR3d 807.

[§7.4] DEFINITIONS

An "**elder**" is a person 65 years of age or older. Pen C §368(g).

A "**dependent adult"** is "a person between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. 'Dependent adult' also includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code", no matter how briefly. Pen C §368(h).

The definition of dependent adult requires only that the limitations restrict normal activities or protect rights. The limitation does not have to preclude activities. "[I]t is not

necessary to prove that the victim is incapable of carrying out normal activities or protecting his or her rights;t is sufficient if the person's ability to protect rights or carry out normal activities is limited in some significant way." *People v Matye* (2008) 158 CA4th 921, 70 CR3d 342.

The term "dependent adult" provides adequate notice to persons of common intelligence what the term means and is not unconstitutionally vague. *People v Superior Court (Holvey)* (1988) 205 CA3d 51, 252 CR 335. Evidence was sufficient to establish victim was a dependent adult where evidence showed she had suffered a massive stroke a few years earlier resulting in partial paralysis, walked with a cane and wore a leg brace, could not speak or comprehend well, had memory problems, and testified that she relied on the defendant. *People v Matye*, *supra*, 158 CA4th 921. In *Roman v Superior Court*, evidence from the victim's mother about her son's mental and developmental functioning and victim's presentation at the preliminary hearing were sufficient to establish that victim was a dependent adult and defendant knew victim's status when defendant allegedly sodomized him. *Roman v Superior Court*, *supra*, 113 CA4th 27.

A **"caretaker"** is a "person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult." Pen C §368(i). A caretaker with regards to neglect is a person who willfully causes or permits the person or health of an elder or dependent adult to be injured or willfully places a victim in a situation where his or her person or health is endangered. The caretaker may be responsible for personal care, providing resources needed by the elder or dependent adult to sustain health, or managing the elder or dependent adult's assets. Examples of caregivers are conservators and attorneys-in-fact under a power of attorney in addition to "hands-on" caregivers. The term "care and custody" in the elder abuse statute does not imply a familial relationship but only a willingness to assume duties corresponding to the role of caregiver. *People v Cochran* (1998) 62 CA4th 826, 73 CR2d 257.

A caretaker under Pen C §368 for the purpose of willfully permitting infliction of physical pain or mental suffering of an elder requires that the defendant have a legal duty to act under tort law. The defendant must have a legal duty to control the conduct of the individual who inflicts the abuse. Otherwise there is no blanket duty to protect against elder abuse. *People v Heitzman*, *supra*, 9 C4th 189. In *Heitzman*, victim Robert Heitzman, aged 67, resided in the home of his adult son, Richard Heitzman, Sr., along with another adult son, Jerry Heitzman, and Richard's three sons. Robert had suffered strokes some twenty years earlier and was completely dependent on others for care. He received monthly Social Security and pension payments. Following Robert's death, law enforcement observed that his body lay on a mattress rotted through from constant wetness, exposing the metal springs. The stench of urine and feces pervaded the entire house. Robert had large pressure ulcers over one-sixth of his body. An autopsy revealed that Robert had a yeast infection in his mouth and suffered from congestive heart failure, bronchial pneumonia, and hepatitis. Death was caused by septic shock due to the pressure ulcers which, in the opinion of the pathologist, were caused by malnutrition, dehydration, and neglect.

Richard supported the household by working two full-time jobs, and supplemented this income with decedent's monthly Social Security and pension checks. Jerry Heitzman was primarily responsible for his father's personal care, and received free room and board in return. Jerry admitted that he had withheld all food and liquids from his father for the three days preceding his death. Jerry explained that he was expecting company for dinner, and did not want his father, who was incontinent, to further cause the house to smell.

Previously Susan Valerie Heitzman, another of decedent's children, previously had lived in the home and acted as his primary caregiver. One year prior to her father's death, she moved away from the home though she regularly spent time at the house visiting her boyfriend/nephew Richard, Jr. She had noticed that since moving out, the entire house had become filthy. She discussed with Jerry the need to take decedent to the doctor. In the six weekends before her father died, she routinely visited. She was last in her father's bedroom five weeks prior to his death, at which time she noticed the hole in the mattress and feces-soiled clothing lying on the floor. Two weeks prior to her father's death, she spent the entire weekend at the house. A week later, during Thanksgiving weekend, and several days prior to decedent's death, she again stayed at the house.

Richard, Jerry, and Susan were charged with neglect; Richard and Jerry were charged additionally with involuntary manslaughter. All were held to answer as charged. Susan brought a motion under Pen C §995 to dismiss the neglect charge. The California Supreme Court found that under these facts Susan had no legal duty of care and granted her motion to dismiss.

[§7.5] NEGLECT AND CRIMINAL NEGLIGENCE

A person cannot be charged with negligence unless they owe a duty of care. A special relationship between the person inflicting pain or suffering on the elder provides the basis for a reasonable and practical interpretation of the statutory language in Pen C §368(b). Under such a statutory construction, in order for criminal liability to arise for permitting an elder to suffer unjustifiable pain or suffering, a defendant must stand in a special relationship to the individual inflicting the abuse on the elder such that the defendant is under an existing duty to supervise and control that individual's conduct." *People v Heitzman*, 4 C4th 189, 213.

Several cases have challenged the constitutionality of the neglect statute claiming it is overbroad and vague. In *People v Manis* (1992) 10 CA4th 110, 12 CR2d 619, a daughter who was supposed to be caring for her mother let her rot away from lack of care. The mother could not care for herself. The daughter was charged with neglect and alleged that the term "care" in the statute was unconstitutionally vague as it could be applied to passersby and others with no duty of care. The court ruled the statute was not vague or overbroad but could only be construed to apply to one with a duty of care who was criminally negligent.

In *People v McKelvey* (1991) 230 CA3d 399, 281 CR 359, defendant alleged that his sister was responsible for their mother's personal hygiene and their mother refused to

allow him to provide care for her hygiene. He claimed that their mother was alert, in command of the household, and had a telephone beside her bed. He alleged the sister had been gone for four days when he summoned emergency assistance. Responding firemen discovered the mother in bed lying in excrement and covered with maggots, ants, and other insects. The court held the statute was not unconstitutionally vague as applied to defendant who was found to be responsible for victim's care. Although defendant claimed the clause dealing with "any person" who willfully permitted a dependent adult to suffer was broad enough to include visitors or bystanders, another clause proscribed abuse or neglect by a person having care or custody of the victim.

In *People v Superior Court (Holvey), supra*, 205 CA3d 51, the court ruled that Pen C §368 prohibiting persons having care or custody of a dependent adult from willfully causing or permitting the person or health to be injured is not unconstitutionally vague or overbroad in general or when applied to medical practitioners. The crime does not require specific intent to injure but does require criminal negligence. *People v Medlin* (2009) 178 CA4th 1092, 100 CR3d 810. Criminal negligence does not mean injuries resulting from medical care provided by a medical practitioner using ordinary care but does apply to non-therapeutic conduct or gross, reckless or culpable departures from ordinary standard of care. *People v Superior Court (Holvey), supra*, 205 CA3d 51. Neglect by a caretaker requires proof of criminal negligence, which is a "gross or culpable departure from the ordinary standard of care." *People v McKelvey, supra*, 230 CA3d 399, 405, citing *People v Superior Court (Holvey), supra*, 205 CA3d 51, 60 (*Note: overruled on other grounds in People v Heitzman, supra*, 9 C4th 189).

In *People v Medlin, supra*, 178 CA4th 1092, the Director of Nursing (DON) and a licensed vocational nurse (LVN) at a skilled nursing facility sought to have their arrest records destroyed based on factual innocence in the death of a patient at the care facility. They claimed there was no evidence of criminal negligence and no intent to injure. In denying the motions and finding sufficient evidence of criminal negligence the court noted that as to the (DON), defendant failed to ensure that the LVN was properly trained in placement of a gastrostomy tube, risks from the improper placement were well known to nurses, defendant was called to check on the patient who was sweating, defendant failed to address the patient's fever and dropping oxygen saturation level, and then failed to call for medical transport to a hospital for an hour after being told to do by a physician by which time the patient had died. As to the LVN, the evidence showed that she replaced a gastrostomy tube without consulting a doctor, did not use markings on the tube to insure proper placement, failed to recognize the error when she was unable to aspirate gastric fluids, and attempted to feed the patient through the tube without checking with supervisors after medicating the patient for distress that defendant attributed to the tube change.

Children have no general legal duty to support or care for elderly parents absent a special relationship which places a defendant under an existing duty to supervise and control that individual's conduct. *People v Heitzman, supra*, 9 C4th at 213). It is error to find a duty of care for purposes of Pen C §368 based on Pen C §270c (financial support for indigent parents) or under former Civil Code §§206 and 242, or common law. 9 C4th at 211-212. "Although at common law parents have long had a duty to care for and protect

their minor children [citations], there is no corresponding common law obligation on adult children to protect and care for their aging parents [citation].” 9 C4th at 212,.

[§7.6] CRIMINAL INTENT

Recognizing the similarities between Pen C §368 and §273a, the analogous statute which applies to the abuse of children, the California Supreme Court has held that case law developed under the child abuse statute is applicable to the elder abuse statute. Criminal negligence is the mens rea for passively permitting injury to a child within the meaning of §273a, while general criminal intent is the mens rea for directly causing such injury within the meaning of that statute. *People v Sargent* (1999) 19 C4th 1206, 81 CR2d 835. Willfully permitting an elder or dependent adult to be injured requires criminal negligence. *People v Superior Court (Holvey)*, *supra*, 205 CA3d 51.

The term “willfully” that appears throughout Pen C §368 means “a purpose or willingness to commit the act, or make the omission referred to.” Pen C §7(1). Since a person must know what he or she is doing and intend to do the act, it also includes knowledge of the nature and/or consequences of the act. (See *People v Garcia* (2001) 25 C4th 744, 752-754, 107 CR2d 355; and *People v Colantuono* (1994) 7 C4th 206, 26 CR2d 908.) “Willfully” denotes a general criminal intent crime. (See *People v Lee* (1994) 28 CA4th 659, 664-665, 33 CR2d 782; and *People v Stark* (1994) 26 CA4th 1179, 31 CR2d 887.)

[§7.7] CONTINUING OFFENSE

Pen C §368 may be violated by a continuous course of conduct which may start and stop. A close temporal connection is not required. When the language of a statute focuses on the goal or effect of the prohibited conduct the crime is a continuing one for purposes of a unanimity instruction. Examples include failure to provide for a minor child, child abuse, contributing to the delinquency of a minor, and animal cruelty. *People v. Rae* (2002) 102 CA4th 116, 125 CR2d 312.

In *People v Rae*, defendant, victim’s caretaker, failed or refused to provide victim with appropriate nutrition, to help her move to prevent or relieve pressure ulcers, to clean her when she was incontinent, to cooperate with health care workers and caregivers attempting to assist him, to use a hospital bed for victim, or to adhere to instructions of visiting health care workers. Victim’s two-day hospitalization did not interrupt defendant’s course of conduct. Victim’s suffering did not end when she entered the hospital and then resume on her release to defendant’s care. Defendant’s actions were successive, compounding, and interrelated. *People v Rae*, *supra*, 102 CA4th 116.

[§7.8] ELDER FINANCIAL ABUSE UNDER PENAL CODE §368(D) AND (E)

The prohibited conduct in Pen C §368(d) and (e), including theft and embezzlement, is not defined in Pen C §368 but instead relies on definitions in other

sections. These terms are not defined more broadly in Pen C §368 than in other statutes. *People v Brock* (2006) 143 CA4th 1266, 1281-1282, 49 CR3d 879.

Elder financial abuse under Pen C §368 can be committed through a variety of acts, including identity theft. For example, in *People v Mitchell* (2008) 164 CA4th 442, 78 CR3d 855, defendant was hired to work as a caregiver for an 80-year-old man in poor health. Following her three-month employment, defendant used blank checks, credit cards and identifying information unlawfully taken from the man to obtain cash, purchase automobiles and acquire other merchandise. She was convicted of 51 offenses, including multiple counts of forgery, receiving stolen property, wrongful use of personal identifying information, and various drug-related offenses. Defendant challenged her conviction and sentencing on multiple counts of identity theft under Pen C §530.5(a) contending that she could only be punished once as all the incidents were committed for a common intent. The court rejected this position and held that the identity theft statute is violated each time an offender *uses* personal identifying information for an unlawful purpose; each separate use is a new crime**.**

In *People v Eastburn* (2010) 189 CA4th 1501, 117 CR3d 787, defendant contended that there was insufficient evidence to prove he knew that the victim was an elder where he forged checks to obtain money from victim's fictitious business bank account. The evidence showed the account was held in the elder's name with a notation that he did business under a fictitious business name, that defendant's employment required that he review the victim's bank account which identified the accountholder as the victim doing business under a fictitious business name, defendant knew he was the victim's only employee, the business was run out of victim's home, and the forged checks could not be cashed without the victim's signature. The court upheld the conviction, finding sufficient evidence that defendant knew the victim was an elder.

In *People v Catley* (2007) 148 CA4th 500, 55 CR3d 786, defendant's conviction for financial abuse was affirmed where defendant took victim's money to buy a sport utility vehicle. Victim and an expert witness established that victim's mental capacity was diminished from cognitive impairment and short term memory loss due to Parkinson's Disease, which prevented victim from legally consenting to give or transfer money to defendant, his caretaker.

If the offense involved the filing or procuring of a false or forged instrument for filing, registering, or recording, the prosecutor may file a written motion to have the court issue an order finding the instrument void. The defendant is entitled to a hearing. If the court finds that an instrument is false or forged, the court's order shall state whether the instrument is false or forged, or both false and forged, and describe the nature of the falsity or forgery. A copy of the instrument shall be attached to the order at the time it is issued by the court, and a certified copy of the order shall be filed, registered, or recorded at the appropriate public office by the prosecuting agency. Procedures for this proceeding are detailed in Pen C §115.

[§7.9] STATUTE OF LIMITATIONS

The statute of limitations for offenses in Pen C §368, other than provisions proscribing theft or embezzlement, is 5 years from the date of occurrence. Pen C §801.6. The statute of limitations for theft and embezzlement offenses under Pen C §§368(d) and (e) is 4 years from date of discovery. Pen C §803(c)(11); *People v Price* (2007) 155 CA4th 987, 66 CR3d 595.

The statute of limitations for theft crimes and perjury committed against an older person runs from date of discovery. In *People v Kronemyer* (1987) 189 CA3d 314, 234 CR 442, the question of what is discovery for the statute of limitations was raised. Defendant, the attorney and conservator for an elderly man, was charged with multiple counts of theft and perjury. The theft charges concerned municipal bonds, savings accounts and money embezzled from the victim; the perjury charges arose from conservatorship accountings the defendant filed which omitted the stolen property. Victim developed dementia after an illness during which time defendant stole assets and concealed the theft by omitting the property from the conservatorship accountings. He was convicted of multiple counts of perjury and grand theft with excessive taking enhancements pursuant to Pen C §12022.6. After making full restitution to the victim's estate, he was sentenced to prison for eight years and fined $80,000.

Before trial, defendant unsuccessfully moved for dismissal on the ground the three-year statute of limitations (former §800) had elapsed. He raised the issue on appeal. The court affirmed, concluding that the statute of limitations is not triggered by mere discovery of a loss until there is awareness of loss resulting from criminal agency. *Com. v Hawkins* (1982) 94 Pa. Super 57, 439 A.2d 748; *People v Swinney* (1975) 46 CA3d 332, 339, 120 CR 148. "…(W)hen the delay is created by the fraudulent legal machinations of one who uses the court's process to have himself appointed conservator of his victim's estate, it is difficult to sympathize. Here, Kronemyer made every effort to prevent discovery of any criminal activity. While he obviously intended to prevent his crimes from ever being detected, he certainly consciously acted to create the maximum delay in discovery. Having thus acted, he should not now be heard to complain he would have desired to have been tried sooner." *People v Kronemyer*, *supra*, 189 CA3d 314, 331**.**

[§7.10] OTHER ELDER ABUSE-RELATED CRIMES: PENAL CODE §243.25; WELFARE AND INSTITUTIONS CODE §§15656 AND 15630(H)

[§7.10.1] CALIFORNIA PENAL CODE §243.25

This misdemeanor battery statute was added in 2002. It provides: "When a battery is committed against the person of an elder or a dependent adult as defined in Section 368, with knowledge that he or she is an elder or a dependent adult, the offense shall be punishable by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment." As with any battery offense, there must be proof of the generic elements of battery, the "willful and

unlawful use of force or violence upon the person of another." (See, *e.g.*, *In re David S.* (2005) 133 CA4th 1160, 35 CR3d 309).

A peace officer may make a warrantless arrest for this offense even when not committed in the officer's presence when all of the following are present:

(1) "The peace officer has probable cause to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed[;]

(2) The peace officer makes the arrest as soon as probable cause arises to believe that the person to be arrested has committed the assault or battery, whether or not it has in fact been committed[;]" and

(3) The victim is aged 65 or older and is related to the alleged offender by blood or legal guardianship. Pen C §836(d).

[§7.10.2] CALIFORNIA WELFARE AND INSTITUTIONS CODE §15656

Welf & I C §15656 provides:

(a) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts unjustifiable physical pain or mental suffering upon him or her, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years.

(b) Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts unjustifiable physical pain or mental suffering on him or her, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation such that his or her person or health may be endangered, is guilty of a misdemeanor.

(c) Any caretaker of an elder or a dependent adult who violates any provision of law prescribing theft or embezzlement, with respect to the property of that elder or dependent adult, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for two, three, or four years when the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950), and by a fine not

> exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both that imprisonment and fine, when the money, labor, or real or personal property taken is of a value not exceeding nine hundred fifty dollars ($950).
>
> (d) As used in this section, "caretaker" means any person who has the care, custody, or control of or who stands in a position of trust with, an elder or a dependent adult.
>
> (e) Conduct covered in subdivision (b) of Section 15610.57 shall not be subject to this section.

In 1994 the Legislature enacted Welf & I C §15656, which at the time mirrored much of Pen C §368. It was intentionally placed in the same code with and close to the sections on laws to protect elder and dependent adults. With time, Pen C §368 has been amended and expanded to add additional crimes and penalties. Welf & I C §15656 has not kept pace. For example, it is not listed in the special statute of limitations for elder abuse under Pen C §801.6. Penalties have not been updated, and false imprisonment is not mentioned at all. Financial abuse is limited to caretakers and includes only theft and embezzlement.

Conduct constituting neglect as defined in the reporting law Welf & I C §15610.57(b) is specifically excluded from this crime. In relevant part, §15610.57(b) describes neglect as including, but not limited to, failing to assist in personal hygiene, failing to provide food, clothing, shelter, medical care for physical and mental health care, providing food, clothing, or shelter; failing to protect from health and safety hazards; and failing to prevent malnutrition or dehydration. Welf & I C §15656(e) specifically excludes these examples. It is rare, but not impossible, that someone would be charged under this section instead of Pen C §368.

[§7.10.3] CALIFORNIA WELFARE AND INSTITUTIONS CODE §15630(H)

An extensive list of health care, law enforcement, aging services, and care provider professionals and staff are mandated to report elder and dependent adult abuse. See Welf & I C §15630. There are separate reporting laws for employees of financial institutions. See Welf & I C §15630.1. Failure to report or inhibiting a mandated reporter from making a report is a misdemeanor offense. Welf & I C §15630(h) contains two crimes, one for incidents which result in great bodily injury or death; the other is for all other situations. The section reads:

> Failure to report, or impeding or inhibiting a report of, physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect of an elder or dependent adult, in violation of this section, is a misdemeanor, punishable by not more than six months in the county jail, by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment. Any mandated reporter who willfully fails to

> report, or impedes or inhibits a report of, physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect of an elder or dependent adult, in violation of this section, <u>if that abuse results in death or great bodily injury</u>, shall be punished by not more than one year in a county jail, by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment. If a mandated reporter intentionally conceals their failure to report an incident known by the mandated reporter to be abuse or severe neglect under this section, the failure to report is a continuing offense until a law enforcement agency specified in paragraph (1) of subdivision (b) of Section 15630 discovers the offense.

Welf & I C §15630(h). The statute of limitations for failure to report elder or dependent adult abuse is 1 year. Pen C §802.

A mandated reporter who has seen, has knowledge of abuse, is told by an elder that he or she has been abused, or reasonably suspects such abuse, must report. Welf & I C §15630(b)(1). "Reasonably suspects" means the mandated reporter has "facts that could cause a reasonable person in a like position" to suspect abuse, which is an objective standard. Welf & I C §15610.65.

Failure to report is a strict liability crime. *People v Davis* (2005) 126 CA4th 1416, 25 CR3d 92, is illustrative. Davis, the administrator of a secure long-term care facility, failed to report the abuse of a dependent adult with a history of psychosis being cared for at her facility. A former employee reported a strangulation attack on the patient. The trial court found that the employee's acts constituted a criminal assault that employees, and the administrator in particular, had a duty to report. Defendant claimed she was not required to report because based on her professional judgment, she had concluded there was no physical or psychological injury to the victim. The court rejected the contention that the mandatory reporting requirement only applies to "substantiated" claims of abuse or those in which the attacker acted with "willful intent" to cause the victim harm. Instead, the duty to report is subject to a purely objective standard, i.e., a report is required if a reasonable person in a like position would have suspected abuse. The statutes "do not permit the application of a mandated reporter's expertise to allow the reporter to determine whether abuse occurred. Rather, if the circumstances give rise to an objective basis for suspecting that abuse occurred, reporting is mandatory. The duty to investigate and the authority to determine whether abuse actually did occur are vested in outside agencies." 126 CA4th 1416, 1426. The court concluded "that a conviction of violation of section 15630 does not require proof of any culpable mental state. Rather, if the defendant knew that abuse occurred, or if she knew of facts giving rise to a reasonable suspicion that abuse occurred, she had a mandatory duty to report to the appropriate authority. [Citation.] Neither negligence nor criminal intent is required." 126 CA4th 1416, 1437.

[§7.11] PROCEDURE TO FREEZE AND SEIZE ASSETS UNDER CALIFORNIA PENAL CODE §186.12

Under Pen C §186.12, the prosecutor may present the criminal court with a parallel civil action to freeze assets held by the defendant in order to preserve property for victim restitution. The petition must be filed with the superior court of the county in which the defendant has been charged with the underlying criminal offense. The charging document must allege a felony violation of Pen C §368(d) or (e), or Welf & I C §15656(c) involving a taking or loss of more than $100,000. Pen C §186.12(a)(1).

The petition must allege the existence of relevant facts. Once the showing has been made, any property in the control of the defendant or that has been transferred by defendant to a third party, "subsequent to the commission of any criminal act alleged pursuant to this subdivision, other than in a bona fide purchase, whether found within or outside the state, may be preserved by the superior court in order to pay restitution imposed pursuant to this section. Upon conviction of the felony, this property may be levied upon by the superior court to pay restitution imposed pursuant to this section." Pen C §186.12(a)(2).

"To prevent dissipation or secreting of property, the prosecuting agency may, at the same time as or subsequent to the filing of a complaint or indictment charging a felony subject to this section, file a petition with the criminal division of the superior court of the county in which the accusatory pleading was filed, seeking a temporary restraining order, preliminary injunction, the appointment of a receiver, or any other protective relief necessary to preserve the property. The filing of the petition shall commence a proceeding that shall be pendent to the criminal proceeding and maintained solely to affect the criminal remedies provided for in this section. The proceeding shall not be subject to or governed by the provisions of the Civil Discovery Act…The petition shall allege that the defendant has been charged with a felony as described in paragraph (1) of subdivision (a) and shall identify that criminal proceeding and the property to be affected by an order issued pursuant to this section." Pen C §186.12(b)(1).

"A notice regarding the petition shall be provided, by personal service or registered mail, to every person who may have an interest in the property specified in the petition. Additionally, the notice shall be published for at least three successive weeks in a newspaper of general circulation in the county where the property affected by an order…is located. The notice shall state that any interested person may file a verified claim with the superior court stating the nature and amount of their claimed interest. The notice shall set forth the time within which a claim of interest in the protected property is required to be filed." Pen C §186.12(b)(2).

"If the property to be preserved is real property, the prosecuting agency shall record, at the time of filing the petition, a *lis pendens* in each county in which the real property is situated which specifically identifies the property by legal description, the name of the owner of record as shown on the latest equalized assessment roll, and the assessor's parcel number." Pen C §186.12(b)(3).

"If the property to be preserved are assets under the control of a banking or financial institution, the prosecuting agency, at the time of the filing of the petition, may obtain an order from the court directing the banking or financial institution to immediately disclose the account numbers and value of the assets of the accused held by the banking or financial institution. The prosecuting agency shall file a supplemental petition, specifically identifying which banking or financial institution accounts shall be subject to a temporary restraining order, preliminary injunction, or other protective remedy." Pen C §186.12(b)(4).

"Any person claiming an interest in the protected property may, at any time within 30 days from the date of the first publication of the notice of the petition, or within 30 days after receipt of actual notice, file with the superior court of the county in which the action is pending a verified claim stating the nature and amount of his or her interest in the property. A verified copy of the claim shall be served by the claimant on the [prosecuting agency]." Pen C §186.12(b)(5).

"The imposition of restitution pursuant to this section shall be determined by the superior court in which the underlying criminal offense is sentenced. Any judge who is assigned to the criminal division of the superior court in the county where the petition is filed may issue a temporary restraining order in conjunction with, or subsequent to, the filing of an allegation pursuant to this section. Any subsequent hearing on the petition shall also be heard by a judge assigned to the criminal division of the superior court in the county in which the petition is filed. At the time of the filing of an information or indictment in the underlying criminal case, any subsequent hearing on the petition shall be heard by the superior court judge assigned to the underlying criminal case." Pen C §186.12(b)(6).

"Concurrent with or subsequent to the filing of the petition pursuant to this section, the prosecuting agency may move the superior court for, and the superior court may issue, the following pendente lite orders to preserve the status quo of the property identified in the petition:

(1) An injunction to restrain any person from transferring, encumbering, hypothecating, or otherwise disposing of that property.
(2) Appointment of a receiver to take possession of, care for, manage, and operate the properties so that the property may be maintained and preserved. The court may order that a receiver appointed pursuant to this section shall be compensated for all reasonable expenditures made or incurred by him or her in connection with the possession, care, management, and operation of any property that is subject to this section.
(3) A bond or other undertaking, in lieu of other orders, of a value sufficient to ensure the satisfaction of restitution imposed pursuant to this section."

Pen C §186.12(c).

"No preliminary injunction may be granted or receiver appointed by the court without notice that meets the requirements of paragraph (2) of subdivision (b) to all known

and reasonably ascertainable interested parties and upon a hearing to determine that an order is necessary to preserve the property pending the outcome of the criminal proceedings. A temporary restraining order may be issued by the court, ex parte, pending that hearing in conjunction with or subsequent to the filing of the petition upon the application of the prosecuting attorney. The temporary restraining order may be based upon the sworn declaration of a peace officer with personal knowledge of the criminal investigation that establishes probable cause to believe that a felony has taken place and that the amount of restitution established by this section exceeds or equals the worth of the property subject to the temporary restraining order. The declaration may include the hearsay statements of witnesses to establish the necessary facts. The temporary restraining order may be issued without notice upon a showing of good cause to the court." Pen C §186.12(d)(1).

"The defendant, or a person who has filed a verified claim as provided in paragraph (5) of subdivision (b), shall have the right to have the court conduct an order to show cause hearing within 10 days of the service of the request for hearing upon the prosecuting agency, in order to determine whether the temporary restraining order should remain in effect, whether relief should be granted from any lis pendens recorded pursuant to paragraph (3) of subdivision (b), or whether any existing order should be modified in the interests of justice. Upon a showing of good cause, the hearing shall be held within two days of the service of the request for hearing upon the prosecuting agency." Pen C §186.12(d)(2).

"In determining whether to issue a preliminary injunction or temporary restraining order in a proceeding brought by a prosecuting agency in conjunction with or subsequent to the filing of an allegation pursuant to this section, the court has the discretion to consider any matter that it deems reliable and appropriate, including hearsay statements, in order to reach a just and equitable decision. The court shall weigh the relative degree of certainty of the outcome on the merits and the consequences to each of the parties of granting the interim relief. If the prosecution is likely to prevail on the merits and the risk of dissipation of the property outweighs the potential harm to the defendants and the interested parties, the court shall grant injunctive relief. The court shall give significant weight to the following factors:

(A) The public interest in preserving the property pendente lite.
(B) The difficulty of preserving the property pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude.
(C) The fact that the requested relief is being sought by a public prosecutor on behalf of alleged victims of elder or dependent adult financial abuse .
(D) The likelihood that substantial public harm has occurred where a felony is alleged to have been committed.
(E) The significant public interest involved in compensating the elder or dependent adult victim of financial abuse and paying court-imposed restitution."

Pen C §186.12(d)(3).

"The court, in making its orders, may consider a defendant's request for the release of a portion of the property affected by this section in order to pay reasonable legal fees in connection with the criminal proceeding, any necessary and appropriate living expenses pending trial and sentencing, and for the purpose of posting bail. The court shall weigh the needs of the public to retain the property against the needs of the defendant to a portion of the property. The court shall consider the factors listed in paragraph (3) prior to making any order releasing property for these purposes." Pen C §186.12(d)(4). "The court, in making its orders, shall seek to protect the interests of any innocent third persons, including an innocent spouse, who were not involved in the commission of any criminal activity." Pen C §186.12(d)(5).

"Any petition filed pursuant to this section shall be part of the criminal proceedings for purposes of appointment of counsel and shall be assigned to the criminal division of the superior court of the county in which the accusatory pleading was filed." Pen C §186.12(d)(6).

"Based upon a noticed motion brought by the receiver appointed pursuant to paragraph (2) of subdivision (c), the court may order an interlocutory sale of property identified in the petition when the property is liable to perish, to waste, or to be significantly reduced in value, or when the expenses of maintaining the property are disproportionate to the value thereof. The proceeds of the interlocutory sale shall be deposited with the court or as directed by the court pending determination of the proceeding pursuant to this section." Pen C §186.12(d)(7).

"The court may make any orders that are necessary to preserve the continuing viability of any lawful business enterprise that is affected by the issuance of a temporary restraining order or preliminary injunction issued pursuant to this action." Pen C §186.12(d)(8). "In making its orders, the court shall seek to prevent any property subject to a temporary restraining order or preliminary injunction from perishing, spoiling, going to waste, or otherwise being significantly reduced in value. Where the potential for diminution in value exists, the court shall appoint a receiver to dispose of or otherwise protect the value of the property." Pen C §186.12(d)(9). "A preservation order shall not be issued against any assets of a business that are not likely to be dissipated and that may be subject to levy or attachment to meet the purposes of this section." Pen C §186.12(d)(10).

"If the allegation that the defendant committed a felony subject to this section is dismissed or found by the trier of fact to be untrue, any preliminary injunction or temporary restraining order issued pursuant to this section shall be dissolved. If a jury is the trier of fact, and the jury is unable to reach a unanimous verdict, the court shall have the discretion to continue or dissolve all or a portion of the preliminary injunction or temporary restraining order based upon the interests of justice. However, if the prosecuting agency elects not to retry the case, any preliminary injunction or temporary restraining order issued pursuant to this section shall be dissolved." Pen C §186.12(e).

"If the defendant is convicted of a felony subject to this section, the trial judge shall continue the preliminary injunction or temporary restraining order until the date of the

criminal sentencing and shall make a finding at that time as to what portion, if any, of the property subject to the preliminary injunction or temporary restraining order shall be levied upon to pay restitution to victims of the crime. The order imposing restitution may exceed the total worth of the property subjected to the preliminary injunction or temporary restraining order. The court may order the immediate transfer of the property to satisfy any judgment and sentence made pursuant to this section. Additionally, upon motion of the prosecution, the court may enter an order as part of the judgment and sentence making the order imposing restitution pursuant to this section enforceable pursuant to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure." Pen C §186.12(f)(1)(A).

"Additionally, the court shall order the defendant to make full restitution to the victim or to make restitution to the victim based on his or her ability to pay, as defined in subdivision (b) of Section 1203.1b. The payment of the restitution ordered by the court pursuant to this section shall be made a condition of any probation granted by the court. Notwithstanding any other provision of law, the court may order that the period of probation continue for up to 10 years or until full restitution is made to the victim, whichever is earlier." Pen C §186.12(f)(1)(B). "The sentencing court shall retain jurisdiction to enforce the order to pay additional restitution and, in appropriate cases, may initiate probation violation proceedings or contempt of court proceedings against a defendant who is found to have willfully failed to comply with any lawful order of the court." Pen C §186.12(f)(1)(C). "If the execution of judgment is stayed pending an appeal of an order of the superior court pursuant to this section, the preliminary injunction or temporary restraining order shall be maintained in full force and effect during the pendency of the appellate period." Pen C §186.12(f)(1)(D).

"The order imposing restitution shall not affect the interest in real property of any third party that was acquired prior to the recording of the lis pendens, unless the property was obtained from the defendant other than as a bona fide purchaser for value. If any assets or property affected by this section are subject to a valid lien, mortgage, security interest, or interest under a conditional sales contract and the amount due to the holder of the lien, mortgage, interest, or contract is less than the appraised value of the property, that person may pay to the state or the local government that initiated the proceeding the amount of the difference between the appraised value of the property and the amount of the lien, mortgage, security interest, or interest under a conditional sales contract. Upon that payment, the state or local entity shall relinquish all claims to the property. If the holder of the interest elects not to make that payment to the state or local governmental entity, the interest in the property shall be deemed transferred to the state or local governmental entity and any indicia of ownership of the property shall be confirmed in the state or local governmental entity. The appraised value shall be determined as of the date judgment is entered either by agreement between the holder of the lien, mortgage, security interest, or interest under a conditional sales contract and the governmental entity involved, or if they cannot agree, then by a court-appointed appraiser for the county in which the action is brought. A person holding a valid lien, mortgage, security interest, or interest under a conditional sales contract shall be paid the appraised value of his or her interest." Pen C §186.12(f)(2).

"In making its final order, the court shall seek to protect the legitimately acquired interests of any innocent third persons, including an innocent spouse, who were not involved in the commission of any criminal activity." Pen C §186.12(f)(3).

"In all cases where property is to be levied upon pursuant to this section, a receiver appointed by the court shall be empowered to liquidate all property, the proceeds of which shall be distributed in the following order of priority:

(1) To the receiver, or court-appointed appraiser, for all reasonable expenditures made or incurred by him or her in connection with the sale or liquidation of the property, including all reasonable expenditures for any necessary repairs, storage, or transportation of any property levied upon under this section.
(2) To any holder of a valid lien, mortgage, or security interest up to the amount of his or her interest in the property or proceeds.
(3) To any victim as restitution for any fraudulent or unlawful acts alleged in the accusatory pleading that were proven by the prosecuting agency as part of the pattern of fraudulent or unlawful acts."

Pen C §186.12 (g).

"Unless otherwise expressly provided, the remedies or penalties provided by this section are cumulative to each other and to the remedies or penalties available under all other laws of this state, except that two separate actions against the same defendant and pertaining to the same fraudulent or unlawful acts may not be brought by a district attorney or the Attorney General pursuant to this section and Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code." Pen C §186.12(h).

[§7.12] PRETRIAL PROCEDURES AND PROCEEDINGS

[§7.12.1] THE OLDER DEFENDANT

Some, though certainly not all or even most, elder abuse defendants are themselves elderly. While age in and of itself should not raise a presumption that the defendant is incompetent to stand trial, or that criminal conduct was caused by illness, these kinds of questions are likely to arise more often than with younger defendants.

Advancing age may be accompanied by chronic medical conditions which affect mobility, hearing, speech production, vision, gait and station (standing and walking), and endurance. Cognitive and mental health conditions may also be present and may affect mood, affect, comprehension and memory. Dementia is more common in older adults, especially in those 85 and older. At age 65 approximately 4-5% of older adults have a dementing illness. At age 85 nearly 50% have dementia. Dementia is not a single illness but rather an umbrella term to describe a widely varied category of illnesses which affects memory, intellectual abilities, and function and is eventually fatal. Different dementia illnesses affect different parts of the brain. Depression is common in older adults and may

co-occur with dementia, making the older adult appear more confused and demented. Similarly, illness, medication toxicity, dehydration, and malnutrition may cause delirium which may make the older adult appear more demented and incapacitated than he or she actually is. Once the underlying problem is treated, the older adult typically will return to his or her "normal" level of functioning. (For more information please consult the *Elder Abuse Pocket Reference: A Medical/Legal Resource for California Judicial Officers* (2012), which can be downloaded at http://www.courts.ca.gov/documents/ElderAbusePDoc.pdf.)

Given these realities, elder abuse cases involving older defendants are likely to raise questions of:

- Competency under Pen C §§1368 and 1367 (A comprehensive guide to competency proceedings is found in *California Judges Benchguide 63*, available at http://www2.courtinfo.ca.gov/protem/pubs/bg63.pdf.)
- Need for medical evaluations under Pen C §4011.5
- Need for psychological evaluations under Pen C §4011.6 (See *California Judges Benchguide 63*, available at http://www2.courtinfo.ca.gov/protem/pubs/bg63.pdf.)
- Need to appoint experts under Evid C §730.

[§7.12.2] ELDER ABUSE CASES INVOLVING DOMESTIC VIOLENCE RELATIONSHIPS

The court should mark elder and dependent adult abuse cases which meet the requirements of Pen C §136.2(e)(1) as "Domestic Violence Cases". "In all cases where the defendant is charged with a crime of domestic violence, as defined in Section 13700, the court shall consider issuing the above-described orders on its own motion…In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue." Pen C §13700 defines domestic violence as abuse committed by a person in any of these nine relationships: current and former spouse; current and former cohabitant; parents of a child in common; and current or former dating or engaged parties. Abuse includes intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to themselves or another. (For further information on Pen C §13700 or the included relationships, please refer to the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (2012).)

There are no similar requirements if the elder abuse case does not involve domestic violence, though a court may choose to mark elder and dependent adult abuse cases in order to assign them to a specific court or calendar.

[§7.12.3] PRE-ARRAIGNMENT RELEASE

[§7.12.3.1] RESTRICTIONS WHEN DOMESTIC VIOLENCE, SERIOUS OR VIOLENT FELONY CHARGED

If the charge is a violent or serious felony (except residential burglary), a felony violation of Pen C §§422, 136.1, 262 or 273.5, a violation of Pen C §646.9 or §243(e)(1), or a violation of Pen C §273.6 in which the defendant allegedly made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party, the defendant cannot be released on more or less than statutory bail or on the defendant's own recognizance without a hearing in open court before a judge or magistrate with 2 days' notice to the prosecution and defense. Pen C §§853.6 and 1270.1.

A peace officer who "has reasonable cause to believe that scheduled bail is insufficient to ensure the defendant's appearance or to ensure the protection of a victim" or family member on a bailable offense or a misdemeanor violation of a domestic violence restraining order may apply for a bail increase above the amount in the schedule of bail. Pen C §1269c. If a higher bail is set the defendant must post the greater amount to be released. Otherwise, the defendant cannot be released on the offenses listed in Pen C §1270.1 without a hearing in open court with notice to counsel.

If the case involves domestic violence, the prosecutor must conduct a computer search of state and national electronic databases regarding defendant's criminal history, prior domestic violence, other acts of violence, and weapons offenses, parole or probation status, and existence of any protective or restraining orders issues against the defendant. Pen C §273.75. Domestic violence is defined in Pen C §13700 and Fam C §§6209 and 6211.

Fam C §6211 defines domestic violence as abuse perpetrated against a spouse or former spouse; a cohabitant or former cohabitant; "a person with whom the respondent is having or has had a dating or engagement relationship; a person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act [citation]; a child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected; and any other person related by consanguinity or affinity within the second degree." Under Fam C §6209 a "'cohabitant' is a person who regularly resides in the household. 'Former cohabitant' means a person who formerly regularly resided in the household."

The Family Code definitions are more expansive that those in Pen C §13700 which is limited to spouse and former spouse, cohabitant and former cohabitant, a person with whom the defendant is having or has had a dating or engagement relationship, and a person with whom the respondent has had a child. Abuse is defined as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." Pen C §13700(a).

Many elder abuse cases involving physical abuse, infliction of unjustified physical pain or mental suffering, and false imprisonment will fit the definition of abuse; if the parties' relationship involves spouses, intimate cohabitants, household members, parents, grandparents, children, grandchildren, siblings, step relations and in-laws, their relationship will meet the relationship criteria for domestic violence.

Note: For a complete discussion of pretrial release in domestic violence cases, please consult the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (2012), chapter 3.

[§7.12.3.2] OTHER CASES

Considerations in making pre-arraignment release decisions apply in elder abuse cases as they do in other kinds of matters. The court must consider:

- Protection of the public and victim safety. Cal Const art I, §28(f)(3), Pen C §1275(a). "The public safety shall be the primary consideration." Pen C §1275(a). See also *Gray v Superior Court (Medical Bd. of Cal.)* (2005) 125 CA4th 629, 23 CR3d 50.
- Safety of the victim's family. Cal Const art I, §28(b)(3).
- Seriousness of the charged offense(s). Cal Const art I, §28(f)(3), §12, Pen C 1275(a). "In considering the seriousness of the offense charged, the judge or magistrate shall include consideration of the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant." Pen C §1275(a)(2).
- Probability of defendant's appearance at trial or hearing. Cal Const art I, §28(f)(3), §12, Pen C §1275(a).
- Defendant's criminal history. Cal Const art I, §28(f)(3), Pen C §1275(a).

[§7.12.3.3] SPECIAL CONSIDERATIONS IN ELDER ABUSE

When the defendant in an elder abuse case is elderly the court may feel greater urgency to consider release from custody because of the defendant's age and actual or perceived frailty. There may be concerns that the defendant "will not thrive" in custody. Jail administration may urge release due to concerns about the defendant's medical or medication needs. County administrators may not want to pay costs associated with placement of an elderly defendant in a medical facility.

In balancing public and victim safety with custodial considerations the court should evaluate:

- Where will defendant reside? If not permitted to reside with the victim, what housing options are available?

- Community ties, other than through the victim.
- When relevant, defendant's cognitive condition and its potential impact on defendant's ability to follow court orders.
- Prior criminal history, including past failures to appear.
- Past abusive acts?
- Prior history of abuse in a caretaker relationship.
- Has defendant threatened the victim or others?
- Does defendant have access to and control over victim's resources, including assets, property, income, or health benefits?
- Defendant's use of alcohol and controlled substances.
- Use of a firearm or other deadly weapon.
- History of violating restraining or other court orders.

If the defendant has been a caretaker for the victim, the court may be asked to release a defendant to return to victim caregiving responsibilities. In considering such requests, the court should evaluate:

- The appropriateness of defendant providing care to the victim.
- Victim safety.
- Has defendant previously prevented victim from reporting abuse or getting medical care? See Dong, *Medical Implications of Elder Abuse and Neglect* (May 2005) 21(2) Clinics in Geriatric Medicine 293.
- Whether community services such as Adult Protective Services have been notified and have responded. (Note: law enforcement, in addition to a variety of other professionals, has a legal duty to report to Adult Protective Services suspected elder and dependent adult abuse including physical abuse, abandonment, abduction, isolation, financial abuse, or neglect of an elder or dependent adult immediately or as soon as practicable, upon discovery of elder abuse. Welf & I C §15630(a).)

[§7.12.4] ASSESSING RISK AND LETHALITY

While there are no studies which specifically address dangerousness in later life, the advanced age of the perpetrator does not obviate the need to assess dangerousness and lethality. Age does not eliminate the defendant's capacity to inflict serious injury or death on an elderly victim.

Elder abuse research has shown that all forms of elder abuse result in:

- Premature death. Lachs et al., *The Mortality of Elder Mistreatment* (August 5, 1998) 280 JAMA 428.
- Increased likelihood of hospitalization. Dong and Simon, *Elder Abuse as a Risk Factor for Hospitalization in Older Persons* (May 27, 2013) 173(10) JAMA Intern Med. 911.

- Increased risk of death. Dong, *Medical Implications of Elder Abuse and Neglect* (May 2005) 21(2) Clinics in Geriatric Medicine 293. "…(R)isk of death for elder abuse and neglect victims is three times higher than for nonvictims." 21(2) Clinics in Geriatric Medicine at 293.

There has been considerable research on homicide-suicide since the late 1980s at the University of South Florida. Findings include:

- The majority include couples who are elderly.
- The majority are spouses.
- The perpetrator is nearly always the male partner.
- The homicide-suicide was not result of "suicide pact," or "mercy killing". Many women were asleep or shot in the head. In some cases, the victim had defensive injuries.
- Most involved use of a firearm.
- Most perpetrators were not demented.
- Common features are the controlling, dominant personality of the man and the perpetrator's perception of separation such as hospitalization or need to move to a nursing home due to illness of either party.
- Separation is viewed by the perpetrator as a threat to the integrity of the relationship.
- Risk factors include:
    - husband is caregiver;
    - advanced old age;
    - declining health of either party
    - perpetrator has a controlling personality;
    - availability of a firearm;
    - pending hospitalization or institutionalization;
    - history of domestic violence;
    - perpetrator is depressed or suicidal;
    - perpetrator is abusing alcohol or controlled substances; and
    - perpetrator's feeling of isolation, anger, hopelessness or loss of control. See et al., *Homicide-Suicide in Older Persons* (March 1, 1998) 155 Am. J. Psychiatry 390; Cohen, *An Update on Homicide-Suicide in Older Persons: 1995–2000* (2000) 6(3) Journal Mental Health and Aging 195-199; Malphurs & Cohen, *A Statewide Case-Control Study of Spousal Homicide-Suicide in Older Persons* 13(3) Am. J. Geriatric Psychiatry 211.

The research on lethality and dangerousness led by Dr. Jacqueline Campbell is also relevant. While not focused on older adults, when the matter is a domestic violence case, Dr. Campbell's risk factors may be helpful to a court considering release on bail or own recognizance (OR). These include:

- Defendant used or threatened victim with a weapon.
- Defendant has threatened to kill victim.

- Defendant tried to choke (strangle) victim.
- Defendant violently and constantly jealous.
- Victim forced to engage in unwanted sexual contact.
- Gun in the house.
- Physical violence has increased in severity.
- Defendant controls most or all of victim's daily activities.
- Physical violence has increased in frequency.
- Defendant uses illicit drugs.
- Victim believes defendant is capable of killing victim.

Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide* (November 2003) 250 NIJ J. 14.

[§7.12.5] CONDITIONS OF RELEASE

If the victim and defendant live together and there is danger of additional abuse or crimes, then the court may need to consider alternative housing for the defendant. The court has an interest in assuring that both victim and defendant have safe housing. The court will be more effective if it is familiar with community agencies and options for older adults including Adult Protective Services, charitable organizations that operate senior housing facilities, the Public Guardian's Office, and aging services programs. Defense counsel should be able to assist in locating other persons with ties to the defendant or organizations able to offer safe housing if the defendant is ordered to stay away from the joint residence.

Age alone should not be the basis for the court to permit contact between victim and defendant when the court would not do so if the parties were younger. The court generally should follow its existing release practices for similar conduct in younger parties, recalling that advanced age does not assure victim safety, follow through with court orders, appearing when ordered, not engaging in victim intimidation and manipulation, and not re-offending. The court may impose reasonable conditions on the defendant as part of a release on the defendant's own recognizance. Pen C §1218(a)(2); *In re York* (1995) 9 C4th 1133, 40 CR2d 308.

[§7.12.5.1] PRETRIAL RELEASE CHECKLIST

Some of the considerations the court may find helpful in deciding issues of pretrial release in an elder abuse case include:

- Issuance of a criminal court protective order under Pen C §136.2.
- No contact provisions.
  - stay away from specified persons (victim, others)
  - stay away from specified locations (e.g., residence, nursing home facility, medical facility, adult day health or other senior center, etc.)
- Peaceful contact (must not harass, strike, threaten, assault (sexually or otherwise), follow, stalk, molest, destroy or damage personal or real

property, disturb the peace, keep under surveillance, or block movements of the protected persons).

- Firearms and ammunition.
  - prohibit possession or acquisition
  - relinquishment
- Alcohol and other drugs.
  - not possess or use
  - stay away from locations where alcohol is chief item of sale
  - enter treatment facility (with defendant's consent)
- Where defendant will reside if not permitted to return home.
  - alternative housing through family and associates
  - senior housing arranged by community agencies or Veteran's Affairs
  - treatment facility
  - medical facility
  - mental health facility
- Electronic monitoring.

[§7.13] CRIMINAL PROTECTIVE ORDERS ISSUED UNDER PENAL CODE §136.2

[§7.13.1] CASES OTHER THAN THOSE INVOLVING DOMESTIC VIOLENCE

Note: This section covers pretrial orders issued by criminal courts under Pen C §136.2. Post conviction orders under this Code Section are covered later in Sentencing, § 7.15.10.3.2.

Courts should consider the appropriateness of issuing a criminal protective order in all elder abuse cases. If the case involves domestic violence under Pen C §13700, even in the absence of a request by the prosecuting attorney, the court "on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is likely to occur…." Pen C §136.2(a)(7)(B)(i).

The protective order's purpose is to preserve the integrity of the administration of criminal court proceedings and to protect those involved in them in order to allow participation without fear of reprisal. *People v Stone* (2004) 123 CA4th 153, 19 CR3d 771; *Babalola v Superior Court (People)* (2011) 192 CA4th 948, 121 CR740; *People v Ponce* (2009) 173 CA4th 378, 92 CR3d 667. "In sum, in domestic violence cases past harm, as evidenced by the underlying charges or other information concerning the defendant's criminal history, or threat of future harm to the victim may provide good cause for issuance of a criminal protective order. In all other cases, a criminal protective order must be based on a finding of good cause to believe an attempt to intimidate or dissuade a victim or witness has occurred or is reasonably likely to occur. That finding may be based on the underlying charges and the circumstances surrounding the commission of the charged

offenses, but a mere finding of past harm to the victim or a witness is not sufficient." *Babalola v Superior Court (People)*, *supra*, 192 CA4th at 963-964.

The required showing of good cause is a threat or a likely threat to the criminal proceedings or the participants. *People v Stone*, *supra*, 123 CA4th at 160). In a non-domestic violence case, where the assault occurred before there were any criminal proceedings, and were committed without any intent to interfere with such proceedings, the showing is insufficient to justify issuance of a criminal protective order. 123 CA4th at 160-161; see also *People v Ponce*, *supra*, 173 Cal. App. 4th 378. Orders are intended to be for a limited duration and are "operative only during the pendency of criminal proceedings and as prejudgment orders. [Citation.]" *People v Selga* (2008) 162 CA4th 113, 119, and as conditions of probation. *People v Stone*, *supra*, 123 CA4th at 159.

The court has express authority under Pen C §136.2(a)(1)to issue ex parte criminal protective orders in domestic violence cases; it is also proper in cases involving violent crimes in other contexts, provided there is an adequate showing of the need for a temporary order and the court thereafter schedules a hearing to consider whether the order should continue for the duration of the criminal case. *Babalola v. Superior Court (People)*, *supra*, 192 CA4th 948.

A court with jurisdiction over the criminal matter may issue the following orders (Pen C §136.2(a)(1) to (7)):

- An order pursuant to Fam C §6320 enjoining defendant from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning (including, but not limited to, making annoying telephone calls as described in Pen C §653m), destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the victim or other named family or household members; and granting exclusive care, possession, or control of animals owned, possessed, leased, kept, or held by defendant, victim, or a minor child residing in the residence or household.
- An order that defendant shall not violate Pen C §136.1.
- An order that a person before the court other than a defendant, including, but not limited to, a subpoenaed witness or other person entering the court, not violate Penal Code §136.1.
- An order prohibiting communication with a specified witness or victim.
- An order prohibiting communication with a specified witness or a victim, except through an attorney under reasonable restrictions that the court may impose.
- An order calling for a hearing to determine if an order as described above should be issued.
- "An order that a particular law enforcement agency within the jurisdiction of the court provide protection for a victim or a witness, or both, or for immediate family members of a victim or a witness who reside in the same household as the victim or witness or within reasonable proximity of the

victim's or witness' household, as determined by the court. The order shall not be made without the consent of the law enforcement agency except for limited and specified periods of time and upon an express finding by the court of a clear and present danger of harm to the victim or witness or immediate family members of the victim or witness." Pen C §136.2(a)(6)(A). "'[I]mmediate family members' include the spouse, children, or parents of the victim or witness." Pen C §136.2(a)(6)(B).

- "An order protecting victims of violent crime from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant." Pen C §136.2(a)(7).

The court shall order that a party enjoined pursuant to Pen C §136.2 "is prohibited from taking any action to obtain the address, or location of a protected party or a protected party's family members, caregivers, or guardian unless there is good cause not to issue that order." Pen C §136.3. The order should be issued on Judicial Council forms whether the order is issued, modified, extended, or terminated by a court. The appropriate forms are available by number at: http://ceb.com/jcforms/forms_by_number.asp

- CR-161 Criminal Protective Order -- Other Than Domestic Violence
- CR-165 Notice of Terminattion [sic] of Protective Order in Criminal Proceeding

[§7.13.2] CASES INVOLVING DOMESTIC VIOLENCE CRIMES

Following the 2004 decision in *People v Stone*, *supra*, 123 CA4th 153, the Legislature amended Pen C §136.2 to add §136.2(h), special procedures in domestic violence cases. *Babalola v Superior Court (People)*, *supra*, 192 CA4th 948. "The separate — and greater — protection afforded victims of domestic violence is fully consistent with the Legislature's consistent and repeated efforts to ensure the courts utilize all available tools, including section 136.2, to safeguard victims of domestic abuse. (See, e.g., Stats. 2001, ch. 698, § 1 ['The Legislature recognizes that both criminal courts and civil courts may issue protective orders or restraining orders to prevent domestic violence. Orders issued by the criminal court also serve to protect the safety of a victim or a witness in a criminal proceeding.'].) Evidence of past harm to the victim of domestic violence may constitute good cause for issuance of a criminal protective order." 192 CA4th at 963)

If the defendant is charged with a crime of domestic violence as defined in Pen C §13700, the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur. The definition of domestic violence for issuance of a criminal protective order on the court's own motion includes all relationships in Fam C §6211.

"[I]n domestic violence cases past harm, as evidenced by the underlying charges or other information concerning the defendant's criminal history, or threat of future harm to

the victim may provide good cause for issuance of a criminal protective order. In all other cases, a criminal protective order must be based on a finding of good cause to believe an attempt to intimidate or dissuade a victim or witness has occurred or is reasonably likely to occur. That finding may be based on the underlying charges and the circumstances surrounding the commission of the charged offenses, but a mere finding of past harm to the victim or a witness is not sufficient." *Babalola v Superior Court (People)*, *supra*, 192 CA4th at 963-964.

The court's authority to consider issuing a protective order on its own motion also includes cases in which the defendant is charged by complaint, indictment, or information with violating Pen C §§261 (rape), 261.5, (unlawful sexual intercourse), 262 (spousal rape), or any case that requires the defendant to register as a sex offender. (Pen C 136.2(h)(1). The court may consider the defendant's relationship to the victim, the likelihood of continuing harm to the victim, the defendant's criminal history, and any current protective or restraining order issued by any civil or criminal court involving the defendant in deciding whether to issue a criminal protective order. Pen C §136.2(h)(1)–(2).

The order must provide that:

- The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect.
- The defendant shall relinquish any firearms that he or she owns or possesses pursuant to CCP §527.9.
- Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while this protective order is in effect is punishable pursuant to Pen C §29825.

Pen C §136.2(a)(7)(B). Cal Rules of Court, rule 4.700 describes the process to be used to determine if a defendant possesses or controls a firearm, and if ordered to relinquish, whether the defendant has complied. (Available at http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_700.)

(c) Setting review hearing

(1) At any hearing where the court issues a criminal protective order, the court must consider all credible information, including information provided on behalf of the defendant, to determine if there is good cause to believe that the defendant has a firearm within his or her immediate possession or control.

(2) If the court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control, the court must set a review hearing to ascertain whether the defendant has complied with the requirement to relinquish the firearm as specified in Code of Civil Procedure section 527.9. Unless the defendant is in custody at the time, the review hearing should occur within two court days after issuance of the

criminal protective order. If circumstances warrant, the court may extend the review hearing to occur within 5 court days after issuance of the criminal protective order. The court must give the defendant an opportunity to present information at the review hearing to refute the allegation that he or she owns any firearms. If the defendant is in custody at the time the criminal protective order is issued, the court should order the defendant to appear for a review hearing within two court days after the defendant's release from custody.

(3) If the proceeding is held under Penal Code section 136.2, the court may, under Penal Code section 977(a)(2), order the defendant to personally appear at the review hearing. If the proceeding is held under Penal Code section 1203.097, the court should order the defendant to personally appear.

(d) Review hearing

(1) If the court has issued a criminal protective order under Penal Code section 136.2, at the review hearing:

(A) If the court finds that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's release on own recognizance is appropriate.

(B) If the defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant.

(2) If the criminal protective order is issued as a condition of probation under Penal Code section 1203.097, and the court finds at the review hearing that the defendant has a firearm in or subject to his or her immediate possession or control, the court must proceed under Penal Code section 1203.097(a)(12).

(3) In any review hearing to determine whether a defendant has complied with the requirement to relinquish firearms as specified in Code of Civil Procedure section 527.9, the burden of proof is on the prosecution.

Advisory Committee Comment

When issuing a criminal protective order under Penal Code section 136.2 or 1203.097(a)(2), the court is required to order a defendant "to relinquish any firearm in that person's immediate possession or control, or subject to that person's immediate possession or control . . . ." (Code Civ. Proc., § 527.9(b).) Mandatory Judicial Council form CR-160, *Criminal Protective Order-Domestic Violence*, includes a mandatory order in bold type that the defendant "must surrender to local law enforcement or sell to a licensed gun dealer any firearm owned or subject to his or her immediate possession or

> control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order".
>
> Courts are encouraged to develop local procedures to calendar review hearings for defendants in custody beyond the two-court-day time frame to file proof of firearms relinquishment with the court under Code of Civil Procedure section 527.9.

Criminal protective orders in domestic violence cases whether issued, modified, extended, or terminated by a court shall be issued on Judicial Council adopted forms which are available by number at: http://ceb.com/jcforms/forms_by_number.asp.

- CR-160 Criminal Protective Order -- Domestic Violence
- CR-162 Order to Surrender Firearms in Domestic Violence Case
- CR-165 Notice of Termination of Protective Order in Criminal Proceeding

The failure to issue the order on a form approved by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable. Pen C §136.2(C).

A protective order issued in a domestic violence case "may require the defendant to be placed on electronic monitoring if the local government, with the concurrence of the county sheriff or the chief probation officer with jurisdiction, adopts a policy to authorize electronic monitoring of defendants and specifies the agency with jurisdiction for this purpose. If the court determines that the defendant has the ability to pay for the monitoring program, the court shall order the defendant to pay for the monitoring. If the court determines that the defendant does not have the ability to pay for the electronic monitoring, the court may order electronic monitoring to be paid for by the local government that adopted the policy to authorize electronic monitoring. The duration of electronic monitoring shall not exceed one year from the date the order is issued. At no time shall the electronic monitoring be in place if the protective order is not in place." Pen C §136.2(D).

Relinquishment of firearms may be accomplished by relinquishing them to the local law enforcement agency, selling them to a licensed firearms dealer, or transferring them to a licensed dealer for the duration of the prohibition if the prohibition on owning or possessing the firearm will expire on a date specified in a court order. Pen Co §29825. The court shall inform the restrained party that s/he may elect to have prohibited firearms transferred to a licensed firearms dealer. Pen C §29810. See chapter 8, Court Orders, §8.3.9 in this Bench Guide for more information on 2014 changes to relinquishment procedures; see Judges Guide to Domestic Violence Cases (Rev. 2014), Firearms and Full Faith and Credit, for additional information.

"The court shall order that any party enjoined pursuant to section 136.2 be prohibited from taking any action to obtain the address or location of a protected party or

a protected party's family members, caretakers, or guardian, unless there is good cause not to make that order. Pen C §136.3.

[§7.13.3] PROCEDURES ONCE CRIMINAL PROTECTIVE ORDER ISSUED

Once a criminal protective order is issued, modified, extended or terminated, the court or its designee shall transmit orders to law enforcement personnel within one business day, pursuant to Fam C §6380(a). It is the court's responsibility to transmit the modification, extension, or termination orders to the same agency that entered the original protective order into the Domestic Violence Restraining Order System in CLETS. Pen C §136.2(a)(7)(A). "All interested parties shall receive a copy of those orders" in domestic violence cases. "In order to facilitate this, the court's records of all criminal cases involving domestic violence shall be marked to clearly alert the court to this issue." Pen C §136.2(e)(1).

[§7.13.4] VIOLATIONS OF CRIMINAL PROTECTIVE ORDERS

Violations of criminal protective orders fall under Pen C §166 which provides that any willful and knowing violation of any protective order or stay-away court order issued pursuant to §136.2, in a pending criminal proceeding involving domestic violence, as defined in §13700, or issued as a condition of probation after a conviction in a criminal proceeding involving domestic violence, as defined in §13700, or **elder or dependent adult abuse**, as defined in §368, or that is an order described in paragraph (3), shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than $1,000, or by both. If a violation "results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended." Pen C §166(c)(2).

Orders subject to this section include orders:

- Issued pursuant to Fam C §6320 or §6389;
- Excluding one party from the family dwelling or from the dwelling of the other; or
- Enjoining a party from specified behavior that the court determined was necessary to effectuate the court's orders.

The offense is a felony when there is a second or subsequent conviction for a violation occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in §139 (c) and (d) and is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years. Pen C §166(c)(4).

A person violating an order under Pen C §136.2(a) "may be punished for any substantive offense described in Section 136.1, or for a contempt of the court making the

order. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1. However, a person so held in contempt shall be entitled to credit for punishment imposed therein against a sentence imposed upon conviction of an offense described in Section 136.1. A conviction or acquittal for a substantive offense under Section 136.1 shall be a bar to a subsequent punishment for contempt arising out of the same act. Pen C §136.2(b).

[7.13.5] INCONSISTENT ORDERS

Effective July 1, 2014, an emergency protective order issued pursuant to Fam C §§6250 et seq or Pen C §646.91 "shall have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets the following requirements:

(A) The emergency protective order is issued to protect one or more individuals who are already protected persons under another restraining or protective order.
(B) The emergency protective order restrains the individual who is the restrained person in the other restraining or protective order specified in subparagraph (A).
(C) The provisions of the emergency protective order are more restrictive in relation to the restrained person than are the provisions of the other restraining or protective order specified in subparagraph (A)."

Pen C §136.2(c)(1)(A).

An emergency protective order that meets these requirements shall have precedence in enforcement over other restraining or protective orders only as to provisions of the emergency protective order that are more restrictive in relation to the restrained person.

In all other situations, a no-contact order as described in Fam C §6320 shall have precedence in enforcement over any other restraining or protective order. Pen C §136.2 (c)(2).

For more information on enforcement of inconsistent orders, refer to chapter 8, Court Orders, § 8.2.6.

[§7.13.6] WHEN PROTECTED PARTY INITIATES CONTACT WITH THE RESTRAINED PARTY

Whether an elder abuse cases involves abuse by a spouse, family member, caregiver, or trusted third party, the dynamics of elder abuse often resemble those in domestic violence. Elder abuse victims may want the relationship to continue or may be physically, emotionally, financially, or psychologically dependent on the defendant to provide companionship, transportation, or caregiving. Family members may discourage

the victim from participating in the criminal process, and may minimize what has occurred. Victims may fear losing or may actually face loss of independence if a defendant is barred from contact. Some victims are justifiably afraid of an abuser who may have threatened and intimidated them throughout the relationship.

These dynamics may result in a victim initiating contact with a restrained party or with a victim requesting early termination of an order. Even if a victim initiates contact the order remains in effect. The restrained party has been ordered to refrain from specific contact and by agreeing to meet the victim has willfully violated the order. Pen C §§13710(b), 13711(c). Because the victim is not a restrained party, the victim cannot violate the order.

The court when issuing an order may find it useful to tell the defendant that the order remains in effect unless changed by the court and that contact with the victim, even if by mutual agreement, violates the order and constitutes a crime. If the protected party is present in court when the order is issued, the court may want to provide the same information to the protected party. If an advocate is available it may be helpful for the victim to meet with the advocate to learn about the terms of the order.

Once an order is issued, particularly after a conviction, the victim may seek early termination of the criminal protective order. When evaluating the request, the court may want to consider:

- The underlying dynamics in the relationship between victim and defendant.
- The timing of the request, i.e., why at this time?
- Whether the victim's request is voluntary.
- Whether third parties have pressured victim to request the early termination.
- Defendant's prior history of abuse against this victim or others.
- Defendant's criminal history.
- Length of time the order has been in effect.
- Defendant's compliance with court orders prior to the request for early termination of the order.
- If defendant has a history of substance abuse, efforts to receive treatment.
- Defendant's compliance with other terms of sentence, including counseling or batterer intervention programs.
- If victim has had the opportunity to speak with an advocate.

[§7.13.7] COORDINATION OF ORDERS WITH OTHER COURTS

Elder abuse cases involving the same parties may be heard in many different departments or divisions. For example, in addition to a criminal matter, other parts of the court may hear requests for protective orders such as the Elder Abuse Restraining Orders (EARO) issued under the Welfare and Institutions Code; Non-Harassment Orders issued under the Code of Civil Procedure; and Domestic Violence Prevention Act Orders issued

under the Family Code. Additionally there are separate matters before the Probate Court and lawsuits in the Civil Division.

Courts are urged to establish procedures to coordinate the various courts in which an elder abuse case may be heard. In domestic violence cases, Pen C §136.2(f) directs the Judicial Council to develop a protocol for the timely coordination of all orders against the same defendant and in favor of the same named victim or victims to assure appropriate communication and information sharing between courts. Cal. Rules of Court, rule 5.445 provides guidance for courts coordinating domestic violence, custody, and visitation matters. Procedures developed in domestic violence cases may be helpful as the court considers its handling of elder abuse cases.

[§7.13.8] FULL FAITH AND CREDIT

Certain criminal protective orders issued by courts of other states are entitled to full faith and credit in California. Fam C §6400; US Const art IV, §1; 18 USC §2265. "State" refers to "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or any branch of the United States military, that has jurisdiction to issue protection orders." Fam C §6401(7); 18 USC §2266.

"'Protection order' means an injunction or other order, issued by a tribunal under the domestic violence, family violence, or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual." Fam C §6401(5). A tribunal is "a court, agency, or other entity authorized by law to issue or modify a protection order." Fam C §6401(8).

Registration or filing of an order issued in another state in California is not required for the enforcement of a valid foreign protection order. Fam C §6403(d). "A foreign protection order valid on its face is prima facie evidence of its validity." Fam C §6402(e). Procedures for enforcement are described in Fam C §6402(a):

- "A person authorized by the law of this state to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a tribunal of this state.
- The tribunal shall enforce the terms of the order, including terms that provide relief that a tribunal of this state would lack power to provide but for this section.
- The tribunal shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection.
- In a proceeding to enforce a foreign protection order, the tribunal shall follow the procedures of this state for the enforcement of protection orders."

A California tribunal "may not enforce a foreign protection order issued by a tribunal of a state that does not recognize the standing of a protected individual to seek enforcement of the order." Fam C §6402(b).

A foreign protection order is valid if it: "(1) Identifies the protected individual and the respondent[;] (2) Is currently in effect[;] (3) Was issued by a tribunal that had jurisdiction over the parties and subject matter under the law of the issuing state[; and] (4) Was issued after the respondent was given reasonable notice and had an opportunity to be heard before the tribunal issued the order or, in the case of an order ex parte, the respondent was given notice and has had or will have an opportunity to be heard within a reasonable time after the order was issued, in a manner consistent with the rights of the respondent to due process." Fam C §6402(d); 18 USC § 2265(b). "Absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order." Fam C §6402(f).

If the foreign order is issued by a tribal court, Cal. Rules of Court, rule 5.386(a) requires courts upon the request of any tribal court located within the county to "adopt a written procedure or local rule to permit the fax or electronic filing of any tribal court protective order that is entitled to be registered under Family Code section 6404." The rule or written procedure must be developed in consultation with the local tribal court(s) and must provide a process for:

(1) The tribal court(s) "to contact a representative of the superior court to inform him or her that a request for registration of a tribal court protective order will be made;
(2) Confirmation of receipt of the request for registration of the order; and
(3) Return of copies of the registered order to the tribal court or the protected person."

Cal. Rules of Court, rule 5.386(b).

"The *Fax Transmission Cover Sheet for Registration of Tribal Court Protective Order* (form DV-610) or similar cover sheet established by written procedure or local rule must be used when fax filing a tribal court protective order. The cover sheet must be the first page transmitted, to be followed by any special handling instructions needed to ensure that the document will comply with local rules. Neither the cover sheet nor the special handling instructions are to be filed in the case. The court is not required to keep a copy of the cover sheet." Cal. Rules of Court, rule 5.386(d). "[N]o fee may be charged for the fax or electronic filing registration of a tribal court protective order. Cal. Rules of Court, rule 5.386(c).

[§7.14] PROCEDURES TO MEMORIALIZE TESTIMONY

[§7.14.1] CONDITIONAL EXAMINATIONS

Given the impact of elder abuse on its victims, the reality that older adults are at increased risk for new health problems while cases are pending, and the likelihood that older persons who have cognitive limitations will continue to suffer deterioration of memory, capacity, and function, courts should utilize procedures to memorialize testimony of elderly victims.

Because of the defendant's right to confront witnesses under *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, procedures should ensure that the defendant is afforded the opportunity for full cross examination.

[§7.14.1.1] GROUNDS FOR SEEKING

There are two different code sections which describe the grounds for seeking a conditional examination: Pen C §§1335 and 1336.

Pen C §1335 permits a conditional examination when:

- At the request of the defendant:
  - in all cases once defendant is charged with a public offense.
  - serious felony (felonies listed in Pen C §1192.7(c)) or any violation of Health & S C §§11351, 11352, 11378, or 11379.
  - domestic violence, when there is evidence the life of the witness is in jeopardy, "a victim or material witness has been or is being dissuaded by the defendant or any person acting on behalf of the defendant, by intimidation or a physical threat, from cooperating with the prosecutor or testifying at trial." Pen C §1335(d). "Domestic violence" means any public offense arising from acts of domestic violence as defined in §13700.

- At the request of the prosecutor:
  - in cases other than those for which the punishment may be death.
  - serious felony (felonies listed in Pen C §1192.7(c)) or any violation of Health & S C §§11351, 11352, 11378, or 11379.

Before a motion for a conditional examination the defendant must have first been fully informed of the right to counsel.

Pen C §1336 permits either party to request the conditional examination of a witness:

- When a material witness for the defendant, or for the people, is about to leave the state;

- Is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial;
- Is 65 years of age or older;
- Is a dependent adult. Pen C §1336(a). A "dependent adult" is any person "between the ages of 18 and 65, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. 'Dependent adult' includes any person between the ages of 18 and 65, admitted as an inpatient to a 24-hour facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." Pen C §1336(c); or
- When there is evidence that the life of a witness is in jeopardy. Pen C §1336(b).

[§7.14.1.2] PROCEDURES

> The application shall be made upon affidavit stating all of the following:
> (a) The nature of the offense charged.
> (b) The state of the proceedings in the action.
> (c) The name and residence of the witness, and that his or her testimony is material to the defense or the prosecution of the action.
> (d) That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial, or is a person 65 years of age or older, or a dependent adult, or that the life of the witness is in jeopardy, or that the witness is a victim or material witness in a domestic violence case who has been or is being intimidated or threatened as described in subdivision (d) of Section 1335 from cooperating with the prosecutor or testifying at trial.

Pen C §1337.

In *People v Mays* (2009) 174 CA4th 156, 173, 95 CR3d 219, the court held that "a conditional examination is not part of the trial; rather, it is a deposition taken in cases where a material witness is unavailable to testify in person at trial." As a result it does not violate defendant's right to a public trial. On appeal the court's finding that the witness was unavailable to testify was affirmed. That ruling was based on testimony of a second-year psychiatry resident who examined and treated the witness that the witness had a panic disorder and agoraphobia, causing sudden onsets of shortness of breath, chest pain, dizziness, and extreme fear. Her panic attacks could cause asthma attacks and had caused her to pass out in the past. During the conditional examination, the court observed the witness visibly trembling and shaking at various points and having breathing difficulty requiring her to use her inhaler twice. To permit the use of a conditional examination transcript or videotape at trial and excuse the witness from live testimony, "the infirmity must be sufficiently problematic that it makes live testimony at trial 'relatively impossible,' not merely inconvenient. [Citation] 'Relatively impossible' includes 'the relative impossibility of eliciting testimony without risk of inflicting substantial trauma on the

witness.' 174 CA4th at 172, citing *People v Winslow* (2004) 123 CA4th 464, 471-472, 19 CR3d 872.

The opposing side is entitled to three days' notice. Pen C §1338. "The defendant has the right to be present in person and with counsel at the examination, and if the defendant is in custody, the officer in whose custody he or she is, must be informed of the time and place of the examination, and must take the defendant thereto, and keep him or her in the presence and hearing of the witness during the examination." Pen C §1340(a). "If the court determines that the witness to be examined is so sick or infirm as to be unable to participate in the examination in person, the court may allow the examination to be conducted by a contemporaneous, two-way video conference system, in which the parties and the witness can see and hear each other via electronic communication." Pen C §1340(b). "Nothing in this section is intended to require the court to acquire two-way video conference equipment for these purposes." Pen C §1340(c). Note: It is suggested that caution be used in the use of two-way teleconferencing as the procedure has not been tested in light of *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, and related cases.

The court can issue a subpoena to compel the attendance of the witness to be examined. Pen C §1342. The witness' testimony "shall be reduced to writing and authenticated in the same manner as the testimony of a witness taken in support of an information. Additionally, the testimony may be video-recorded." Pen C §1343.

The magistrate must seal and transmit the deposition to the Clerk of the Court in which the action is pending or may come for trial. Pen C §1344. "The deposition, or a certified copy of it, may be read in evidence, or if the examination was video-recorded, that video-recording may be shown by either party at the trial if the court finds that the witness is unavailable as a witness within the meaning of Section 240 of the Evidence Code. The same objections may be taken to a question or answer contained in the deposition or video-recording as if the witness had been examined orally in court." Pen C §1345.

The conditional examination can be conducted even if the defendant is presently incompetent to stand trial under Penal Code §1368. The court can determine admissibility later at the time of trial. *People v Cadogan* (2009) 173 CA4th 1502, 93 CR3d 881. In *Cadogan* the court upheld the conditional examination of defendant's wife who was terminally ill and not likely to survive until trial, especially where the defendant's competency determination was significantly delayed by defendant's intransigence.

For more information on competence to stand trial, please refer to the California Judges Benchguide 63: *Competence to Stand Trial* (Cal CJER) available at http://www2.courtinfo.ca.gov/protem/pubs/bg63.pdf.

[§7.15] TRIAL ISSUES

In this section discovery of Adult Protective Services records, trial setting, testimonial issues, evidence of similar conduct, instructions, and sentencing provisions will each be discussed.

[§7.15.1] DISCOVERY OF ADULT PROTECTIVE SERVICES RECORDS

In general, reports of suspected elder or dependent adult abuse are confidential. Welf & I C §15633(a). A violation of the confidentiality provision is a misdemeanor punishable by a term not to exceed 6 months in county jail, a fine not to exceed $500.00, or both. Welf & I C §15633(a) Disclosure is also prohibited if to do so would violate other state or federal laws. Welf & I C §15633(c).

Reports of suspected elder and dependent adult abuse may be disclosed to certain agencies and entities, including an adult protective services agency, a local law enforcement agency, the office of the district attorney, the office of the Public Guardian, the Probate Court, the Attorney General's Bureau of Medi-Cal Fraud and Elder Abuse, or an investigator of the Department of Consumer Affairs, Division of Investigation, who is investigating a known or suspected case of elder or dependent adult abuse. Welf & I C §15633.5. Disclosure of reports and the information contained in the reports can also be made to multidisciplinary teams addressing elder abuse matters. Welf & I C §15633(b)(2)(A). Members of such teams must maintain the confidentiality of the information. Welf & I C §15633(b)(2)(A). The identity of the reporter is confidential but subject to disclosure to the district attorney in a criminal prosecution, when the reporting party waives confidentiality, or by court order. Welf & I C §15633.5.

Welf & I C §§10850(e)(1) and (2) authorize adult protective services and other agencies to testify in a criminal prosecution for Pen C §368 and to provide records when ordered by the court. The section in relevant part provides:

> (1) An adult protective services employee or ombudsman may answer truthfully at any proceeding related to the petition or prosecution, when asked if he or she is aware of information that he or she believes is related to the legal mental capacity of that aid recipient or the need for a conservatorship for that aid recipient. If the adult protective services employee or ombudsman states that he or she is aware of such information, the court may order the adult protective services employee or ombudsman to testify about his or her observations and to disclose all relevant agency records.
>
> (2) The court may order the adult protective services employee or ombudsman to testify about his or her observations and to disclose any relevant agency records if the court has other independent reason to believe that the adult protective services employee or ombudsman has information that would facilitate the resolution of the matter.

Since the reports can be provided to the investigating agency and the prosecutor, the prosecution has a duty to provide relevant content to the defense through discovery, pursuant to Pen C §§1054 et seq.

The prosecutor may still need to protect the address and telephone number of a victim or witness. Pen C §1054.2 prohibits defense counsel from disclosing that address or telephone number to the defendant, defendant's family, and others unless specifically permitted by the court after a hearing. The court can limit disclosure under Pen C §1054.7 when there is good cause such as threats or intimidation of the witness or victim.

[§7.15.2] TRIAL SETTING

Cases involving persons over the age of 70 or dependent adults are entitled to trial setting preference. Pen C §1048(b) provides "…all criminal actions in which… a person who was 70 years of age or older at the time of the alleged offense or is a dependent adult, as defined in subdivision (h) of Section 368, was a witness to, or is the victim of, the alleged offense or (3) any person is a victim of an alleged violation of Section 261, 262, 264.1, 273a, 273d, 285, 286, 288, 288a, or 289, committed by the use of force, violence, or the threat thereof, shall be given precedence over all other criminal actions in the order of trial…."

In such cases, continuations shall be granted by the court only after a hearing and determination of the necessity and shall be commenced within 30 days after the arraignment, unless for good cause the action is continued. The court must have a hearing; find necessity for the continuance; and state on the record the reasons for finding good cause. Pen C §1048(b).

[§7.15.3] JURY SELECTION

Many jurors bring personal feelings about aging, later life, and older persons. They may have biases and misconceptions about adults with disabilities and assume that all older adults have dementia or memory problems. Many bring unresolved feelings about their elderly parents. Many jurors may be caring for an aging parent, relative, or friend, providing continuous personal care, managing finances, or both. Others know people who are caregivers, both paid and volunteer. Some jurors cannot accept the possibility that older people are abused; others know people who have been victims.

If the case involves spouses, it is likely that some jurors may have been victims of domestic violence themselves or know family or friends who have been victims. If the case involves allegations of sexual assault, some jurors may feel unable to listen to evidence on the subject or disbelieve the victim simply because of the nature of the charge. These concerns may help the court evaluate proposed voir dire questions offered by counsel.

Because of these realities, the Court may want to call a larger jury pool. The Court may also want to inform jurors that parts of the voir dire examination can be completed outside the presence of other jurors.

[§7.15.4] COMPETENCY TO TESTIFY

Advanced age or existence of an age-related health condition or disability does not equate with incompetence to testify. There is no presumption of incompetence based on age. Every witness, "irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." Evid C §700. A person is disqualified from testifying only if incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or if incapable of understanding the duty of a witness to tell the truth. Evid C §701(a). See also *People v Ayala* (2000) 23 C4th 225, 264-265, 96 CR2d 682; *People v Cudjo* (1993) 6 C4th 585, 621-622, 25 CR2d 390); and *People v Mincey* (1992) 2 C4th 408, 443-445, 6 CR2d 822. If a challenge is made to a witness' competence based on this section and if the court conducts a hearing outside the presence of the jury, the court may reserve challenges to the witness' competence until the conclusion of the direct examination. Evid C §701(b).

A witness' testimony on a *particular matter* (other than expert opinion testimony) is inadmissible "unless [the witness] has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." Evid C §702(a). The court may exclude the testimony of a witness for lack of personal knowledge *only if no jury could reasonably find* that the witness has such knowledge. Personal knowledge of a matter may be shown by any admissible evidence, including the witness' own testimony. Evid C §702(b). The determination of competency rests with the court (Evid C §405) though the court's authority is limited to deciding if the witness understands the oath and can express him or herself. Determining the witness' credibility is left to the jury. *People v McCaughan* (1957) 49 C2d 409, 420, 317 P2d 974; *People v Lewis* (2001) 26 C4th 334, 361, 110 CR2d 272). A witness's uncertainty about his or her recollection of events does not preclude admitting his or her testimony. *People v Lewis* 26 C4th at 362-363; *People v Avery* (1950) 35 C2d 487, 492, 218 P2d 527 (uncertainty of recollection goes to the weight and not admissibility of a witness's testimony).

Capacity to perceive and to recollect is a condition for the admission of the witness' testimony concerning a particular matter instead of a condition of competency to be a witness. If *there is* evidence that the witness has those capacities, the determination whether the witness in fact perceived and does recollect is left to the trier of fact. *People v Anderson* (2001) 25 C4th 543, 574, 106 CR2d 575; *People v Dennis* (1998) 17 C4th 468, 525-526, 71 CR2d 680. It therefore follows that even if a witness has been diagnosed with a dementing illness, the court has ordered a probate conservatorship, or the witness has been the subject of a Welf & I C §5150 proceeding, the witness is not presumed to be incompetent to testify. The test is whether that witness is disqualified under Evid C §701(a). A witness in earlier stages of dementia will likely meet the test of competency.

A Probate Court finding that a person is unable to manage personal finances, provide for basic needs or resist undue influence has not made a finding that the person is unable to understand the oath and communicate information concerning the matter before the court. See e.g., *People v McCaughan*, *supra*, 49 C2d at 420 (a witness's mental defect or insane delusions does not necessarily establish that the witness lacks capacity to perceive

or recollect); *People v La Rue* (1923) 62 CA 276, 284, 216 P 627 ("It is admissible . . . in order to affect the credibility of the witness, to prove that he was or is subject to insane delusions; that his mind and memory are impaired by disease."). In *People v Anderson* (2001) 25 C4th 543, 106 CR 2d 575, a witness to a robbery-murder described her observation including her son Anthony's presence during the murder, the traffic accident in which Anthony was killed, and the birth and death of her triplets. Extensive evidence that Anthony, the accident, and the triplets were imaginary was presented to the jury as well as disclosures that she relived events through dreams and believed defendant had telepathic powers. Admission of her testimony was proper where details unlikely to be known by anyone but a witness and corroborated by independent evidence were presented.

[§7.15.5] THE IMPACT OF *CRAWFORD V WASHINGTON* ON ELDER ABUSE CASES

The *Crawford* decision in 2004 profoundly changed the ways courts evaluate proffered evidence in criminal cases and determine admissibility. This section is not intended to be a comprehensive review of *Crawford* and its related cases. Please review the comprehensive review of *Crawford* in Simons, "California Evidence Manual" (2014 ed). This section will only review cases relevant to victim and lay witness testimony. It will not examine the *Crawford* cases considering scientific testing or expert witness testimony.

[§7.15.5.1] OVERVIEW OF *CRAWFORD V WASHINGTON*

In *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, the United States Supreme Court reinterpreted the Confrontation Clause of the Sixth Amendment. "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The decision provides extra protections for a criminal defendant when the prosecution seeks to offer an out of court statement against that defendant in a criminal prosecution.

Crawford rules only apply if a statement is offered for its truth. *People v Combs* (2004) 34 C4th 821, 22 CR3d 61; *People v Cooper* (2007) 148 CA4th 731, 56 CR3d 6. In *Cooper*, an expert reviewed a videotaped statement by a 92-year-old victim of theft in order to assess her mental and physical condition. The tape was not offered for its truth and therefore was not subject to the requirements of the Confrontation Clause. A videotaped tour of victim's residence was neither testimonial nor hearsay.

The *Crawford* line of cases created a distinction between out of court statements that are "testimonial" in nature and those that are "non-testimonial". *Crawford* described testimonial statements as those which are more formalized and solemn and akin to a police interrogation or testimony before a court or grand jury, as well as statements developed for later use at trial within the definition.

Under *Crawford*, statements that are "testimonial" in nature are inadmissible unless the declarant is in court and subject to cross examination or the declarant is not present in

court but at a prior time, such as the preliminary hearing, was subject to cross examination. *People v Hollinquest* (2010) 190 CA4th 1534, 119 CR3d 551. Actual cross-examination is not required; rather only the opportunity for "effective" cross-examination is sufficient. *People v Smith* (2003) 30 C4th 581, 134 CR2d 1. The right to cross examination does not guarantee an ideal or perfect cross examination. *People v Wilson* (2005) 36 C4th 309, 30 CR3d 513. In *United States v Owens* (1988) 484 US 555, 108 S Ct 838, 98 L Ed 2d 951, a guard who was attacked sustained a head injury which left him unable to recall the attack or who committed it. His prior identification of the defendant shortly after the assault was admitted as a prior identification. While defense claimed they could not meaningfully cross examine the guard, the guard's presence in court and availability for cross examination, even if imperfect, satisfied the requirements of *Crawford*. See also *United States v Kappell* (6th Cir 2005) 418 F3d 550, 555.

The distinction between testimonial and non-testimonial statements has evolved since 2004. In *Davis v Washington* and *Hammon v Indiana* (2006) 547 US 813, 126 S Ct 2266, 165 L Ed 2d 224, the court distinguished between statements made to enable law enforcement to meet an emergency (non-testimonial) and statements made after an incident when the parties are separated, law enforcement has determined the nature of the incident, the emergency has passed, and the purpose of the interview is to gather information about a prior incident to be used in a later court case (testimonial). See e.g., *People v Johnson* (2007) 150 CA4th 1467, 59 CR3d 405. (When police responded to a domestic violence call they were met by defendant who had blood on his body and clothes; his wife, the victim, was in the background screaming with obvious signs of having been beaten. Officers asked what happened and victim said she had been assaulted by defendant. That statement was held to be non-testimonial as the officer did not know that a crime occurred and was gathering information to assess the situation. The fact that the officer may have had suspicions was not dispositive).

The California Supreme Court incorporated these principles in the case of *People v Cage* (2007) 40 C4th 965, 205 CR3d 789, which offered these guidelines for distinguishing testimonial from non-testimonial statements:

- The Confrontation Clause applies to *testimonial hearsay* -- out of court statements in "purpose and form" of witness testimony at trial; a statement, to be considered "testimonial" in nature, must be made under circumstances that impart the "formality and solemnity characteristic of testimony";
- A statement must be given and received for a *testimonial purpose* such as to prove a past fact for potential use in a criminal prosecution to be deemed "testimonial" in character;
- The *primary purpose* of a statement is to be assessed "objectively" considering the *totality of circumstances* relating to the intent of the principals in the conversation;
- The requisite formality exists in a "nonemergency" situation when a statement is given in response to an inquiry from law enforcement; and
- A statement given to law enforcement for the principal purpose of dealing with a "contemporaneous emergency," in contrast to obtaining evidence for

> prospective use at a later criminal proceeding, is not testimonial. See e.g., *People v Nelson* (2010) 190 CA4th 1453, 119 CR3d 56 (victim who was seriously injured and being rushed to a hospital by ambulance told a firefighter who was assisting the ambulance crew the identity of the shooter in response to a brief inquiry driven by concerns for immediate public safety was non-testimonial).

Subsequently, the Court offered further clarification by stating, "[A] statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." *People v Geier* (2007) 41 C4th 555, 605, 61 CR3d 580. Testimonial includes not just statements to law enforcement but also includes those to persons with special relationships with law enforcement. A declarant's awareness that the statement might be used later at trial is not enough. 41 C4th at 605.

In *Michigan v Bryant* (2011) 562 US ___, 131 S Ct 1143, the United States Supreme Court stated that the determination whether there is an ongoing emergency is an objective one and is decided based on the facts and circumstances known at the time of the statement. In *Bryant*, victim had been shot and walked two blocks to call police. He told officers who shot him and the circumstances. The Court ruled the statement was non-testimonial as the emergency was ongoing. The suspect was at large, a gun had been used and it had not been recovered. While the victim's emergency was ended, the danger to the public and the responding officer was ongoing. See *People v Blacksher* (2011) 52 C4th 769, 130 CR3d 191.

[§7.15.5.2] FORFEITURE BY WRONGDOING

Crawford and its progeny do not apply and the declarant's statements are admissible if the defendant *caused* the declarant's unavailability intending to render him or her unavailable for trial. *Giles v. California* (2008) 554 US 353, 128 S. Ct. 2678, 171 L Ed 2d 488. The forfeiture rule is one of equity. *Crawford v Washington*, *supra*, 541 US 36, 62. "We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' [Citation]" *Davis v Washington*, *supra*, 547 US at 833.

The forfeiture by wrongdoing statute is codified in Evid C §1390 which is currently scheduled to sunset on January 1, 2016. The burden of proof to establish forfeiture is preponderance of the evidence. Evid C §1390(b)(1). The court shall conduct the foundational hearing outside the presence of the jury though if the trial has begun the court can consider evidence already presented in deciding if the forfeiture has occurred. Evid C §1390(b)(3).

Giles noted that domestic violence cases are unique and can create circumstances when intent can be inferred from prior occurrences of abuse (e.g., intent to dissuade victim from seeking assistance). In *People v Banos* (2009) 178 CA4th 483, 100 CR 476, defendant

murdered his girlfriend. She had made statements to law enforcement during several prior contacts in which she reported other incidents. Some of the statements were non-testimonial, but at least two were deemed testimonial. The court admitted the testimonial statements because defendant caused victim's unavailability to prevent her from cooperating with authorities and to prevent her from testifying at trial.

The dynamics of domestic violence noted in *Giles* may carry over into elder abuse cases. Additionally, the use of undue influence tactics may be employed to dissuade a witness from seeking help or make him or her unable to call for help.

[§7.15.5.3] EVIDENCE CODE §1380

In 1999 the Legislature enacted Evid C §1380 which made admissible a videotaped statement made to law enforcement bearing particularized guarantees of trustworthiness made by the victim of a violation or attempted violation of Pen C §368 who becomes legally unavailable to testify. The section allowed for the early memorialization of an elderly or dependent adult victim's statement and its later use in a criminal case; it was based on the understanding that older adults and dependent adults face deteriorating health and death following their victimization.

Shortly after the United States Supreme Court decided *Crawford*, a California Appellate court reviewed the case of *People v Pirwani* (2004) 119 CA4th 770, 14 CR3d 673. There, a statement in compliance with Evid C §1380 was secured by law enforcement and admitted at trial when the declarant, a dependent adult, was legally unavailable to testify. *Crawford* was decided while *Pirwani* was on appeal. The Attorney General conceded that Evid C §1380 is unconstitutional. 119 CA4th at 774.

What remains of Evid C §1380? If such a statement is taken and offered for its truth in the absence of the declarant, *Pirwani* precludes its admission. If the statement is offered for a different non-hearsay purpose such as defendant's knowledge that the victim is an elder or dependent adult or to counter a claim of consent, the statement should not be barred from admission because of the questionable status of Evid C §1380.

[§7.15.6] ADMISSIBILITY OF EVIDENCE OF PRIOR BAD ACTS IN AN ELDER ABUSE CASES

Evid C §1109 provides authority for a court to admit evidence of defendant's prior acts of elder abuse and domestic violence to show propensity to abuse. Evid C §1109(a)(1) addresses acts of domestic violence; §1109(a)(2) addresses acts of elder and dependent adult abuse. There are similar provisions for sexual offenses under Evid C §1108 which have been ruled constitutional. *People v Falsetta* (1999) 21 C4th 903, 917, 89 CR2d 847; *People v Cabrera* (2007) 152 CA4th 695, 703-704, 61 CR3d 373). In *People v Escobar* (2000) 82 CA4th 1085, 1095-1096, 98 CR2d 696, the Court considered the constitutionality of §1109 in domestic violence cases. "Admission of evidence of prior acts of domestic violence under section 1109 is similarly subject to the limitations of section 352. [Citation.] Under the reasoning of *Falsetta*, this safeguard should ensure that

section 1109 does not violate the due process clause. [Citation.]" See also *People v James* (2000) 81 CA4th 1343, 1353, 96 CR2d 823; *People v Brown* (2000) 77 CA4th 1324, 1335, 92 CR2d 433; *People v Hoover* (2000) 77 CA4th 1020, 1027-1028, 92 CR2d 1020; *People v Johnson* (2000) 77 CA4th 410, 417-420, 91 CR2d 596. Evid C §1109's constitutionality has been affirmed in an elder abuse case in *People v Williams* (2008) 159 CA4th 141, 70 CR3d 845.

Evid C §1109(a)(2) applies when a defendant is accused of an offense involving abuse of an elder or dependent person. It provides that evidence of the defendant's commission of other abuse of an elder or dependent person (as defined in Evid C §177) is not made inadmissible by §1101 if the evidence is not inadmissible pursuant to §352. "'Abuse of an elder or dependent person' means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering." Evid C §1109(d)(1).

"Domestic Violence" is defined under Pen C §13700, as well as in Fam C §6211, if the act occurred no more than five years before the charged offense. The broader relationships under Fam C §6211 include family and household members. The five year time frame is limited to Family Code-defined incidents.

The age of admissible acts defined in Pen C §13700 and elder and dependent adult abuse is governed by Evid C §1109(e) which provides: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Health & S C §1250 are inadmissible. Evid C §1109(f).

If the People intend to offer evidence of prior acts they must disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Pen C §1054.7. The court must conduct a hearing to determine if the probative value of the evidence being proposed for admission is outweighed by its prejudicial effect under Evid C §352. The court shall include consideration of any corroboration and remoteness in time. Evid C §1109(a)(3). The court's discretion to exclude propensity evidence saves Evid C §1108 from a defense due process challenge. *People v Fitch* (1997) 55 CA4th 172, 183, 63 CR2d 753; *People v Cabrera*, *supra*, 152 CA4th at 704; *People v Falsetta*, *supra*, 21 C4th at 917.

Evidence of prior acts under Evid C §§1108 and 1109 is admitted only as circumstantial evidence supporting an inference that the defendant committed the charged offense, by demonstrating the defendant's propensity and bolstering the victim's credibility. *People v Reliford* (2003) 29 C4th 1007, 1012-1014, 130 CR2d 254; *People v Falsetta*, *supra*, 21 C4th at 911, 915. "[A] jury may not convict the defendant based *solely* on evidence of a prior sexual crime. [Citations.]" *People v Loy* (2011) 52 C4th 46, 72, 127 CR3d 679 (emphasis added).

Propensity evidence alone will not support a conviction beyond a reasonable doubt. *People v Hill* (2001) 86 CA4th 273, 277-278, 103 CR2d 127; *People v Younger* (2000) 84 CA4th 1360, 1382, 101 CR2d 624 (domestic violence).

Relevant instructions under Evid C §1109 are:

- CALCRIM No.852, Evidence of Uncharged Domestic Violence.
- CALCRIM No.853, Evidence of Uncharged Abuse of Elder or Dependent Person.

The instruction for uncharged sex offenses is CALCRIM No. 1191.

[§7.15.7] EXPERT WITNESS TESTIMONY

An array of experts may be called in an elder abuse case. Some are rarely called in other kinds of cases. In *People v Dejourney* (2011) 192 CA4th 1091, 121 CR3d 787, expert testimony was properly received to show why persons with developmental disabilities such as cerebral palsy would not seek assistance when faced with violent sexual acts. The foundation to establish that the witness is a person with an intellectual disability can come from the witness or from other sources.

Examples of the kinds of experts that could appear in an elder abuse case include:

- *Mental health professionals* may be called to address challenges to a victim's competence to testify, level of mental functioning and ability to understand documents when executed, ability to consent and whether that consent was given, or susceptibility to undue influence. The defense may call a mental health professional when there are questions of a defendant's present ability to understand the charges and assist in the defense, sanity when events occurred, criminal responsibility and ability to form specific intent; for sentencing considerations; or to challenge a prosecution expert.
- A variety of *medical experts*, including *geriatricians and wound care specialists*, may be called to discuss the nature of injuries, whether what is described as abuse is instead related to an underlying medical problem or medication side effect, whether alleged neglect was preventable, standard of care, or proper care.
- *Forensic accountants and document examiners* may be called to explain financial transactions and "follow the money".
- Experts on disabilities may be called to describe how the disability affects the person with that disability physically, cognitively, in activities of daily living, etc.
- *Advocates, law enforcement professionals with special training and experience, and academics* may testify about the interpersonal dynamics that may result in the victim engaging in counterintuitive behaviors.

- *Attorneys, accountants, and other professionals* may testify to standards of practice in a particular field when the case involves alleged misconduct by professionals who allege they acted within the proper scope of their field.

[§7.15.8] VICTIM PROTECTION AND RIGHTS

Special protections are afforded victims who are elderly and those described as dependent persons. A "dependent person" is a "person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. 'Dependent person' includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in" Health & S C §§1250, 1250.2, and 1250.3. Evid C §177; Pen C §288(f)(3).

This definition does not match the definition of a "dependent adult" in Pen C §368(h) or Welf & I C §§15656 and 15610.23. A dependent person must have an impairment that "substantially" restricts his or her activities or is "significantly" diminished because of age.

This chart highlights the court-related rights and protections afforded to dependent persons. (References to crimes against children which are contained in some of the code sections listed in the chart have been are omitted.)

Rights of Dependent Persons

Proceeding	Code Section	Right or Protection
Testifying	Evidence Code §710	• Dependent persons may promise to tell the truth rather than taking a formal oath or affirmation when giving testimony.
	Evidence Code §767	• The court may permit a dependent person to be questioned on direct examination using leading questions in cases of elder and dependent adult abuse (Pen C §368), and acts described in Pen C §11165.1 (Pen C §§261, 261.5(d), 264.1, 285, 286, 288a, 288(a), 288(b), 288(c)(1), 289, and 647.6).
	Evidence Code §765	• The court has a duty to protect dependent persons from harassment, embarrassment, and repetitive questioning when

		testifying. The court also must ensure that questions are appropriate for the dependent person's cognitive level.
Grand Jury	Penal Code §939.21	• Dependent persons may, at the discretion of the prosecutor, have a support person present with them at a grand jury proceeding in cases of sexual assault and dependent adult abuse.
Preliminary Hearing	Penal Code §859.1 Penal Code §868.7 Penal Code §861.5	• The preliminary hearing may be closed to the public during the preliminary hearing testimony of a dependent person in a domestic violence or sexual assault case. • The preliminary hearing may be closed to the public in sexual assault cases where testimony is by a dependent person who is likely to suffer psychological harm if the court hearing is not closed and other alternatives are not available. • The preliminary hearing may be continued one court day to accommodate the special physical, emotional, needs of dependent persons
Sentencing	Penal Code §502.9 Penal Code §515 Penal Code §525	• In sentencing a person for telecommunications or computer fraud, the fact that the victim is an elder or dependent person is a factor in aggravation. • In sentencing a person for embezzlement, the fact that the victim is an elder or dependent person as defined in Pen C §288 is a factor in aggravation. • In sentencing a person for extortion, the fact that the victim is an elder or dependent person as

	Penal Code §§1191.1; 1191.15	defined in Pen C §288 is a factor in aggravation. • Victim's right to speak at sentencing, including by video or audio tape

Of course not all victims of elder abuse will qualify as "dependent persons". The Legislature also provides certain protections to victims of elder and dependent adult abuse. These include:

- Court's authority to control the proceedings and the interrogation of witnesses. Evid C §765.
- Right to two support persons of the victim's choosing, one of whom can accompany the victim to the witness stand, at the preliminary hearing, trial, and juvenile proceeding. Pen C §868.5.

Elders also have rights to a support person and an advocate at formal law enforcement, prosecution or defense interviews and at a sexual assault forensic examination. Pen C §679.04: sexual assault victim interviews; Pen C §264.02: sexual assault forensic examination; Pen C §679.05: domestic violence victim interviews.

In recent years prosecuting agencies have begun to use therapy dogs to calm witnesses and make it less traumatic for the witness to testify. The therapy dog is not a substitute for a support person but rather, an additional aid. In *People v Spence* (2012) 212 CA4th 478, 151 CR3d 374, the court allowed a child sexual assault victim to testify accompanied by a support person and a therapy dog. The court relied on several factors to find there was no error in that procedure, such as: (a) the court's discretion to control courtroom proceedings and witness examination; (b) the absence of any claim of interference by the dog's presence with the defendant's right to confront and cross-examine the victim-witness; (c) the lack of any indication the dog's presence alone communicated to the jury any presupposition of this witness's "very victimhood"; and (d) the absence of any indication there had been any improper gifts or favors in this respect from the prosecutor to the victim-witness. See also *State v Dye* (2012) 170 Wn. App. 340, 283 P3d 1130.

If the victim has a disability (as defined in Govt C §12926(j), mental, & (m), physical), and the defendant is charged with a violation of Pen C §§243.4, 261, 285, 286, 288, 288a, 288.5, 289, 314(1), or any domestic violence crime as defined in Pen C §13700, committed with or upon a person with a disability, the court shall take special precautions to provide for the comfort and support of the person with a disability and to protect him or her from coercion, intimidation, or undue influence as a witness, such as:

(a) Reasonable periods of relief from examination and cross-examination during which he or she may retire from the courtroom. The judge may allow

other witnesses to be examined when the person with a disability retires from the courtroom.

(b) The judge may remove his or her robe if the judge believes that this formal attire intimidates the person with a disability.

(c) The judge, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the person with a disability.

(d) Limiting the taking of the testimony of the person with a disability to normal school hours if there is no good cause to take the testimony of the person with a disability during other hours.

The court may permit leading questions on direct examination when there are "special circumstances". Evid C §767). Existence of a disability may constitute a special circumstance. *People v Augustin* (2003) 112 CA4th 444, 449, 5 CR3d 171. Trial courts have broad discretion to decide when such special circumstances are present. *People v Williams* (1997) 16 C4th 635, 672, 66 CR2d 573. Examples in which use of leading questions was affirmed on appeal include *Mead v Mead* (1919) 41 CA 280, 182 P 761 (witness was a frail 83-year-old man who was deaf and paralyzed) and *People v Augustin*, *supra*, 112 CA4th 444 (use of leading questions for victim who had cerebral palsy and whose speech was difficult to understand was proper; court not required to appoint an interpreter).

[§7.15.9] JURY INSTRUCTIONS AND RELATED CASE LAW

The relevant jury instructions for Pen C §368 are:

Pen C §368(b)(1)	CALCRIM No. 830
Pen C §368(c)	CALCRIM No. 831
Pen C §368(d) and (e)	CALCRIM No. 1807

A number of cases have addressed whether a court must give a unanimity instruction where the statute could be violated by a continuous course of conduct. A unanimity instruction is not required where the criminal acts are so closely connected that they form a single transaction or where the offense consists of a continuous course of conduct. *People v Rae* (2002) 102 CA4th 116, 125 CR2d 312. The jury does not have to unanimously agree on the specific circumstances or conditions that were likely to produce great bodily injury or death, but could properly consider all circumstances or conditions likely to lead to great bodily injury or death. It was proper not to give a unanimity instruction. *People v Racy* (2007) 148 CA4th 1327, 56 CR3d 455.

Pen C §368(c) is a lesser included offense in Pen C §368(b); it was error not to give the lesser offense where the victim was not injured after being zapped with a stun gun, was 6 feet 3 inches and weighed 210 pounds. After he was zapped he was able to retreat to the bedroom, attempt to call 911, and lie on the bed in a defensive position. *People v Racy*, *supra*, 148 CA4th 1327.

In any criminal trial or proceeding in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness, upon the request of a party, the court shall instruct the jury, as follows:

> In evaluating the testimony of a person with a developmental disability, or cognitive, mental, or communication impairment, you should consider all of the factors surrounding the person's testimony, including their level of cognitive development. Although, because of his or her level of cognitive development, a person with a developmental disability, or cognitive, mental, or communication impairment may perform differently as a witness, that does not mean that a person with a developmental disability, or cognitive, mental, or communication impairment is any more or less credible a witness than another witness. You should not discount or distrust the testimony of a person with a developmental disability, or cognitive, mental, or communication impairment solely because he or she is a person with a developmental disability, or cognitive, mental, or communication impairment.

Pen Code §1127g; CALCRIM No. 331. CALCRIM No. 331 does not violate defendant's due process rights by lowering the prosecution burden of proof. *People v Catley* (2007) 148 CA4th 500, 55 CR3d 786.

[§7.15.10] SENTENCING

Sentencing in an elder abuse case should attempt to enhance the victim's safety and restore to the victim what has been taken through restitution and other court orders; protect the community from further criminal conduct, and hold the offender accountable. This may be especially difficult in an elder abuse case due to the relationship between the parties, dynamics of the relationship, and likelihood that the victim, if still alive, will have decreased life expectancy from the impact of the abuse. Dong, *Medical Implications of Elder Abuse and Neglect*, *supra*; Lachs et al., *The Mortality of Elder Mistreatment*, *supra*.

Some older victims may want continuing contact with the abuser. In that situation the court must consider if permitting contact will be permitted at all and if so, how victim safety may be balanced with the desire for contact. In such situations the court may wish to consider:

- Should contact be permitted immediately or should it permitted after defendant has complied with some terms of probation such as completion of a drug treatment in-patient program, or after completion of a certain number of sessions of counseling or batterer's intervention or payment of a certain amount of restitution?
- Should contact be supervised at least initially? Who will supervise it?
- Should contact be limited to specific dates and times and in public places?

If probation is appropriate the court may need to decide whether or not it should be supervised by the Probation Department. Resources will guide what the court's options are but if the court can order supervision by the Probation Department, at least initially, it allows the court to:

- Determine if the defendant is complying with court orders without having to require the victim to initiate reports of problems.
- Increase assurance that defendant is paying restitution.
- Be certain that defendant is enrolled in counseling or batterer's intervention programs and attending as directed.
- Communicate that the court, and not the victim, is supervising the case.

If the defendant is also elderly, there may be pressure not to incarcerate even if a similar crime by a younger person would receive a term of incarceration. Courts considering a grant of probation may be inclined to impose shorter terms because of the defendant's age. If the older defendant has dementia or other significant medical conditions, the court should evaluate:

- Does the defendant have the capacity to understand, participate in, and benefit from group counseling or batterer's intervention programs based on a group counseling model?
- Can the defendant control his or her behavior? If not, what interventions or orders are sufficient to meet both the defendant's need for supervision and the victim's and society's need to be protected?
- Is there a need for a psychiatric or medical evaluation?
- Does defendant need a protective placement such as a conservatorship?

Finally, as the court considers sentence, the court should consider if ordering monitoring or compliance hearings will be helpful in assuring that defendant is complying with the terms of the court's sentence. The frequency and continuation of those hearings may change as defendant shows a pattern of compliance with the court's orders.

[§7.15.10.1] SENTENCING LIMITATIONS: PENAL CODE §§1203.09 AND 667.9.

There are two sections most likely to be alleged in elder abuse cases. These are Pen C §§1203.09 and 667.9.

[§7.15.10.1.1] PENAL CODE §1203.09

Pen C §1203.09(a) provides that probation shall not be granted nor imposition of sentence suspended for any person who commits a specified crime against a person 60 years of age or older or "against a person who is blind, a paraplegic, a quadriplegic, or a person confined to a wheelchair and that disability is known or reasonably should be known" to the defendant; and who during the course of the offense inflicts great bodily

injury upon the victim. Included crimes are: murder; robbery; kidnapping in violation of §§207, 209, or 209.5; burglary in the first degree; rape by force or violence, in violation of §261(a)(2) or (6) or §262(a)(1) or (4); assault with intent to commit rape or sodomy; and carjacking.

This allegation applies in all cases, including those where infliction of great bodily injury is an element of the offense. The allegation must be alleged in the information or indictment and either admitted by the defendant in open court or found true by a jury or court sitting without a jury or by plea of guilty or nolo contendere.

Pen C §1203.09(f) provides that except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of having committed one or more specific crimes against a victim aged 60 years or older. Included crimes are: assault with a deadly weapon or instrument, battery which results in physical injury which requires professional medical treatment, carjacking, robbery, or mayhem.

Pen C §1203.09 does not violate the Equal Protection Clause by requiring that some offenders know that their victims are blind, paraplegic or quadriplegic and not requiring others to know that their victims are elderly. *People v Peace* (1980) 107 CA3d 996, 166 CR 202.

Denial of probation for committing crimes against a person 60 or older or against persons who are blind, paraplegic or quadriplegic only applies to the person who personally inflicts great bodily injury and not to aiders and abettors who are involved in crimes in which great bodily injury is inflicted. *People v Brown* (1980) 110 CA3d 24, 167 CR 557).

[§7.15.10.1.2] PENAL CODE §667.9

Pen C §667.9(a) in relevant part provides that a person who commits one or more specified crimes against a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, a paraplegic, or a quadriplegic and that disability or condition is known or reasonably should be known to the defendant shall receive a one-year enhancement for each violation. If the defendant has a prior conviction for a specified offense he or she shall receive a two-year enhancement for each violation. This is in addition to enhancements under Pen C §667. Pen C §667.9(b). Included offenses are: mayhem (§§203 or 205); kidnapping (§§ 207, 209, or 209.5); robbery (§211); carjacking (§215); rape (§261(a)(2) or (6)); spousal rape (§262(a)(1) or (4); rape, spousal rape, or sexual penetration in concert (§264.1); sodomy (§§286(c)(2) or (3) or 286(d)); oral copulation (§§288a(c)(2) or (3), or 288a(d)); sexual penetration (§289(a)); and burglary in the first degree (§460, in violation of §459).

"Developmentally disabled" means a severe, chronic disability of a person, which is attributable to a mental or physical impairment or a combination of mental and physical impairments; likely to continue indefinitely; and results in substantial functional limitation

in three or more of the following areas of life activity: (a) self-care; (b) receptive and expressive language; (c) learning; (d) mobility; (e) self-direction; (f) capacity for independent living; and (g) economic self-sufficiency. Pen C §667.9(d).

The sentence enhancement is not unconstitutionally vague though it permits enhancement in the absence of actual knowledge of victim's age when evidence establishes defendant reasonably should have known based on victim's appearance. *People v Smith* (1993) 13 CA4th 1182, 16 CR2d 820. In *Smith*, the victim's appearance at trial even though not fully described on the record allowed the jury to reasonably deduce her age. The victim was nearly 68 and defendant addressed her as "old lady" during the incident. The enhancement under §667.9(a) is intended for first time offenders. There is no requirement that defendant have a prior serious felony. *People v Huricks* (1995) 32 CA4th 1201, 38 CR2d 592. The court has authority to dismiss the enhancement under Pen C §1385. *People v Luckett* (1996) 48 CA4th 1214, 56 CR2d 37.

If the basis for an allegation is that victim has a developmental disability, the prosecution must prove defendant knew or reasonably should have known that the condition was likely to continue indefinitely and resulted in substantial functional limitation in three or more of areas of life activity. Proof that defendant knew the victim had a mental impairment, had spoken with her before, and called her a "crazy lady" is insufficient to prove the enhancement. *People v Morris* (2010) 185 CA4th 1147, 11 CR3d 204.

[§7.15.10.2] SENTENCING FOR VIOLATIONS OF PENAL CODE §368

Please refer to section 7.2 for a discussion of the specific crimes and sentences for various violations of Pen C §368. Please refer to the *California Judges Benchbook: Domestic Violence Cases in Criminal Court* (2012), chapter 7, if the case involves domestic violence offenses.

Realignment affects some but not all crimes in the section. Specifically, sentences to state prison for violations of §368(b) must be served in state prison. State prison sentences for violations of §§368(d), (e), and (f) are realigned so terms are served in county jail and subject to the provisions of Pen C §1170(h).

For a review of realignment provisions please refer to Couzens & Bigelow, *Felony Sentencing After Realignment* (March 4, 2014) <http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf> (as of April 20, 2014); and *2011 Criminal Justice Realignment Act Frequently Asked Questions* (December 10, 2012) <http://www.courts.ca.gov/partners/documents/cjr_faq.pdf> (as of April 20, 2014).

Pen C §368 contains specific sentencing requirements. When a defendant is placed on probation the court may require him or her to receive appropriate counseling as a condition of probation. "Any defendant ordered to be placed in a counseling program shall be responsible for paying the expense of his or her participation in the counseling program

as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay." Pen C §368(k). Electronic monitoring is permitted. See Pen C §§1210.7-1210.10.

[§7.15.10.2] CONCURRENT OR CONSECUTIVE SENTENCING

A person can be charged and convicted of violating Pen C §§368(b) or (c) and a related charge of murder or assault with a great bodily injury allegation. "Nothing in this section shall preclude prosecution under both this section and Section 187 or 12022.7 or any other provision of law. However, a person shall not receive an additional term of imprisonment under both paragraphs (2) and (3) of subdivision (b) for any single offense, nor shall a person receive an additional term of imprisonment under both Section 12022.7 and paragraph (2) or (3) of subdivision (b) for any single offense." Pen C §368(j).

A person can be consecutively sentenced if his or her conduct involved separate intents. For example, in *People v Racy*, *supra*, defendant was convicted of physical elder abuse under circumstances likely to result in great bodily injury or death and robbery. Defendant's statements in the probation report indicated that he went to victim's home to confront him about victim's alleged sexual assault on the defendant's mother and then decided to rob him. These statements, though not admissible at trial, provided substantial evidence that he harbored different intents for the robbery and elder abuse so he could be separately punished for each crime.

[§7.15.10.3] PROBATION TERMS

The court may impose reasonable terms and conditions in order that justice may be done, that "amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." Pen C §1203.1(j). Of course appropriate terms will vary by the nature of the crime(s) and the defendant's situation. This section will review terms and conditions that are likely to arise in elder and dependent adult abuse cases. Given the nature of elder abuse crimes, the likelihood it may continue and escalate if the parties continue to have contact, the presence in many cases of mental health and substance abuse issues, and the relative vulnerability of victims, supervised probation rather than court probation should be carefully considered if a defendant is placed on probation.

[§7.15.10.3.1] RESTITUTION

For most victims of elder and dependent adult abuse restitution orders are critical, and for some victims, are viewed as the most important aspect of the sentence. Restitution orders must be meaningful, balancing a defendant's ability to pay with the likelihood that a victim's life savings have been wiped out by the conduct and that a victim's life expectancy may well have been shortened by the criminal conduct. (Please refer to the discussion of the impact of elder abuse in section 7.12.4 "Assessing Risk and Lethality").

Cal Const art I, §28(b)(13) states: "(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. (C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim."

The court shall order restitution if the victim suffers monetary loss. Pen C §1202.4. Losses may include:

- Lost wages from the victimization itself as well as from time spent participating in the criminal justice process. Pen C §§1202.4(f)(3); 1202.4(k)(3).
- Costs to improve home security or replace broken locks.
- Costs to retrofit a residence or vehicle if the victim sustained a disability as a result of the crime.
- Medical costs and hospitalization.
- Emergency ambulance transport.
- Mental health counseling. (See Pen C §1203.1j, which provides "In any case in which the defendant is convicted of assault, battery, or assault with a deadly weapon on a victim 65 years of age or older, and the defendant knew or reasonably should have known the elderly status of the victim, the court, as a condition of probation, shall order the defendant to make restitution for the costs of medical or psychological treatment incurred by the victim as a result of the crime, and that the defendant seek and maintain legitimate employment and apply that portion of his or her earnings specified by the court toward those costs. The defendant shall be entitled to a hearing, concerning any modification of the amount of restitution, based on the costs of medical and psychological treatment incurred by the victim subsequent to the issuance of the order of probation.") But see *People v Slattery* (2008) 167 CA4th 1091, 84 CR3d 672, which held that the hospital that treated the victim of defendant's infliction of abuse on an elder adult was not "victim" for restitution statute though victim died owing the hospital money. Hospital was neither the immediate object of the conduct nor the entity against which the crime was committed. Diverting restitution due to the immediate victim of elder abuse to the hospital that treated her violates the statute requiring that the victim be made whole for economic losses, including medical expenses though victim died with unpaid medical bills. Hospital could bring a civil claim against victim's estate to ensure payment of the debt.
- Restitution for expenses to monitor an identity theft victim's credit report and for costs to repair the victim's credit for a period of time is reasonably necessary to make the victim whole. Pen C §1202.4(f)(3)(L).

Restitution orders which are unpaid can become civil judgments. See Pen C §1214(b).

(Please refer to §7.11 "Procedure to Freeze Assets" to enable funds to be available for restitution)

[§7.15.10.3.2] POST CONVICTION CRIMINAL PROTECTIVE ORDER (NO CONTACT; STAY AWAY ORDERS)

The court should always consider if a no contact, stay away, or peaceful contact order should be issued to limit defendant's contact with the victim. If the crime is domestic violence as defined in Pen C §13700, the court shall:

- Issue an order pursuant to Pen C §1203.097(a)(2) "a criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and if appropriate, containing residence exclusion or stay-away conditions."
- Consider issuing a post-conviction restraining order under Pen C §136.2(i)(1), which provides "In all cases in which a criminal defendant has been convicted of a crime of domestic violence as defined in Section 13700…, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail, is subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."
- There is a similar requirement if the conviction is for stalking. Pen C §646.9(k)(1).

The court has the power to order a post-conviction criminal protective order under Pen C §136.2 if it places a defendant on probation. *People v Stone* (2004) 123 CA4th 153, 160, 19 CR3d 771.

A sentencing court shall consider issuing a restraining order prohibiting the defendant from any contact with the victim, valid for up to 10 years, when sentencing a person for violating Pen C §368(b), (c), (d), (e), or (f). The order shall be considered whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation. The length of the order shall be based on the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. Pen C §368(*l*)

Courts may be asked by a victim to not impose a protective order or to permit ongoing contact between a victim and defendant. These requests may require the court to

balance victim desires with victim safety. In making its decision the court may wish to evaluate:

- Nature and length of the relationship.
- Whether the victim's choice is voluntary or if pressure has been applied by family members or others.
- Defendant's history of compliance with court orders.
- Defendant's substance abuse or mental health problems (if applicable, has the defendant received treatment?).
- Compliance with other terms of probation.
- Whether the victim has spoken with an advocate.

The court may want to preclude contact while defendant completes certain probation terms such as in-patient treatment or a certain number of outpatient sessions, then permit visits when supervised by a third party acceptable to the court and in public locations, and then later consider increasing visits as progress on probation is demonstrated.

[§7.15.10.3.3] OTHER ORDERS

- In- or out-patient mental health treatment.
- In- or out-patient alcohol and drug treatment.
- Submit to a warrantless search condition. (See *People v Balestra* (1999) 76 CA4th 57, 66-68, 90 CR2d 77 in which the court imposed a warrantless search clause as a term of probation following defendant's conviction for elder abuse. The defendant, smelling of alcohol, had physically attacked and otherwise terrorized her 69-year-old mother for two hours until the mother was able to finally escape. The court noted that, while warrantless search conditions may be more common in cases involving theft, narcotics, or firearms, these conditions are intended to ensure that the subject is complying with the fundamental requirement that a probationer obey all laws. Because a warrantless search is justified by its rehabilitative purpose, "it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms." The condition served a valid rehabilitative purpose.)
- Not volunteer or work in settings which primarily serve older or dependent adults.
- Domestic violence conditions under Pen C §1203.097 if the case involves a domestic violence relationship and conduct, including participation in a batterer intervention program.
- Registration under Pen C §290, if appropriate.
- Consider if all cases are appropriate for the provisions of Pen C §1203.1(h) which provides that the probation officer or designated representative "shall consider whether any defendant who has been convicted of a nonviolent and nonserious offense and ordered to participate in community service as a condition of probation shall be required to engage in the performance of

house repairs or yard services for senior citizens and the performance of repairs to senior centers through contact with local senior service organizations in the performance of the community service.″

[§7.15.10.3.4] MONITORING HEARINGS

The court can play a powerful role in assuring that its orders are complied with and protecting victims by maintaining court oversight of elder and dependent adult abuse cases. Ordering review or monitoring hearings can communicate a strong message that the court views these cases as serious. (See National Center for State Courts, "Elder Abuse Cases: Proposed Performance Measures".)

CHAPTER 8

RESTRAINING ORDERS

[§8.1] OVERVIEW

[§8.2] EMERGENCY PROTECTIVE ORDERS FOR ELDER AND DEPENDENT ADULT ABUSE

[§8.2.1] GROUNDS FOR ISSUANCE

[§8.2.2] ORDERS THAT MAY BE INCLUDED

[§8.2.3] WHAT MUST BE INCLUDED

[§8.2.4] DURATION AND VIOLATIONS

[§8.2.5] LAW ENFORCEMENT DUTIES

[§8.2.6] INCONSISTENT ORDERS

[§8.2.7] JUDICIAL COUNCIL FORMS

[§8.2.8] KEY PROVISIONS OF THE ELDER AND DEPENDENT ADULT EMERGENCY PROTECTIVE ORDER

[§8.3] ELDER ABUSE RESTRAINING ORDERS

[§8.3.1] HISTORICAL OVERVIEW

[§8.3.2] CRAFTING EFFECTIVE ORDERS

[§8.3.3] WHO CAN SEEK AN ELDER ABUSE RESTRAINING ORDER

[§8.3.4] AVAILABLE ORDERS

[§8.3.5] SHOWING FOR EARO

[§8.3.6] TEMPORARY RESTRAINING ORDERS

[§8.3.7] ORDERS AFTER HEARING; DURATION

[§8.3.8] TERMINATION OR MODIFICATION OF AN EARO

[§8.3.9] FIREARMS AND AMMUNITION PROHIBITIONS

[§8.3.10] CRIMES

[§8.3.11] RIGHT TO SUPPORT PERSON FOR PARTY ALLEGING ABUSE

[§8.3.12] SERVICE AND NOTICE

[§8.3.13] COURT DUTIES UPON ISSUANCE

[§8.3.14 LAW ENFORCEMENT RESPONSIBILITIES

[§8.3.15] FEES AND COSTS

[§8.3.16] JUDICIAL COUNCIL FORMS RELATED TO THE EARO

[§8.3.17] KEY PROVISIONS OF THE ELDER AND DEPENDENT ADULT ABUSE RESTRAINING ORDER

[§8.4] COMPARING RELIEF THAT CAN BE ORDERED UNDER THE EARO, THE DOMESTIC VIOLENCE PREVENTION ACT ORDER (DVPA), AND THE NON HARASSMENT ORDER (CCP §527.6)

[§8.4.1] CHART COMPARING KEY PROVISIONS

[§8.4.2] COMPARING SPECIFIC ORDERS THAT CAN BE ISSUED UNDER EARO, DVPA, AND NON HARASSMENT ORDERS

[§8.5] LIMITATIONS OF ORDERS TO PROTECT ELDER AND DEPENDENT ADULTS

[§8.1] OVERVIEW

Elder abuse victims may seek and be protected by a variety of orders. In the previous chapter criminal protective orders were discussed. This chapter will focus on civil court orders that can be sought by the elder abuse victim or by others on the older person's behalf. These orders vary as to who can seek the order, the relationship between the petitioner and respondent, the nature of the conduct that gives rise to the order, and the relief available under the order.

Because the dynamics of elder abuse cases are unique, courts may need to consider special provisions when making orders in these cases. Some considerations for crafting effective orders include:

- "Protecting the abused person (encouraging or helping him or her to prepare a safety plan, issuing restraining orders);
- Protecting the abused person's assets…;
- Maintaining the independence of the abused person;
- Maintaining the relationship between the victim and the abuser, if desired and appropriate (may involve ordering counseling or visitation);
- Linking the abused person to appropriate services (APS, aging network, domestic violence program or shelter, victim assistance program, or other community services);
- Protecting other individuals from the abuser; and
- Making the victim whole (restitution and return of property)."

Judicial Council of California/Administrative Office of the Courts, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation* (2008) pp. 60-61. For an extensive discussion of all civil court orders that may arise in a domestic violence context please refer to the *Judges Guide to Domestic Violence Cases: California Protective Orders* (Cal CJER).

This chapter will highlight the emergency protective order for elder abuse and the elder abuse restraining order. It will contrast relief available under other types of orders, including Non Harassment and Domestic Violence Prevention Act orders.

[§8.2] EMERGENCY PROTECTIVE ORDERS FOR ELDER AND DEPENDENT ADULT ABUSE

Emergency protective orders are typically sought in general domestic violence or stalking cases. A judicial officer may also issue an ex parte emergency protective order (EPO) when a law enforcement officer asserts reasonable grounds to believe that an elder or dependent adult is in immediate and present danger of abuse. (Fam C §6250 (d)). Recently, Bay Area Rapid Transit (BART) Police have been added to those who can request a stalking EPO. Pen C §§646.91; 830.33(a).

[§8.2.1] GROUNDS FOR ISSUANCE

Abuse of an elder or a dependent adult is defined as "physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering"; or deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering".(Welf & I C §15610.07). The belief that the person is in an immediate and present danger must be based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought. Fam C §6250(d).

The EPO is only valid if issued by a judicial officer who makes the required findings at the specific request of a law enforcement officer. The order is enforced by a law enforcement officer. Included in the term "law enforcement officer" are police officers; sheriff's deputies; California Highway Patrol peace officers; University of California, State University, school district, and college peace officers; Department of Parks and Recreation peace officers; Los Angeles City Department of General Services peace officers; housing authority patrol officers; district attorney peace officers; and parole and probation officers. Fam C §6240.

For purposes of the EPO, an "elder" is a person residing in California aged 65 years or older. Welf & I C §15610.27). A "dependent adult" is someone between the ages of 18 and 64 years who resides in California and "who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age." "Dependent adult" also includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Welf & I C §15610.23.

Abuse for an elder or dependent adult abuse EPO includes "physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" or "the deprivation by a care custodian of goods or services necessary to avoid physical harm or mental suffering." Welf & I C §15610.07.

Although "abuse" under the Welf & I C §15610.07 includes financial abuse, an EPO may not be based solely on an allegation of financial abuse. Fam C §6250(d). Some other conduct included in Welf & I C §15610.07 must have also occurred. (Please refer to Section 8.2.1 for definitions of forms of abuse under §15610.07).

The issuing judicial officer must find both that the elder or dependent adult is in immediate and present danger of abuse (other than financial abuse) and the EPO is necessary to prevent the occurrence or recurrence of elder or dependent adult abuse. Fam C §6251. The EPO may be issued even if the endangered person has left the household to avoid abuse. Fam C §6254.

[§8.2.2] ORDERS THAT MAY BE INCLUDED

The EPO may include a protective order under Fam C §6218 or an order authorized by Welf & I C §15657.03. Fam C §6252. Fam C §6218 includes orders described in §6320 enjoining specific acts of abuse; orders described in §6321 excluding a person from a dwelling; and orders described in §6322 enjoining other specified behavior.

Pursuant to Fam C §6321(b), the court can order a party to immediately move out of the residence shared by the parties, regardless of which party holds legal or equitable title or is the lessee of the dwelling, if it finds all three of these conditions exist:

"(1) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.

(2) That the party to be excluded has assaulted or threatens to assault the other party or any other person under the care, custody, and control of the other party, or any minor child of the parties or of the other party.

(3) That physical or emotional harm would otherwise result to the other party, to any person under the care, custody, and control of the other party, or to any minor child of the parties or of the other party."

Welf & I C §15657.03 includes orders enjoining a party from "abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of, the petitioner, and, in the discretion of the court, on a showing of good cause, of other named family or household members or a conservator, if any, of the petitioner"; orders "excluding a party from the petitioner's residence or dwelling, except that this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner"; and orders enjoining a party from specified behavior that is necessary to effectuate orders already described.

Absent good cause, the court shall prohibit the enjoined party from taking any action to obtain the address or location of a protected party or a protected party's family members or caretakers. Fam C §6252.5(a).

The court shall order the restrained party to relinquish all firearms and to not possess, purchase, receive or attempt to receive firearms or ammunition for the duration of the order. Pen C § 29830; Fam C Pen C §6389(a) and (c)(1).

[§8.2.3] WHAT MUST BE INCLUDED

Pursuant to Fam C §6253, the elder abuse EPO must include:

"(a) A statement of the grounds asserted for the order.

(b) The date and time the order expires.

(c) The address of the superior court for the district or county in which the endangered person … resides.

(d) The following statements, which shall be printed in English and Spanish:

(1) 'To the Protected Person: This order will last only until the date and time noted above. If you wish to seek continuing protection, you will have to apply for an order from the court, at the address noted above. You may seek the advice of an attorney as to any matter connected with your application for any future court orders. The attorney should be consulted promptly so that the attorney may assist you in making your application.'

(2) 'To the Restrained Person: This order will last until the date and time noted above. The protected party may, however, obtain a more permanent restraining order from the court. You may seek the advice of an attorney as to any matter connected with the application. The attorney should be consulted promptly so that the attorney may assist you in responding to the application.'"

[§8.2.4] DURATION AND VIOLATIONS

The EPO is valid for five court days following the date of issuance or seven calendar days following the date of issuance, whichever is earlier. Fam C §6256.

A violation of a term or condition of an elder or dependent adult abuse EPO is punishable under Pen C §273.6. A violation of the firearm prohibition is punishable under Pen C §29825; a violation of the ammunition prohibition is punishable under Pen C §30305(a).

Officers shall use every reasonable means to enforce an EPO. Fam C §6272(a). The order remains in effect notwithstanding the actions of the protected party. Pen C §13710(b).

[§8.2.5] LAW ENFORCEMENT DUTIES

"A law enforcement officer who responds to a situation in which the officer believes that there may be grounds for the issuance of an emergency protective order …, shall inform the person for whom an emergency protective order may be sought, … that he or she may request the officer to request an emergency protective order …." Fam C §6275(a). "[A]n officer shall request an emergency protective order if the officer believes that the person requesting an emergency protective order is in immediate and present danger." Fam C §6275(b).

Law enforcement must reduce the order to writing (Fam C §6270); make reasonable efforts to locate and serve the restrained party (Fam C §6271(a)); give the protected party a copy of the order (Fam C §6271(b)); and file a copy of the order with the court as soon as practicable after issuance (Fam C §6271(c)). Officers no longer must carry copies of orders they have requested. Instead, the officer must have the order entered into the state computer database system for protective and restraining orders. Fam C §6271(d).

Once issued, the EPO shall be transmitted within one business day to the Department of Justice for entry into the California Law Enforcement Telecommunications System (CLETS). Fam C §6380(d)(1).

[§8.2.6] INCONSISTENT ORDERS

If there are multiple orders with inconsistent provisions, the following rules govern enforcement:

- If there is an EPO that takes precedence in enforcement pursuant to Pen C §136.2 (1), and any other order, the officer shall enforce the EPO as to any inconsistency.

- If there is no EPO which takes precedence pursuant to Pen C §136.2 (1) and one of the orders issued is a no-contact order as described in Fam C § 6320, the officer shall enforce the no-contact order.

- If there is no EPO and no no-contact order and multiple inconsistent civil orders, the officer shall enforce the order issued last.

- If there is no EPO and no no-contact order and multiple inconsistent civil and criminal orders issued regarding the same parties, the officer shall enforce the criminal order issued last. (Fam C §6383(h)(2)).

[§8.2.7] JUDICIAL COUNCIL FORMS

The EPO form, EPO-001, most recently updated January 1, 2013, is available at http://www.courts.ca.gov/documents/epo001.pdf. The form is also available in Chinese (EPO-001C); Korean (EPO-001K); Spanish (EPO-100S); and Vietnamese (EPO-001V).

[§8.2.8] KEY PROVISIONS OF THE ELDER AND DEPENDENT ADULT EMERGENCY PROTECTIVE ORDER

Who Can Request	Peace officer.
Who Can Be Protected	Elder or dependent adult as defined in Welf & I C §15610.07.
Conduct to Justify Order	Immediate and present danger of elder or dependent adult abuse based on an allegation of a recent incident of abuse or threat of abuse by the party sought to be restrained. An EPO may not be based solely on an allegation of financial abuse.
Standard of Proof	Reasonable grounds to believe that an elder or dependent adult is in an immediate and present danger of abuse and the EPO is necessary to prevent the occurrence or reoccurrence of abuse.
Duration of Order	Close of judicial business on the fifth court day following the day of issuance or the seventh calendar day following the day of issuance, whichever is sooner.
Exclusion from Residence	Permitted unless the restrained party holds legal or equitable title to, or lease of, the residence, or the dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the protected party.
Firearms and Ammunition Prohibitions	Required if EPO for elder or dependent adult abuse is issued.
Service	The law enforcement officer who obtains the order shall serve the restrained party if that person can reasonably be located. The order can be served by any law enforcement officer.
Criminal Violations	Violation of order: Penal Code §273.6 Violation of firearms provisions: Penal Code §29825 Violation of ammunition provisions: Penal Code §30305(a)

[§8.3] ELDER ABUSE RESTRAINING ORDERS

[§8.3.1] HISTORICAL OVERVIEW

The Elder Abuse Restraining Order (EARO) was created following the decision in *O'Kane v Irvine* (1996) 47 CA4th 207, 54 CR2d 549. In that case, the parties were previously unacquainted sub-lessees living in different areas of the residence. They shared common areas of the residence but did not have a romantic or friendly relationship. Following an altercation O'Kane sought and obtained a Domestic Violence Prevention Act

(DVPA) restraining order. Irvine appealed alleging their relationship did not meet the definition of "cohabitant." The appellate court agreed, finding that the word 'household' under the DVPA refers to "a collection of persons, whether related or not, who live together as a group or unit of permanent or domestic character, with one head, under one roof or within a common curtilage, who direct their attention toward a common goal consisting of their mutual interests. [Citation omitted.]" 47 CA4th at 212.

The Legislature in creating the EARO sought to address abuse occurring in the context of shared residences with no other relationship that would qualify for relief under the DVPA. As originally enacted it created limited relief for elders and dependent adults. While the relief under the EARO has been expanded, differences in available relief under the EARO, DVPA, and non-harassment statutes remain. These will be highlighted below. (See Section 8.3.2.)

The remedies provided by the EARO are not exclusive so petitioners can also use other civil remedies. Welf & I C §15657.03(v).

[§8.3.2] CRAFTING EFFECTIVE ORDERS

When crafting an effective order the court should consider the dynamics often present in elder and dependent adult abuse situations. Most situations in which a party seeks a protective order involve families which may have a history of difficult interpersonal dynamics. There may a history of domestic violence or the abuser may be a family member such as a child or grandchild. The abuser may have a history of emotional or mental health problems, untreated substance abuse, chronic unemployment or underemployment, or be dependent on the petitioner for food, clothing, shelter and money. The abuser may face real or perceived homelessness if removed from the petitioner's home or life, even temporarily.

The person seeking protection may be dependent on the abuser to meet physical care needs, to provide companionship, or to drive the petitioner to appointments and social, religious, or cultural activities. The abuser may take advantage of those needs to make the petitioner believe that if the abuser is removed from the petitioner's life that his or her only option is much worse than the abuse.

Even when the petitioner does not rely on the abuser there may be strong emotional ties between the parties. The petitioner may see the abuser as a child, recalling the years spent raising that person. Other family members may put pressure on the petitioner to discourage following through with the court process or specific orders the court may have already made. In some cases the petitioner is justifiably afraid of the abuser and what the abuser will do if the petitioner follows through with the court process or insists on compliance with an order.

In light of these dynamics, the court may want to consider some of these options when crafting EAROs:

- Use of telephonic hearings to reduce the inconvenience to older adults with disabilities of traveling to court and the opportunity for in-court confrontations between petitioner and an abuser;
- Crafting orders that prohibit contact until the restrained party has participated in a substance abuse or mental health counseling program;
- Requiring that contact between the petitioner and restrained party be limited to certain dates and times, occur in public places, and be supervised by a responsible third party;
- Requiring that a certain amount of restitution or return of property be made before permitting any contact between the protected party and respondent; and
- Scheduling review hearings in which proof of respondent's participation and progress in any necessary programs is provided.

The court should exercise caution in obtaining information directly from the protected party in open court if that process will increase danger or discourage the protected party from speaking candidly to the court.

[§8.3.3] WHO CAN SEEK AN ELDER ABUSE RESTRAINING ORDER

The EARO may be sought by an elder or dependent adult who has suffered abuse. In addition, the action may be brought on behalf of an abused elder or dependent adult by a conservator, a trustee, an attorney-in-fact who acts within the authority of the power of attorney, a person appointed as a guardian ad litem, or other person legally authorized to seek such relief. Welf & I C §15657.03(a)(2).

Effective July 1, 2016, adult protective services (APS) agencies may also apply for an EARO. Welf & I C §15657.03(a)(3)(A). APS may petition if:

- The elder or dependent adult has provided written authorization to a county adult protective services agency to act on his or her behalf; or
- The elder or dependent adult has suffered abuse and has an impaired ability to appreciate and understand the circumstances that place him or her at risk of harm. Welf & I C §15657.03(a)(3)(A)(i), (ii).

If APS seeks the petition on behalf of a person who has an impaired ability to appreciate and understand the circumstances that place him or her at risk of harm, a referral shall be made to the public guardian prior to or concurrent with the filing of the petition, unless a petition for appointment of a conservator has already been filed with the probate court by the public guardian or another party. Welf & I C §15657.03(B)

The term "conservator" includes "the legally appointed conservator of the person or estate of the petitioner, or both." Welf & I C §15657.03(b)(2).

The term "petitioner" "means the elder or dependent adult to be protected by the protective orders and, if the court grants the petition, the protected person." Welf & I C §15657.03(b)(3).

An “elder” is a person aged 65 years or older residing in California. Welf & I C §15610.27.

A “dependent adult” is someone “between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age. ‘Dependent adult’ also includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility,” as defined in Health & S C §§1250, 1250.2, and 1250.3. Welf & I C §15610.23.

An adult protective services agency that petitions for an EARO shall be subject to any confidentiality restrictions that otherwise apply to its activities under law and shall disclose only those facts as necessary to establish reasonable cause for the filing of the petition and to establish the agency’s belief that the elder or dependent adult has suffered abuse and has an impaired ability to appreciate and understand the circumstances that place him or her at risk, and as may be requested by the court in determining whether to issue an order under this section.

Upon the filing of a petition for a protective order, the elder or dependent adult on whose behalf the petition has been filed shall receive a copy of the petition, a notice of the hearing, and any declarations submitted in support of the petition. The elder or dependent adult shall receive this information at least five days before the hearing. The court may, on motion of the petitioner or on its own motion, shorten the time for provision of this information to the elder or dependent adult.

APS shall make reasonable efforts to assist the elder or dependent adult to attend the hearing and provide testimony to the court, if he or she wishes to do so. If the elder or dependent adult does not attend the hearing, the agency shall provide information to the court at the hearing regarding the reasons why the elder or dependent adult is not in attendance.

APS shall take all reasonable steps to provide for the safety of the elder or dependent adult upon filing of a petition for a protective order and upon issuance of an order granting the petition, which may include, but is not limited to, facilitating the location of alternative accommodations for the elder or dependent adult, if needed.

“Abuse of an elder or a dependent adult” includes “physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering” as well as the “deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.” Welf & I C §15610.07.

The following chart provides definitions for types of abuse referenced in Welf & I C §15657.03, the EARO.

Form	California Welfare and Institutions Code Definition and Code Section
Abandonment	The "desertion or willful forsaking of an elder … by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody." §15610.05
Abduction	Removal from California and restraint from returning to CA, or restraint from returning to CA, of an elder without capacity to consent thereto, as well as removal from CA or restraint from returning to CA, of a conservatee without consent of the court or conservator. §15610.06
Care Custodian	An "administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff: (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code. (b) Clinics. (c) Home health agencies. (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services. (e) Adult day health care centers and adult day care. (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders. (g) Independent living centers. (h) Camps. (i) Alzheimer's Disease day care resource centers." (j) Community care facilities and residential care facilities for the elderly. "(k) Respite care facilities. (l) Foster homes. (m) Vocational rehabilitation facilities and work activity centers. (n) designated area agencies on aging. (o) Regional centers for persons with developmental disabilities. (p) State Department of Social Services and State Department of Health Services licensing divisions. (q) County welfare departments. (r) Offices of patients' rights advocates and clients' rights advocates, including attorneys. (s) The office of the long-term care ombudsman. (t) Offices of public conservators, public guardians, and court investigators. (u) Any protection or advocacy agency or entity designated by the Governor to fulfill the requirements and assurances of" "The federal Developmental Disabilities Assistance and Bill of Rights Act of 2000" or "The Protection and Advocacy for the Mentally Ill Individuals Act of 1986". "(v) Humane societies and animal control agencies. (w) Fire departments. (x) Offices of environmental health and building code enforcement. and (y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." §15610.17
Financial Abuse	Occurs when any person or entity "takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with intent to defraud, or both"; or "assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder for a wrongful use or with intent to defraud, or both"; or who/that accomplishes these acts by undue influence, as defined in Welf & I C §15610.70. §15610.30
Neglect (Caregiver)	"The negligent failure of any person having the care or custody of an elder or dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." §15610.57(a)(1)

Physical Abuse	Assault (Pen C §240); Battery (Pen C §242); Assault with a deadly weapon or force likely to produce great bodily injury (Pen C §245); or "unreasonable physical constraint, or prolonged or continual deprivation of food or water". Sexual assault, meaning Sexual battery (Pen C §243.4); Rape (Pen C §261); Rape in concert (Pen C §264.1); Spousal rape (Pen C §262); Incest (Pen C §285); Sodomy (Pen C §286); Oral copulation (Pen C §288a); Sexual penetration (Pen C §289); or Lewd or lascivious acts (Pen C §288(b)(2)). Use of a physical or chemical restraint or psychotropic medication for punishment, for longer than the medication was ordered by a California physician and surgeon providing medical care to the elder at the time the instructions were given, or for any unauthorized purpose. §15610.63
Psychological/ Emotional	"'Mental suffering' means fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult." §15610.53
Isolation	"(1) Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls. (2) Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons. (3) False imprisonment, as defined in [Pen C §236]. (4) Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors." There is a rebuttable presumption the acts do not meet the definition if performed pursuant to the instructions of a licensed California physician or surgeon who is caring for the elder or dependent adult when the instructions are given and as part of the medical care. If the acts are "performed in response to a reasonably perceived threat of danger to property or physical safety", they shall not meet the definition. §15610.43
"Goods and services necessary to avoid physical harm or mental suffering"	Includes, but is not limited to, all of the following: the "provision of medical care for physical and mental health needs; [a]ssistance in personal hygiene; [a]dequate clothing; [a]dequately heated and ventilated shelter; [p]rotection from health and safety hazards; [p]rotection from malnutrition, under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment; [and t]ransportation and assistance necessary to secure any of the[se] needs". §15610.35

The order may protect the elder or dependent adult and with good cause, named household and family members and a conservator. Welf & I C §15657.03(b)(3)(A).

The petitioner must submit a Confidential CLETS Information form with any petition for an Elder and Dependent Adult Abuse protective order (as well as any non harassment order or Domestic Violence Prevention Act order petitions). California Rules of Court, rule 1.51(a). The Confidential CLETS Information form must be kept confidential, and access to the information on the form is limited to authorized court staff and law enforcement and other personnel authorized by the State Department of Justice to transmit or receive CLETS information. California Rules of Court, rule 1.51(b). The form must not be included in the court file. California Rules of Court, rule 1.51(c). The Judicial Council form is CLETS-001.

[§8.3.4] AVAILABLE ORDERS

The court can issue the following restraining orders ex parte, after notice and hearing, or in a judgment:

"(A) An order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of, the petitioner, and, in the discretion of the court, on a showing of good cause, of other named family or household members or a conservator, if any, of the petitioner. On a showing of good cause, in an order issued pursuant to this subparagraph in connection with an animal owned, possessed, leased, kept, or held by the petitioner, or residing in the residence or household of the petitioner, the court may do either or both of the following:

(i) Grant the petitioner exclusive care, possession, or control of the animal.

(ii) Order the respondent to stay away from the animal and refrain from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

(B) An order excluding a party from the petitioner's residence or dwelling, except that this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner.

(C) An order enjoining a party from specified behavior that the court determines is necessary to effectuate orders described in subparagraph (A) or (B)."

Welf & I C §15657.03(b)(4).

After notice and hearing, the court is authorized to issue "an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner." Welf & I C §15657.03(h).

In addition, the court shall order that any party enjoined pursuant to §15657.03 "be prohibited from taking any action to obtain the address or location of any protected person, unless there is good cause not to make that order." Welf & I C §15657.04.

Note: Judicial Council form EA-110 (EARO TRO) includes this provision in paragraph 5(a)(3) and EA-130 (EARO Restraining Order) includes this provision in paragraph 6(a)(3). The TRO form is available at http://www.courts.ca.gov/documents/ea110.pdf. The Restraining Order form is available at http://www.courts.ca.gov/documents/ea130.pdf. Use of these forms is mandatory. Welf & I C §15657.03(y).

[§8.3.5] SHOWING FOR EARO

An order may be issued "with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if a declaration shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult." Welf & I C §15657.03(c).

The order may issue on the basis of past abuse. There is no requirement that evidence establish that the abuse will continue or be repeated in the future. *Gdowski v Gdowski* (2009) 175 CA4th 128, 95 CR3d 799.

The standard of proof for establishing past acts of abuse is preponderance of evidence. *Bookout v Nielsen* (2007) 155 CA4th 1131, 67 CR3d 2.

[§8.3.6] TEMPORARY RESTRAINING ORDERS

A temporary restraining order (TRO) may be granted in accordance with CCP §527 (except to the extent Welf & I C §15657.03provides a rule that is inconsistent). §527(c) provides:

> "No temporary restraining order shall be granted without notice to the opposing party, unless both of the following requirements are satisfied:
>
> (1) It appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice.
>
> (2) The applicant or the applicant's attorney certifies one of the following to the court under oath:
>
> (A) That within a reasonable time prior to the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made.

(B) That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them.

(C) That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney."

The TRO may include any of the protective orders described in Welf & I C §15657.03(b)(3). (See §8.3.4 above for descriptions of these orders.)

The court may only issue an ex parte order excluding a party from the petitioner's residence or dwelling upon a showing of all of the following:

"(1) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.

(2) That the party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of the petitioner, or a conservator of the petitioner.

(3) That physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or a conservator of the petitioner."

Welf & I C §15657.03(d).

"A request for the issuance of a temporary restraining order without notice under this section shall be granted or denied on the same day that the petition is submitted to the court, unless the petition is filed too late in the day to permit effective review, in which case the order shall be granted or denied on the next day of judicial business in sufficient time for the order to be filed that day with the clerk of the court." Welf & I C §15657.03(e).

"Within 21 days, or, if good cause appears to the court, 25 days, from the date that a request for a temporary restraining order is granted or denied, a hearing shall be held on the petition. If no request for temporary orders is made, the hearing shall be held within 21 days, or, if good cause appears to the court, 25 days, from the date that the petition is filed." Welf & I C §15657.03(f). "The respondent may file a response that explains or denies the alleged abuse." Welf & I C §15657.03(g).

Either party may be represented by private counsel, and each party may appear on their own behalf. Welf & I C §15657.03(p). Parties to an EARO may require accommodations, i.e., "actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities", such as "making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating

services or programs to accessible facilities; or providing services at alternative sites." California Rules of Court, rule 1.100(a)(3).

The request may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally and shall be forwarded to the court's access coordinator or designee no fewer than five court days before the requested implementation date. "The court may, in its discretion, waive this requirement."

The request must include a description of the accommodation sought and a statement of the impairment that necessitates the accommodation. All information, including medical information, and all oral or written communication from the applicant concerning the request, must be kept confidential, unless the applicant waives confidentiality in writing, or disclosure is required by law.

"The applicant's identity and confidential information may not be disclosed to the public or to persons other than those involved in the accommodation process." Cal Rules of Ct 1.100(c).

The respondent shall be entitled, as a matter of course, to one continuance, for a reasonable period, to respond to the petition. Welf & I C §15657.03(m).

[§8.3.7] ORDERS AFTER HEARING; DURATION

The Court may issue all orders that could be made under the TRO (see prior section), and after notice and hearing may issue "an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner." Welf & I C §15657.03(h).

The order after hearing may be issued for not more than five years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. Welf & I C §15657.03(i)(1). "[O]rders may be renewed upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. The request for renewal may be brought at any time within the three months before the expiration of the order." Welf & I C §15657.03(i)(1). If renewal is contested, the court "should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse." The evidence must demonstrate "it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable." *Ritchie v Konrad* (2004) 115 CA4th 1275, 1290, 10 CR3d 387 (analyzing the renewal of a domestic violence protective order).

An order issued without an expiration date is valid for three years from date of issuance. Welf & I C §15657.03(i)(2).

[§8.3.8] TERMINATION OR MODIFICATION OF AN EARO

If an action is filed to terminate or modify a protective order prior to the order's expiration date by a party *other than the protected party*, the protected party shall be given notice of the proceeding, pursuant to CCP §1005(b), by personal service or, if the protected party is part of the State Secretary of State's confidential address program (Govt Code §6205 et seq), by service on the Secretary of State. (Note: the confidential address program, called Safe at Home, is available to victims of domestic violence, stalking and sexual abuse who meet certain criteria. For more information see http://www.sos.ca.gov/safeathome/.)

If the protected party "cannot be notified prior to the hearing for modification or termination of the protective order, the court shall deny the motion to modify or terminate the order without prejudice or continue the hearing until the party who is protected can be properly noticed and may, upon a showing of good cause, specify another method for service of process that is reasonably designed to afford actual notice to the protected party." Welf & I C §15657.03(i)(3).

When considering an action to modify or terminate an order the court should be mindful of the dynamics and tactics of abusers and make rulings consistent with the paramount concern for victim safety. Considerations may include:

- Length of time the order has been in effect.
- The restrained party's compliance with the court's order.
- The restrained party's compliance with orders, including restitution and probation, issued by other courts.
- Intervening violations of the law.
- The protected party's reasons for concurring in the request or requesting that the order be continued, including efforts by the restrained party or others to convince the protected party to take that position.
- Whether the protected party has consulted with an advocate or trusted advisors.
- Whether granting the motion would place the protected party or his or her representatives, family members, or conservator in personal danger or would increase the potential for danger.

The protected party may waive the right to notice if physically present in court and if he or she does not challenge the sufficiency of the notice. Welf & I C §15657.03(i)(3).

[§8.3.9] FIREARMS AND AMMUNITION PROHIBITIONS

A restrained party under an EARO "shall not own, possess, purchase, receive, or attempt to receive a firearm or ammunition while the protective order is in effect." Welf & I C §15657.03(t)(1).

This prohibition does <u>not</u> apply if the protective order "was made solely on the basis of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse." Welf & I C §15657.03(t)(4).

The court shall order all persons subject to an EARO that is not based solely on financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse to relinquish any firearms they own or possess pursuant to CCP §527.9. Welf & I C §15657.03(t)(2).

"Every person who owns, possesses, purchases, or receives, or attempts to purchase or receive a firearm or ammunition while subject to a protective order issued under this section is punishable" under Pen C §§29825 and 30305(a). Welf & I C §15657.03(t)(3).

The court cannot remove the firearms prohibition when renewing the order. *Ritchie v Konrad, supra*, 115 CA4th at 1293-1300.

Relinquishment of firearms may be accomplished by relinquishing them to the local law enforcement agency, selling them to a licensed firearms dealer, or transferring them dealer for the duration of the prohibition if the prohibition on owning or possessing the firearm will expire on a date specified in a court order. Pen Co §29825. The court shall inform the restrained party that s/he may elect to have prohibited firearms transferred to a licensed firearms dealer. Pen C §29810. See *Judges Guide to Domestic Violence Cases* (Rev. 2014), *Firearms and Full Faith and Credit*.

Effective January 1, 2016, the following Gun Violence Restraining Orders are now available:

- Temporary Emergency Gun Violence Restraining Order (Pen C §18125 et seq)
  Ex parte Gun Violence Restraining Order (Pen C §18150 et seq)
- Gun Violence Restraining Order After Hearing (Pen C §18170 et seq)

The Temporary Emergency Gun Violence Restraining Order must be requested by a law enforcement officer and requires an assertion that there is reasonable cause to believe (1) the subject of the petition poses an immediate and present danger of causing personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm; **and** (2) A Temporary Emergency Gun Violence Restraining Order is necessary to prevent personal injury to the subject of the petition or another because less restrictive alternatives either have been tried and found to be ineffective or have been determined to be inadequate or inappropriate for the circumstances of the subject of the petition. The order prohibits the restrained person from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition, and expires 21 days from the date the order is issued. The applicable Judicial Council form is Firearms Emergency Protective Order, form EPO-002.

The Ex Parte Gun Violence Restraining Order may be requested by an immediate family member of the person to be restrained or a law enforcement officer. "Immediate family member" includes a spouse or domestic partner; the subject's parents, children, siblings, grandparents, grandchildren, and their spouses (including stepparents or step-grandparents); a spouse's parents, children, siblings, grandparents, and grandchildren; and

a household member who regularly resides with the subject or has resided with the subject within the last six months. The showing is the same as for the emergency order. The court shall hold a hearing within 21 days after the date of the ex parte restraining order to determine if a Gun Violence Restraining Order should be issued. (Pen C §18165). The Judicial Council form for the order is Temporary Firearms Restraining Order, form GV-110.

In determining whether grounds for a Gun Violence Restraining Order exist, the court shall consider all evidence of the following: a recent threat of violence or act of violence by the subject of the petition directed toward another; a recent threat of violence or act of violence by the subject of the petition directed toward himself or herself; a violation of an emergency protective order that is in effect at the time the court is considering the petition; a recent violation of an unexpired protective order (Family Law, non-harassment, elder abuse, dating violence, or criminal protective order); a conviction for any offense listed in Penal Code section 29805; a pattern of violent acts or violent threats within the past 12 months, including, but not limited to, threats of violence or acts of violence by the subject of the petition directed toward himself, herself, or another; and other evidence of an increased risk for violence (e.g., unlawful and reckless use, display, or brandishing of a firearm; history of use, attempted use, or threatened use of physical force against another person; prior felony arrests; history of violating an EPO or protective order; documentary evidence, such as police reports and records of convictions, of recent criminal offenses involving controlled substances or alcohol or ongoing abuse of controlled substances or alcohol; and evidence of recent acquisition of firearms, ammunition, or other deadly weapons, where *recent* means within six months). Pen C §18155.

At the hearing, the petitioner must prove <u>by clear and convincing evidence</u> that (1) the subject of the petition, or a person subject to an Ex Parte Gun Violence Restraining Order, poses a significant danger of personal injury to himself, herself, or another by having in his or her custody or control, owning, purchasing, possessing, or receiving a firearm or ammunition; and (2) a Gun Violence Restraining Order is necessary to prevent personal injury to the subject of the petition, or the person subject to an Ex Parte Gun Violence Restraining Order, as applicable, or another because less restrictive alternatives either have been tried and found to be ineffective, or are inadequate or inappropriate for the circumstances.

If the requisite proof is shown, the court shall issue a Gun Violence Restraining Order prohibiting the subject of the petition from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition. If the court finds that there is not clear and convincing evidence to support the issuance of a Gun Violence Restraining Order, the court shall dissolve any Temporary Emergency or Ex Parte Gun Violence Restraining Order then in effect.

The Gun Violence Restraining Order After Hearing is valid for one year and may be renewed in the final 90 days of the order's validity. (Pen C §§18170, 18190). The order

is subject to termination by further order of the court at a hearing. (Pen C §18175). The Judicial Council order form is Firearms Restraining Order After Hearing, form GV-130.

All three orders require that the court prohibit the respondent from having in his or her custody or control, owning, purchasing, possessing, or receiving, or attempting to purchase or receive, a firearm or ammunition, and that the respondent relinquish all firearms and ammunition. Violations of these provisions are punishable as misdemeanors under Pen C §18205.

With these orders, the court is limited to orders regarding firearms and ammunition. Requests for no-contact, stay-away, and personal conduct provisions must be separately considered under a different type of order.

For more information, please visit the Judicial Council public website at www.courts.ca.gov/documents/gv100.pdf; www.courts.ca.gov/documents/gv100info.pdf.

[§8.3.10] CRIMES

Violations of orders to relinquish firearms and not possess firearms or ammunition are described in §8.3.9.

In addition, any willful disobedience of any EARO temporary restraining order or restraining order after hearing is punishable pursuant to Pen C §273.6. Welf & I C §15657.03(u).

Pursuant to Pen C§836(c) (1) an officer shall make a warrantless arrest for violating an EARO without a citizen's or private person's arrest and even if the violation is not in the officer's presence when:

1. The officer has probable cause to believe that the defendant has notice of the order; and
2. The defendant has violated a term or condition of the order.

[§8.3.11] RIGHT TO SUPPORT PERSON FOR PARTY ALLEGING ABUSE

A support person may accompany in court a party who alleges he or she is a victim of abuse "and, if the party is not represented by an attorney, may sit with the party at the table that is generally reserved for the party and the party's attorney. The support person is present to provide moral and emotional support" and may assist a person who alleges being a victim of abuse "in feeling more confident that he or she will not be injured or threatened by the other party during the proceedings if [both parties] are required to be in close proximity." Welf & I C §15657.03(j).

The support person may not act as a legal adviser or provide legal advice. The court may exercise "its discretion to remove the support person from the courtroom if the court believes the support person is prompting, swaying, or influencing the party assisted by the support person. Welf & I C §15657.03(j).

[§8.3.12] SERVICE AND NOTICE

A "respondent shall be personally served with a copy of the petition, notice of the hearing or order to show cause, temporary restraining order, if any, and any declarations in support of the petition. Service shall be made at least five days before the hearing. The court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent." Welf & I C §15657.03(k); see also California Rules of Court, rule 3.1152.

A notice of hearing shall notify the respondent that if respondent does not attend the hearing, the court may make orders against respondent valid for up to five years. Welf & I C §15657.03(l).

Upon the filing of a declaration by petitioner that the respondent could not be served within the time required by statute, the court may reissue the order previously issued. The reissued order shall remain in effect until the hearing date. Welf & I C §15657.03(m)(1). "The reissued order shall state on its face the date of expiration". Welf & I C §15657.03(m)(2).

"If a respondent, named in an order … after a hearing, has not been served personally with the order but has received actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement of the order." Welf & I C §15657.03(n)(1).

"If the respondent named in a temporary restraining order is personally served with the order and notice of hearing" but "does not appear at the hearing, either personally or by an attorney, and the terms and conditions of the restraining order or protective order issued at the hearing are identical to the temporary restraining order, except for the duration of the order, then the restraining order or protective order issued at the hearing may be served on the respondent by first-class mail sent to the respondent" at the respondent's most current address that is available to the court. Welf & I C §15657.03(n)(2).

The Judicial Council form for elder and dependent adult abuse temporary orders shall contain a statement which substantially states:

> "If you have been personally served with a temporary restraining order and notice of hearing, but you do not appear at the hearing either in person or by a lawyer, and a restraining order that is the same as this temporary restraining order except for the expiration date is issued at the hearing, a copy of the order will be served on you by mail at the following address: ____.

> If that address is not correct or you wish to verify that the temporary restraining order was converted to a restraining order at the hearing without substantive change and to find out the duration of that order, contact the clerk of the court."

Welf & I C §§15657.03(n)(3). Note: Substantially similar language appears on the Elder Abuse TRO form (EA-110) under **Warnings and Notices to the Restrained Person,** "Notice Regarding Nonappearance at Hearing and Service of Order."

[§8.3.13] COURT DUTIES UPON ISSUANCE

Orders must be entered into the state law enforcement computer system, California Law Enforcement Telecommunications System (CLETS). Welf & I C §15657.03(o)(1); Fam C §6380.

Information on any protective order relating to elder or dependent adult abuse issued by a court shall be transmitted to the Department of Justice by:

> Ordering "the petitioner or the attorney for the petitioner to deliver a copy of an order … or a reissuance, extension, modification, or termination of the order, and any subsequent proof of service, by the close of the business day on which the order, reissuance, extension, modification, or termination was made, to each law enforcement agency having jurisdiction over the residence of the petitioner, and to any additional law enforcement agencies within the court's discretion as are requested by the petitioner"; or
>
> "[T]he court or its designee shall transmit, within one business day, to law enforcement personnel all information required under [Fam C §6380(b)] regarding any order issued under this section, or a reissuance, extension, modification, or termination of the order, and any subsequent proof of service, by either … [t]ransmitting a physical copy of the order or proof of service to a local law enforcement agency authorized by the Department of Justice to enter orders into the California Law Enforcement Telecommunications System (CLETS)"; or "[w]ith the approval of the Department of Justice, entering the order or proof of service into CLETS directly."

Welf I & C §15657.03(o)(2-3)

[§8.3.14 LAW ENFORCEMENT RESPONSIBILITIES

If the order relates to domestic violence, the order remains in effect notwithstanding the actions of the protected party. Pen C §13710(b). Even if the protected party initiates contact with the restrained party, the order remains in effect and fully enforceable.

Law enforcement agencies "shall make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported abuse." Welf & I C §15657.03(o)(4).

On request of petitioner, law enforcement officers shall serve unserved orders on the respondent, whether or not the respondent has been taken into custody, when present at the scene of reported abuse involving the parties to the proceeding. Welf & I C §15657.03(o)(5).

"The petitioner shall provide the officer with an endorsed copy of the order and a proof of service, which the officer shall complete and send to the issuing court." Welf & I C §15657.03(o)(5). If an officer receives information at the scene of an incident of abuse that a protective order has been issued but not served, or is informed that a person who has been taken into custody is the respondent to an unserved order, "if the protected person cannot produce an endorsed copy of the order, a law enforcement officer shall immediately attempt to verify the existence of the order." Welf & I C §15657.03(o)(6).

If a "law enforcement officer determines that a protective order has been issued, but not served, the officer shall immediately notify the respondent of the terms of the order and where a written copy of the order can be obtained, and the officer shall at that time also enforce the order." Welf & I C §15657.03(o)(7).

A "law enforcement officer's verbal notice of the terms of the order shall constitute service of the order and is sufficient notice for the purposes of this section and for the purposes of" Pen C §273.6 (criminal violation of the order). Welf & I C §15657.03(o)(7).

[§8.3.15] FEES AND COSTS

"There is no filing fee for a petition, response, or paper seeking the reissuance, modification, or enforcement of a protective order" filed in an EARO proceeding. Welf & I C §15657.03(q).

A "petitioner shall not be required to pay a fee for law enforcement to serve an order issued under this section." Welf & I C §15657.03(r); see also Govt C § 6103.2(b)(4).

The prevailing party may be awarded court costs and attorney's fees. Welf & I C §15657.03(s). "The award of attorney's fees … shall be based on factors related to the value of the services rendered, including, but not limited to, the factors" listed in the State Bar Rules of Professional Conduct, rule 4-200, "and all of the following:

a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained.
b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability.

c) The reasonableness and timeliness of any written offer in compromise made by a party to the action."

Welf & I C §15657.1. Rule 4-200 includes considerations such as the fee in proportion to the value of services, the novelty and difficulty of the legal issues, the skills required to provide competent services, the amount of the fees and the results obtained, time limitations, and the time and labor required.

[§8.3.16] JUDICIAL COUNCIL FORMS RELATED TO THE EARO

The following forms created by the Judicial Council apply to the EARO:

Form Number	Title
CLETS-001	Confidential CLETS Information (Completed by party seeking protection. Not to be placed in the court file.)
EA-100	Request for Elder or Dependent Adult Abuse Restraining Orders (Elder or Dependent Adult Abuse Prevention)
EA-100-INFO	Can a Restraining Order To Prevent Elder or Dependent Adult Abuse Help Me?
EA-109	Notice of Court Hearing
EA-110	Temporary Restraining Order (CLETS-TEA or TEF) (Elder or Dependent Adult Abuse Protection)
EA-115	Request to Continue Court Hearing and to Reissue Temporary Restraining Order (CLETS-TEA or TEF)
EA-116	Notice of New Hearing Date and Order on Reissuance
EA-120	Response to Request for Elder or Dependent Adult Abuse Restraining Orders
EA-120-INFO	How Can I Respond to a Request for Elder or Dependent Adult Abuse Restraining Orders?
EA-130	Elder or Dependent Adult Abuse Restraining Order After Hearing (CLETS-EAR or EAF) (Elder or Dependent Adult Abuse Prevention)
EA-200	Proof of Personal Service
EA-200-INFO	What is "Proof of Personal Service"?
EA-250	Proof of Service of Response by Mail
EA-260	Proof of Service of Order After Hearing By Mail
EA-700	Request to Renew Restraining Order
EA-710	Notice of Hearing to Renew Restraining Order
EA-720	Response to Request to Renew Restraining Order
EA-730	Order Renewing Elder or Dependent Adult Abuse Restraining Order
EA-800	Proof of Firearms Turned In or Sold
EA-800-INFO	How Do I Turn In or Sell My Firearms?

[§8.3.17] KEY PROVISIONS OF THE ELDER AND DEPENDENT ADULT ABUSE RESTRAINING ORDER

Who Can Seek	Elder or dependent adult, conservator, trustee, GAL, attorney in fact when authorized by POA, or other authorized person. Effective July 1, 2016, APS can also petition for this order.
Who Can Be Protected	Elder, dependent adult, family or household members, conservator.
Conduct to Justify Order	Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, treatment with resulting physical harm, pain, or mental suffering, care custodian's deprivation of goods or services necessary to avoid physical harm or mental suffering.
Level of Proof	TRO: Reasonable proof of past abuse. OAH/Injunction: Preponderance of the evidence.
Duration of TRO	21 days; 25 with good cause. Court may reissue if service not completed.
Finding for Exclusion From Residence in TRO	(1) The party who will stay in the dwelling has a right under color of law to possession of the premises; (2) The party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of petitioner, or a conservator of the petitioner; and (3) Physical or emotional harm would otherwise result to petitioner, other named family or household member of the petitioner, or petitioner's conservator. Exclusion from home on TRO requires physical abuse or threat of physical abuse.
Duration of Final Order	Not more than 5 years. If no expiration date appears on the order, the order is valid for 3 years.
Renewal of Order	On request of a party, either for 5 years or permanently, without a showing of any further abuse since the issuance of the original order. Request must be brought within 3 months of the expiration of the order.
Firearms and Ammunition Prohibitions	Restrained party is prohibited from owning, possessing, purchasing, receiving, or attempting to receive a firearm or ammunition while the protective order is in effect. No firearms prohibition if the protective order is made solely on the basis of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse.
Criminal Violations	Violation of firearms prohibitions: Pen C §29825 Violations of ammunition prohibition: Pen C §30305(a) Violations of the terms and conditions of the order: Pen C §273.6
Miscellaneous	Order must be entered into CLETS.

[§8.4] COMPARING RELIEF THAT CAN BE ORDERED UNDER THE EARO, THE DOMESTIC VIOLENCE PREVENTION ACT ORDER (DVPA), AND THE NON HARASSMENT ORDER (CCP §527.6)

A fuller discussion of protective orders is available in the *Judges Guide to Domestic Violence Cases, California Protective Orders, supra*, which can be downloaded from http://www2.courtinfo.ca.gov/protem/pubs/protective_orders.pdf.

[§8.4.1] CHART COMPARING KEY PROVISIONS

When originally enacted, the EARO legislation offered limited protections that in some instances were insufficient to fully protect an abuse victim. While the current protections have been expanded, there still may be situations where an elder or dependent adult may need to seek relief available only through more than a single type of order.

The selection of order is guided by the age or condition of the petitioner, relationship between the parties, type of abuse, need for residence exclusion, need for specific orders, and standard of proof.

In this section key aspects of the three types of orders will be compared and contrasted. In the next section authority to issue specific orders will be compared.

Type of Order	**EARO**	**DVPA**	**Non Harassment**
Authority	Welf & I C §15657.03	Fam C §6200 et seq	CCP §527.6
Who can seek	Elder or dependent adult, conservator, trustee, GAL, attorney in fact when authorized by POA, or other authorized person; APS (effective July 1, 2016)	Person who has suffered abuse by current or former spouse, current or former cohabitant, parent of a child in common, current or former dating or engaged party, child of a party or child subject to a paternity action, relationships through consanguinity and affinity within second degree	Petitioner who has suffered harassment. No relationship between parties required. Petitioner must be a person, not a corporation. CCP §527.6(a).
Conduct to give rise to relief	Physical abuse, neglect, financial abuse, abandonment,	"Abuse" which includes intentionally or recklessly causing	Petitioner has suffered harassment consisting of:

	isolation, abduction, treatment with resulting physical harm, pain, or mental suffering, care custodian's deprivation of goods or services necessary to avoid physical harm or mental suffering	or attempting to cause bodily injury to another, sexual assault, placing another person in fear of imminent serious bodily injury to that person or another; and behavior that has been or could be enjoined including molest, attack, strike, stalk, threaten, sexually assault, harass, telephone, destroy personal property, contact directly or indirectly, come within a specified distance, disturb the peace.	• Unlawful violence (assault, battery, or stalking, but not lawful self-defense or defense of others),\; or • Credible threat of violence (knowing & willful statement or course of conduct that would place a reasonable person in fear for self or immediate family, and serves no legitimate purpose); or • A knowing and willful course of conduct directed at specific person that seriously alarms, annoys, or harasses that person and serves no legitimate purpose and the conduct would cause a reasonable person to suffer substantial emotional distress, and actually caused petitioner to suffer substantial emotional distress. ("Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of

			purpose.) CCP §527.6(b)(1).
Who Can Be Protected	Elder, dependent adult, family or household members, conservator	Petitioner, family or household members	Petitioner and household members (CCP §527.6(c).)
Filing Fee	No filing fee for a petition, response, or paper seeking the reissuance, modification, or enforcement of an order (Welf & I C §15657.03(q)); no fee for law enforcement service of an order (Welf & I C §15657.03(r)).	No filing fee for a petition, response, or order to show cause seeking the issuance, reissuance, modification, or enforcement of an order (Fam C §6222); no fee for law enforcement service of an order (Govt C §6103.2(b)(4)).	No filing fee for petition that alleges that defendant has: 1) inflicted or threatened violence against petitioner or an employee; 2) stalked petitioner or an employee; or 3) acted or spoken in a manner that has placed petitioner or an employee in reasonable fear of violence. CCP §527.6(w). • No fee for answer responding to those allegations. CCP §527.6(w). No fee for service by sheriff if: 1) order based on stalking; or 2) order based on credible threat of violence resulting from threat of sexual assault. CCP §527.6(x)(1).
Issued Without Notice to Party to be Restrained	Court must find reasonable proof of a past act or acts of abuse.	Court must find reasonable proof of a past act or acts of abuse. Fam C §6300. Fam C §6320 includes non-violent conduct	Reasonable proof of harassment of petitioner by respondent and that great or irreparable harm would result to petitioner. CCP §527.6 (d). Notice

		as well as physical injury and assault.	to other party required unless: 1) irreparable harm will result before matter can be heard; and 2) within a reasonable time before the application the applicant informed the opposing party of the time and place where the application would be made; or applicant in good faith attempted to notify the opposing party but was unable to do so, or for reasons specified, the applicant should not be required to so inform the opposing party. CCP §527.6(c).
Standard of Proof	TRO: Reasonable proof of past abuse OAH: Preponderance of the evidence	TRO: Reasonable proof of past abuse OAH/Injunction: Preponderance of the evidence	TRO: Reasonable proof of harassment of petitioner by respondent and great or irreparable harm would result to petitioner. Injunction: Clear and convincing evidence that unlawful harassment exists.
Miscellaneous Orders	Welf & I C §15657.03(l): Notice of hearing shall notify respondent if s/he does not attend the hearing the court	Fam C §6302: Notice of hearing shall notify respondent if s/he does not attend the hearing the court may make orders	CCP §527.6(p)(2): If the respondent is personally served with the order and notice of hearing based on the TRO, but does not appear at the hearing, in person

	may make orders against him/her that could last up to 5 years.	against him/her that could last up to 5 years.	or by an attorney, and the terms and conditions of the order issued at the hearing are identical to the TRO, except for the duration of the order, the order issued at the hearing may be served on respondent by first-class mail sent to the respondent at the most current address available to the court.
Duration	TRO: 21 days, up to 25 with good cause. OA H: Not more than 5 years; if no expiration date on the order, order is valid for 3 years.	TRO: 21 days, up to 25 with good cause. OAH: Not more than 5 years for protective orders and firearms; custody and support orders continue to be in effect.	TRO: 21 days, up to 25 with good cause. OAH: Not more than 5 years. (CCP 527.6 (j)(1))If no expiration date on the order, order is valid for 3 years. CCP §527.6(j)(2).
Extension of the Order	On request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order brought within three months of the expiration of the order.	On request of a party, order can be made permanent without a showing of any further abuse since the issuance of the original order brought within three months of the expiration of the order.	On request of a party, order may be renewed for up to five more years without a showing of harassment since the issuance of the original order. The request for renewal may be brought within three months of the expiration of the order. CCP §527.6(j)(1).

Firearms and Ammunition Prohibitions	Not permitted if only allegation is financial abuse; mandatory for all other forms that respondent be prohibited from owning, possessing, purchasing, receiving or attempting to receive a firearm or ammunition while the order is in effect. Court shall order relinquishment of all firearms.	Mandatory that respondent be prohibited from owning, possessing, purchasing, receiving or attempting to receive a firearm or ammunition while the order is in effect. Court shall order relinquishment of all firearms.	Mandatory that respondent be prohibited from owning, possessing, purchasing, receiving or attempting to receive a firearm or ammunition while the order is in effect. Court shall order relinquishment of all firearms.
Right to a support person	A support person may accompany a party in court; if party is not represented by counsel, the support person may sit with the party at counsel table.	"A support person shall be permitted to accompany either party to any proceeding to obtain a protective order, as defined in Section 6218. Where the party is not represented by an attorney, the support person may sit with the party" at counsel table. Fam C §6303(b). A support person shall be permitted to accompany a party in court where there are allegations or threats of domestic violence. Fam C §6303(d).	If there is an allegation of unlawful violence or credible threats of violence, a support person may accompany a party in court. Where the party is not represented by an attorney, the support person may sit with the party at counsel table. CCP §527.6(l).
Residence Exclusion	Ex parte TRO excluding a party from the	Ex parte TRO excluding a party from the	Not Available

	petitioner's home requires a finding that: (1) the party who will stay in the dwelling has a right under color of law to possession of the premises; (2) the party to be excluded has assaulted or threatens to assault the petitioner, or any other person under the care, custody, and control of the other party, or any minor child of the parties or of the other party; and (3) physical or emotional harm would otherwise result to petitioner, to any person under the care, custody, and control of the other party, or to any minor child of the parties or of the other party.	petitioner's home requires a finding that: (1) the party who will stay in the dwelling has a right under color of law to possession of the premises; (2) the party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of petitioner, or a conservator of the petitioner; and (3) physical or emotional harm would otherwise result to petitioner, other named family or household member of the petitioner, or petitioner's conservator. Note: Exclusion from home on TRO requires physical abuse or threat of physical abuse.	
Violations	Violation of order: Pen C §273.6 Violation of firearms prohibition: Pen C §29825; Violations of ammunition prohibition: Pen C §30305(a)	Violation of order: Pen C §273.6 Violation of firearms prohibition: Pen C §29825; Violations of ammunition prohibition: Pen C §30305(a)	Violation of order: Pen C §273.6 Violation of firearms prohibition: Pen C §29825; Violations of ammunition prohibition: Pen C §30305(a)
Award of Court Costs and Attorney Fees	The prevailing party may be awarded court costs and attorney's fees.	If petitioner prevails and cannot afford to pay attorney's fees and	The prevailing party may be awarded court costs

	Welf & I C §15657.03(s)	costs, based on the parties' respective abilities to pay, the court shall order respondent to pay petitioner's costs and attorney's fees to commence and maintain the action. Fam C §6344(b).	and attorney's fees. CCP §527.6(r).
TRO and Order After Hearing Can Be Used to Support Notification to Landlord to Terminate Tenancy or for Landlord to Terminate a Tenancy (CC §1946.7; CCP §1161.3)	Yes	Yes	Yes if related to domestic violence, stalking, sexual assault, or elder or dependent adult abuse and human trafficking.

[§8.4.2] COMPARING SPECIFIC ORDERS THAT CAN BE ISSUED UNDER EARO, DVPA, AND NON HARASSMENT ORDERS

Terms and Conditions

Term or Condition	DVPA TRO	DVPA OAH	EARO TRO	EARO Order (Injunction)	CCP §527.6 TRO	CCP§ 527.6 Injunction
Personal Conduct	X	X	X	X	X	X
No contact, stay away	X	X	X	X	X	X
Animals	X	X	X	X	X	X
Residence Exclusion	X	X	X	X		
Other Restraints Necessary to Effectuate Order	X	X	X	X	X	X
Prohibit Obtaining Petitioner's Address	X	X	X	X	X	X

Firearms Prohibitions	X	X	X Not if only financial abuse	X Not if only financial abuse	X	X
Ammunition Prohibitions	X	X	X Not if only financial abuse	X Not if only financial abuse	X	X
Temporary Custody, Visitation	X	X				
Temporary Use of Property, Possession, Debt Payment	X	X				
Record Unlawful Communications	X	X				
Child Support		X				
Spousal Support		X				
Restitution		X				
Batterer's Treatment		X				
Attorney's Fees and Costs		X		X		X
Mandatory Entry of Order in CLETS	X	X	X	X	X	X

[§8.5] LIMITATIONS OF ORDERS TO PROTECT ELDER AND DEPENDENT ADULTS

The charts in the preceding sections highlight some of the differences between the three orders. In some situations one order cannot provide the full range of protection needed by an elder or dependent adult. Petitioners may find it necessary to file under more than a single statutory scheme.

Examples of differences between the orders include:

- Only the DVPA authorizes the court to order restitution for lost earnings and out-of-pocket expenses including medical care and housing.
- The EARO residence exclusion order requirements are more limited than those provided by the DVPA. The DVPA TRO may be issued to exclude a party from the residence without consideration of title to the property.

- DVPA is not available to co-tenants with no relationship where parties simply share common areas within a residence but have separate sleeping areas; EARO permits issuance of a protective or restraining order in that situation.
- DVPA and EARO require a lower level of proof than the Non Harassment Injunction (clear and convincing vs. preponderance).
- EARO can be sought for neglect, financial exploitation, and infliction of emotional suffering while DVPA and Non Harassment are more limited in the conduct that justifies issuance of the order.
- EARO can protect a conservator; DVPA and Non Harassment orders cannot.
- If the petitioner lacks cognitive capacity, only EARO permits concerned parties such as conservators, GALs, attorneys-in-fact, adult protective services agencies (effective July 1, 2016), and other authorized persons to file on the petitioner's behalf. DVPA and Non Harassment orders can only be filed by the petitioner.
- DVPA can include support, property control orders, batterer's intervention program, and restitution; EARO and Non Harassment orders cannot.

These examples illustrate the complexities elder and dependent adult abuse petitioners face as they attempt to navigate the statutory patchwork of remedies. The complexities also present issues for courts to consider.

- Where are each of these orders heard? Are they heard in different courts? Is there a way to identify pending actions involving the same parties? Can and should they be consolidated in a single court, and if so, which one? If there a process to ensure that all related matters are heard in one court at one time?
- If matters are heard in more than one court, is there a process to avoid issuing inconsistent orders? Can procedures already developed to avoid issuing inconsistent orders in domestic violence cases be duplicated for elders and dependent adults? (See California Rules of Court, rule 5.445, Court communication protocol for domestic violence and child custody orders.)
- If a petitioner has filed under one statutory scheme and needs relief offered under more than just that type of order, what are the court's options? Can and should the court encourage the petitioner to also file for relief under another type of order?
- Is the court process supportive of access to justice for older persons and/or persons with disabilities? Does the court provide appropriate assistance to persons needing help and accommodations? Does the court use alternatives to personal appearance such as telephonic hearings when needed?
- Are matters heard at times more convenient to older persons, e.g., late morning? Are matters involving older persons and dependent adults heard promptly when scheduled?

Courts can create and utilize procedures to meet the special needs of victims of elder and dependent adult abuse, including creation of elder protection courts and specialized elder abuse calendars, and use of telephonic hearings for court orders. For more information please see Judicial Council of California/Administrative Office of the Courts, *Effective Court Practice for Abused Elders: A Report to the Archstone Foundation* (2008), available at http://www.courts.ca.gov/documents/EffectiveCourtAbusedEldersMain.pdf. Chapter 5 has suggestions for what various courts have done to meet the needs of elder and dependent adult abuse litigants.

Chapter 9

ABUSE OF POWERS OF ATTORNEY [RESERVED]

Chapter 10

PROBATE AND CONSERVATORSHIP PROCEEDINGS [RESERVED]

CHAPTER 11
ELDER ABUSE IN TRIBAL COMMUNITIES: A GUIDE FOR CALIFORNIA STATE JUDGES

PART 1: LEGAL ISSUES

I. The Court's Jurisdiction
   a. Criminal Jurisdiction
   b. Civil Regulatory Jurisdiction
II. Overview of Legal Issues That Arise in Cases Involving Indian Country
III. Court Orders
   a. Crafting Culturally Sensitive Orders
   b. Enforcement Issues
IV. Criminal Cases
   a. Handling Sacred Objects
V. Conservatorship and Guardianship Cases
VI. Tribal Money Judgments
VII. Discovery Issues

PART 2: IDENTIFICATION, HISTORY, AND CULTURAL BELIEFS AND VALUES OF AMERICAN INDIAN AND ALASKA NATIVE TRIBAL MEMBERS

I. Tribal Definitions and Demographics
II. Identification as an American Indian/Alaska Native (AI/AN)
III. "Indian Country"
IV. The American Indian/Alaska Native (AI/AN) Population
V. The American Indian/Alaska Native Elderly Population
VI. Illness, Dementia, Depression, and Death in American Indian/Alaska Native Communities
VII. Cultural Values Relevant to Elder Abuse in American Indian/Alaska Native Communities: Overview
   a. The Traditional Role of Elders; "Elder" vs. Elderly
   b. Cultural Values Relevant to an Understanding of Abuse in Late Life
   c. Historical Trauma and Tribal History
VIII. Defining Elder Abuse in Tribal Communities
IX. Extent of the Problem: What Is Known About the Prevalence and Incidence of Elder Abuse in California
X. Characteristics of Victims
XI. Characteristics of Perpetrators
XII. Risk Factors

PART 3: COURT PROCEEDINGS INVOLVING TRIBAL MEMBERS—INTERACTIONS, FACT FINDING, AND PRACTICES

I. American Indian/Alaska Native Older Adults in State Court

II. Court Settings in Which Abuse of an Older American Indian/Alaska Native May Appear
III. Court Interactions With American Indian/Alaska Native Older Adults
  a. Language Obstacles
  b. Speech Patterns
IV. Barriers to Reporting, Seeking, and Pursuing Court Remedies
V. Innovative and Restorative Justice Models

REFERENCES
CASES
STATUTES
APPENDICES

APPENDIX A: PUBLIC LAW 280 JURISDICTION
California Indian Tribes and Territory
General Rules (these rules apply in California unless modified by PL 280)
Public Law 280
Full Faith and Credit
Effect on Dependency and Delinquency Jurisdiction
Effect on Jurisdiction in DV Cases and Ability to Enforce Protective Orders
Laws Governing Federal Jurisdiction in Indian Country
California State Laws Concerning Recognition and Enforcement of Tribal Court Orders

APPENDIX B: THE AMERICAN INDIAN/ALASKA NATIVE AND AI/AN ELDERLY POPULATION: GROWTH AND RESIDENCE
The AI/AN Population
The AI/AN Elderly Population

APPENDIX C: DEFINITIONS OF ELDER ABUSE IN TRIBAL COMMUNITIES
Sacred and Cultural Objects

APPENDIX D: PREVALENCE AND INCIDENCE OF ELDER ABUSE IN THE GENERAL POPULATION AND AMERICAN INDIAN/ALASKA NATIVE COMMUNITIES
National Studies of the Elderly Population
AI/AN Studies

APPENDIX E: RISK FACTORS FOR ABUSE AND NEGLECT IN AMERICAN INDIAN/ALASKA NATIVE COMMUNITIES

This chapter is intended to inform California judicial officers about the unique legal, jurisdictional, factual, and cultural issues that may arise in elder abuse cases involving American Indian/Alaska Natives (AI/AN) or take place in "Indian Country."[1] The goal is to provide the court with critical information and resources to enable California court officials to effectively handle matters and provide justice in cases of elder abuse involving this population.

This chapter is divided into three sections. Part 1 discusses legal issues such as jurisdiction and specific legal contexts in which state courts may address elder abuse involving AI/AN and/or taking place in Indian Country. Part 2 covers AI/AN identification, history, and cultural beliefs and values that may be relevant when handling an elder abuse matter in state court involving this population. Part 3 offers ideas for judicial fact finding and practices in elder abuse matters involving this population.

The chapter also includes appendices, which provide more detailed information about topics included in the chapter.

> *The traditional status of elders in American Indian and Alaska Native (AI/AN) cultures is one of honor and respect. Elders are respected for their age, experience, maturity, and wisdom. They are considered valuable resources to the tribe as custodians of tribal history, culture, and tradition. The term "elder abuse" describes a multifaceted phenomenon including abuse forms such as neglect, physical harm, sexual or emotional maltreatment, and exploitation.*

(Davis, 2013, at p. 1.)

PART 1: LEGAL ISSUES

AI/AN communities are unique because of their legal status, heterogeneity, cultural values, and history. The state court's effectiveness in resolving elder abuse matters arising in Indian Country or involving AI/AN may turn on the court's understanding of those unique features and its consideration of historical approaches and practices when evaluating evidence and issuing rulings.

[1] "Indian Country" is a term that is defined in federal law at 18 U.S.C. § 1151; essentially it includes lands held in trust by the federal government for the benefit of Indian tribes or individual Indians such as reservations, rancherias, dependent Indian communities, and individual Indian trust allotments.

Each federally recognized tribe is a sovereign nation.[2] Every tribe has authority to enact its own laws and establish tribal courts and justice systems. State law is applicable in Indian Country in limited situations and only with congressional approval. In California, the most common source of this congressional approval is Public Law 280, discussed in more detail below. A state court's authority to issue orders, control parties, and enforce orders against tribal members is different and more limited than that exercised outside of tribal communities. At the same time, AI/AN residents of California are citizens of the state and the country entitled to the same level of services and protection as other citizens.

Currently there are some 566 federally recognized tribes in the United States; 109 federally recognized tribes are in California. An additional 81 entities are currently petitioning for federal recognition.[3] Tribes are heterogeneous, not homogeneous. Each has its own history, culture, traditions, laws, language, circumstances, resources, and partnerships. Some of the AI/ANs appearing in state court may be members of federally recognized tribes. Others may not, but may be descendants of or affiliated with an AI/AN community or tribe. Some may live on or off of tribal lands. They may live with non- Indians or persons who are not members of the same tribe. These differences will challenge state courts dealing with legal issues in these populations when crafting effective solutions and providing justice and fair access to the courts.

The history of relations between American Indian tribes throughout the United States and in California and federal and state governmental entities has been contentious and disturbing.[4] Historical governmental policies and practices have included denial of basic human rights, broken promises and treaties, and practices aimed at eradicating tribal identity and sovereignty. Each tribe's history affects its perceptions of elder abuse, trauma experience, and relationships with federal and state governments, courts, and law enforcement.

I. The Court's Jurisdiction

Jurisdiction involving Indian Country is complex. There are potentially three different systems that may have authority to act in a particular matter: tribal; federal, and state. (More information on jurisdiction may be found in Appendix A.)

---

[2] Not all tribes in California are federally recognized and not all AI/AN in California are members of federally recognized tribes or of tribes with historical roots in California. We discuss the California AI/AN population in more detail in Part 2. You can also find more information at *www.courts.ca.gov/3066.htm*.
[3] *Id.*
[4] There are a number of good resources on California Indian history, which can be accessed at the History section here: *www.courts.ca.gov/3066.htm*.

a. Criminal Jurisdiction

Historically, the state had no authority to enforce state laws in Indian Country. Tribes could establish court systems and tribal codes but until the passage of the Tribal Law and Order Act in 2010 (Public Law 111-211; TLOA), under the constraints of the Indian Civil Rights Act of 1968 (codified at 25 U.S.C §§ 1301–1304), no matter the seriousness of the crime, a tribal court could only sentence perpetrators to a maximum term of imprisonment of one year.[5] Tribal courts were prohibited from prosecuting crimes committed by non-Indians. The federal government could prosecute but only for the specific crimes included in the General Crimes Act (18 U.S.C. § 1153) and the Major Crimes Act. (18 U.S.C. § 1152). As a result of these jurisdictional limitations, many crimes could not be prosecuted. The passage of TLOA and the 2013 reenactment of the Violence Against Women Act have closed some of these gaps.

In 1953, Congress passed Public Law83-280 (commonly referred to as PL 280), which shifted criminal jurisdiction over offenses involving Indians in Indian Country from the federal government to certain designated states, including California. PL 280 also shifted the costs associated with enforcement of criminal laws to California.

PL 280 does not convey state jurisdiction to investigate and prosecute all criminal acts. PL 280 jurisdiction is limited to the enforcement of state criminal statutes.

- Local and county criminal ordinances and laws are not enforceable on tribal lands.
- Civil regulatory laws are not enforceable. Examples of regulatory laws include environmental control, land use, gambling, parking offenses, and licensing.[6]
- PL 280 criminal jurisdiction cannot be used to alter the status of trust lands or to restrict federally protected hunting and fishing rights.
- California cannot tax trust lands.

PL 280 did not alter the tribes' authority to create and maintain police departments with authority to enforce tribal laws. Nor did it fully eliminate federal criminal jurisdiction over certain crimes.

---

[5] The Indian Civil Rights Act was codified at 25 U.S.C. § 1301 et seq.

[6] PL 280 and case law distinguish between criminal prohibitory matters and those that are civil regulatory, however, the line between these categories can be unclear. See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 209. The fact that something is set out in the criminal code or the nature of the punishment is not determinative. The analysis turns on whether the activity is generally permitted but subject to regulation, and on how closely its control is tied to public safety.

Judicial Checklist to Inform Decision-Making: Criminal Cases

- Did incident occur in Indian Country? (If no, no PL 280 issues.)
- If yes, is at least one of the parties AI/AN? (If no, no PL 280 issues.)
- If yes, is the conduct "criminal prohibitory" or "civil regulatory"?
  - If criminal prohibitory, state court has jurisdiction.
  - If civil regulatory, state court lacks jurisdiction.
- If yes, or if parties are AI/AN, consider incorporating culturally accepted practices and programs into case resolution and other appropriate decisions.

Summary Points Regarding Jurisdiction

- State courts may have concurrent jurisdiction with tribal courts over certain criminal matters.
- State courts are prohibited from hearing certain matters arising on tribal lands.
- State courts may be obligated to apply tribal laws and customs in certain civil disputes.

Resources

For more information about PL 280, please refer to Appendix A: Public Law 280 Jurisdiction, and to the following:

- Judicial Council of California, *Jurisdictional Issues in California Regarding Indians and Indian County*, available at *www.courts.ca.gov/.../Jurisdiction_in_California_Indian_Country.pdf*
- *VAWA 2013 and Tribal Jurisdiction Over Crimes of Domestic Violence*, available at *www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/vawa-2013-tribal-jurisdiction-overnon-indian-perpetrators-domesticviolence.pdf*

State court jurisdiction over civil regulatory matters involving tribal members and Indian Country is also delineated in PL 280. The statute was designed to open state courts as a forum to adjudicate civil and criminal actions involving Indians living on reservations, without subjecting reservations to the full range of state regulations. Some matters, viewed as central to the existence of the tribe and its sovereign status, are excluded from state court jurisdiction. Examples include tribal membership, use and ownership of trust property and assets, and treaty matters (Goldberg and Champagne, 2007).

The criminal provisions of PL-280 are codified at 18 U.S.C. § 1162. The civil provisions are codified at 28 U.S.C. § 1360. 28 U.S.C. § 1360 provides:

> (a) Each of the States listed in the following table [omitted; includes California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State…

In California, this section covers all Indian Country within the State.

28 U.S.C. § 1360(b) prohibits California and other PL 280 states from authorizing "the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."

Subdivision (b) also prohibits California from:

- Regulating the use of such property in a manner inconsistent with any Federal treaty, agreement, statute or regulation; or
- Adjudicating, in probate proceedings or otherwise, the ownership or right to possession of such property or property interest.

State courts are required to apply tribal law and custom in resolving civil disputes whenever possible. 28 U.S.C. § 1360(c) states that tribal ordinances or customs adopted by an Indian tribe, band, or community in the exercise of its authority shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action.

II. Overview of Legal Issues That Arise in Cases Involving Indian Country

California courts will address elder abuse cases involving AI/AN, some of whom live on tribal lands and some who live elsewhere. State courts will be asked to enforce orders made by tribal courts, review and monitor guardianships and conservatorships established by tribal courts, and issue orders that may require enforcement in Indian Country.

A starting point whenever dealing with matters involving tribal courts and governments is that unlike states, tribes are sovereign governments with many powers of a foreign nation. The sovereignty of tribal governments predates the U.S. Constitution. Tribes are

not parties to or generally bound by the Constitution, including the full faith and credit requirements. While tribal courts and governments can be asked to enforce orders, report crimes, and work with state courts, they generally cannot be compelled by the state to do so.

Key to the effective administration of state laws involving an AI/AN or Indian Country is the creation of trusted relationships and agreements between tribal courts and state courts. The goals of these relationships and agreements are to:

- Enhance inter-court communication;
- Increase awareness and understanding of practices, culture, traditions, and services available to AI/AN;
- Improve enforcement of laws and court orders; and
- Assure access to justice for AI/AN.

> *Over the past two decades, interest has been building in the interaction between American Indian tribal courts and state courts. Specifically, state and tribal judiciaries have devoted attention to promoting cooperation, reducing jurisdictional conflicts, expanding tribal court operations, and granting full faith and credit to each other's judgments and orders. The often unspoken but powerful underlying assumption is a genuine recognition that tribal courts play a vital role in dispensing justice in their communities and that state courts can benefit by working hand-in-hand with them.*

(Stenzel, 2009, at p. 226.)

Like a number of other states, California[7] has created a tribal-state forum to improve relationships and the delivery of justice between state and tribal courts.

In light of this history and the legal issues that arise in cases involving tribal members, California judicial officers hearing cases involving this population may benefit from building cooperative and collaborative relationships with tribal governments, tribal courts, and tribal service providers.

[7] See California Tribal Court–State Court Forum at *www.courts.ca.gov/3065.htm*

III. Court Orders

a. Crafting Culturally Sensitive Orders

In crafting orders that build on values and beliefs of AI/AN, the following questions may be helpful:

- What role do older adults play in the family? In the community?
- Who, within the family, provides care to the elderly or sick family members? Is there anyone else that can help?
- Who makes decisions about how family resources are expended particularly for the elderly or sick family member? About other aspects of family life?
- Who, within the family, do members turn to in times of conflict or strife?
- How can the community, court, and tribe work with the elderly person to address what has occurred?
- What conduct would the older adult like to see change? This is culturally preferable to asking what the elderly person wants the abuser to stop doing. Most AI/AN elders will not accuse a family member of criminal acts or abuse but will describe what they would like to see changed.
- To whom will an older adult turn for help (e.g. members of the extended family, respected members of the community, tribal leaders, religious leaders, physicians)?
- What/who are the trusted sources of information in the community?

For more information about cultural values and strengths please refer to section V below.

b. Enforcement Issues

Tribal court orders issued under the domestic violence, family violence, or stalking laws of the issuing jurisdiction are fully enforceable within California (Fam. Code, § 6402) so long as:

- The order names the protected and restrained parties;
- The order is in effect;
- The issuing court had jurisdiction over the subject matter and the parties; and
- Respondent was given an opportunity to be heard. (Fam. Code, § 6401(5).)

Included are orders issued by an Indian "tribe or band." (Fam. Code, § 6401 (7).)

The order does not need to be registered in California to be enforced. (Fam. Code, § 6403(d).)

Foreign orders, including tribal orders, may be registered in California upon request of a person in possession of the order (Fam. Code, § 6404(a)) at no charge (Fam. Code, § 6404(b)).

Relevant federal law is found at 18 U.S.C. § 2265.

The rule 5.386 of the California Rules of Court has been adopted to guide the filing of tribal court protective orders. The rule is available on the California Courts website at *www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_386*.

Tribal courts have jurisdiction to issue and enforce protective orders. The Violence Against Women Act provides that "a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe … or otherwise within the authority of the Indian tribe." (18 U.S.C. § 2265(e).)

Assuring that a seamless process for entering tribal orders into the California Restraining and Protective Order System (CARPOS) through the California Law Enforcement Telecommunications System (CLETS) is provided, implemented, and used will not only effectuate state and federal law, but it will support inter-court communication, develop trust, and enhance access to justice for litigants. Law enforcement will be better able to enforce orders as they will be able to verify tribal orders.

Not all orders issued in elder abuse matters will meet the standards for full faith and credit under state and federal statutes governing domestic violence. Orders issued in situations where the abuse is solely financial exploitation are not subject to the legal requirements listed above. Such orders are not based on laws related to domestic or family violence or stalking and are not subject to mandatory firearms relinquishment requirements and prohibitions against possession, use, or acquisition of firearms and ammunition. This does not mean the tribal court orders should not be recognized and enforced by state courts. Effective January 1, 2016, California's version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act will provide specific provisions concerning recognition and enforcement of certain adult protective proceeding orders issued by tribal courts.[8] In addition, state courts may recognize and enforce orders under the principles of comity. State courts should consider working with tribal judges and tribes to develop agreements or other statements of understanding

[8] See SB 940 (Stats. 2014, ch. 553) at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB940*

regarding procedures to register such financial abuse protection orders so they can be verified and enforced.

Enforcement of court orders issued by state courts relating to tribal or individual Indian trust property requires collaboration with tribal courts. A state court lacks jurisdiction to "evict" someone from tribal lands. If a tribal member seeks a protective order under the Domestic Violence Prevention Act (DVPA) and indicates a need for the respondent to be excluded from a residence on tribal lands, courts will likely grant such an order. Effectuating that condition requires the assistance and support of the tribal court as only the tribal authority can force the respondent to leave. The tribe will either need to adopt the state order or use some other procedure. The existence of a collaborative relationship between the tribal and state courts is critical to the victim's safety and access to justice.

IV. Criminal Cases

California has jurisdiction over crimes that occur in Indian Country.[9] While there are more state prosecutions of elder abuse cases than previously, it is rare to hear of a successfully prosecuted elder abuse case involving AI/AN living in Indian Country.[10]

When handling a criminal elder abuse case, particularly when setting bail and at sentencing, the court should consider the centrality of the extended family among AI/ANs (Red Horse, 1983, 1997). Because members of these communities view elder abuse as a shared problem, they will expect to be engaged in addressing the problem. At the same time, the court also should consider the possibility of co-occurring child abuse and neglect and/or interpersonal violence (Jervis, 2013). If appropriate, the state court may find it helpful to engage community members and tribal services in the defendant's recovery and related prevention efforts.

A discussion of alternatives to the existing criminal justice model, such as restorative justice, is below in section IX.

a. Handling Sacred Objects

On occasion, courts will need to order that a AI/AN be taken into custody. That person may be wearing a sacred item or have sacred item, such as a medicine pouch or eagle feather, in their possession. Absent safety or evidentiary reasons, it is preferable that such items not be handled, disturbed, or booked into evidence (See Hendrix, n.d.).Often

[9] Subject always to the "criminal prohibitory" versus "civil regulatory" analysis discussed above.
[10] See U.S. Department of the Interior, Bureau of Indian Affairs. (2013). *Adult Protective Services Handbook*, at p. 8, available at *www.bia.gov/cs/groups/webteam/documents/document/idc1-026637.pdf*.

cultural and religious rules govern who may touch such objects and how they should be dealt with. While mindful of the need for courtroom and jail security, the court should consider if the item really needs to be taken, handled, or searched. If the item does not need to be booked or handled, it may be helpful to determine if it can be turned over to someone designated by the defendant who understands the proper handling and maintenance of such objects.

If there is a need to handle the object, the court and its staff should consider if the intrusion can be minimized. The court and or police may want to consider consulting a tribal leader or elder for advice on the proper treatment of the item. The court can honor tribal traditions by anticipating such situations and working with the tribal court or tribal leadership to develop a respectful process.

V. Conservatorship and Guardianship Cases

Tribes have the inherent sovereign authority to enact laws governing their lands and their members and to establish tribal courts to enforce those laws, including those addressing civil and criminal aspects of elder abuse, such as laws creating and supervising guardianships and conservatorships.

Depending on tribal law, tribal courts may exercise jurisdiction to protect and govern members living outside of Indian Country—for example, when elders for whom tribal courts have established conservatorships (or guardianships) move outside of Indian Country borders to state lands. Historically it has been difficult to register or transfer those conservatorships and guardianships between state and tribal courts so courts could monitor and oversee them. Monitoring is an important way to prevent and detect abuse by court-appointed conservators and guardians.

Senate Bill 940, effective January 1, 2016, establishes the California Conservatorship Jurisdiction Act (CCJA), a modified version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The CCJA defines standards and procedures for jurisdiction in a proceeding to appoint a conservator of a person, estate, or both. The CCJA establishes conditions for registering or transferring a conservatorship from or to California and from or to another state or a federally recognized Indian tribe. Provisions, codified in the California Probate Code, include the following:

Probate Code, § 1821(k) requires that a petition for conservatorship state whether the proposed conservatee is a member of a federally recognized Indian tribe. If so, the petition shall state the name of the tribe, the state in which the tribe is located, and whether the proposed conservatee resides on tribal land and/or is known to own property

on tribal land. Probate Code, § 1982(m) includes in its definition of the term “state” a federally recognized Indian tribe.

Probate Code, § 1984 permits a California court to communicate with a court in another state concerning a proceeding arising under the act. The court may allow the parties to participate in the communication.

Probate Code, § 1985 authorizes a California court to request that an appropriate court in another state conduct an evidentiary hearing; order a person in that state to produce evidence or give testimony, order an evaluation or assessment of a proposed conservatee; order any appropriate investigation of a person involved in a proceeding, forward a certified copy of the transcript or other record of a hearing, evidence, or assessment to the California court; and issue orders authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information.

Section 1985(b) authorizes a court in another state to make similar requests of a California court.

Probate Code, § 1993(b) authorizes a California court to permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A California court shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

Special provisions apply if the proposed conservatee is a member of a federally recognized Indian tribe.

Probate Code, § 2031 provides as follows:

> (a) “California tribe” means an Indian tribe with jurisdiction that has tribal land located in California.
> (b) “Indian tribe with jurisdiction” means a federally recognized Indian tribe that has a court system that exercises jurisdiction over proceedings that are substantially equivalent to conservatorship proceedings.
> (c) “Tribal land” means land that is, with respect to a specific Indian tribe and the members of that tribe, “Indian country” as defined in Section 1151 of Title 18 of the United States Code.

Probate Code, § 2033(a) states: “If a petition for the appointment of a conservator has been filed in a court of this state and a conservator has not yet been appointed, any

person entitled to notice of a hearing on the petition may move to dismiss the petition on the grounds that the proposed conservatee is a member of an Indian tribe with jurisdiction. The petition shall state the name of the Indian tribe."

Section 2033(b) states: "If, after communicating with the named tribe, the court of this state finds that the proposed conservatee is a member of an Indian tribe with jurisdiction, it may grant the motion to dismiss if it finds that there is good cause to do so. If the motion is granted, the court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a conservator be filed promptly in the tribal court."

Section 2033(c) states:

> In determining whether there is good cause to grant the motion, the court may consider all relevant factors, including, but not limited to, the following:
> (1) Any expressed preference of the proposed conservatee.
> (2) Whether abuse, neglect, or exploitation of the proposed conservatee has occurred or is likely to occur and which state could best protect the proposed conservatee from the abuse, neglect, or exploitation.
> (3) The length of time the proposed conservatee was physically present in or was a legal resident of this or another state.

These new provisions create a need for tribal courts and state courts to develop cooperative and collaborative relationships to protect conservatees and wards. Because many tribal members live off of tribal lands and may return to the tribe for medical and other services, it is likely that that there will be frequent movement between jurisdictions.

VI. Tribal Money Judgments

Beginning January 1, 2015, and lasting until December 31, 2017, unless reauthorized, Indian tribal court money judgments are exempted from the Uniform Foreign Country Money Judgments Recognition Act (Cal. Code Civ. Proc., § 1713 et seq.). Instead, recognition and entry of tribal money judgments are controlled by the Tribal Court Civil Money Judgment Act (Code Civ. Proc., § 1730 et seq.).

These provisions do not apply to taxes, fines, or other penalties or to child and family support orders subject to full faith and credit; nor do they affect other state or federal laws granting recognition to tribal court orders; nor do they apply to probate matters

such as guardianships, conservatorships, trusts, powers of attorney, and matters involving estates of deceased persons.

Tribal courts and tribal justice systems include all courts or administrative bodies established under the law or custom of federally recognized Indian nations, tribes, pueblos, bands, or Alaska Native villages.[11] A tribal court money judgment refers to any written judgment, decree, or order of a tribal court for a specified amount of money issued in a civil action or proceeding that is final, conclusive, and enforceable by the issuing tribal court and is authenticated in accordance with the tribe or tribal court's laws and procedures.

Jurisdiction for filing the application is the county in which respondent lives or owns property; or if respondent is not a resident of California, in any county in the state where he or she does reside.

Applications are filed in superior court and executed under penalty of perjury (Code Civ. Proc., § 1734). Required statements and attachments appear in the same section. Notice and service requirements are detailed in section 1735.

The superior court judgment must include the terms and provisions of the tribal court money judgment and shall be entered in the same manner, have the same effect, and be enforceable in the same manner as any civil judgment, order, or decree of a state court (Code Civ. Proc., § 1736(b)).

For reasons specified in statute a state court may refuse to recognize a tribal court money judgment (see Code Civ. Proc., § 1737(b) and (c)).

The Judicial Council must prescribe appropriate application forms for recognition of tribal court money judgments.

VII. Discovery Issues

When matters are pending in state court, sometimes records or information in the possession of the tribal government may be sought. Examples include Adult Protective Services (APS) records prepared by tribal APS, video footage from a tribal business or casino showing an assault, and victim medical records from a tribal health clinic. Such records may especially relevant in a probate or criminal matter.

As sovereign governments, tribes, tribal governments, and tribal enterprises that are deemed arms of the tribal government may claim tribal sovereign immunity from state

[11] 25 U.S.C. § 1301; 25 U.S.C. § 1903(12); 25 U.S.C. § 1306(8).

court process, including subpoenas or summonses. Instead, state and tribal courts will need to develop agreements and procedures to review such requests and respond to them.

PART 2: IDENTIFICATION, HISTORY, AND CULTURAL BELIEFS AND VALUES OF AMERICAN INDIAN AND ALASKA NATIVE TRIBAL MEMBERS

I. Tribal Definitions and Demographics

In this segment the legal definition of who is an Indian, what is Indian Country, the number and nature of tribes and tribal membership, and information about California's tribal population are discussed. It is important to acknowledge that the legal definitions and categories established by federal and state law may not correspond to the way these terms and categories are understood by AI/AN and tribal governments.

II. Identification as an American Indian/Alaska Native (AI/AN)

There is no single definition of the term "Indian." The term "Indian" may be used to refer to a cultural, historical, racial, or legal category depending on the context and who is using the term and for what purpose. For the most part, the categories reflect a colonial worldview that has been imposed upon indigenous peoples and does not reflect their own historic beliefs and practices. Nevertheless it is important to understand the various meanings of the term Indian when attempting to determine the court's jurisdiction and mandates.

The determination of who falls under the legal definition of Indian continues to evolve.[12] For example, in *United States v. Rogers* (1846) 45 U.S. 567, the court defined the term "Indian" to mean "those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, of the family of Indians . . ." (at p. 573). When Congress has not provided a definition courts have developed a two-prong test: "(1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian." *United States v. Broncheau* (9th Cir. 1979) 597 F.2d 1260, 1263. Actual tribal membership is not dispositive. *Ex parte Pero* (7th Cir. 1938) 99 F.2d 28, 31; *United States v. Bruce* (9th Cir. 2005) 394 F.3d 1215, 1224.

Each government—tribal and federal—determines who is an Indian for purposes of *that* government's laws and programs. As a result someone may be designated an Indian under tribal law but not under federal law or vice versa. (Administration for Native Americans, 2014b.) When used in relation to tribal membership, Indian is a political classification, not a racial one.

[12] Felix S. Cohen, *Handbook of Federal Indian Law* (2005 ed.) § 3.03[1], at page 171.

The term "Indian" has been used by the federal government to define the limits of tribal communities for the purposes of federal statutes and distribution of assets pursuant to treaties and other agreements. Federal recognition of a particular group as constituting a tribe for federal purposes has historically occurred through treaties, acts of Congress, presidential executive orders or other federal administrative actions, and federal court decisions. (Administration for Native Americans, 2014b.) Tribes seeking federal recognition may request it (see 25 C.F.R. Part 83).

Federal recognition by the U.S. Department of the Interior largely guarantees that an Indian tribe will qualify to participate in federal Indian programs. That said, the denial of federal recognition does not necessarily disqualify a tribe or its individual members from all federal programs as eligibility may be extended to state-recognized tribes, particular individuals of Indian ancestry or identification,[13] nonprofit organizations, and programs not specifically limited to federally recognized tribes. (Administration for Native Americans, 2014b.)

For criminal jurisdiction under federal law, members of federally recognized tribes are "Indians" (25 U.S.C. § 1301(2)) even if the alleged act occurred on some other federally recognized tribe's lands. Enrolled members of tribes recognized by a state (but not by the federal government) and indigenous people from Canada, Mexico, and other foreign nations do not meet the legal definition of "Indian" for criminal jurisdictional purposes because they do not have a special legal and political relationship with the United States government. (*Morton v. Mancari* (1974) 417 U.S. 535; *United States v. Antelope* (1977) 430 U.S. 641.)

California does not appear to have any formalized process to provide state recognition for a tribe.

Even if an individual or a group may not fit within a legal definition of "Indian" or "tribe," they may be culturally and historically Indian by ancestry and affiliation.

[13] 25 U.S.C. section 651 defines the "Indians of California as follows: "the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."

Summary Points Regarding Identity as an Indian

- There is no single definition or procedure for determining who is an Indian.
- The definition will be based on the defining authority, context, and purpose for the designation.
- The court may need to determine a litigant's status when evaluating its jurisdiction, location of the incident before the court, and applicable procedures.

Resources

Map of "Indian Country" in California at
www.bia.gov/cs/groups/xregpacific/documents/document/idc1-028537.pdf

For more about the AI/AN population in California see
www.courts.ca.gov/3066.htm

III. "Indian Country"

Under federal law, "Indian country" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(18 U.S.C. § 1115.)

IV. The American Indian/Alaska Native (AI/AN) Population

The AI/AN community is highly heterogeneous, diverse, and growing (Hendrix, n.d.). Each of the 566 federally recognized tribes, as well as bands and clans, has its own

distinct history, culture, and often separate language (U.S. Department of Justice, Dec. 2004; U.S. Department of the Interior, Jan. 2014). There are many more tribes that are not federally recognized.

In California, there are currently 109 federally recognized Indian tribes (U.S. Department of the Interior, Jan. 2014) and 81 entities petitioning for recognition (Bureau of Indian Affairs, 2013). In addition, there are several rancherias, tribal communities, and federally recognized tribes comprised of multiple historical tribal entities that were put on the same reservation by the federal government. (For example, see the history of the Shoshone Bannock tribes at *www.shoshonebannocktribes.com/shoshone-bannock-history.html*.)

California is home to the largest number of AI/AN residents in the United States. There are approximately 150 distinct tribes that are native to California (California Native American Heritage Commission, *www.nahc.ca.gov/cna.html*). In addition to the indigenous California Natives, there are many American Indian and Alaska Natives living in California from tribes across the United States and the Americas. For example, California is home to many Cherokee, Navajo (also known as Dine), Lakota (also known as Sioux), Mayan, and so on." (Satter et al., 2010, at p. 50.)

While an estimated 14% of AI/ANs living in California are members of California indigenous tribes, the majority are members of tribes outside of the state. In addition, the majority of California AI/ANs do not live on reservations but live in other urban and rural areas. (Satter et al., 2010.) Many AI/AN members have left tribal lands because of their small size, remoteness, and, in many cases, lack of economic opportunities. In California, about 60% of AI/AN elders live in urban areas. Los Angeles County is home to the largest urban AI/AN population in the country. (Satter et al., 2010.)

Those tribal members who do live on tribal lands often live with non-Indians and non-member Indians.

For more information about the California AI/AN population and where members live, please review Appendix B. See also "Native American Statistical Abstract: Population Characteristics," *CFCC Research Update* (March 2012), available at *www.courts.ca.gov/documents/Tribal-ResearchUpdate-NAStats.pdf*; and "Native American Research Series: Tribal Justice Systems," *CFCC Research Update* (June 2012), available at *www.courts.ca.gov/documents/TribalJusticeSystemRU.pdf*.

Summary of Section and Application to the State Court

- Understanding where older AI/AN individuals live may provide context to some of the jurisdictional issues courts may face. For example, if the person lives in Los Angeles but is the victim of financial exploitation of his or her per capita distribution by family members who live on tribal lands, it may be difficult to locate the perpetrator, issue warrants, and obtain critical tribal records.

- Local law enforcement may be in geographically distinct areas from where the theft occurred and may lack information about their authority to investigate crimes on tribal lands. Tribal and local authorities may not cooperate with one another and courts may be without authority to issue certain orders for persons on tribal lands or may be unable to obtain compliance with their orders.

Resources

For more information on the AI/AN elderly population, please refer to Appendix B: The AI/AN and AI/AN Elderly Population: Growth and Residence

V. The AI/AN Elderly Population

There is no single legal definition of the age at which a person becomes "elderly." In California, a person is an elder for purposes of an elder abuse restraining order under Welfare and Institutions Code, § 15657.03, victim designation under Penal Code, § 368, and subject of a mandatory elder abuse report under Welfare and Institutions Code, § 15630 et seq. at age 65. Federal laws incorporate a variety of age-based definitions. For example, the Older Americans Act (42 U.S.C. § 3057 (2006)) uses age 60; Medicare uses age 65; and the Department of Justice Late Life Grants program uses age 50. Federal data sources use a variety of ages as well.

When describing the AI/AN population, many tribes consider 50 or 55 as elderly (Hendrix, n.d.; White, 2004). This younger age may be due to the reality that impairments associated with aging in AI/ANs may occur 20 years earlier than in the general population (National Indian Council on Aging, 1981) and to the recognition that AI/AN persons have historically lived shorter lives than other racial and cultural groups living in the United States. American Indians and Alaska Natives born today have a life

expectancy more than 4 years less than all other races in the U.S. population (73.7 years vs. 78.17 years) (Indian Health Service, 2015).

VI. Illness, Dementia, Depression, and Death in AI/AN Communities

The Indian Health Service (2014) reports that AI/AN people "have long experienced lower health status when compared with other Americans. Lower life expectancy and the disproportionate disease burden exist perhaps because of inadequate education, disproportionate poverty, discrimination in the delivery of health services, and cultural differences. These are broad quality of life issues rooted in economic adversity and poor social conditions…" (Indian Health Service, 2015).

Physical complaints are normalized as part of life, and memory loss and dementia are minimized by family members and the tribal community. The diagnostic criteria of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* may not be applicable to members of the AI/AN community due to differences in tribal beliefs about mental illness, cultural labeling of different emotions, and conceptual language differences (Hendrix, n.d.). These differences carry over to medical and mental health screenings and assessments. Unless the testing includes culturally applicable elements, the person may appear less capable than he or she actually is.

Depression is generally not discussed so its prevalence among older tribal members is unknown. If questions about depression need to be asked, the interviewer will be more effective if the questions are framed in terms of having a heavy heart or feeling out of balance or out of harmony with the earth, which are emotions that are more culturally acceptable to express. (Hendrix, n.d.)

Little is known about the extent or nature of dementia in AI/AN communities. There is no prevalence data on various causes or types of dementia in the AI/AN population. While Alzheimer's disease is thought to be rare, vascular dementia is believed to be more common due to high rates of diabetes. (Hendrix, n.d.)

Dementia may be described in cultural terms rather than as an illness, e.g., as part of learning, the outcome of violating a cultural taboo, communicating with the next world, or the conflict and stress of living in two worlds at the same time.

Courts should be aware that some AI/AN cultures do not speak of death, dying, or negative consequences in the belief that thought and speech can cause the negative outcome to occur. Many AI/AN traditions teach there will be a joining with the ancestors and that death is a natural part of the life cycle.

Some believe that dementia and illness are caused by an imbalance in the patient's spiritual, emotional, and social environment. Speaking of negative consequences

(prognosis) of an illness can bring those events to pass as thought and language have the power to shape reality.

> *In some traditions, speaking the name of the deceased person may hold that person's spirit in limbo and delay their journey to the next world. As an example, in one tribe therapy groups had to address grief from the loss of a number of young people in a single accident. Within this tribe, the names of the deceased were not to be spoken because it would have pulled the individuals back from the spirit world and would not have let the individuals move forward in their journey.*

(Gray and Rose, 2012; Hendrix, n.d.)

Summary Points About Health Conditions and Death in the AI/AN Elderly

- Courts should carefully weigh the results of mental-status and functional evaluations if the evaluation does not incorporate cultural elements. In particular, courts should view with caution the results of testing and assessment tools if commonly used activities of daily living (ADL) and instrumental activities of daily living (IADL) scales were used. These tests typically evaluate tasks such as the older adult's ability to manage a checkbook and use a telephone. These tasks may have never been done by an elderly tribal member whose life revolved around chopping wood, carrying water, leather working, bead working, and weaving. (Hendrix, n.d.) Courts should be aware that there are concerns about the validity of the Western measures of depression with the AI/AN populations. Courts are urged be cautious if presented with findings based on evaluations that use scales other than the Indian Depression Scale (IDS). The IDS was developed to incorporate the cultural context of AI/AN life. Other scales may yield results that indicate that a person is more depressed or incapacitated than she or he really is. (Hendrix, n.d.)
- Evaluators and courts should frame questions about depression in terms of having a heavy heart or feeling out of balance or out of harmony with the earth as these are more culturally acceptable emotions (Hendrix, n.d.).
- Court officials—whether conducting an investigation as part of a conservatorship proceeding, questioning an older AI/AN as part of a restraining order application, or evaluating testimony regarding possible neglect or a threat of death—may find it difficult to get the relevant information. The older tribal member may be unwilling to speak of death or a fear of death from the actions of another in the belief that by talking of death it will come to pass or if the person has already died, then mentioning the person's name will delay his or her meeting with the ancestors. Family members may be unwilling to describe behaviors or capacities associated with dementia fearing doing so will worsen the condition.
- Courts interceding in situations in which a family is neglecting an elderly AI/AN may need to recognize and consider that the family may resist court interventions because of a cultural belief that it is their responsibility to provide care or that the condition is one they should be able to manage.
- Court officials may want to consider modifying their form of questioning to incorporate an understanding of relevant cultural views. They may find it helpful to ask about cultural attitudes, values, and beliefs in order to offer more culturally acceptable ways to accept services or to ask about illnesses in ways that provide the court with needed information without raising concerns about hastening death or slowing the reunion with ancestors.

Resources

For more information on AI/AN beliefs please see Appendix G: History and Historical Trauma

VII. Cultural Values Relevant to Elder Abuse in AI/AN Communities: Overview

This section summarizes what is known about elder abuse in AI/AN communities. The traditional roles of "elder" members in tribal communities, as well as cultural values relevant to an understanding of elder abuse, are examined. That said, traditional values vary from tribe to tribe and region to region. (Gray and Rose, 2012.)

a. The Traditional Role of Elders; "Elder" vs. Elderly

Outside of AI/AN communities, the terms "elder" and "elderly" are used interchangeably. In tribal communities these terms have distinct and different meanings. The term "elder" denotes a position of leadership based on experience, spirituality, and community service, rather than age. In short, "elder" is not the same as an older Indian. (Hendrix, n.d.)

> *The traditional status of elders in American Indian and Alaska Native cultures is one of honor and respect. Elders are respected for their age, experience, maturity, and wisdom. They are considered valuable resources to the Tribe as custodians of Tribal history, culture and tradition.*

(Jackson, and Sappier, 2005, at p. 1.)

Elders have been seen as repositories of knowledge, valued for their experience and wisdom, and as an important link to the past and a resource for the future (White, 2004). For example:

> *It is the tradition and custom of the White Mountain Apache people to honor and protect their elderly as they are the possessors of the spiritual and collective wisdom and traditions of the White Mountain Apache Tribe of the Fort Apache Indian Reservation which are passed from generation to generation.*

(White Mountain Apache Tribe, Elderly and Incapacitated Adult Protection Ordinance, 1998.)

> *Elders are valuable resources to the Nation because they are repositories and custodians of Navajo history, culture, language, and tradition. Navajo elders provide stability by being role models for their children and grandchildren to whom they demonstrate long-lasting commitment to family, marriage, employment, profession and other social institutions.*

(Navajo Nation, Dineh Elder Protection Act, 1998.)

> *Respect for elders, both tribal and familial, is instilled in children from a young age…[t]ribal elders today still perform many important spiritual, political, and tribal functions.*

(Carson and Hand, 1999, at p. 170.)

Summary Points About Term "Elder"

- California court officers should distinguish between "elders" and "elderly" AI/AN when addressing older litigants for whom it may be preferable to use terms such as "elderly" or "older person."

- When statutory requirements do not require the use of the term "elder abuse" consider using other terms such as "abuse in later or late life" or "abuse of an older adult."

b. Cultural Values Relevant to an Understanding of Abuse in Late Life

> *Native Americans generally share a set of cultural values and norms regarding their social goals and relationships, particularly within their families that tend to be very different from and even in conflict with those found among White Americans… . The dominant values of Native Americans in general have the effect of creating and sustaining a sense of community and belonging… . It begins with a spiritual base, and religious observances are a vital part of their social lives… For many, their basic religious belief is that they come from and continue to be part of the earth. It follows from that, then, that they must live in harmony generally with nature and specifically with their fellow tribesmen. Consequently, they tend to interact with each other primarily on the basis of cooperation and family/clan interdependency… . Traditionally, Native Americans have tended to deliberately avoid the kind of intense individual competition that prevails throughout the modern Western world.* (Cites removed.)

(Brown, 1999, at p. 150.)

These shared values have contributed to individual, family, and tribal "survival and resiliency" and include, in addition to what has already been highlighted, community conscience and responsibility; group participation and success; reciprocity; "optimism

and contentment that comes from a cosmic identity; a deep sense of spirituality… and a priority of living in harmony with all creation…" (Carson and Hand, 1999, at p. 170). Tribes represent "communities of relatedness" (relationships that endure from generation to generation) (Carson and Hand, 1997, at p. 88).

Cultural values that may act as protective factors in elder abuse and neglect in Native American communities include:

1. Strong emphasis on family and tribal interdependence and support, community.
2. Conscience and responsibility, group participation, cooperation and non-competition except in playful, ceremonial, or athletic activities, values rooted in Tribal culture, spirituality, ritualistic practice, and living in harmony.
3. Extended family and kinship networks.
4. Trans-generational transmission of history, customs, and beliefs.
5. Respect for tribal and familial elders and older family members.
6. Interest in preserving tribal culture and languages.
7. Belief in broad dispute resolution in which "each person is an integral part of the community as a whole; each person's actions reflects a distinctive life path that should not be judged by others; and the goodness or harm one shows to others will eventually return to the life of the sender"

- (Carson and Hand, 1997, at p. 88.)

Courts can integrate these cultural values when resolving legal matters. For example, in criminal cases, these values may be relevant when making pretrial release and any conditions, considering the likelihood of the offender obeying court orders, determining links to the community, and evaluating counseling programs at sentencing.

When issuing court orders, the existence of these values may be helpful in determining the likelihood that the restrained party will honor the order and the protected party will be supported by the family and others as they seek protection.

In probate matters, these values may be helpful when deciding who to appoint as a conservator, whether the caregiver is an appropriate choice and capable of providing proper care, and if the caregiver will be supported by others when providing care.
A discussion of their use in crafting orders was described previously in section III. a of Part I.

Cultural Values About Dementia and Death

Summary Points Regarding Shared Cultural Values

- Courts should be aware of cultural values and beliefs and protective factors in local tribal communities.
- Court practices and rulings that incorporate those values and protective factors are more likely to be effective.
- State court judges should build relationships with their tribal counterparts and tribal governments.

c. Historical Trauma and Tribal History

The history of AI/AN tribes and government interactions is a lengthy and sad one marked by policies and practices designed to destroy tribal communities, assimilate members into the European-American culture, "civilize" tribal members, and end cultural practices and tribal identification (Trusty et al., 2002). AI/AN who lived through the centuries of such practices suffered a variety of traumatic consequences that are often labeled as "historical trauma" in which the trauma is transferred to subsequent generations through biological, psychological, environmental, and social means, resulting in a cross-generational cycle of trauma (Brown-Rice, 2013). Historical trauma has led to changes in tribal beliefs and culture.

Historical trauma has resulted in social-environmental, psychological, and physiological disparities. Examples are described in the following table:

Type of Stressor	Manifestations

Social-environmental	• Higher domestic violence, physical and sexual assault rates (3.5 times higher than national average and may be higher due to underreporting) (Sue and Sue, 2012).
	• Higher poverty rates (U.S. Census Bureau, 2006; Denny, et al., 2005; Brown-Rice, 2013).
	  ○ 28.4% of AI/AN lived in poverty in 2010 (compared to 15.3% of the nation as a whole). (U.S. Census Bureau, 2010c.)
	  ○ AI/AN elders age 55 and over are nearly three times more likely (49% vs. 17%) to be poor or near poor (less than 200% of the federal poverty level (FPL)), than non-Latino whites. (Satter et al., 2010.)
	• Lowest income, least education, and highest poverty level of any group in the U.S. (Denny, et al., 2005; Brown-Rice, 2013).
	• Higher unemployment rates than rest of U.S. population (U.S. Census Bureau, 2006).

Psychological	• Highest rate of weekly consumption of alcohol of any ethnic group (Chartier and Caetano, 2010; Myhra, 2011). • High rates of mood disorders and PTSD (Centers for Disease Control and Prevention (CDC), 2007; Dickerson and Johnson, 2012). • Suicide rates are 3.2 times higher than the national average (CDC, 2007). • Compared with all other racial groups, non-Hispanic Native American adults are at greater risk of experiencing feelings of psychological distress and more likely to have poorer overall physical and mental health and unmet medical and psychological needs (Barnes, et al., 2010; Brown-Rice, 2013).
Physiological	• The life expectancy at birth for the Native American population is 2.4 years less than that of all U.S. populations combined (CDC, 2010). • The lowest life expectancy of any population group in the United States (CDC, 2010). • Higher rates of heart disease, tuberculosis, sexually transmitted diseases, and injuries (Barnes et al., 2010). • Diabetes prevalence is significantly higher than any other racial or ethnic group in the United States (Barnes et al., 2010).

Resources

For more information on historical trauma, please refer to Appendix G: History and Historical Trauma

- See also Evans-Campbell, T. (2008). Historical trauma in American Indian/Native Alaska communities: A multilevel framework for exploring impacts on individuals, families, and communities, *Journal of Interpersonal Violence 23*, 316, available at *http://jiv.sagepub.com/content/23/3/316*.
- For an example of a culturally based curriculum for use in domestic violence matters, see: The Northern California Tribal Court Coalition (2010), Native Identity-Based Cultural Intervention and Healing Curriculum.

Significance of Historical Trauma for California Judicial Officials

The boarding school experience continued well into the 1960s and, in some places, even longer. As a result, courts will be dealing with actual survivors of the boarding school experience or their children or grandchildren. The boarding school experience left many AI/AN distrustful of governmental officials, including courts, and unwilling to seek help from non-tribal professionals and systems.

JUDICIAL CHECKLIST

Courts working with older AI/AN and/or their families may want to explore:

- Are the parties—all or some—"traditional" in their beliefs and practices, "acculturated," or somewhere in between?
- Are the parties—all or some—familiar with, and accepting of, state laws and practices? (Note: this is not to suggest that if parties are not accepting of state practices and laws, the court cannot or should not act, but rather to gain information whether a party is more or less likely to understand state and local services, court orders, duties of a conservator, bail conditions, etc.)
- How can the court improve its communication with the victim and offender?
- Are there situations in which the court could use less adversarial procedures and employ procedures that are more in keeping with how tribal communities address conflict and unacceptable behavior, if agreeable to the victim?
- Are there services available through the tribe that would be helpful and incorporate an understanding of the tribe's and the individual person's historical experiences?
- Can the court incorporate traditional practices into the court's response?
- Would it be helpful and appropriate to share supervision and monitoring of a court order or offender's sentence terms with a local tribal court or tribal entity? Would the tribal court welcome such a request?
- What kinds of agreements or understandings exist between a state court and tribal court?
- Would the victim be assisted by and amenable to counseling, healing practices and ceremonies, and support through the tribe?

Summary Points About Historical Trauma

- AI/AN litigants may well have personally experienced governmental practices that eroded trust in the U.S. government, undermined tribal identity, and left deep personal scars. Even if litigants did not, they know others who had these experiences.
- State court officials should become knowledgeable about the local tribes and their historical experiences with state and federal governments.
- Developing collaborative and cooperative relationships with tribal court officials and tribal governments may be helpful in overcoming distrust about the state government and courts.
- Integrating traditional practices and tribal programs into state court rulings may increase trust and participation by AI/AN.

VIII. Defining Elder Abuse in Tribal Communities

The elder abuse prevention field has long struggled to create a single universally accepted definition of elder abuse. In the absence of such a definition, a framework has been offered. The federal Roadmap Project funded by the U.S. Departments of Justice and Health and Human Services, drawing on the expertise of some 750 researchers, practitioners, and other experts in the field, described elder abuse as physical, sexual, and psychological/emotional abuse; financial exploitation; abandonment, and neglect of an older adult by another person or entity that occurs in any setting "*either in a relationship where there is an expectation of trust and/or when an older person is targeted based on age or disability"* (Connelly, Brandl, and Breckman, 2014). While this framework is helpful, it does not fully encompass elder abuse as experienced by elderly AI/AN.

Because of the diversity of AI/AN tribes and communities, there will be "differences in perceptions of elder abuse among persons of the same race in different areas of the state who may have different cultural backgrounds and values. This finding is a reminder of the heterogeneity of persons who are seemingly of the same race and that race does not equal culture." (Hudson et al., 1998, at 548; U.S. Department of the Interior, 2013.)

AI/AN perceptions of elder abuse include:

- AI/AN older adult respondents ranked more items as abusive and 22 items at a higher level of abuse severity than did African American and Caucasian respondents. In comparison to African Americans and Caucasians, Native Americans felt more strongly that "verbally forcing" (term used in the survey) an elder is elder abuse and that some elder abuse is committed by relatives. They were also more likely to disagree that yelling and swearing at an elder needs to occur more than once to constitute elder abuse and that the use of "verbal force," including yelling or swearing at or belittling an elder, is not a form of elder abuse. American Indian/Alaska Native older adults were less likely than other groups to agree that elders are at risk for elder abuse because they are seen as physically weaker than when they were younger; healthy elders can be abused; and elder abuse is mistreatment because the behavior harms the elderly adult. (Hudson and Carlson, 1999, at pp. 197–199; Hudson et al., 1998.)

- Distinguishing financial exploitation from culturally acceptable conduct is difficult. Elderly Navajo tribal members who admitted that their money went to someone else all explained that it had been a matter of an elderly person voluntarily sharing their money with needy family members. They were not

being exploited, but were themselves living up to an important cultural value (Brown, 1998). The interplay of cultural values and elder abuse are not evident just in financial exploitation.

- Exploitive child care may be difficult to distinguish from culturally normative and esteemed child care (Jervis, 2013).

- Older AI/AN who are asked about abuse are likely to characterize it in terms of being treated well or poorly by family. The term "family" has cultural significance and often includes individuals who are not biological relatives. In the Shielding American Indian Elders (SAIE) project, older tribal members were asked about their beliefs. Good treatment included being taken care of, having one's needs met, and being respected. In contrast, poor treatment included financial exploitation, neglect, and lack of respect (Jervis, 2013). Respect was a crucial component of what it meant to be treated well, while disrespect was largely equated with abuse (Jervis, 2013, at p. 76).

- Tribal members describe certain conduct as "ritual abuse" in which the older adult is denied access to traditional activities such as attendance at the powwow, not permitted to join in community ceremonies, not provided or allowed to eat traditional foods associated with certain observances, as well as other actions that are defined by the tribe's culture and tradition (National Indian Council on Aging, 2012).

- Tribal communities may not conceptualize abuse of older members in the same way as the dominant culture. In particular, they may not conceptualize it as criminal conduct (Heisler, 2000, 2013) in which wrongful acts take place in a context where there are clear perpetrators and clear victims and distinctions fail to address problems related to informal care giving (Manataka American Indian Council, 2000).

- Relatively few tribes have developed elder abuse codes (National Indigenous Elder Justice Initiative, 2013) though the numbers of tribes with or who are developing elder abuse codes is increasing. In California, for example, the Dry Creek Rancheria Band of Pomo Indians has enacted a Tribal Elder Code as part of its Judicial Code (see http://drycreekrancheria.com/wp-content/uploads/2013/08/5-DCR-Elders-Code-FINAL1.pdf) The Bishop Tribe has a Tribal Adult Guardianship Ordinance, available at *www.bishoppaiutetribe.com/assets/ordinances/Tribal%20Adult%20Guardianshi*

p%20Ordinance.pdf, as does the Yurok Tribe, available at *www.narf.org/nill/Codes/yurokcode/elder_vulnerable_adult_protection.html*.

- Some AI/AN elders have extremely valuable and culturally significant or sacred artifacts, including traditional regalia, baskets, and beadwork, which are highly sought after by collectors. In many AI/AN communities sacred objects are not "owned" by any individual and cannot be sold or encumbered by the person who possesses them. They are considered sacred rather than mere property. When such artifacts are taken and sold, the loss is both financial and spiritual as tribal members may not believe these items should be sold to outsiders. (Baldridge et al., 2004.) In addition, selling/misappropriation of sacred objects assumes that someone "owns" these objects.

Summary Points for Defining Elder Abuse in Tribal Communities

- Older AI/AN (like other older adults) may not understand or conceptualize what has happened to them as "elder abuse."
- Some acts may be considered elder abuse by AI/AN older adults but may not fit within state statutory definitions. State remedies may not be available for such conduct.
- Older AI/AN may not recognize conduct as elder abuse and may hesitate to use state remedies and services that could improve their health and safety.
- Older AI/AN may recognize conduct as abuse but not see the state court as providing an adequate and culturally appropriate remedy or see it as imposing a remedy that is unwanted, such as a jail term.
- Questions that incorporate terms such as "respect," "being listened to," and "being able to participate in tribal ceremonies, traditions, and observances" will be better understood by tribal elders and may lead to improved fact finding and decision making.
- An understanding of abuse in culturally accepted terms will allow the court to craft better terms and conditions in its orders.
- Understanding the cultural significance of certain objects will help the court understand the degree of loss and the need for the return of the actual item rather than a monetary order of restitution.

Resources

For more information about the prevalence and incidence of elder abuse, please refer to Appendix D: Prevalence and Incidence of Elder Abuse in the General Population and AI/AN Communities

IX. Extent of the Problem: What Is Known About the Prevalence and Incidence of Elder Abuse in California

While elder mistreatment is anathema to the traditional cultural norm of respect for older members of the tribe, elder abuse is a frequently cited concern of older adults living on reservations across the United States. The actual extent of elder abuse in AI/AN communities is unknown although "the existing literature and accounts by Indian elders and their families, tribes and advocates suggest that it is a serious and pervasive problem." (Seigler, 2012, at pp. 423–424.) Elder abuse is a "concern for AI/AN tribal leaders though it is not well-characterized." (Sapra et al., 2014, at p. 1.) There are few studies or surveys of the prevalence or incidence of elder abuse in AI/AN communities. There are no national studies and only a few tribal-specific studies (Jackson and Sappier, 2005, at p. 2).

The National Indian Council on Aging indicates that neglect is the most common form reported among AI/AN elders, accounting for nearly half of reported cases. Material exploitation and psychological abuse are the next most common types, occurring with about equal frequency. (Hall and Weiss, 2010.)

Elder abuse in AI/AN populations is underreported. Buchwald et al. (2000) found that only 31% of definite cases of abuse of elderly AI/AN were reported to authorities.

The extent of AI/AN elder abuse and neglect in California has not been studied.

X. Characteristics of Victims

Studies have consistently found that in all forms of abuse AI/AN victims are usually women. In cases of physical abuse, Buchwald found that women were 9.4 times more likely to be physically abused than men.

Victim characteristics associated with abuse include:

- Being very old
- Being socially isolated
- Perceived by family members as burdens
- Living with the abuser
- Being in poor health

Higher risk for abuse and neglect is associated with suddenly becoming dependent on others and having mental impairments, including confusion (National Indian Council on Aging, 2004). Victims who were younger than non-victims were 4.4 times more likely to be depressed and 2.7 times more likely to depend on others for food (Buchwald et al., 2000; U.S. Department of the Interior, 2013).

XI. Characteristics of Perpetrators

AI/AN victims of late life abuse are most often abused by people they know, love, and trust rather than strangers. Some tribal service providers estimate that nearly 80% of those abusing Native elders are immediate family members; 10% are extended family members. (Brown et al., 1990.) Adult children are the most common perpetrators, followed by spouses, other relatives, and grandchildren. (National Center on Elder Abuse, 1995; Hudson et al., 1998.) Brown (1989) conducted interviews on the Navajo reservation and randomly interviewed 37 of the 110 older adults between ages 59 and 90. Those who admitted having been neglected or abused almost universally identified family members (spouses and direct descendants) as the perpetrator.

Caregiver perpetrator characteristics are:

- Alcohol/drug use
- Mental illness in the home/caregiver residence
- Marital conflict/domestic violence
- Financial dependence on the elders
- Multiple caregivers
- Medication noncompliance.

(Buchwald et al., 2000.)

Physically abusive caregivers tended to be younger and unemployed, have more personal problems, live with victims, have other responsibilities, and are less likely to receive help from others. (Jervis, 2013, citing the Buchwald study.) Non-caregiver perpetrators were overwhelming male (over 88%). (Buchwald et al., 2000.)

XII. Risk Factors

Risk factors are neither actuarial tools nor proof that abuse has occurred. Nevertheless, knowledge of risk factors can inform the court's evaluation of information when issuing court orders and deciding appropriate terms and conditions, when setting bail or conditions of release, at sentencing, and when deciding who should be appointed to serve as an older tribal member's conservator.

Risk factors associated with abuse of older AI/AN members include social, health, economic, and historical conditions. Some relate to the lessening of family bonds,

historical poverty, weakening of kinship systems, historical trauma, acculturation stress, and the changing roles and status of older and younger tribal members.

Resources

For a more complete discussion of risk factors please refer to Appendix E: Risk Factors for Abuse and Neglect in AI/AN Communities

Risk Factors by Type of Abuse

Form of Abuse	Associated Risk Factors
Neglect	(1) The number of hours of care per day that families provide their older members; (2) The mental conditions (confusion) of the older care recipient; (3) How suddenly the elderly person became dependent and in need of care; (4) Families trying to share the caregiver responsibilities; (5) Extent that having to provide care created a family crisis; and (6) Older adult's level of income. (Manataka American Indian Council, 2000.)
Emotional/Psychological Abuse	(1) Extent of family crisis due to caregiver responsibilities; (2) Mental condition of the elder; and (3) Suddenness of the elder becoming dependent. (Manataka American Indian Council, 2000.)
Physical Abuse	(1) Most strongly associated with mental condition of the elder; and (2) Less strongly associated with families trying to share the caregiver responsibilities. (Manataka American Indian Council, 2000.) (3) Marital conflict/domestic violence (4) Dependence on others for food, and (5) Fewer caregivers at home. (Buchwald et al., 2000.)
Financial Exploitation	(1) Families trying to share the caregiver responsibilities; (2) Suddenness of the elder becoming dependent; (3) Number of hours of care per day that the elder said they

	needed; and (4) Number of hours of care per day that families were providing. (Manataka American Indian Council, 2000.)

Summary Points on Victims, Perpetrators, and Risk Factors

- Court rulings that address perpetrator substance abuse, mental health, and economic dependency on the victim can reduce risk of continuing abuse.
- Incorporating tribal historical practices and traditions in rulings will increase victim safety and reduce offender risk of reoffending.
- Developing cooperative and collaborative efforts with tribal courts and governments will enhance compliance with court rulings and orders.

PART 3: COURT PROCEEDINGS INVOLVING TRIBAL MEMBERS—INTERACTIONS, FACT FINDING, AND PRACTICES

I. AI/AN Older Adults in State Court

There are a variety of issues that arise in court proceedings in which an older tribal member may appear seeking assistance with an elder abuse matter. This section will describe court settings in which elder abuse matters may arise, as well as barriers to participation including communication and reporting, and suggest considerations and practices to enhance participation in the state court process.

II. Court Settings in Which Abuse of an Older AI/AN May Appear

Abuse cases involving elderly victims may appear in multiple court settings and may be seen across court departments. For example:

Court Setting	Type of Matter
Criminal	• Prosecutions for crimes against elderly AI/AN members • Probation revocation

Probate	• Probate conservatorships • Lanterman-Petris-Short (LPS) conservatorships • Will contests • Guardianships of juveniles
Civil	• Restraining orders • Elder abuse civil actions • Civil actions for conversion, breach of contract, etc.
Family	• Child custody
Juvenile	• Dependency • Delinquency

Some matters will be readily identifiable as elder abuse; in others, the elder abuse may be part of something else or not identified at all.

Summary Points Regarding Court Settings

- Elder abuse matters involving tribal members may appear in virtually any court or calendar.
- Courts may wish to identify and assign to a single judge related elder abuse matters involving tribal members.
- Court staff will be essential in identifying elder abuse matters involving AI/AN and assuring that cases are assigned to a single judge.

III. Court Interactions With AI/AN Older Adults

California courts interacting with AI/AN, especially elderly parties, may encounter language obstacles and unfamiliar speech patterns.

a. Language Obstacles

- Some AI/AN are monolingual non-English speaking. Since tribal members may have moved to California and left their ancestral tribes and cultures, the court should assure that translators are available.
- Translator issues:
  - It is culturally preferable to use translators of the same gender as the victim or witness.
  - Not all words can be translated into the witness's language and some Native language terms do not translate into English.
  - Language Line interpretation may not be proficient in all of the 150 or more spoken AI/AN Languages (Hendrix, n.d.).
- When asking questions:
  - Probability statements do not translate in some tribal languages and may be misinterpreted.
  - It is preferable to ask questions indirectly (e.g., what would someone else in the older person's same situation want to have happen?) rather than directly (what do you want to happen?).
  - In some AI/AN cultures it may be culturally inappropriate to ask about or provide negative information (e.g., death and dying) as there may be a belief that thought and word may give reality to negative conditions or may prevent or delay a person's passage to the next life.

b. Speech Patterns

- Some older AI/AN litigants will speak "Reservation Dialect English." The person will be understandable but may, for example, use the present tense when describing past events.
- Socially, AI/AN tend to speak in a soft, slow, deliberate manner, stressing the emotions more than the content.
- AI/AN may be very emotionally expressive but can be very reserved when speaking with persons perceived as hostile or distrusted. Speech is usually a secondary expression to behavior.
- Silence is especially valued, and most Native Americans are comfortable with silence.
- Some AI/AN litigants will speak slowly and will pause between phrases. It is common for there to be long pauses between the end of a question and the beginning of the response. The court should not assume that the person did not understand the question or does not know the answer. Do not fill the silence with another question or repeat one already asked. It is considered rude to interrupt someone who is speaking (or about to speak). The person being questioned may

be offended or may believe that you do not want the question answered. Alternatively, the tribal member may feel they have interrupted you and offended you.

- Many AI/AN will not look another person, particularly someone in a position of authority, in the eye due to their tribe's cultural traditions. To do so may be considered disrespectful. It is not a sign of evasion or deceit.
- Some older AI/AN have difficulty describing what happened in a linear or temporal way (and then what happened?). Instead they may use a traditional method of describing events, such as storytelling in which a story describes events. This is an accepted way of communicating and is part of an oral tradition and a way to pass down traditions and beliefs. It also allows the person to explain what occurred without accusing or confronting someone for their conduct, another traditional cultural belief.

(See Gray and Rose, 2012; Satter et al., 2005.)

IV. Barriers to Reporting, Seeking, and Pursuing Court Remedies

The contentious and violent history of interactions between the U.S. and state governments and tribes and their members and the lack of consensus about what constitutes elder abuse have contributed to the underreporting of abuse against elderly tribal members. Elder abuse even outside of tribal communities has always been under-reported (Lachs and Berman, 2011) but the cumulative effect of historical experiences has magnified the problem.

Realities of local policing may act as additional barriers.

Victims of violence may feel the police or judicial system cannot help them, and therefore may be reluctant to seek help. Tribal police forces are often stretched thin in terms of economic resources and personnel, often with a small number of officers covering large reservations and rural areas (Wakeling et al., 2001). A 2007 report found that fully one-half of all California reservations had total populations under 100, making it unlikely that most would have their own police agencies. Because their gaming facilities draw in large numbers of outside customers, some of these tribes do operate police agencies (Goldberg and Champagne, 2007).

Resources

For more information about tribal police forces please see Appendix H: Tribal Law Enforcement Agencies

Other barriers to older AI/AN members seeking help for relief from abuse include:

- Fear and distrust, including of law enforcement authorities (Wakeling et al., 2001). Fears of retaliation are heightened by geographic isolation from police and non-tribal social services. In smaller communities, it is likely that the elder will come into contact with the perpetrator or his or her family after abuse is reported.
- Some victims do not seek help because they have little confidence in the services offered to them. Their confidence may be increased by the support of advocates able to deliver culturally sensitive, trauma-informed services. Some tribes are able to provide victim advocacy service. Other victims, for reasons of privacy and confidentiality, personal preference, and/or safety, may prefer to receive services not provided by the tribe. In this instance the victim should be eligible for programs available to non-tribal members.
- Some victims believe that state court remedies are not meaningful and acceptable within the tribal community (Bassett et al., 2012).

- Lack of systemic responses that are helpful for older adults and are culturally grounded in the experiences and needs of AI/AN persons and culturally sensitive. A recent study of over 18,000 tribal elderly conducted by the National Resource Center on Native American Aging found that only 1% of older AI/AN persons currently use elder abuse prevention programs such as mental health services, counseling, legal assistance and support services to help an elder live more independently, reducing the need and stresses on caregivers. More than 13 % would use caregiver, financial assistance, legal assistance, personal care, and transportation programs if offered by their respective tribes. (Davis, 2013.)

- Lack of Protective Services response. Many tribes have no Adult Protective Services (APS) programs of their own, necessitating that cases be investigated by California APS staff. In California, tribes rely on state adult protective services programs, even though the available assistance they can offer may be minimal (Department of the Interior, 2013). APS in California is a county-based program whose workers may not be familiar with the culture, traditions, or experience of the tribe or individual members. They may not have relationships with the tribes they serve and, unless a matter rises to the level of a criminal action, they may lack jurisdiction to enter tribal lands in order to conduct investigations or offer services because this could be seen as “civil regulatory” activity unless there are memoranda of understanding or other agreements between the APS program and the tribe. Nevertheless, tribal members are entitled to the same services that are provided to other residents.

Some tribes with APS programs may staff them with volunteers who may not be able to devote their full attention to the cases they encounter. “These factors may contribute to the sense that the risks of reporting mistreatment are not worth the possible benefits. Elders and family members may be additionally motivated by the desire to maintain a sense of privacy around their family’s ‘business’ or to keep the kin group together; concern about losing grandchildren; the fear of ending up in a nursing home; and/or a sense of responsibility for the abuser, for whom the elder may be a caregiver. When considered as a whole, it is not surprising that Native elder mistreatment so often goes unreported.” (Jervis, 2013, at 78.)

Tribal members, whether they live on or off tribal lands, are eligible for the same services as non-tribal members. They may also have access to a range of additional services provided specifically for Native Americans. If they live near their tribe’s lands, the tribe may provide a range of programs and services. Typically, those residing in most metropolitan centers have the most services available. APS services vary considerably from county to county. Many Californian APS programs are understaffed and underfunded. There is considerable variability among counties about the availability of culturally sensitive services and counseling.

If the AI/AN abuse victim is from another state or country (most commonly Canada or Mexico), the home tribe located outside of California may be able to provide services and resources to that victim such as per capita distribution or victim assistance. Other states may also have an interest through a state-tribal compact if the victimization involves an out-of-state per capita distribution. (Personal communication, Raquelle Myers, Attorney National Indian Justice Center.)

Summary Points on Barriers to Reporting, Seeking, and Pursuing Court Remedies

- Courts can educate themselves whether local tribes and local Native agencies, such as the Indian Health Service clinics, offer culturally appropriate elder abuse services to AI/AN and, if so, the nature of those services.
- Courts can determine if local tribes operate Adult Protective Services programs and, if not, the nature of county responses by APS programs to AI/AN both on and off of tribal lands. When evaluating information from APS, courts may wish to consider the nature of the evaluation and whether validated, culturally specific testing was conducted. (See page 21, Summary Points re Health Conditions and Death in AI/AN Elderly" for more information.)
- Courts can support and encourage local tribal and county law enforcement collaborations and joint efforts to improve enforcement of the laws and access to justice.
- Court can inquire if local court-based advocacy services, victim witness program, community-based domestic violence and/or sexual assault program, aging services organizations, or others have advocates on staff from tribal communities or have culturally competent training for staff to assist AI/AN.
- Courts should support the use of advocates who can deliver victim-centered, trauma-informed culturally appropriate services.

- **Courts can assure that court staff is aware of culturally appropriate services and includes such programs and providers in referral information provided to AI/AN**.

- **Courts can foster and participate in state court-tribal court collaborations and initiatives to improve access to justice.**

- **Courts can encourage the development and use of culturally appropriate services and practices for AI/AN whether victims or perpetrators, including victim services and advocacy, and counseling and healing programs.**

- **Courts should allow AI/AN abuse victims to be accompanied by support persons. For statutory requirements regarding support persons please refer to Appendix H.**

- **Courts should employ relevant accommodations and innovative practices in handling elder abuse matters involving AI/AN. For examples please refer to Appendix I.**

V. Innovative and Restorative Justice Models

In addition to drawing on state court experiences with elder abuse cases, state courts can learn from the restorative justice practices used by tribal courts. In a restorative justice framework, the case is not addressed simply as a violation of criminal law. Instead the matter is viewed as a violation of intra-tribal relationships. Generally everyone affected by the abuse—victims, abusers, their respective families, and other members of the tribal community—participates in the case resolution (Seigler, 2012). At least one state, Michigan, is attempting to create a court modeled on tribal practices (National Center for State Courts, 2014).

In describing trial courts, Judge B. J. Jones, Tribal Court Judge and Director of the Tribal Judicial Institute at the University of North Dakota School of Law, stated:

> *I think non-tribal systems rely too heavily upon solutions by others: judges, lawyers. In tribal court we're trying to emphasize that the solutions lie within the community and lie within the persons who engage in conflict. In tribal courts, the lawyers and the judges are really secondary. It's the people who are involved in conflict that have to find their own manner of resolving it because the community is going to rely upon them to make it a healthy community in the future.*

(Center for Court Innovation, 2009, at p. 370.)

One example of restorative justice is the use of "sentencing circles" in which a criminal court judge refers a case to a group of tribal members—victims, offenders, family members, community members, and sometimes the parties' attorneys and the judge. Participants make sentencing recommendations. Agreements may be enforced as a binding sentence or may be presented to the court for approval. This process, like all restorative justice approaches, focuses on the causes of abuse and aims to reach an agreement by which all members of the circle agree on a just sentence. (Seigler, 2012.)

Tribal courts and state courts have other models of collaboration. For example, the Leech Lake Band of Ojibwe Tribal Court and the state courts for Cass and Itasca Counties in Minnesota, and the Shingle Springs Band of Miwok Indians and the Superior Court of Eldorado County in California, have formed joint jurisdiction state-tribal courts in which the judges from the two systems share the bench, collaborate over interactive television, and occasionally preside in the other's courtroom (Stenzel, 2009, at p. 245). The model of cooperation is one that could be considered for elder abuse cases in which the tribe and county courts share an interest in the matter and the participants.

For more information, please see Center for Court Innovation (2012) "Can Peacemaking Work Outside of Tribal Communities?," available at *www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities* and *www.wellnesscourts.org/files/Shingle%20Springs%20Joint%20Jurisdiction%20Presentiation.pdf*

References

ABC News (July 25, 2014). 86 family members disenrolled from Oregon tribe, available at http://www.cnsnews.com/news/article/86-family-members-disenrolled-oregon-tribe

Acierno, R., Hernandez, M. A., Amstadter, A. B., Resnick, H. S., Steve, K., Muzzy, W., and Kilpatrick, D. G. (Feb. 2010). Prevalence and correlates of emotional, physical, sexual and financial abuse and potential neglect in the United States: The national elder mistreatment s tudy. *American Journal of Public Health 100*(2), 292–297.

Acierno, R., Hernandez-Tejada, M., Muzzy, W., and Steve, K. (2009). *National elder mistreatment study*. Washington DC: National Institute of Justice. Retrieved from *www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf.*

Administration for Native Americans. (March 2014a). "American Indians and Alaska Natives—Federal Recognition," available at *www.acf.hhs.gov/programs/ana/resource/american-indians-and-alaska-natives-federal-recognition*.

Administration for Native Americans. (March 2014b). "American Indians and Alaska Natives—Who is Indian? What is an Indian Tribe?," available at *www.acf.hhs.gov/programs/ana/resource/who-is-indian-what-is-an-indian-tribe*

Administration on Aging. (2008). "A Statistical Profile of Americans Indian and Native Alaskan Elderly," U.S. Department of Health and Human Services, available at *www.aoa.acl.gov/Aging_Statistics/minority_aging/Facts-on-AINA-Elderly2008-plain_format.aspx*

Amendola, K. L., Slipka, M. G., Hamilton, E. E., and Whitman, J. L. (Dec. 2010). *The course of domestic abuse among Chicago's elderly: Protective behaviors, risk factors, and police intervention*. Retrieved from *www.ncjrs.gov/pdffiles1/nij/grants/232623.pdf*

American College of Obstetricians and Gynecologists, Committee on American Indian/Alaska Native Women's Health and Committee on Health Care for Underserved Women. (Jan. 2012, reaffirmed 2013). Health care for urban American Indian and Alaska Native women (Committee Opinion No. 515), available at *www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Urban-American-Indian-and-Alaska-Native-Women*

Baldridge, D., Nerenberg, L., and Benson, W. (June 2004). *Preventing and responding to abuse of elders in Indian Country*. Washington DC: National Indian Council on Aging for the National Center on Elder Abuse, available at *http://nicoa.org/?s=%22Preventing+and+Responding+to+Abuse+of+Elders+in+Indian+Country%22*

Barnes, P. M., Adams, P. F., & Powell-Griner, E. (2010). Health characteristics of the American Indian or Alaska Native adult population: United States, 2004–2008. *National Health Statistics Reports, No. 20*. Hyattsville, MD: National Center for Health Statistics.

Bassett, D., Tsosie, U., and Nannauck, S. (Winter 2012) 'Our culture is medicine': Perspectives of Native healers on posttrauma recovery among American Indian and Alaska Native patients. *Permanente Journal 16*(1), 19–27, available at *www.ncbi.nlm.nih.gov/pmc/articles/PMC3327107*

BigFoot, D., and Braden, J. (Winter 2007). Adapting evidence-based treatments for use with American Indian and Native Alaskan children and youth. *Focal Point*, *21*(1), 19–22, available at *www.pathwaysrtc.pdx.edu/pdf/fpW0706.pdf*

Brave Heart, M., Chase, J., Elkins, J., and Altschul, D. B. (2011). Historical trauma among indigenous peoples of the Americas: Concepts, research, and clinical considerations. *Journal of Psychoactive Drugs*, *43*(4), 282–290, DOI:10.1080/02791072.2011.628913.

Brave Heart, M. Y. H., and DeBruyn, L. M. (1998). The American Indian holocaust: Healing historical unresolved grief. *American Indian and Alaska Native Mental Health Research*, *8*(2), 60–82.

Brown, A. S. (1989). A survey on elder abuse at one Native American tribe. *Journal of Elder Abuse & Neglect*, *1*, 17–37.

Brown, A. S. (1998). *Perceptions and attitudes toward mistreatment and reporting: A multicultural study* (an analysis of the Native American data). A report submitted to the National Indian Council on Aging and the National Center on Elder Abuse.

Brown, A. S. (1999). Patterns of abuse among Native American elderly. In (T. Tatara, Ed.), *Understanding elder abuse in minority communities* (ch. 10, pp. 143–159) Philadelphia, PA: Brunner/Mazel.

Brown, A. S., Fernandez, R., and Griffin, T. M. (1990). *Service perceptions of elder abuse among the Navajo* (Research Report RR-90-3). Flagstaff, AZ: Northern Arizona University, Social Research Laboratory.

Brown-Rice, K. (2013). Examining the theory of historical trauma among Native Americans. *The Professional Counselor*, *3*(3), 117–130, available at *http://tpcjournal.nbcc.org/category/volume-3-issue-3*

Buchwald, D., Tomita, S., Hartman, S., Furman, R., Dudden, M., and Manson, S. M. (Aug., 2000). Physical abuse of urban Native Americans. *Journal of General Internal Medicine*, *5*(8), 562–564. (PMCID: PMC1495579), available at *www.ncbi.nlm.nih.gov/pmc/articles/PMC1495579/*.

Bureau of Indian Affairs. (Nov. 2013). *List of petitioners by state*, available at *www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf*

California Native American Heritage Commission. (n.d.). Cultural areas and languages of Native California, available at *http://nahc.ca.gov/lanuage.html*.

Carson, D. K. (1995). American Indian elder abuse: Risk and protective factors among the oldest Americans. *Journal of Elder Abuse and Neglect*, *7*(1), 17–37.

Carson, D. K., and Hand, C. (1997). Dilemmas surrounding elder abuse and neglect within Native American communities. In *Understanding and combating elder abuse in minority communities* (pp. 87–96). Long Beach, CA: Proceedings of a 1997 conference sponsored by the National Center on Elder Abuse (NCEA) and funded by the Archstone Foundation.

Carson, D. K., and Hand, C. (1999). Dilemmas surrounding elder abuse and neglect in Native American communities. In (T. Tatara, Ed.), *Understanding elder abuse in minority communities* (ch. 11, pp. 161–184) Philadelphia, PA: Brunner/Mazel, at p. 170.

CBS News (Jan. 20, 2014). Disenrollment leaves Natives 'culturally homeless,' available at *www.cbsnews.com/news/disenrollment-leaves-natives-culturally-homeless*

Centers for Disease Control and Prevention (CDC). (2007). *Web-based injury statistics query and reporting system*. Retrieved from *www.cdc.gov/injury/wisqars/index.html*

Centers for Disease Control and Prevention (CDC), Office of Minority Health & Health Equity. (2010). *American Indian & Alaska Native populations.* Retrieved from *www.cdc.gov/minorityhealth/populations/REMP/aian.html*

Centers for Disease Control and Prevention. (2012). American Indian & Alaska Native populations, downloaded April 17, 2014 from *www.cdc.gov/minorityhealth/populations/REMP/aian.html*.

Center for Court Innovation. (Fall 2009). Reflections on tribal justice: Conversations with Native American judges: Interview with B. J. Jones, Tribal Court Judge and Director, Tribal Judicial Institute, University of North Dakota School of Law. *Journal of Court Innovation*, *2*(2), 367–380.

Chartier, K., and Caetano, R. (2010). Ethnicity and health disparities in alcohol research. *Alcohol Research & Health*, *33*(1-2), 152–160.

Connelly, M.T., Brandl, B., and Breckman, R. (2014). *The elder justice roadmap. A stakeholder initiative to respond to an emerging health, justice, financial and social crisis*. Retrieved June 11, 2014, from *http://ncea.acl.gov/Library/Gov_Report/docs/EJRP_Roadmap.pdf*.

Cram, J. (2014). Elder court: Enhancing access to justice for all seniors. In C. R. Flango, D. W. Smith, N. E. Sydow, C. F. Campbell, and N. B. Kauder (Eds.), *Trends in state courts 2014* (pp. 87–89). Williamsburg, VA: National Center for State Courts, available at *www.ncsc.org/sitecore/content/microsites/trends-2014/home*

Davis, J. (May 2013). *Elder abuse in American Indian and Alaska Native communities.* National Resource Center on Native American Aging, National Indigenous Elder Justice Initiative.

Denny, C. H., Holtzman, D., Goins, T., and Croft, J. B. (2005). Disparities in chronic disease risk factors and health status between American Indian/Alaska Native and White elders: Findings from a telephone survey, 2001 and 2002. *American Journal of Public Health*, *95*(5), 825–827. doi:10.2105/AJPH.2004.043489

Dickerson, D. L., and Johnson, C. L. (2012). Mental health and substance abuse characteristics among a clinical sample of urban American Indian/Alaska Native youths in a large California metropolitan area: A descriptive study. *Community Mental Health Journal*, *48*(1), 56–62. doi:10.1007/s10597-010-9368-3

Duran, E., and Duran, B. (1995). *Native American postcolonial psychology*. Albany, NY: State University of New York Press.

Garrett, M. T., and Pichette, E. F. (2000). Red as an apple: Native American acculturation and counseling with or without reservation. *Journal of Counseling & Development*, *78*(1), 3–13.

Goldberg, C. and Champagne, D. (2007). *Law enforcement and criminal justice under Public Law 280: Final report*. National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Can be downloaded from *www.tribal-institute.org/lists/pl280.htm*

Goldberg, C. and Singleton, H. V. (2005). "Public Law 280 and Law Enforcement in Indian Country—Research Priorities," *Research in Brief*. National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, available at *www.nij.gov/publications/pages/publication-detail.aspx?ID=7054*

Gray, J. S. and Rose, W. J. (2012). Cultural adaptation for therapy with American Indians and Alaska Natives. *Journal of Multicultural Counseling and Development*, *40*, 82–92. Can be accessed through *http://ruralhealth.und.edu/what-we-do/native-americans*

Hall, G., Weiss, B. D. (June 2010). "Elder Care: A Resource for Interprofessional Providers," Arizona Center on Aging, visited April 14, 2014, at *http://www.reynolds.med.arizona.edu/EduProducts/providerSheets/Elder%20Abuse.pdf*, available at *http://aging.arizona.edu/education_training/programs/elder_care*

Heisler, C. J. (2000). Elder abuse and the criminal justice system: New awareness, new responses. *Generations*, *24*(2), 52–58.

Heisler, C. J. (2013). Elder abuse. In R. C. Davis, A. J. Lurigio, and S. Herman (Eds.), *Victims of crime* (4th ed., pp. 161–184). Sage Publications.

Hendrix, L. R. (n.d.). Ethnogeriatric Curriculum Module: *Health and health care of American Indian and Alaska Native elders*, available at *www.stanford.edu/group/ethnoger/americanindian.html*

Hudson, M. F., Armachain, W. D., Beasley, C. M., and Carlson, J. R. (1998). Elder abuse: Two Native American views. *The Gerontologist*, *38*(5), 538–548, available at *http://gerontologist.oxfordjournals.org/content/38/5/538.full.pdf*

Hudson, M. F. and Carlson, J. (1999). Elder abuse: Its meaning to Caucasians, African Americans, and Native Americans. In (T. Tatara, Ed.), *Understanding elder abuse in minority communities* (ch. 12, pp. 187–204) Philadelphia, PA: Brunner/Mazel.

Indian Health Service (Jan. 2015) "Disparities," available at *www.ihs.gov/newsroom/factsheets/disparities*

Jackson, Y. (June 2010). Administration on Aging, Interdepartmental Tribal Justice, Safety, and Wellness Session 11, Rapid City, SD.

Jackson, M. Y., and Sappier, T. (June 2005). *Elder abuse issues in Indian Country*. Administration on Aging, U.S. Department of Health and Human Services.

Jervis, L. L. (2013). Native elder mistreatment. In *Elder abuse and its prevention: Workshop summary* (II.4, pp. 75–79). Washington, DC: The National Academies Press, Institute of Medicine, National Academy of Sciences, available at *http://books.nap.edu/openbook.php?record_id=18518&page=75*

Judicial Council of California. (Feb. 2008). *Effective court practice for abused elders: A report to the Archstone Foundation*, available at *www.courts.ca.gov/documents/EffectiveCourtAbusedEldersMain.pdf*

Kendall-Tackett, K. (2009). Psychological trauma and physical health: A psychoneuroimmunology approach to etiology of negative health effects and possible interventions. *Psychological Trauma: Theory, Research, Practice, and Policy*, *1*(1), 35–48. doi:10.1037/a0015128

Lachs, M., and Berman, J. (2011). *Under the radar: New York State elder abuse prevalence study*. Retrieved from *http://nyceac.com/wp-content/uploads/2011/05/UndertheRadar051211.pdf*

Laumann, E. O., Leitsch, S. A., & Waite, L. J. (2008). Elder mistreatment in the United States: Prevalence estimates from a nationally representative study. *Journal of Gerontology*, *63*, 248–254.

Manataka American Indian Council. (March 2000). *Native American elder abuse: A government report*, available at *www.manataka.org/page1804.html*

Maxwell, E. K., and Maxwell, R. J. (1992). Insults to the body civil: Mistreatment of elderly in two Plains Indian tribes. *Journal of Cross-Cultural Gerontology*, *7*, 3–23.

Minton B. A., and Soule S. (Winter 1990). Two Eskimo villages assess mental health strengths and needs. *American Indian and Alaska Native Mental Health Research*, *4*(2):7–24.

Myhra, L. L. (2011). "It runs in the family": Intergenerational transmission of historical trauma among urban American Indians and Alaska Natives in culturally specific sobriety maintenance programs. *American Indian and Alaska Native Mental Health Research*, *18*(2), 17–40.

National Center for State Courts. (2014). *Trends in state courts 2014*, available at *www.ncsc.org/sitecore/content/microsites/trends-2014/home*.

National Center on Elder Abuse. (Sept. 24, 1995). "Addressing Elder Abuse with American Indian Tribes: A National Telecourse."

National Indian Council on Aging. (1981). Indian elderly and entitlement programs. Albuquerque, NM.

National Indian Council on Aging. (June 2004). *Elder abuse in Indian Country: A review of the literature*, available at *http://ncea.acl.gov/Resources/Publication/docs/litreview040707.pdf*.

National Indian Council on Aging. (2012). Using Your Tribal Values to Develop an Elder Protection Code, available at *http://nicoa.org/wp-content/uploads/2014/05/Elder-Protection-Workbook-Final.pdf*.

National Indigenous Elder Justice Initiative (NIEJI). (2013). See *www.nieji.org*.

Dao, J. (Dec. 12, 2011). In California, Indian tribes with casino money cast off members. *New York Times*, available at *www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all&_r=0*

Nez, T., Jr. (Feb. 2004). Dineh elder protection program. Presented at meeting of Title VI Training and Technical Assistance Conference, Phoenix, AZ (referenced in Jackson, M. Y., and Sappier, T. (June 2005), above).

Perry, S. W. (July 10, 2014). Tribal crime data collection activities, 2014. U.S. Department of Justice, Bureau of Justice Statistics, NCJ 246917, available at *www.bjs.gov/index.cfm?ty=pbdetail&iid=5053*.

Red Horse, J. (1983). Indian family values and experiences. In G. J. Powell (Ed.), *The psychosocial development of minority group children* (pp. 258–271). New York: Brunner/Mazel.

Red Horse, J. (1997). Traditional American Indian family systems. *Families, Systems & Health*, *15*(3), 243–250.

Romney, L. (March 5, 2014). Tribal judge works for Yurok-style justice. *Los Angeles Times*, available *at http://www.latimes.com/local/la-me-yurok-tribal-judge-20140305-dto-htmlstory.html*

Sapra, K. J., Juninski, S .M., Tanaka, M. F., and Gershon, R .M. (2014). Family and partner interpersonal violence among American Indians/Alaska Natives. *Injury Epidemiology*, *1*(7), available at *www.injepijournal.com/content/pdf/2197-1714-1-7.pdf*

Satter, D. E., Veiga-Ermert, A., Burhansstipanov, L., Ches, L. P., and Restivo, T. (2005). Communicating respectfully with American Indian and Alaska Natives: Lessons from the California health interview survey. *Journal of Cancer Education*, *20*(1), 49–51.

Satter, D. E., Wallace, S. P., Garcia, A. N., and Smith, L. M. (2010). *Health of American Indian and Alaska Native elders in California: Research report*. Los Angeles, CA: UCLA Center for Health Policy Research, available at *http://healthpolicy.ucla.edu/publications/search/pages/detail.aspx?PubID=68*

Seigler, J. (2012). Injustice in Indian Country: The need for a serious response to Native American elder abuse. *Elder Law Journal*, *19*, 415, University of Illinois College of Law.

Solomon, E. P., and Heide, K. M. (2005). The biology of trauma: Implications for treatment. *Journal of Interpersonal Violence*, *20*(1), 51–60.

Sotero, M. M. (2006). A conceptual model of historical trauma: implications for public health practice and research. *Journal of Health Disparities Research and Practice*, *1*(1), 93–108.

Stenzel, P. (Fall 2009). Full faith and credit and cooperation between state and tribal courts: Catching up to the law. *Journal of Court Innovation*, 2(2), 225–248.

Sue, D. W., and Sue, D. (2012). *Counseling the culturally diverse: Theory and practice* (6th ed.). New York, NY: John Wiley & Sons, Inc.

Trusty, J., Looby, E. J., and Sandhu, D. S. (2002). *Multicultural counseling: Context, theory and practice, and competence*. New York, NY: Nova Science Publishers.

U.S. Census Bureau. (March 2001). Census 2000 brief: Overview of race and Hispanic origin, available at *www.census.gov/prod/2001pubs/c2kbr01-1.pdf.*

U.S. Census Bureau. (Feb. 2006). *We the people: American Indians and Alaska Natives in the United States: Census 2000 special reports* (CENSR-28). Retrieved from *www.census.gov/prod/2006pubs/censr-28.pdf*

U.S. Census Bureau. (2010a). 2010 census brief: Overview of race and Hispanic origin, available at *http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf*

U.S. Census Bureau. (2010b) 2010 census summary file 1, table QT-P5, available at *https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.*

U.S. Census Bureau. (2010c). 2010 American community survey for the American Indian and Alaska Native alone population, available at *http://factfinder2.census.gov*

U.S. Census Bureau. (2012) 2012 national population projections: Summary tables, available at *www.census.gov/population/projections/data/national/2012/summarytables.html*

U.S. Department of the Interior, Bureau of Indian Affairs. (2013). *Adult protective services handbook: Native American adult protective services—A guide for protecting vulnerable adult and elder Indians from abuse, neglect, and exploitation,* available at *www.bia.gov/cs/groups/webteam/documents/document/idc1-026637.pdf*

U.S. Department of the Interior, Bureau of Indian Affairs (Jan. 2014). Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs. *Federal Register, 79*(19), pp. 4748–4753, available at *www.bia.gov/cs/groups/public/documents/text/idc006989.pdf*

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. (Dec. 2004). *American Indians and crime: A BJS statistical report, 1992–2002*, available at *www.justice.gov/sites/default/files/otj/docs/american_indians_and_crime.pdf*

U.S. Department of Justice, National Institute of Justice. (2005). *Public Law 280 and law enforcement in Indian Country: Research priorities*, available at *www.ncjrs.gov/pdffiles1/nij/209839.pdf*.

Wakeling, S., Jorgensen, M., Michaelson, S., and Begay, M. (2001). *Policing on American Indian reservations: A report to the National Institute of Justice.* Washington, DC: U.S. Department of Justice.

Whitbeck, L. B., Adams, G. W., Hoyt, D. R., and Chen, X. (2004). Conceptualizing and measuring historical trauma among American Indian people. *American Journal of Community Psychology, 33*(3-4), 119–130. doi:10.1023/B:AJCP.0000027000.77357.31

White, H. B. (2004). Elder Abuse in Tribal Communities, Southwest Center for Law and Policy and Office on Violence Against Women, available at *www.swclap.org/uploads/file/2de3c2e355104a588d680b7e4ad2f4a7/ELDERABUSE.pdf*

Cases

California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202

Ex parte Pero (7th Cir. 1938) 99 F.2d 28

Morton v. Mancari (1974) 417 U.S. 535

United States v. Antelope (1977) 430 U.S. 641

United States v. Broncheau (9th Cir. 1979) 597 F.2d 1260

United States v. Bruce (9th Cir. 2005) 394 F.3d 1215, 1224

United States v. Rogers (1846) 45 U.S. 567

Statutes

Federal

18 U.S.C. § 1115

18 U.S.C. § 2262

18 U.S.C. § 2265

25 U.S.C. § 1301(2)

25 C.F.R. Part 83

28 U.S.C. § 1360

42 U.S.C. § 3057 (2006), Older Americans Act

Tribal

Navajo Nation (1998), Dineh Elder Protection Act

White Mountain Apache Tribe (1998), Elderly and Incapacitated Adult Protection Ordinance

State

Cal. Code Civ Proc., § 527.6(l)

Cal. Fam. Code, § 6303(b)

Id., § 6401

Id., § 6403

Id., § 6404

Cal. Pen. Code, § 264.02

Id., § 368

Id., § 679.04

Id., § 679.05

Id., § 868.5

Id., § 939.21

Id., § 1048

Cal. Welf. & Inst. Code, § 15610.05

Id., § 15610.06

Id., § 15610.30

Id., § 15610.35

Id., § 15610.53

Id., § 15610.57(a)

Id., § 15610.63

Id., § 15610.70

Id., § 15630

Id., § 15657.03

California Legislature, Senate Bill 940 (Stats. 2014, ch. 553)

California Rules of Court, rule 5.386

APPENDIX A:
PUBLIC LAW 280 JURISDICTION

In 1953, largely as a way to save federal money (Goldberg and Champagne, 2007), Congress passed Public Law 280 (hereinafter PL 280). PL 280, or more accurately PL 83-280, dramatically changed criminal jurisdiction by shifting criminal jurisdiction over offenses involving Indians in Indian Country from the federal government to certain states. In six states, including California, the transfer was mandatory, unless a specific tribe in one of these states was excluded from the change. There were no tribes excluded in California. In other states, adoption of PL 280 was optional (Goldberg and Singleton, 2005).

Mandatory transfers of jurisdiction under PL 280 could not be opposed by the state and did not require the consent of the tribes until the enactment of amendments in 1968 (Goldberg and Champagne, 2007). No funding was provided for the additional duties transferred to local law enforcement (Goldberg and Singleton, 2005).

The enactment of PL 280 meant that the costs of enforcement of criminal laws fell to local government. Because reservation trust lands are exempt from state and local property taxes, and tribal members living and earning income on reservations are exempt from paying state income and sales taxes, these important sources of funding for local law enforcement and criminal justice on reservations have been unavailable (Goldberg and Champagne, 2007).

The history of law enforcement action under PL 280 has been criticized. A 1995 survey of California tribes indicated that the most prevalent concerns among the tribes surveyed were jurisdictional confusion and inadequate law enforcement responses to complaints (U.S. Department of Justice (DOJ), 2005). There were also findings that officers did not act because of their "unfamiliarity with tribal communities." (U.S. DOJ, 2005.) Inconsistency of response has led to complaints of "insensitive or discriminatory treatment" by state and local law enforcement and has fostered mistrust and hostility between state and tribal officials and communities.

PL 280 has created a number of legal complexities which may help explain why state responses have been inconsistent and at times, inadequate:

- Only statewide, not local, criminal laws are enforceable. PL 280 only authorizes enforcement of statewide criminal laws. Local and county ordinances and laws are not enforceable on tribal lands.

- PL 280 only authorizes enforcement of criminal (prohibitory) laws. Civil Regulatory laws are not enforceable. PL 280 and case law, including *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 209, have drawn a distinction between

prohibitory crimes and those that are regulatory. State law enforcement is directed to act in response to prohibitory crimes but lacks jurisdiction to act if the conduct is regulatory. This has meant that California may not enforce its laws related to such matters as environmental control, land use, gambling, and licenses. The line between these categories can be unclear.

- PL 280 criminal jurisdiction cannot be used to alter the status of trust lands or to restrict federally protected hunting and fishing rights. PL 280 prohibited California from legislating about property held in trust by the United States and federally guaranteed hunting, trapping, and fishing rights. The state cannot tax on the reservations. These limitations have been especially problematic when there are state criminal laws relating to hunting and fishing, when excluding disruptive persons from tribal lands pursuant to a state court order, or enforcing bans on polluting trust lands through illegal dumping (Goldberg and Champagne, 2007).

- PL 280 did not change the tribe's authority to create and maintain police departments with authority to enforce tribal laws. In addition, federal law enforcement agencies retain criminal jurisdiction over certain crimes, though their authority is greatly reduced under PL 280.

- The lack of funding, confusion over the authority conveyed to local (state-level) law enforcement—what can be enforced and what cannot, lack of training and relationships with tribal officials and police, and overlapping jurisdiction have all contributed to the inconsistent response to crimes on tribal lands. In addition, state and local agency practices have created additional barriers to response to crimes in Indian Country. For example, existing databases may not permit searches for elder abuse and other crimes. Until recently, tribal courts could not enter orders into state and federal protective order systems so state officers could not verify the orders in order to enforce them.

California Indian Tribes and Territory

California currently has approximately 110 federally recognized tribes,[1] with nearly 100 separate reservations or rancherias.[2] In addition there are currently 81 groups petitioning for federal recognition.[3] In the 2010 census roughly 725,000 California citizens identified as American Indian or Alaska Native either alone or in combination with other ethnicities.[4] This

[1] See http://www.bia.gov/cs/groups/public/documents/text/idc006989.pdf
[2] Note that some tribes remain "landless" meaning they have no land in trust for their members, while other tribes may have more than one reservation or rancheria.
[3] As of November 12, 2013. See http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024418.pdf
[4] See http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf

represents roughly 14% of the entire American Indian/Alaska Native population of the United States.

General Rules (these rules apply in California unless modified by PL 280)

Tribes are sovereign and have exclusive inherent jurisdiction over their territory and members, but **not** necessarily with jurisdiction over non-Indians even within tribal territory.

Tribes are under the exclusive and plenary jurisdiction of the federal Congress, which may restrict or abolish jurisdiction and sovereignty. The federal government has exercised this power a number of times to limit tribal jurisdiction, assume federal jurisdiction over a number of areas, and delegate that jurisdiction to some states. Congress has granted limited jurisdictional authority to the federal courts (under the General Crimes Act, 18 U.S.C. § 1153 and the Major Crimes Act, 18 U.S.C. § 1152) and to state courts (for example under Public Law 280). Congress has imposed limits on tribal courts through the Indian Civil Rights Act (ICRA, 25 U.S.C. § 1301–1303).

Public Law 280

The general jurisdictional scheme was altered in California by Public Law 280 enacted by Congress in 1953. PL 280 transferred federal criminal jurisdiction and conferred some civil jurisdiction on states and state courts in the six mandatory Public Law 280 states, which includes California. Public Law 280 is now codified in federal law as 28 U.S.C. § 1360 regarding civil jurisdiction and 18 U.S.C. § 1162 regarding criminal jurisdiction.[5]

Per the U.S. Supreme Court in C*alifornia v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, Public Law 280 had the following effect on California's civil and criminal jurisdiction in Indian Country:

> In Pub.L. 280, Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States. In § 2 [i.e.18 U.S.C. § 1162], California was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State. Section 4's [i.e. 28 U.S.C. § 1360's] grant of civil jurisdiction was more limited. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), we interpreted § 4 to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. *Id.*, at 385, 388–390. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280 it must be determined whether the law is criminal in nature, and thus fully applicable to the

[5] See included statutes.

> reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

(*Id.* at pp. 207–208.)

The "criminal/prohibitory" versus "civil/regulatory" distinction was set out by the Court in *Cabazon* as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation.

(*Id.* at p. 209.)

So, in terms of civil jurisdiction, the effect of PL 280 was merely to grant Indians access to state court forums to resolve disputes. It did not give the state jurisdiction to impose civil/regulatory laws on the tribes or tribal territory. Note that the fact that there are misdemeanor criminal penalties for infraction of a law is not sufficient in and of itself to convert it from civil/regulatory into criminal/prohibitory for the purposes of PL 280. Further, PL 280 applies only to STATE laws of general application; local ordinances do not apply.

The term "Indian Country" is defined in 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

California Criminal Jurisdiction in Indian Country Under Public Law 280

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction unless certain specific federal laws apply.
Non-Indian	Indian	Generally, state has jurisdiction exclusive of federal and tribal jurisdiction. (However, under VAWA[6] can have concurrent tribal, and federal if interstate provisions (18 U.S.C. §§ 2261, 2261A, 2262 or 922(g)(8) or (9)) apply.) Under VAWA tribes may opt to exercise some jurisdiction over non-Indians for DV offenses.
Indian	Non-Indian	State has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under the Tribal Law and Order Act) but tribe may exercise concurrent jurisdiction. Federal for certain federal offenses including interstate DV.
Indian	Indian	Generally, state has jurisdiction exclusive of federal government (unless federal government has reassumed jurisdiction under Tribal Law and Order Act, or unless specific federal crimes are involved) but tribe may exercise concurrent jurisdiction.
Non-Indian	Victimless	State jurisdiction is exclusive unless federal jurisdiction has been reassumed under Tribal Law and Order Act.
Indian	Victimless	There may be concurrent state, tribal, and federal jurisdiction if reassumption under Tribal Law and Order Act. There is no state regulatory jurisdiction.

Full Faith and Credit

While tribes are recognized as sovereign, they are not "states" for the purposes of the full faith and credit requirements of article IV of the U.S. Constitution. There is general consensus (but no Supreme Court authority on point) that tribes are not encompassed by the federal full faith and credit statute (28 U.S.C. § 1738). There are, however, a number of

[6] Violence Against Women Act (federal).

relevant federal and state provisions that mandate full faith and credit for and between tribal courts:

- Indian Child Welfare Act (25 U.S.C. § 1911(d))
- Violence Against Women Act (18 U.S.C. § 2265)
- Child Support Enforcement Act (28 U.S.C. § 1738B)
- Uniform Child Custody Jurisdiction and Enforcement Act (Cal. Fam. Code, § 3404)

Where there is no specific statutory mandate for full faith and credit, the general rule is that tribal court orders are entitled to comity.

Effect on Dependency and Delinquency Jurisdiction

Under the jurisdictional regime of PL 280, state courts in California generally have jurisdiction over dependency and delinquency cases involving Indians and Indian children, even if the events occur in Indian Country. However, this jurisdiction is affected by the requirements of the Indian Child Welfare Act (ICWA) and the fact that tribes may also exercise jurisdiction over these matters. Pursuant to ICWA (25 U.S.C. § 1911) even in PL 280 states, tribal jurisdiction is exclusive where a child is already the ward of a tribal court. Further, ICWA recognizes presumptive tribal jurisdiction over cases involving Indian children who are not already wards of a tribal court.

Effect on Jurisdiction in DV Cases and Ability to Enforce Protective Orders

If events take place in Indian Country and either the victim or perpetrator or both are Indian, then a tribal court may exercise concurrent jurisdiction with the state court. (Note that there may also be federal jurisdiction over some federally defined crimes.) Tribal jurisdiction and remedies are subject to limitations under the Indian Civil Rights Act and Major Crimes Act.

Civil state protective or restraining orders may be considered civil/regulatory and therefore be unenforceable in Indian Country unless registered with the tribe/tribal court. Some county police departments take the position that they have no authority to enforce protective orders in Indian Country. Restraining orders issued in a criminal case should be enforced/enforceable on tribal lands.

Few California tribes have tribal courts or tribal police departments.

Laws Governing Federal Jurisdiction in Indian Country

General Crimes Act:

"18 U.S.C. § 1152. Laws governing

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Major Crimes Act:

"18 U.S.C. § 1153. Offenses committed within Indian country

"(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

Embezzlement:

"18 U.S.C. § 1163. Embezzlement and theft from Indian tribal organizations

"Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

"Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—

"Shall be fined under this title, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $1,000, he shall be fined under this title, or imprisoned not more than one year, or both.

"As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws."

Public Law 280

Public Law 280 (Criminal Provision):

"18 U.S.C. § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	Indian country within the State
Minnesota	Indian country within the State, except the Red Lake Reservation
Nebraska	Indian country within the State
Oregon	Indian country within the State, except the Warm Springs Reservation
Wisconsin	Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

"(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General--

"(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

"(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments."

Public Law 280 (Civil Provisions):

"28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	Indian country within the State
California	Indian country within the State
Minnesota	Indian country within the State, except the Red Lake Reservation

Nebraska	Indian country within the State
Oregon	Indian country within the State, except the Warm Springs Reservation
Wisconsin	Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Federal Laws Requiring Full Faith and Credit

"18 U.S.C. § 2265. Full faith and credit given to protection orders

"(a) Full faith and credit.—Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be accorded full faith and credit by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.

"(b) Protection order.—A protection order issued by a State, tribal, or territorial court is consistent with this subsection if--

"(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

“(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

“**(c) Cross or counter petition.**—A protection order issued by a State, tribal, or territorial court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if—

“(1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or

“(2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

“(d) Notification and registration.—

“(1) Notification.—A State, Indian tribe, or territory according full faith and credit to an order by a court of another State, Indian tribe, or territory shall not notify or require notification of the party against whom a protection order has been issued that the protection order has been registered or filed in that enforcing State, tribal, or territorial jurisdiction unless requested to do so by the party protected under such order.

“(2) No prior registration or filing as prerequisite for enforcement.—Any protection order that is otherwise consistent with this section shall be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State, tribal, or territorial jurisdiction.

“(3) Limits on Internet publication of registration information.—A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.

“(e) Tribal court jurisdiction.—For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising

anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

“25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings

“(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

“The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

“§ 1738B. Full faith and credit for child support orders

“(a) General rule.—The appropriate authorities of each State—

“(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

“(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

“(b) Definitions.—In this section:

“child” means—

“(A) a person under 18 years of age; and

“(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

“child’s State” means the State in which a child resides.

“child’s home State” means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

“child support” means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

“child support order”—

“(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

“(B) includes—

“(i) a permanent or temporary order; and

“(ii) an initial order or a modification of an order.

“contestant” means—

“**(A)** a person (including a parent) who--

“**(i)** claims a right to receive child support;

“**(ii)** is a party to a proceeding that may result in the issuance of a child support order; or

“(iii) is under a child support order; and

“(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

“court” means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

“modification” means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

“State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

“(c) Requirements of child support orders.--A child support order made by a court of a State is made consistently with this section if--

“(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)—

“(A) has subject matter jurisdiction to hear the matter and enter such an order; and

“(B) has personal jurisdiction over the contestants; and

“(2) reasonable notice and opportunity to be heard is given to the contestants.

“(d) Continuing jurisdiction.—A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

“(e) Authority to modify orders.—A court of a State may modify a child support order issued by a court of another State if—

“(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

“**(2)(A)** the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

“(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

“(f) Recognition of child support orders.—If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

“(1) If only 1 court has issued a child support order, the order of that court must be recognized.

“(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

“(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

“(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

“(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

"(g) Enforcement of modified orders.--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

"(h) Choice of law.--

"(1) In general.—In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

"(2) Law of State of issuance of order.—In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

"(3) Period of limitation.—In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

"(i) Registration for modification.—If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification."

California State Laws Concerning Recognition and Enforcement of Tribal Court Orders

Under the Uniform Child Custody Jurisdiction and Enforcement Act:

"Family Code § 3404. Native American children

"(a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) is not subject to this part to the extent that it is governed by the Indian Child Welfare Act.

"(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this chapter and Chapter 2 (commencing with Section 3421).

"(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced under Chapter 3 (commencing with Section 3441)."

Under the Uniform Interstate Family Support Act:

Family Code § 4901

"The following definitions apply to this chapter:

"(s) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" also includes both of the following:

(1) An Indian tribe"

Under the Uniform Interstate Enforcement of Domestic Violence Protection Orders:

Family Code § 6401

"In this part:

"(1) "Foreign protection order" means a protection order issued by a tribunal of another state.

"(2) "Issuing state" means the state whose tribunal issues a protection order.

"(3) "Mutual foreign protection order" means a foreign protection order that includes provisions in favor of both the protected individual seeking enforcement of the order and the respondent.

"(4) "Protected individual" means an individual protected by a protection order.

"(5) "Protection order" means an injunction or other order, issued by a tribunal under the domestic violence, family violence, or antistalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual.

"(6) "Respondent" means the individual against whom enforcement of a protection order is sought.

"(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or any branch of the United States military, that has jurisdiction to issue protection orders.

"(8) "Tribunal" means a court, agency, or other entity authorized by law to issue or modify a protection order."

Under the Foreign Country Money Judgments Act:

Code of Civil Procedure § 1714. Definitions

"As used in this chapter:

"(a) "Foreign country" means a government other than any of the following:

"(1) The United States.

"(2) A state, district, commonwealth, territory, or insular possession of the United States.

"(3) Any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

"(b) "Foreign-country judgment" means a judgment of a court of a foreign country. "Foreign-country judgment" includes a judgment by any Indian tribe recognized by the government of the United States."

Under the Interstate and International Depositions and Discovery Act

Code of Civil Procedure § 2029.200

"In this article:

"(a) "Foreign jurisdiction" means either of the following:

"(1) A state other than this state.

"(2) A foreign nation.

"(b) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

"(c) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"(d) "State" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

"(e) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

"(1) Attend and give testimony at a deposition.

“(2) Produce and permit inspection, copying, testing, or sampling of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

“(3) Permit inspection of premises under the control of the person.”

Indian Civil Rights Act

25 U.S.C. § 1301. Definitions

“For purposes of this subchapter, the term--

“(1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

“(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

“(3) “Indian court” means any Indian tribal court or court of Indian offense; and

“**(4)** “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.”

25 U.S.C. § 1302. Constitutional rights

“(a) In general

“No Indian tribe in exercising powers of self-government shall—

“(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

“(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

“(3) subject any person for the same offense to be twice put in jeopardy;

“(4) compel any person in any criminal case to be a witness against himself;

“(5) take any private property for a public use without just compensation;

“(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

“(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

“(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

“(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

“(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

“(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

“(9) pass any bill of attainder or ex post facto law; or

“(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

“(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

“A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who--

“(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

“(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

“(c) Rights of defendants

“In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

“(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

“(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

“(3) require that the judge presiding over the criminal proceeding—

“(A) has sufficient legal training to preside over criminal proceedings; and

“(B) is licensed to practice law by any jurisdiction in the United States;

“(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

“(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

“(d) Sentences

“In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

“(1) to serve the sentence—

“(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

“(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

“(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

“(D) in an alternative rehabilitation center of an Indian tribe; or

“(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

“(e) Definition of offense

“In this section, the term “offense” means a violation of a criminal law.

“(f) Effect of section

“Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.”

25 U.S.C. § 1303. Habeas corpus

“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”

Legislation Affecting Jurisdiction Over Domestic Violence Cases

25 U.S.C. § 1304. Tribal jurisdiction over crimes of domestic violence

“(a) Definitions

“In this section:

“(1) Dating violence

“The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

“(2) Domestic violence

“The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

“(3) Indian country

“The term “Indian country” has the meaning given the term in section 1151 of Title 18.

“(4) Participating tribe

“The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

“(5) Protection order

“The term “protection order”—

“(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

“(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

“(6) Special domestic violence criminal jurisdiction

The term “special domestic violence criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

“(7) Spouse or intimate partner

“The term “spouse or intimate partner” has the meaning given the term in section 2266 of Title 18.

“(b) Nature of the criminal jurisdiction

“(1) In general

“Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

“(2) Concurrent jurisdiction

“The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

“(3) Applicability

“Nothing in this section—

“(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

“(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

“(4) Exceptions

“(A) Victim and defendant are both non-Indians

“(i) In general

“A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

“(ii) Definition of victim

“In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

“(B) Defendant lacks ties to the Indian tribe

“A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant--

“(i) resides in the Indian country of the participating tribe;

“(ii) is employed in the Indian country of the participating tribe; or

“(iii) is a spouse, intimate partner, or dating partner of—

“(I) a member of the participating tribe; or

“(II) an Indian who resides in the Indian country of the participating tribe.

“(c) Criminal conduct

“A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

“(1) Domestic violence and dating violence

“An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

“(2) Violations of protection orders

“An act that—

“(A) occurs in the Indian country of the participating tribe; and

“(B) violates the portion of a protection order that--

“(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

“(ii) was issued against the defendant;

“(iii) is enforceable by the participating tribe; and

“(iv) is consistent with section 2265(b) of Title 18.

“(d) Rights of defendants

“In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

“(1) all applicable rights under this Act;

“(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;

“(3) the right to a trial by an impartial jury that is drawn from sources that--

“(A) reflect a fair cross section of the community; and

“(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

“(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

“(e) Petitions to stay detention

“(1) In general

“A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

“(2) Grant of stay

“A court shall grant a stay described in paragraph (1) if the court—

“(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

“(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

“(3) Notice

“An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title.

“(f) Grants to tribal governments

“The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

“(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—

“(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

“(B) prosecution;

“(C) trial and appellate courts;

“(D) probation systems;

“(E) detention and correctional facilities;

“(F) alternative rehabilitation centers;

“(G) culturally appropriate services and assistance for victims and their families; and

“(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

“(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

“(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

“(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of Title 18, consistent with tribal law and custom.

“(g) Supplement, not supplant

“Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

“(h) Authorization of appropriations

“There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.”

18 U.S.C. § 2261. Interstate domestic violence

“(a) Offenses.--

“(1) Travel or conduct of offender.—A person who travels in interstate or foreign commerce or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

“(2) Causing travel of victim.—A person who causes a spouse, intimate partner, or dating partner to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and who, in the course of, as a result of, or to facilitate such conduct or travel, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

“(b) Penalties.—A person who violates this section or section 2261A shall be fined under this title, imprisoned—

“(1) for life or any term of years, if death of the victim results;

“(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

“(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

“(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

“(5) for not more than 5 years, in any other case,

or both fined and imprisoned.

“(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.”

18 U.S.C. § 2261A. Stalking

“Whoever—

“(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

“(A) places that person in reasonable fear of the death of, or serious bodily injury to—

“(i) that person;

“(ii) an immediate family member (as defined in section 115) of that person; or

“(iii) a spouse or intimate partner of that person; or

“(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

"(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

"(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

"(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

"shall be punished as provided in section 2261(b) of this title."

18 U.S.C. § 2262. Interstate violation of protection order

"(a) Offenses.—

"(1) Travel or conduct of offender.—A person who travels in interstate or foreign commerce, or enters or leaves Indian country or is present within the special maritime and territorial jurisdiction of the United States, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished as provided in subsection (b).

"(2) Causing travel of victim.—A person who causes another person to travel in interstate or foreign commerce or to enter or leave Indian country by force, coercion, duress, or fraud, and in the course of, as a result of, or to facilitate such conduct or travel engages in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, shall be punished as provided in subsection (b).

"(b) Penalties.—A person who violates this section shall be fined under this title, imprisoned--

"(1) for life or any term of years, if death of the victim results;

"(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

“(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

“(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

“(5) for not more than 5 years, in any other case,

“or both fined and imprisoned.”

18 U.S.C. § 922. Unlawful acts

***

“(g) It shall be unlawful for any person—

***

“(8) who is subject to a court order that—

“(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

“(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

“(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

“(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

“(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

“to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

APPENDIX B:
THE AMERICAN INDIAN/ALASKA NATIVE (AI/AN) AND AI/AN ELDERLY POPULATION:

GROWTH AND RESIDENCE

The American Indian/Alaska Native Population

The AI/AN population is growing. Between the 2000 Census and 2010 Census the AI/AN population increased by 1.1 million persons, an increase of 26.7% (compared with the overall population growth of 9.7%). (U.S. Census Bureau, 2001; U.S. Census Bureau, 2010a.)

As of the 2010 Census, the nation's population of American Indians and Alaska Natives, including those of more than one race, numbered 5.2 million. They made up 1.7 percent of the total population. Of this total, 2.9 million were American Indian and Alaska Native only, and 2.3 million were American Indian and Alaska Native in combination with one or more other races. (U.S. Census Bureau, 2010a; Centers for Disease Control, 2012). *The AI/AN population is projected to increase to 8.6 million, or approximately 2%* of the U.S. population by 2050. (U.S. Census Bureau, 2012; Centers for Disease Control and Prevention, 2012).

California has the largest number of American Indian residents (about 1% of the total population of those reporting one race; and 2% of those reporting two or more races. (U.S. Department of Justice, 2004). In 2010 the California AI/AN in California numbered 723,225; followed by Oklahoma (482,760) and Arizona (353,386). (U.S. Census Bureau, 2010b.)

Of the more than 4.3 million individuals who identified themselves as either partly or solely American Indian or Alaska Native in the 2000 U.S. Census, 61% do not live on reservations or Native lands. While many live in rural western states, most live in metropolitan areas. The decision to live in cities may be based on educational and employment opportunities, access to services other than health care, or forced relocation related to past government policies. Many have lived in metropolitan areas for generations and may move back and forth between cities and reservations to use local Indian Health Service or tribal health care. (American College of Obstetricians and Gynecologists, 2012 and 2013). "Compared with those living in rural reservation areas who may share common tribal origins, American Indian and Alaska Native populations living in cities tend to be heterogeneous. There is no standard definition of an urban American Indian or Alaska Native. Individuals may self-identify as an urban American Indian or Alaska Native based on ancestry, shared culture, appearance, or participation in events organized by a local American Indian or Alaska Native community."(*Id.*, at p. 2).

The American Indian/Alaska Native Elderly Population

Nearly 37.9 million Americans were aged 65 and over in 2007; some 60% are women. Over the next 40 years, the number of people aged 65 and older is expected to double and the number of people aged 85 and older is expected to triple. Consistent with trends for America's population, the American Indian and Alaskan Native population is living longer. (Administration on Aging, 2008.) The AI/AN older population, which in 2009 numbered 232,042, is projected to grow to almost 918,000 by 2050. In 2009, American Indian and Native Alaskan older persons made up 0.6 percent of the population. By 2050 that percentage will increase to 1% of the older population. (*Ibid*,)

The AI/AN population age 55 and over is projected to increase from 13% of the total U.S. AI/AN population in 2000 to 26% in 2050 (Satter et al., 2010). In 2009, 50% of American Indian and Alaskan Native elderly lived in just six states: California (14.0%), Oklahoma (10.7%), Arizona (9.2%), New Mexico (6.2%), Texas (6.0%), and North Carolina (4.3%) (Administration on Aging, 2008).

APPENDIX C:
DEFINITIONS OF ELDER ABUSE IN TRIBAL COMMUNITIES

There is no single definition across tribal communities for abuse of older adults. Some tribes and their members identify elder abuse behaviors differently from state and federal statutes and from one another. Because of the diversity of American Indian/Alaska Native (AI/AN) tribes and communities, there will be "differences in perceptions of elder abuse among persons of the same race in different areas of the state who may have different cultural backgrounds and values. This finding is a reminder of the heterogeneity of persons who are seemingly of the same race and that race does not equal culture." (Hudson et al., 1998, at p. 548.)

While there are differences in what constitutes elder abuse across tribes, there are some commonalities. Hudson and Carlson (1999) studied perceptions of elder abuse in AI, African American, and Caucasian populations. AI older adults' perceptions of what constitutes elder abuse differed from African Americans and Caucasians. AI responders ranked more items as abusive and 22 items at a higher level of abuse severity than did African Americans and Caucasians responders. In comparison to African Americans and Caucasians, Native Americans felt more strongly that "verbally forcing" (term used in the survey) an elder is elder abuse and that some elder abuse is committed by relatives. They were also more likely to disagree that yelling and swearing at an elder needs to occur more than once to constitute elder abuse, and the use of "verbal force," including yelling, swearing or belittling an elder, is not a form of elder abuse. AI study participants were less likely than other groups to agree that elders are at risk for elder abuse because they are seen as physically weaker than when they were younger; healthy elders can be abused; and elder abuse is mistreatment because the behavior harms the elderly adult. (Hudson and Carlson, 1999, at pp. 197–199; Hudson et al., 1998.)

Some widely held cultural views shape whether certain conduct is considered abusive. For example, sharing of hospital food or medications is common within clan groups and extended families. (Hendrix, n.d.) so a person's use of an older tribal member's prescribed medication may not be considered elder abuse by the tribal group even if it is detrimental to the older member's health.

Defining what constitutes financial exploitation can be equally confounding. For example, in an effort to determine if they had been exploited, elderly Navajo tribal members were asked if their money had gone to someone else. Of those who admitted that it had, all explained that it had been a matter of elderly person voluntarily sharing their money with needy family members. They were not being exploited, but were themselves living up to an important cultural value (Brown, 1998). Members of 17 different tribes had similar explanations for

how and why their money was used to benefit others (Manataka American Indian Council, 2000).

The interplay of cultural values and elder abuse are not just evident in financial exploitation. Exploitive childcare may be difficult to distinguish from culturally normative and esteemed childcare (Jervis 2013). Close grandparent-grandchild relationships that include childcare (and where children may provide eldercare) are common among AIs/ANs (Schweitzer, 1999; Jervis et al., 2010), as are cultural values that emphasize familial (and financial) interdependence (Red Horse, 1983). "Yet, in situations of pervasive poverty, dislocation, diminished health, and overcrowded tribal housing, traditional values and norms may be altered in such a way that they act to the detriment of elders…." (Jervis, 2013, at p. 77.)

Older tribal members who are asked about abuse are likely to characterize it in terms of being treated well or poorly by family. The term "family" has cultural significance and often includes individuals who are not biological relatives. In the Shielding American Indian Elders (SAIE) project, older tribal members were asked about their beliefs. Good treatment included being taken care of, having one's needs met, and being respected. In contrast, poor treatment included financial exploitation, neglect, and lack of respect (Jervis 2013). Respect was a crucial component of what it meant to be treated well, while disrespect was largely equated with abuse (*Ibid*., at p. 76).

Tribal members may include within elder abuse forcing an elder to care for small children against his or her wishes or making excessive use of the older adult as a babysitter, having little time for older family members, treating older adults as though they no longer matter, and not listening when the older person speaks (White, 2004).

Tribal members have identified certain conduct as "ritual abuse" in which the older adult is denied access to traditional activities such as attendance at the powwow, not permitted to join in community ceremonies, not provided or allowed to eat traditional foods associated with certain observances, and other actions that are defined by the tribe's culture and tradition (National Indian Council on Aging, 2012).

Elders and tribal judges include in their view of neglect and financial abuse family members using an elder's money, car, gasoline, food, and medications. Financial abuse may include the extended family's use of the elder's social security check, even to the personal detriment of the elder, as well as their per capita distribution and non-gaming funds distribution in California. (White, 2004, at p. 3; Personal communication, Raquelle Myers, attorney with the National Indian Justice Center.) Neglect may include denying tribal elders access to sufficient food or clothing, ignoring their difficulties in sustaining their homes and finances, and preventing them from obtaining needed medical or social services (National Indian Council on Aging, 2012).

Older tribal adults also include as abuse the failure to report abuse and having little time to care for elders. (White, 2004; Jackson, 2010.)

While AI/AN communities and members may agree that elder abuse occurs and have a shared view of the forms it may take, they may not conceptualize abuse of the elderly and the response to it in the same way as the dominant culture. Across the United States there has been a clear trend toward criminalizing the conduct (Heisler, 2000; 2013). Some tribal communities have criticized the creation of elder abuse laws because such laws imply that wrongful acts take place in which some are perpetrators and certain others are victims (Manataka American Indian Council, 2000). Such statutes are criticized for not addressing the enormous problems related to informal caregiving *(ibid)*. Relatively few tribes have developed elder abuse codes (NIEJI, 2013) though the numbers of tribes with or who are developing elder abuse codes is increasing. In California, for example, the Dry Creek Rancheria Band of Pomo Indians has enacted a Tribal Elder Code as part of its Judicial Code (see *http://drycreekrancheria.com/judicial-code*). The Bishop Tribe has a Tribal Adult Guardianship Ordinance, available at *www.bishoppaiutetribe.com/assets/ordinances/Tribal%20Adult%20Guardianship%20Ordinance.pdf*, as does the Yurok Tribe, available at *www.narf.org/nill/Codes/yurokcode/elder_vulnerable_adult_protection.html*.

Sacred and Cultural Objects

Some AI/AN elders have extremely valuable and culturally significant or sacred artifacts, including traditional regalia, baskets, and beadwork, which are highly sought after by collectors. These assets may be taken and sold by family members or others with access to the homes of elderly tribal members. The loss is both financial and spiritual as tribal members often do not believe these items should be sold to outsiders. (Baldridge et al., 2004.) In addition, selling/misappropriation of sacred objects assumes that someone "owns" these objects. In many AI/AN communities sacred objects are not "owned" by any individual and cannot be sold or encumbered by the person who possesses them. They are considered sacred rather than mere property.

It may also be worth noting that their possession, sale, and transfer to others may violate various federal laws including the Archeological Resources Protection Act (ARPA); the Native American Graves Protection and Repatriation Act (NAGPRA); and to a lesser extent, the American Antiquities Act. Feathers and animal parts may also be covered by such laws as the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act; the Marine Mammal Protection Act; and the Endangered Species Act. A fuller discussion of these laws is located at the Antique Tribal Art Dealers Association website, *www.atada.org/Art_and_the_Law.html#intro*.

APPENDIX D:
PREVALENCE AND INCIDENCE OF ELDER ABUSE IN THE GENERAL POPULATION AND AMERICAN INDIAN/ALASKA NATIVE (AI/AN) COMMUNITIES

Elder abuse studies historically have suffered from a variety of weaknesses including: lack of common definitions and research methodologies, and adequate funding. The result has been an inconsistent and widely varied understanding of the extent of elder abuse. Quantifying elder abuse in tribal communities has suffered from these same limitations with even fewer studies undertaken.

National Studies of the Elderly Population

More recently newer studies of elder abuse have begun to clarify the picture. Some leading findings include:

- Acierno and colleagues conducted a telephonic survey of 5,777 persons over age 60 in the continental United States who were all cognitively capable and found a prevalence rate of 11.4 % percent in the year prior to the study. Types and rates of abuse are: physical abuse 1.6%; verbal abuse 4.6%; sexual abuse 0.6%; neglect 5.1 %; and financial abuse committed by a family members 5.2%. (Acierno et al., 2010; Acierno et al., 2009.)

- The National Social Life, Health and Aging Project (NSHAP) conducted by Laumann et al. (2008) sampled 3,005 persons aged 57 to 85 and found rates of: verbal abuse, 9% (defined differently from Acierno's verbal abuse); financial abuse 3.5%; and physical abuse 0.2%. These were the only forms studied.

- A statewide study of 4,156 New York residents aged 60 and older living in the community and a survey of programs serving victims of elder abuse and older victims of domestic violence in New York's 62 counties. The study found a one-year incidence rate of 7.6% per thousand older residents for any form of elder abuse, and a significant gap between the rate of elder abuse reported by older persons and that referred to agencies with the capacity and/or responsibility to assist older victims of abuse. For every case of elder abuse that is reported, 23 to24 remain unreported and undetected. (Lachs and Berman, 2011.)

- A study of 1,795 elderly residents of Chicago at least 60 years of age for whom crime victimization data was available found prevalence rates for: physical abuse 0.5%; financial abuse 2.2%; emotional abuse 4.51%; and neglect 1.33% (Amendola et al., 2010).

American Indian/Alaska Native (AI/AN) Studies

There are few studies or surveys of the prevalence or incidence of elder abuse in AI/AN communities. There are no national studies and only a few tribal-specific studies. (Jackson and Sappier, 2005, at p. 2.)

Tribal leadership, service providers, and older members are aware of the issue of elder abuse. A 1998 survey of the attitudes of Native American elders from 17 different tribes revealed that elderly American Indians themselves are aware and knowledgeable about elder abuse on tribal lands. Most of those who had directly observed actual abuse cases were especially sensitive to the problems that caregivers encountered in their duties (Brown, 1998). A survey of 152 service providers on the Navajo Indian Reservation (including those in social services, health care, law enforcement, volunteer work, and tribal officials) found that over 90% of those service providers were aware of the seriousness of elder abuse and had encountered clients who had been mistreated. How seriously they judged each type of elder abuse on the reservation closely matched the findings from the survey of Navajo elders. (Brown et al., 1990.)

Surveys and studies have demonstrated a higher prevalence of interpersonal violence against AI/AN members than in the general U.S. population. Incidence rates are unknown due to a lack of longitudinal studies. (Sapra et al., 2014, at p. 1.) The few studies that have been conducted yielded widely variable prevalence rates. Drawing on diverse studies of AI/AN populations, Buchwald et al. (2000) found prevalence estimates of abuse ranging from 2% to 46% among AI/AN populations (*ibid.*, at pp. 5, 8).

A study of abuse in the Navajo Nation, the Dineh Elder Protection Program, reported about 800 cases of elder abuse were referred to their agency in 2003; about half the cases were substantiated. (Nez, 2004, referenced in Jackson and Sappier, 2005.) The only study researching abuse of AI/AN in urban settings was conducted by Buchwald et al. (2000). The retrospective study of 550 medical charts of urban Native Americans and Native Alaskans served by the Seattle Indian Health Board examined rates of physical abuse. The study found that in 10% of files there was definite abuse. This was similar to rates of physical abuse found in other studies of AI/AN elders: 11% of Alaska Natives (Minton and Soule, 1990), 16% of Navajos (Brown, 1989), and 19% of Northern Cheyenne (cited in Buchwald et al., 2000).

Hudson et al. (1998) conducted a cross-cultural study of the occurrence of elder abuse among seven different cultural groups and also compared two AI tribal groups living in different locations in North Carolina. One finding is that 4% of AI/AN who were surveyed reported

abuse occurring after age 65. This rate was lower than for other racial groups, although the experience of abuse over the lifetime was highest for AI/AN (26%). (Sapra et al., 2014.)

While all forms of elder abuse found in other populations also occur in AI/AN populations, data reported by National Indian Council on Aging indicate that neglect is the most common form reported among Native American elders, accounting for nearly half of reported cases. Material exploitation and psychological abuse are the next most common types, occurring with about equal frequency. (Hall and Weiss, 2010.)

In a survey conducted by the Office of Aging Americans of Tribal Title VI directors, 48% perceived that elder neglect occurred often and 39% that psychological or verbal abuse occurred often. This abuse was perceived to occur most often at the hand of spouses/partners and other family members (Jackson and Sappier, 2005).

These studies also show that elder abuse in AI/AN populations is underreported. Buchwald et al. (2000) found that only 31% of definite cases of abuse of elderly AI/AN were reported to authorities.

In California, there are no known studies of abuse and neglect within California—AI tribes or urban communities. A comprehensive state-specific study is needed to study California tribes and non-California Indians living in this state. It should incorporate data from tribal law enforcement and tribal and federal Indian health services, both of which may have data not reflected in state data sources.

APPENDIX E:
RISK FACTORS FOR ABUSE AND NEGLECT IN AI/AN COMMUNITIES

Risk factors associated with abuse of older AI/AN members can be categorized as social, health, economic, and historical conditions. These categories often overlap.

Social risk factors include loosening of family ties, changing role and status of older adults with resultant loss of status, intergenerational conflict and transmission of violent family patterns, and social and geographical isolation.

Other risk factors include: poverty, the weakening of kinship systems, acculturation stress, financial dependency of adult children on their elderly parents, the poor health of many Native American elders, the negative effects of technology and progress, a value switch from the wisdom of elders to the abilities and ambitions of youth, young people's lack of interest in elder adults, and a change in tribal leadership from elders to younger adults."(Carson, 1995, cited in Hudson et al., 1998.)

Health factors include older adult and abuser poor health practices, presence of multiple health problems that place unexpected and unplanned stressors on the family caregiver and family, the older adult's underutilization of social services, and the presence of abuser mental health and substance abuse problems. *(Ibid.)*

Economic factors include poverty, high levels of unemployment and lack of employment opportunities, an economic dependency relationship between the older adult and abuser, and reliance on adult children for information about services and transportation. A study of risk factors among two different groups of Plains Indians found that higher levels of abuse were found on the more isolated and impoverished reservations. (Maxwell and Maxwell, 1992.) A study of elder abuse on the Navajo Nation identified poverty, unemployment, and family caretakers who feel overwhelmed by their responsibilities as primary causes (Brown et al., 1990). Although it is not yet clear how economic conditions and elder mistreatment intersect, the poverty within many Native communities may increase risk by fostering economic dependency of the young on the relatively stable elderly. (Brown, 1989; Jervis, 2013.)

Even when younger tribal members are not impoverished, the use of drugs and alcohol may drain their resources causing them to look for other sources of money. Family members who may be physically frail or confused may be selected for abuse because of the likelihood the abuse will not be recognized, or if it is, will not be reported. Having any kind of income is a risk factor for physical and psychological abuse, as are shared caregiving arrangements and mental confusion. (Brown, 1989.)

Historical factors are related to the imposition of rules and regulations from outside the tribe, the effects of historical trauma, and family members' acculturation stress.

For a discussion of the role of history and historical trauma please see section Part 2 VIIc.

Risk Factors by Type of Abuse

Form of Abuse	Associated Risk Factors
Neglect	(1) The number of hours of care per day that families provide their older members; (2) The mental conditions (confusion) of the older care recipient; (3) How suddenly the elderly person became dependent and in need of care; (4) Families trying to share the caregiver responsibilities; (5) Extent that having to provide care created a family crisis; and (6) Older adult's level of income. (Manataka American Indian Council, 2000.)
Emotional/ Psychological Abuse	(1) Extent of family crisis due to caregiver responsibilities; (2) Mental condition of the elder; and (3) Suddenness of the elder becoming dependent. (Manataka American Indian Council, 2000.)
Physical Abuse	(1) Most strongly associated with mental condition of the elder; and (2) Less strongly associated with families trying to share the caregiver responsibilities (Manataka American Indian Council, 2000). (3) Marital conflict/domestic violence (4) Dependence on others for food, and (5) Fewer caregivers at home (Buchwald et al., 2000).
Financial Exploitation	(1) Families trying to share the caregiver responsibilities; (2) Suddenness of the elder becoming dependent; (3) Number of hours of care per day that the elder said they needed; and (4) Number of hours of care per day that families were providing (Manataka American Indian Council, 2000).

APPENDIX F:
CULTURAL VIEWS OF DEMENTIA AND DEATH

There is no single universal tribal view of dementia, depression, and death. Tribes may define these conditions in terms of cultural beliefs rather than illnesses or "problems." For example, in describing dementia, members of the Isleta Pueblo in New Mexico believe that each person is put on the earth for a purpose. When that purpose is accomplished the person is ready to leave this world. Death and illness are not caused by others, and prolonged grieving prevents the spirit from crossing over to the next world where there is no pain, but peacefulness. (Hendrix, n.d.)

Cherokee tradition describes dementia as part of the Creator's plan for that person's ultimate learning and something that may not require intervention or help-seeking while Navajo tradition teaches that dementia may be caused by the breaking of a cultural taboo by the person with dementia or a family member. Treatment may require the services of traditional Indian medicine and not necessarily Western medicine. (Hendrix, n.d.)

Oklahoma Choctaw tribal members believe that dementia is a condition of the body in which the person's spirit has already crossed over into the next world but the body remains behind as it prepares to leave. The caregiver's job is to take care of the body until it is ready to leave, and this is sacred work. The person is communicating in the spirit world, which is why language and behavior appear to us as if overhearing one side of a telephone conversation. In some Indian communities this is a mark of an elevated spiritual status for the family. *(Ibid.)*

Urban Lakota Sioux tribal members believe there is a connection between dementia and history. They believe that dementia is caused by the stress and conflict resulting from living in two worlds at one time; the rigid Christian belief system of traditionally reservation-raised elderly and the stress over time of urban Indian living and family life. The lack of a collective consciousness in traditional Indian spiritual beliefs dilutes the power of the Indian spiritual community and allows stress to develop into illness, of which dementia is one form. *(Ibid.)*

Courts should also be aware that some AI/AN cultures do not speak of death, dying, or negative consequences because these cultures believe that thought and speech can cause the negative outcome to occur. Some believe that dementia and illness are caused by an imbalance in the patient's spiritual, emotional, and social environment. Speaking of negative consequences (prognosis) of an illness can bring those events to pass as thought and language have the power to shape reality.

Most tribal traditions teach there will be a joining with the ancestors and that death is a natural part of the life cycle.

In some traditions, speaking the name of the deceased person may hold that person's spirit in limbo and delay their journey to the next world. As an example, in one tribe therapy groups had to address grief from the loss of a number of young people in a single accident. Within this tribe, the names of the deceased were not to be spoken because it would have pulled the individuals back from the spirit world and would not have let the individuals move forward in their journey. (Gray and Rose, 2012; Hendrix, n.d.)

APPENDIX G
HISTORY AND HISTORICAL TRAUMA

The history of American Indian/Alaska Native (AI/AN) tribes and the government is a lengthy and sad one marked by policies and practices designed to destroy tribal communities, assimilate members into the European-American culture, "civilize" tribal members, and end cultural practices and tribal identification (Trusty et al., 2002). Even as tribal members died, Native people were not allowed to practice traditional rituals of mourning and healing, which included phases of grief that would have provided adjustment to cultural and other losses, ceremonial and ritual mourning, and family and community support. Brave Heart and DeBruyn (1998) stated that "Disenfranchised grief results in an intensification of normative emotional reactions such as anger, guilt, sadness, and helplessness." This unresolved grief is a result of historical trauma that is transmitted down through each Native generation and is cumulative and compounded as more traumatic events occur. (Bassett et al., 2012.)

AI/AN who lived through the centuries of such practices suffered a variety of traumatic consequences often labeled as "historical trauma" in which the trauma is transferred to subsequent generations through biological, psychological, environmental, and social means, resulting in a cross-generational cycle of trauma (Brown-Rice, 2013).

Not all historical trauma experienced by AI/AN members is the same. Each tribe has its own history with the federal government that may influence how the government policy of assimilation has affected historical trauma and cultural identity within the specific tribe. (Gray and Rose, 2012.)

Judge Abby Abinanti, Chief Judge of the Yurok Tribe speaks of "historical trauma" as wounds passed wordlessly through generations with an accumulating grief and the urge to salve it with alcohol and drugs. It is what Yurok Tribal Chairman Thomas O'Rourke calls "the sickness of this land." (Romney, 2014.)

The AI/AN historical trauma experience has played out in several stages. Initially, the dominant culture and government committed mass traumas on the AI/AN populations, resulting in cultural, familial, societal, and economic devastation resulting in losses of members, land, family, and culture. These traumas resulted in *symptoms* related to social-environmental and psychological functioning that persist today. (Whitbeck et al., 2004; Brown-Rice, 2013.)

An example of historical trauma with enormous consequences is the boarding school experience that disrupted family structure, destroyed personal identity, and devastated the AI tribal communities. Government and church-run boarding schools removed AI children from their families at the age of 4 or 5 and prohibited all contact with their relatives and tribe for a minimum of 8 years. (Brave Heart and DeBruyn, 1998; Garrett and Pichette, 2000.) Siblings often were sent to different schools so that children never saw their siblings again or did not see them for years or decades. Children had their hair cut and were dressed like European American children. Sacred items were taken away. They were forbidden from speaking their

Native language or practicing traditional rituals and religions (Brave Heart and DeBruyn, 1998; Garrett and Pichette, 2000.) Children who were physically and sexually abused often developed problematic coping strategies such as learned helplessness, manipulation, compulsive gambling, alcohol and drug use, suicide, and denial. (Brave Heart and Debruyn, 1998; Garrett and Pichette, 2000.) The result was that many did not engage in traditional ways and religious practices and so lost their ethnic identity (Garrett and Pichette, 2000). The boarding school experience is viewed as a crucial precursor to many of the existing problems some AI continue to face. (Brave Heart and Debruyn, 1998; Duran and Duran, 1995.)

"Traumatic experiences cause traumatic stress, which disrupts homeostasis" in the body (Solomon and Heide, 2005, p. 52). People who have experienced traumatic events have higher rates than the general population for cardiovascular disease, diabetes, cancer, and gastrointestinal disorders (Kendall-Tackett, 2009), and can their neurological functioning can be affected (Brown-Rice, 2013).

The historical events led to a systematic transmission of trauma to subsequent generations (Brave Heart et al., 2011; Whitbeck et al., 2004). The destruction of family, tribes, and culture means that for many AI/AN traditional cultural practices and family and tribal support systems are not available (BigFoot and Braden, 2007).

Historical trauma is not the passage of the trauma per se to the next generation but rather the passage of the psychological responses to the trauma to subsequent generations. For example, the children forced into boarding schools lost the ability to learn cultural practices, including child rearing within the context of their community. If they returned to their tribal community, they brought back with them new habits and concepts that were forced into daily practices, many of which were contrary to the traditional community practices and teachings. The traditional and "taught" practices resulted in "dichotomies" that were passed to children in their care and to those close to them. As generations passed, the practices did as well without awareness of the psychological impact of the different practices. With subsequent generations that had not experienced the original trauma directly or through parents or grandparents, the younger members have begun to question and challenge tribal language, cultural practices, and the authority of and respect for elders who survived the traumatic events. (Raquelle Myers, Attorney with the National Indian Justice Center.)

Historical trauma has resulted in social-environmental, psychological, and physiological disparities. Examples include:

Type of Stressor	**Manifestations**
Social-environmental	• Domestic violence, physical and sexual assault rates 3.5 times higher than national average and may be higher due to under-reporting (Sue and Sue, 2012). • Higher poverty rates (U.S. Census Bureau, 2006; Denny, Holtzman, Goins, and Croft, 2005; Brown-Rice, 2013). ○ 28.4% of American Indians and Alaska

	Natives lived in poverty in 2010 (compared to 15.3% of the nation as a whole) (U.S. Census Bureau, 2010c). o AI/AN elders age 55 and over are nearly three times more likely (49% vs. 17%) to be poor or near poor (less than 200% of the federal poverty level (FPL)), than non-Latino whites (Satter et al., 2010). • Native American individuals are reported as having the lowest income, least education, and highest poverty level of any group in the U.S. (Denny, Holtzman, Goins, and Croft, 2005; Brown-Rice, 2013). • Higher unemployment rates than rest of U.S. population (U.S. Census Bureau, 2006)
Psychological	• Highest weekly rate of alcohol consumption of any ethnic group (Chartier and Caetano, 2010; Myhra, 2011) • High rates of mood disorders and PTSD (CDC, 2007; Dickerson and Johnson, 2012) • Suicide rates among Native Americans are 3.2 times higher than the national average (CDC, 2007) • Compared with all other racial groups, non-Hispanic Native American adults are at greater risk of experiencing feelings of psychological distress and more likely to have poorer overall physical and mental health and unmet medical and psychological needs (Barnes, Adams, and Powell-Griner, 2010; Brown-Rice, 2013).
Physiological	• The life expectancy at birth for the Native American population is 2.4 years less than that of all U.S. populations combined (CDC, 2010). • The lowest life expectancy of any population group in the United States (CDC, 2010) • Higher rates of heart disease, tuberculosis, sexually transmitted diseases, and injuries (Barnes et al., 2010). Diabetes prevalence is significantly higher than any other racial or ethnic group in the United States (Barnes et al., 2010).

These grim statistics may be symptomatic of a "legacy of chronic trauma and unresolved grief across generations" that has resulted from a history of domination and mistreatment perpetrated on AI/AN by the dominant culture (Brave Heart and DeBruyn, 1998, p. 60).

Historical trauma has led to changes in tribal beliefs and culture. Today, some tribal cultures are philosophically very close to their traditional past and are referred to as “traditional.” Others are closer to the dominant Western culture and are referred to as “acculturated.” Individual tribal members may be anywhere along the continuum between traditional and acculturated; some are bicultural, or “walk in two worlds,” while others may not identify with either culture. (Gray and Rose, 2012, p. 82.)

APPENDIX H
TRIBAL LAW ENFORCEMENT AGENCIES

Increasingly, tribes are creating their own police agencies and reporting crime data. In 2014 in response to mandates of the 2010 Tribal Law and Order Act, the Bureau of Justice Statistics reported that the number of tribal law enforcement agencies reporting crime data to the FBI's Uniform Crime Reporting (UCR) Program increased from 143 in 2010 to 158 in 2012. Tribes across the U.S. received $350,609 through Edward Byrne Memorial Justice Assistance Grants (JAG). One tribe in California receives funding though the amount was less than $25,000. (Perry, 2014.)

In California, while there are a number of tribal police agencies, their powers vary. Some only exercise their powers at casinos and have no law enforcement status. Some have been cross-deputized by California law enforcement agencies and are authorized to enforce tribal and California laws. Others are certified by the Bureau of Indian Affairs as Special Law Enforcement Commissioned (SLEC) officers who can enforce tribal and federal laws. Some are tribal employees; others are federal employees. (Goldberg and Singleton, 2005.) Some tribes have well-trained and staffed law enforcement departments while others have no tribal police officers at all. Some tribal agencies have officers who have received little or no formal law enforcement training.

As new funding streams become available to AI/AN communities through the Tribal Law and Order and the Violence Against Women acts, state and federal governments and tribes will join together and collaborate in order to improve relationships, develop needed services, develop or enhance tribal policing agencies, improve data collection, create or expand tribal court systems, and create elder abuse codes.

For more information on tribal justice systems please see "Native American Research Series: Tribal Justice Systems" *CFCC Research Update* (June 2012), available at *www.courts.ca.gov/documents/**TribalJusticeSystem**RU.pdf*.

APPENDIX I
RIGHT TO SUPPORT PERSONS

Courts can assist elderly witnesses, including victims, to feel less intimidated and frightened in court by permitting them to be accompanied or supported by support persons and advocates. Elder abuse victims have the right the presence of support persons and advocates at criminal and restraining order proceedings.

Relevant statutes include:

Situation	**Authority**
Testify before a grand jury	Cal. Pen. Code, § 939.21
Testify in court, including juvenile court	Cal. Pen. Code, § 868.5
Law enforcement, prosecution, and defense interviews	Sex Crimes: Cal. Pen. Code § 679.04, 264.02 Domestic Violence: Cal. Pen. Code, § 679.05
Elder Abuse Restraining Order	Cal. Welf. & Inst. Code, § 15657.03(j)
Non-Harassment Order with a credible threat of violence or allegation of unlawful violence	Cal. Code Civ. Proc., § 527.6(l)
Family Law Order	Cal. Fam. Code, § 6303(b)

APPENDIX J

ACCOMMODATIONS AND INNOVATIVE PRACTICES FOR ELDERLY WITNESSES AND PARTIES

California has been a leader in developing specialized courts to handle elder abuse matters. The first such court was established in Alameda County and a second was established in Contra Costa County. Other courts have established an elder abuse restraining order calendar.

These courts share a commitment to creating courts that consider the special needs of older litigants. Examples of their practices include:

- Scheduling cases in the late morning or early afternoon.
- Reducing waiting time by having only such cases on calendar.
- Hearing criminal and restraining order matters in the same courtroom with the same judge, often allowing for a more comprehensive and coordinated handling of all aspects of a case.
- Conducting a telephonic hearing in civil matters if a party cannot get to court without extraordinary effort due to physical, mobility, or geographic reasons.
- Engaging community agencies in assisting parties through various means, including using a case manager connected to many different community services, allowing trained peer counselors to support and provide information to parties, and establishing a relationship with the local bar association to provide pro bono or legal service at reduced cost to unrepresented litigants.
- Making assistive devices such as amplification systems readily available. (For more information about these and other elder abuse court innovations, please see Judicial Council of California (2008) and Cram, 2014.)

While these court initiatives do not specifically address cases in which a tribal member is the victim of elder abuse, many of ideas and approaches could be further adapted to serve tribal members. For example, state courts could:

- Use telephonic hearings for court order matters when the tribal member is unable to travel to state court.
- Explore establishing a cooperative agreement with a tribal court to take the testimony at the tribal court or via teleconference or Skype-type technology from the tribal court offices.
- Set hearings at convenient times to accommodate tribal members who traveled from remote locations.
- Hear several kinds of cases involving the same parties at the same time to reduce the number of court appearances and to attempt to resolve the case and all its actions.
- Invite representatives from tribal services to address the court on programs that could assist defendants.
- Work with tribal court officials in monitoring compliance with state court orders and probation terms.

All of these efforts would make the state courts more accessible and less hostile to tribal members.

Chapter 12

JUDICIAL ETHICS AND COURT LEADERSHIP

[§12.1] OVERVIEW

[§12.2] FAIRNESS AND CULTURAL ISSUES

[§12.3] SELF-REPRESENTED LITIGANTS

[§12.4] DUE PROCESS; REPORTING RESPONSIBILITIES

[§12.5] EX PARTE COMMUNICATIONS – GENERAL RULES

[§12.5.1] EX PARTE COMMUNICATIONS – EXCEPTIONS: OTHER JUDGES

[§12.5.2] EX PARTE COMMUNICATIONS – EXCEPTIONS: COURT PERSONNEL

[§12.5.3] EX PARTE COMMUNICATIONS – OTHER EXCEPTIONS

[§12.6] SETTLEMENT CONFERENCES

[§12.7] JUDICIAL SPEECH – GENERALLY

[§12.8] DISQUALIFICATION

[§12.9] DISCLOSURE

[§12.10] EXTRAJUDICIAL ACTIVITIES – GENERAL RULES

[§12.11] GOVERNMENTAL AND COMMUNITY ACTIVITIES

[§12.12] FUNDRAISING

[§12.13] CONCLUSION

[§12.1] OVERVIEW

Judges are at all times guided by the mandates of canon 1 of the California Code of Judicial Ethics that: "An independent, impartial and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

Nowhere is this principle more important than in Elder Courts, where independence, adherence to the law and integrity are balanced with maintenance of respect for the dignity of senior citizens. Canon 3B(2) of the Code requires that judges "shall be faithful to the law" and "shall maintain professional competence in the law;" thus judges in Elder Courts should observe continuing familiarity with Title II of the Americans with Disabilities Act and applicable state law concerning accommodations for elders and disabled persons.

Canon 2A of the Code underscores the necessity for judges to act at all times in a manner that would promote public confidence in the integrity and impartiality of the judiciary. Canon 2, by its title, guides the judges in every action both public and private, by emphasizing that a judge "shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

[§12.2] FAIRNESS AND CULTURAL ISSUES

Cal. Code Jud. Ethics, canon 3B(4) requires that judges be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity." Patience and sensitivity to issues due to advanced age or disability are particularly important in Elder Courts, where litigants may need not only physical accommodations but also frequent breaks in the proceedings and interpretative assistance.

Canon 3B(4) also mandates that judges require the same standards of patience and sensitivity of lawyers, staff and court personnel under the judge's direction and control. Thus, a judge has disciplinary responsibilities should a member of his or her staff, or a lawyer appearing in the court, exhibit rudeness or intolerance in these situations. (See §12.4 below, concerning the disciplinary and reporting responsibilities of judges.)

California judges are advised that any conduct that could be perceived as bias or prejudice would be a violation of canon 3B(5); the judge must require lawyers in proceedings before them to refrain from words or conduct that would exhibit such bias or prejudice. Cal. Code Jud. Ethics, canon 3B(6). The prohibited categories include, but are not limited to, race, sex, gender, religion national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status and political affiliation. If one of the above categories is an issue of the proceeding before the judge, legitimate advocacy on the topic is permitted.

The prohibition against speech or conduct exhibiting bias or prejudice extends to a judge's extrajudicial and quasi-judicial activities as well. The Advisory Committee Commentary to canon 4A, governing extrajudicial activities in general, advises: "Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions that may do so include inappropriate use of humor or the use of demeaning remarks."

In a related canon regarding administrative duties, judges are required to exact the same standards of conduct concerning probity and lack of bias and prejudice from staff and court personnel "under the judge's direction and control." Cal. Code Jud. Ethics, canon 3C(3). This mandate requires judges to monitor courtroom proceedings, attorney presentations, judicial speech and staff conduct in Elder Courts and other proceedings involving vulnerable citizens to ensure strict compliance.

[§12.3] SELF-REPRESENTED LITIGANTS

California has long recognized the right of a litigant to "appear and conduct his own case" (*Gray v Justice's Court of Williams Judicial Township* (1937) 18 CA2d 420, 63 P2d 1160) and that the courts must apply the same substantive legal principles, as well as the same rules of evidence and procedure, to both attorney-represented and self-represented litigants. A comprehensive discussion of this topic may be found in *Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers* (Cal CJER), and Gray, *Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants* (2005), 27 J. Nat'l Ass'n Admin. L. Judiciary iss. 1, art. 4.

While canon 3B(8) requires that "a judge shall dispose of all judicial matters fairly, promptly, and efficiently", four fundamental principles of fairness emerge in the California jurisprudence involving the right of self-representation:

1) Matters should be decided on the merits rather than by procedural default.
2) Trial judges have a duty to avoid miscarriages of justice.
3) Trial judges have a duty to ensure adequate notice and clarity of instructions to ensure comprehension by litigants uneducated in the law.
4) Trial judges may provide assistance to self-represented litigants to ensure compliance with the rules of evidence and procedure.

Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers, *supra*, 3-4 to 3-7.

The last principle has now been articulated in the Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 3B(8): "The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs."

California trial judges have, with approval of appellate review, construed court filings and allowed liberal opportunity to amend, prepared jury instructions and assisted in settlement in cases where one party or both are unrepresented by counsel. Furthermore, in such cases, appellate courts have approved trial court explanations of introduction of evidence, objections, cross-examination, subpoena procedures, and how to question and challenge jurors. (See *Handling Cases Involving Self-Represented Litigants*, *supra*, chapter 3.)

In handling cases involving self-represented litigants, judges should avoid the following pitfalls:

1) Acting as counsel for a litigant or investigating facts outside the record:

a) *Wenger v Commission on Judicial Performance* (1981), 29 C3d 615, 175 CR 420 (investigation of suspected false statements).

b) *Ryan v Commission on Judicial Performance* (1988) 45 C3d 518, 247 CR 378 (investigation of facts of criminal case and called witness impeaching defendant).

2) Denying rights to self-represented litigants:

a) *Inquiry Concerning Judge Fred L. Heene, Jr.* (1993) Commission on Judicial Performance No. 153 (refused to allow traffic defendant to cross-examine police officer).

b) *Inquiry Concerning Broadman* (1999) 18 C4th CJP Supp. 67 (denied self-represented civil litigant right to cross-examine and present evidence).

c) *Public Admonishment of Judge Joan Comparet-Cassani* (2011) Commission on Judicial Performance (accused pro per defendant of lying about preparation of documents and improperly revoked pro per status).

e) *Inquiry Concerning Judge John O'Flaherty* (2010) 50 C4th CJP Supp. 1 (embroilment; ordered a small claims plaintiff to have no contact with three women and issued a stay-away order without complying with any of the procedural requirements and without affording the plaintiff notice or an opportunity to be heard).

[§12.4] DUE PROCESS; REPORTING RESPONSIBILITIES

Pursuant to canon 3B(7) of the California Code of Judicial Ethics, a judge shall accord "every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law." The Rules of Professional Conduct of the California State Bar require competent representation on the part of its members (Rule 3-110); in the case of elders and disabled individuals, this provision implies representation free of financial interest, financial or otherwise, and with full advocacy for the interests of the attorney's client.

If a judge has personal knowledge of misconduct in an attorney's representation of an elderly client, or so concludes in a judicial decision, the judge is mandated by Cal. Code Jud. Ethics, canon 3D(2) to "take appropriate corrective action, which may include reporting the violation to the appropriate authority." Similar reporting responsibilities are imposed if a judge concludes that an attorney has violated any provisions of the Rules of Professional Conduct. Alternative suggestions for corrective action include direct communication with the errant attorney, confidential referrals to assistance programs, or reports to the presiding judge. Advisory Committee Commentary to canon 3D(2).

Further, judges must comply with Bus & P C §6086.7, which requires that judges notify the State Bar of:

1) A final order of contempt involving grounds which would warrant State Bar discipline;
2) Modification or reversal of a judgment based upon misconduct, incompetent or willful misrepresentation by an attorney;
3) Judicial sanctions imposed of $1000 or more; or
4) A civil penalty imposed pursuant to Fam C §8620.

[§12.5] EX PARTE COMMUNICATIONS – GENERAL RULES

Cal. Code Jud. Ethics, canon 3B(7) states that "a judge shall not initiate, permit or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding." For purposes of canon 3B(7), all information available in the media, including the internet and press, are specifically included in this prohibition. The canon emphasizes that judges "shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed."

A judge must make reasonable efforts to avoid any ex parte communications (except for certain exceptions). If a judge inadvertently receives such an inappropriate or unauthorized ex parte communication concerning the substance of a matter, the judge must promptly "notify the parties of the substance of the communication and provide the parties with an opportunity to respond." Cal. Code Jud. Ethics, canon 3B(7)(d).

[§12.5.1] EX PARTE COMMUNICATIONS – EXCEPTIONS: OTHER JUDGES

Though permitted as an exception to canon 3B(7), judges must exercise caution in ex parte communications with other judges concerning a pending or impending proceeding. Reasonable efforts must be made to avoid receiving factual information that is not part of the record; if such information is received, it must be disclosed to the parties. Cal. Code Jud. Ethics, canon 3B(7)(a).

This poses difficulties for a judge in an Elder Court, where parties in a proceeding may have ancillary proceedings pending before another judge. For example, a judge hearing a case involving criminal elder abuse by one spouse upon the other may wish to consult the Family Law judge handling the dissolution between the parties or the Probate judge handling conservatorship of one of the parties. There is a fine line to be drawn between discussion about the case between the judges which satisfies the constraints of the Code of Judicial Ethics and a conversation in which impermissible factual information is related.

A judge should not discuss a case with a judge who has previously been disqualified, and judges are advised to be careful not to talk about a case with a judge whom the judge knows would be disqualified. In parallel, a disqualified judge must avoid discussing a case with the assigned judge. Finally, there is a specific prohibition against judges conversing about a case if either one has participated, is participating or

will participate in appellate review. Cal. Code Jud. Ethics, canon 3B(7)(a) and Advisory Committee Commentary thereto.

[§12.5.2] EX PARTE COMMUNICATIONS – EXCEPTIONS: COURT PERSONNEL

Special care must be taken by Elder Court judges in any communications with staff and court personnel; just as in communications with other judges, reasonable efforts must be made to "avoid receiving factual information that is not part of the record or an evaluation of that factual information." Cal. Code Jud. Ethics, canon 3B(7)(a).

The commentary to canon 3B(7)(a) gives guidance as to the permissible discussions judges may have with court personnel – the conversation must relate solely to the performance the staff person's duties: "For example, a bailiff may inform the judge of a threat to the judge or to the safety and security of the courtroom, but may not tell the judge ex parte that a defendant was overheard making an incriminating statement during a court recess. A clerk may point out to the judge a technical defect in a proposed sentence, but may not suggest to the judge that a defendant deserves a certain sentence."

Canon 3B(7)(a) is specific in listing which individuals qualify for the term "court personnel": bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court. Attorneys in a proceeding before the judge, employees of other governmental entities such as social workers or lawyers, or persons appointed by the court to serve in some capacity in a proceeding (special masters, CASA advocates, etc.) are NOT included in the definition. Judges are specifically forbidden to have an ex parte consultation with a representative of the probation department concerning a sentencing matter before the judge.

In Elder Courts, it is probable that the same prohibition would apply to ex parte conversations with representatives of Adult Protective Services, victim witness advocates and elder case managers.

[§12.5.3] EX PARTE COMMUNICATIONS – OTHER EXCEPTIONS

Until 2013, judges were permitted, with notice to the parties, to "obtain the advice of a disinterested expert on the law". This exception to the prohibition against ex parte communications has been eliminated as potentially inconsistent with the "core tenets of the adversarial system." Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 3B(7). Judges are, however, permitted to "initiate, permit or consider" ex parte communications when expressly authorized by law or by stipulation of the parties. (Canon 3B(7)(c)) The commentary to canon 3B(7) cites CCP §116.250 which allows a judge to informally investigate in small claims cases and also Evid C §730 which provides for judicial appointment of an expert if expert testimony or analysis is deemed necessary.

The provision for ex parte communications for scheduling, administrative purposes or emergencies has been maintained in the 2013 revision of the Code of Judicial Conduct, as long as neither party will gain a procedural or tactical advantage and proper notification of all parties is ensured. Cal. Code Jud. Ethics, canon 3B(7)(b). Furthermore, court staff and personnel are permitted to communicate scheduling information and to perform other "administrative functions" ex parte. Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 3B(7).

[§12.6] SETTLEMENT CONFERENCES

Settlement discussions are a very important element of handling a case involving elder abuse, and a judge participating in such discussions must do so with sensitivity to the numerous issues that arise, including: physical, mental and psychological fragility of the victim; availability of community resources; and frequently, family dynamics. In many cases involving elder abuse, mediation may not be appropriate unless the victim has a trained and strong advocate.

The revisions to the California Code of Judicial Ethics in 2013 recognized the importance of settlement discussion, moving the relevant canon from an exception to the prohibition against ex parte communications to canon 3B(12) which specifically permits judicial participation in settlement discussions. With consent of the parties, a judge may confer separately with the parties and/or their lawyers, but judges are cautioned to strictly maintain impartiality and the appearance of impartiality during these discussions. Furthermore, a judge may not engage in conduct that could reasonably be perceived as coercive, and must at all times preserve rights of the parties "to be heard according to law." Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 3B(12).

A judge may decline to engage in settlement discussions if the judge believes that participation would affect his impartiality or would impact his ability to fairly decide the matter. If the judge will preside over the trial in a matter in which he or she has participated unsuccessfully in settlement discussions, canon 3B(12) provides guidance as to factors a judge should consider before entering into mediation or negotiations:

a) whether the judicial participation is with consent or over objection of the parties;
b) the relative sophistication of the parties or their counsel;
c) whether a party is unrepresented;
d) whether the trial is by judge or jury;
e) whether the parties will participate and the effect of personal contact between the judge and parties; and
f) whether the judge should, in the course of these discussions, express an opinion on the merits or legal issues.

Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 3B(12).

[§12.7] JUDICIAL SPEECH – GENERALLY

Canon 3B(9) dictates that a judge may not make any public comment about a pending or impending proceeding in any court, and may not make a "nonpublic comment that might substantially interfere with a fair trial or hearing." Exceptions to this general rule permit a judge to make statements in the course of official duties, to explain the procedures of the court and to discuss appellate cases in legal education programs and materials. (This exception does not apply to cases over which the judge has personally presided.) The prohibition does not apply to cases in which the judge is a litigant in a personal capacity.

The Terminology portion of the Cal. Code Jud. Ethics specifies that a "pending proceeding" continues through any period in which an appeal may be filed until final disposition. "Impending proceeding" is a matter that is imminent or expected to occur in the near future.

If a judge is subjected to public or private criticism due to a ruling or court decision, the Advisory Committee Commentary to canon 3B(9) specifically permits a judge to release a full or partial transcript of a court proceeding open to the public, to release copies of a written ruling or opinion, and to explain the rules and procedures "related to a decision rendered by a judge."

The 2013 revision to the California Code of Judicial Ethics has added a new and significant provision in canon 2A which governs judicial conduct in general: "A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Such comments may lead to disqualification (see discussion of canon 3E(3)(a) in §12.8 below) and thus would run afoul of canon 4A(4) which cautions judges to conduct all extrajudicial activities so that they do not lead to frequent disqualification.

With regard to nonpublic speech, judges are cautioned by the Advisory Committee Commentary to canon 3B(9) that the comment may be "misheard, misinterpreted or repeated." A judge who makes a nonpublic comment about a case over which the judge is presiding is advised to avoid the appearance that the judge has formed an opinion prematurely and does not maintain an open mind.

[§12.8] DISQUALIFICATION

Judges are disqualified in any proceeding in which disqualification is required by law (canon 3E(1)); the law governing disqualification lies in CCP §170.1(a). Disqualifying factors include:

a) Personal knowledge of evidentiary facts;
b) Judge or family member a witness;
c) Judge served as lawyer in proceeding (two-year limitation);
d) Judge was associated with lawyer in proceeding (two-year limitation);

e) Judge or family member has financial interest;
f) Judge or family member is a party;
g) Lawyer or associate of lawyer is spouse or family member of the judge;
h) Judge doubts ability to be impartial;
i) Judge believes disqualification would further the interests of justice;
j) Person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial;
k) Judge is physically impaired and cannot properly perceive the evidence or is unable to properly conduct the proceeding;
l) Campaign contributions over certain limits within certain time frames; and
m) Judge in negotiations for employment with attorney or party in proceeding.

The California Code of Judicial Ethics imposes upon judges further grounds for disqualification; canon 3E(3)(b) requires disqualification is a judge owns a corporate bond worth more than $1500 in a party in a proceeding. Ownership of a government bond issued by a party is disqualifying only if the outcome of the proceeding could substantially affect the value of the bond.

Canon 3E(3)(a), newly adopted in 2013, requires disqualification if the judge, while a judge or candidate for judicial office, "has made a statement, other than in a court proceeding, that a person aware of the facts might reasonably believe commits the judge to reach a particular result or rule in a particular way in a proceeding."

This stringent disqualification provision appears to limit significantly the provisions of CCP §170.2 which specify that it shall NOT be grounds for disqualification that a judge "has in any capacity expressed a view on a legal or factual issue" presented in a proceeding.

[§12.9] DISCLOSURE

Canon 3E(2) requires judges to disclose on the record information reasonably relevant to the issue of disqualification under CCP §170.1, "even if the judge believes there is no actual basis for disqualification" as well as campaign contributions in excess of $99.99. The Advisory Committee Commentary at the end of Cal. Code Jud. Ethics canon 3E also advises a judge to disclose membership in organizations which have the potential to given an appearance of partiality, even though membership is permitted under the Canons. (See discussion of extrajudicial activities in §12.10 below.)

Disqualification under Canon 3E(3)(a) (a judicial statement which might be interpreted to commit the judge to reaching a particular result in a case) is also subject to the reasonable person test. Thus, if a judge has made such a statement in the past, other than in a judicial decision or opinion, disclosure should be considered.

Judges presiding in elder abuse cases frequently question whether they have a duty to disclose facts or information which may be personal but relevant to the case over which the judge is presiding. Personal family situations involving issues such as dementia,

capacity, undue influence may be relevant to a case, but may raise concerns of privacy so that the judge is loath to make such intimate revelations. In this instant, recusal is appropriate (without explanation); if questioned, the judge may submit a sealed explanation to the Presiding Judge.

[§12.10] EXTRAJUDICIAL ACTIVITIES – GENERAL RULES

Standard 10.5 of the California Rules of Court specifically encourages judicial participation in community outreach: "Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics."

California judges are reminded that Cal. Code Jud. Ethics, canons 1 and 2 require judges to uphold and observe high standards of conduct, in both bench and off-bench activities. The Advisory Committee Commentary to canon 2A cautions that a "judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly."

Guidelines for these constraints upon judicial conduct in extrajudicial activities are codified in canon 4A, which mandates that a judge may engage in extrajudicial activities only so long as the activities do not:

1) cast reasonable doubt on the judge's impartiality;
2) "demean the judicial office;
3) interfere with the proper performance of judicial duties; or
4) lead to frequent disqualification".

Thus judges must conform off-bench behavior to maintain these high standards; the commentary warns that inappropriate use of humor or incidental demeaning remarks may be considered violations of the Code as they may be deemed to be expressions of bias or prejudice.

Judges may "speak, write, lecture, teach and participate in activities concerning legal and nonlegal subject matters" (Cal. Code Jud. Ethics, canon 4B) but are advised to ensure that the use of the judicial title, or the prestige of judicial office, is not utilized to promote the personal or pecuniary interest of the judge or others (Cal. Code Jud. Ethics, canon 2B). An exception to the general prohibition against use of the judicial title is that it is permissible to identify the judge by title in the promotion of legal education programs and materials. Advisory Committee Commentary to Cal. Code Jud. Ethics, canon 4B.

A judge must monitor personal investments so as to minimize the potential for disqualification (Cal. Code Jud. Ethics, canon 4D(4)) and may not engage in financial or business dealings that could be perceived to exploit the judicial position or would "involve the judge in frequent transactions or continuing business relationships with

lawyers or other persons likely to appear" in the judge's court. Cal. Code Jud. Ethics, canon 4D(1). Judges may engage in business activities other than "a business affected with a public interest" such as a bank, insurance company or public utility, but must ensure that neither the prestige of judicial office nor the judge's judicial position may be used to promote a commercial enterprise. Cal. Code Jud. Ethics, canon 4D(1) and Advisory Committee Commentary thereto.

[§12.11] GOVERNMENTAL AND COMMUNITY ACTIVITIES

Judges may serve as officers, directors, trustees or nonlegal advisors of organizations or government agencies devoted to the improvement of the law, legal system or administration of justice, and may also serve in this capacity for nonprofit educational, religious, charitable, service or other civic organizations, ensuring compliance with the general guidelines of canon 4A. Cal. Code Jud. Ethics, canon 4C(3). Canon 2C prohibits a judge from membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation. Cal Const art VI, §17 forbids a judge to serve in a public office.

With regard to nonprofit organizations, further restrictions dictate that these organizations should not be engaged in judicial proceedings that would come before the judge, nor should they be involved frequently in adversary proceedings in the judge's court or a court subject to the judge's appellate jurisdiction. Cal. Code Jud. Ethics, canon 4C(3)(c). Thus a judge serving as an Elder Court judge may not be a member of the board of directors of a legal services corporation which assists seniors if employees of that organization appear in the judge's court.

Judges may serve in governmental positions on committees or commissions only if they deal with issues of fact or policy concerning the improvement of the law, legal system or administration of justice. Cal. Code Jud. Ethics, canon 4C(2). A similar restriction is placed upon judicial testimony at a public hearing or consultation with an executive or legislative body, or a public official. Cal. Code Jud. Ethics, canon 4C(1).

[§12.12] FUNDRAISING

Judges are frequently asked to assist civic or charitable organizations in fundraising activities such as solicitation letters, dinners or other events. While canon 4C(3)(d) prohibits a judge from personally engaging in fundraising or membership solicitation for such organizations, certain exceptions are noted:

a) Judges may participate in planning a fundraising event or campaign.
b) Judges may solicit donations from family members and other active sitting judges.
c) Judges may serve as speakers, guests of honor or recipients of awards as long as the prestige of judicial office is not used for fundraising or membership solicitation.

d) Judges who are officers of such an organization may permit the judicial name and title to remain on letterhead even if used for fundraising provided that other officers have parallel designations on the stationery

e) Membership solicitation which is not a fundraising mechanism is permitted so long as the judge's participation could not be perceived as coercive

A judge may write a letter of recommendation to a fund-granting organization for a program or project which involves the law, legal system or the administration of justice. Cal. Code Jud. Ethics, canon 4C(3)(d)(ii).

[§12.13] CONCLUSION

Judges in Elder Courts can play an important and vital role by educating their courts and their communities on elder abuse and other topics involving the senior population, networking and coordinating organizations and individuals who provide services to the elderly, and promoting access to the courts for elders and disabled persons. As articulated in the Preamble to the Code of Judicial Ethics, "The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."

Thus, the constraints and restrictions imposed by the Code, as described in this chapter, need not be burdensome or obstacles, but should be aspirations for judicial conduct. Leadership in the community on elder abuse and other issues can be achieved without compromising due process and impartiality; thus the court can fulfill a significant role in violence prevention, community awareness and the enhanced safety of the citizenry.