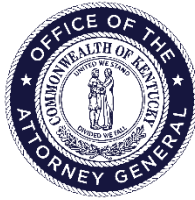


OFFICE OF THE ATTORNEY GENERAL

Prosecution Manual for  
Crimes Against the  
Elderly

2020



Commonwealth of Kentucky  
Office of the Attorney General

Daniel Cameron  
Attorney General

Capitol Building, Suite 118  
700 Capital Avenue  
Frankfort, Kentucky 40601  
(502) 696-5300  
Fax: (502) 564-2894

July 31, 2020

Dear Kentucky Prosecutors,

Thank you for your diligent work on behalf of Kentuckians. Your commitment to pursuing justice for Kentucky's elder citizens and to protecting them from abuse, neglect, and exploitation is essential to ensuring our seniors are treated with the dignity and respect they deserve.

Together, our Office of Senior Protection and our Office of Medicaid Fraud and Abuse Control work tirelessly to protect Kentucky's seniors. We are committed to supporting your efforts by providing tools like the enclosed 2020 Elder Abuse Prosecution Manual. This manual is part of a concerted effort by our Office of Medicaid Fraud and Abuse Control to assist you in your work. It includes resources and best practices for prosecuting cases related to personal, financial, and medical abuse, neglect, and exploitation.

In 2019, the Department of Community Based Services, Adult Protective Services received over 36,000 calls related to elder abuse, neglect, or exploitation. According to the National Center on Elder Abuse, a recent study found that for every reported case of elder abuse, 24 incidents are not reported. These alarming statistics underscore the importance of your work on behalf of Kentucky's seniors.

Please do not hesitate to reach out to our Office of Medicaid Fraud and Abuse Control at (502) 696-5405 if you need additional assistance or have questions about the material included in this manual. If you have questions related to seniors experiencing fraud, scams, or financial exploitation please contact our Office of Senior Protection by calling (502) 696-5300. Again, thank you for your work, and we welcome our role as your continued partner as you seek justice on behalf of Kentucky's elder citizens.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Cameron".

Daniel Cameron  
Attorney General

The Office of the Attorney General does not discriminate on the basis of race, color, religion, sex, national origin, pregnancy, age, veteran status, genetic information, disability, sexual orientation, gender identity, political affiliation or status as a smoker.

## **I. MISSION STATEMENT**

The Attorney General's Office strives to ensure that Kentucky's elders are treated with dignity and respect and are free from abuse, neglect, and exploitation. Our office recognizes that elder citizens are often more vulnerable to these crimes and can inadvertently become the victims of those they trust and rely on most for personal, financial, and medical care. The Attorney General's Office of Medicaid Fraud and Abuse are committed to investigating instances of these crimes and stopping the exploitation of our elders.

The Attorney General recognizes and appreciates the critical work of prosecutors across the state in combating elder abuse in all its forms. KRS 209 provides tools for the coordinated and efficient investigation and prosecution of crimes against seniors.

The Attorney General supports the multi-disciplinary approach endorsed by the Kentucky legislature and implemented throughout the state. Multi-disciplinary teams, including law enforcement officers, social workers, medical professionals, victims' advocates, and prosecutors offer a coordinated and efficient approach to combating elder abuse.



## **II. INTRODUCTION and OVERVIEW OF INVESTIGATIVE AGENCIES**

**The requirement to report adult abuse, neglect and exploitation is universal.**

**Call  
1-877-597-2331  
for the  
Department of  
Community  
Based Services  
Adult Abuse  
Hotline.**

The abuse of vulnerable adults is a hideous and frightening crime. All too often this segment of our population is left alone and frightened, completely dependent upon others for the simplest tasks that the more fortunate can perform for themselves.

The aging of baby boomers is expected to hit Kentucky with particular force. By 2025, Kentucky is expected to have the 12<sup>th</sup> highest proportion of seniors in the United States. By 2030, nearly one in four Kentuckians will be 65 or older; a percentage that will have increased 32 percent from the numbers in 2012. By 2050, more Kentuckians will be 65 and older than 18 and younger.

Kentucky's adult protective laws provide for timely response to complaints of adult abuse, neglect or exploitation based upon the apparent seriousness of the allegations and, most importantly, risk to the life, health, and safety of the victim. The law requires any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report the abuse, neglect or exploitation. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death. KRS 209.030(2). The tip line phone number is 1-877-597-2331. Any person who makes such a complaint in good faith is immune from civil or criminal liability. (More information regarding KRS 209 can be located in Chapter 3).

Other agencies also receive reports of abuse, neglect, and exploitation. The Office of Medicaid Fraud and Abuse Control in the Office of the Attorney General (OAG/MFCU) accepts complaints of abuse, neglect or exploitation that occur in Medicaid funded facilities. Complaints can be made by calling 1-877-228-7384.

Complaints involving abuse, neglect, or exploitation of adults receiving care in licensed facilities should be reported to the Office of the Inspector General (OIG).

The Cabinet for Health and Family Services, Office of the Inspector General's website indicates that the complaint information should include the following:<sup>2</sup>

- Was the complaint reported to the county Department for Community Based Services office?
- Name of facility
- Who is the complainant?
- What is the complaint? (Describe the facts of the complaint situation)
- Who is/are the alleged perpetrator(s)?
- How was the patient/resident affected?
- When did the complaint situation occur? Was it an isolated event or an ongoing situation? (Include the date, time, time between different events)
- Where did it happen? (In what care unit, patient/resident room)
- How did it happen? What was the sequence of events?
- Is a patient/resident or the family of a patient/resident involved?
- Who witnessed the complaint situation?
- Names of staff or other residents involved. Also, include other persons involved, such as volunteers or visitors.
- Was facility made aware of complaint?
- What actions were taken by the facility?

Long term care facilities are required by the Center for Medicare and Medicaid Services (CMS) to self-report incidents occurring in their facilities to the Office of the Inspector General. An example of the reporting form that is to be used by long term care facilities can be located at the end of this chapter.

DCBS, OIG and OAG/MFCU work closely together to investigate and prosecute cases of adult abuse, neglect and exploitation. In addition, local law enforcement and prosecutors are an invaluable partner in investigating allegations of elder abuse.

---

<sup>2</sup> <https://chfs.ky.gov/agencies/os/oig/dhc/Documents/ComplaintInformation.pdf>

Kentucky Cabinet for Health and Family Services  
Office of Inspector General – Division of Health Care  
**Long Term Care Facility – Self-Reported Incident Form**

Initial Report       5 Day Follow up/Final Report       Combined Incident Report/Final Report

Please complete Parts A & B for 24-hour Initial notifications. Include Part C for 5 day Follow up/Final Reports.

**Part A**

Name of Facility \_\_\_\_\_

Address \_\_\_\_\_

Street

City

State

Zip

Incident Date \_\_\_\_\_ Incident Location \_\_\_\_\_

Resident(s)/Client(s) Involved \_\_\_\_\_

Staff Involved \_\_\_\_\_

**Required Incident Reports**

- Fire
- Missing Resident/Elopement
- Injuries of Unknown source
- Allegations of Neglect
- Allegations of Abuse/Mistreatment

- Physical Abuse
- Sexual Abuse
- Mental Abuse
- Verbal Abuse
- Seclusion
- Misappropriation of Property

**Optional Incident Reports**

- Communicable Disease
- Outbreak of Infectious Disease
- Storm Damage
- Utility Failure (more than 4 hours)
- Care and Treatment
- 
- Incident Involving Life Safety Code
- Death Other than by Natural Causes
- Other \_\_\_\_\_

**Notifications**(Check all that apply)

- Physician
- Family/Guardian
- Resident's Legal Representative
- DCBS
- Local Law enforcement
- Appropriate Licensing Board
- Attorney General
- Ombudsman
- Other \_\_\_\_\_

**Part B**

Description of Incident. Please include injuries sustained as well as measures taken to protect the resident(s) during investigation. (Limit of 500 characters attach additional pages as necessary)

**Please include relevant resident history (i.e. cognitive status, fall risk assessment, relevant care plan instructions prior to this incident, etc.)** (Limit of 500 characters attach additional pages as necessary)

**Part C**

For 5-working day/final reports, please include a summary of the investigation (include investigative actions, findings and causative factors) and corrective measure implemented to prevent recurrence. (Limit of 500 characters attach additional pages as necessary)

\_\_\_\_\_  
**Reporting Party (type or print clearly)**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**Reporting Party's Contact Number**

### III. Overview of KRS 209

In 2005, the Kentucky General Assembly passed legislation to improve the operation of Kentucky's system of adult protection. One of the provisions of that legislation required the Attorney General's Office to draft this manual for the use of local prosecuting attorneys in handling cases of adult abuse, neglect, or exploitation. Because prosecutors and many other professionals must work closely to successfully prosecute these cases, significant segments of this manual are devoted to the roles of this varied group, both for the prosecutors' information and the guidance of those professionals who may not have yet had the opportunity or cause to work in a prosecutorial setting. These cases will become more prevalent as the population ages, both in Kentucky and the nation. With the trend toward encouraging "aging in place" for seniors, law enforcement and prosecution must be ever vigilant in seeking out cases where these vulnerable, aging adults might be victimized.

The reasons for lack of prosecution of elder maltreatment are varied, but one fact is clear: crimes against the elderly are often ignored.<sup>1</sup> Too frequently the crimes detailed in this manual are seen as "private matters" much as domestic violence and child abuse were before those criminal phenomena received concentrated attention from law enforcement, prosecutors and the media. Additionally, elder homicide is often successfully hidden by caretakers since others perceive that the victim was at the end of their life expectancy and mistakenly attribute the death to disease processes.

KRS 209 was enacted for the following purposes:

#### ***KRS 209.010 Purpose and application of chapter***

(1) The purpose of this chapter is:

(a) To provide for the protection of adults who may be suffering from abuse, neglect, or exploitation, and to bring said cases under the purview of the Circuit or District Court;

(b) To provide that any person who becomes aware of such cases shall report them to a representative of the cabinet, thereby causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these adults in need of protective services and to prevent abuse, neglect, or exploitation;

---

<sup>1</sup> The study found that mandatory reporting of crimes against elders is linked to higher investigation rates. Jogerst, G. et al. Domestic Elder Abuse and the Law, American Journal of Public Health; Vol. 93 (12), 2131-2136; December 2003. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448164/> (Jul. 2018)

and

(c) To promote coordination and efficiency among agencies and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults.

(2) This chapter shall apply to the protection of adults who are the victims of abuse, neglect, or exploitation inflicted by a person or caretaker. It shall not apply to victims of domestic violence unless the victim is also an adult as defined in KRS 209.020(4).

An adult is defined in KRS 209.020 as: “a person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services.”

***KRS 209.030 Administrative regulations -- Reports of adult abuse, neglect, or exploitation -- Cabinet actions -- Status and disposition reports.***

(1) The secretary may promulgate administrative regulations in accordance with KRS Chapter 13A to effect the purposes of this chapter. While the cabinet shall continue to have primary responsibility for investigation and the provision of protective services under this chapter, nothing in this chapter shall restrict the powers of another authorized agency to act under its statutory authority.

(2) Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.

(3) An oral or written report shall be made immediately to the cabinet upon knowledge of suspected abuse, neglect, or exploitation of an adult.

(4) Any person making such a report shall provide the following information, if known:

- (a) The name and address of the adult, or of any other person responsible for his care;
- (b) The age of the adult;
- (c) The nature and extent of the abuse, neglect, or exploitation, including any evidence of previous abuse, neglect, or exploitation;
- (d) The identity of the perpetrator, if known;
- (e) The identity of the complainant, if possible; and
- (f) Any other information that the person believes might be helpful in establishing the cause of abuse, neglect, or exploitation.

(5) Upon receipt of the report, the cabinet shall conduct an initial assessment and take the following action:

- (a) Notify within twenty-four (24) hours of the receipt of the report the appropriate law enforcement agency. If information is gained through assessment or investigation relating to emergency circumstances or a potential crime, the cabinet shall immediately notify and document notification to the appropriate law enforcement agency;
- (b) Notify each appropriate authorized agency. The cabinet shall develop standardized procedures for notifying each appropriate authorized agency when an investigation begins and when conditions justify notification during the pendency of an investigation;
- (c) Initiate an investigation of the complaint; and
- (d) Make a written report of the initial findings together with a recommendation for further action, if indicated.

(6) (a) The cabinet shall, to the extent practicable, coordinate its investigation with the appropriate law enforcement agency and, if indicated, any appropriate authorized agency or agencies.

(b) The cabinet shall, to the extent practicable, support specialized multidisciplinary teams to investigate reports made under this chapter. This team may include law enforcement officers, social workers, Commonwealth's attorneys and county attorneys, representatives from other authorized agencies, medical professionals, and other related professionals with investigative responsibilities, as necessary.

(7) Any representative of the cabinet may enter any health facility or health service licensed by the cabinet at any reasonable time to carry out the cabinet's responsibilities under this chapter. Any representative of the cabinet actively involved in the conduct of an abuse, neglect, or exploitation investigation under this chapter shall also be allowed access to financial records and the mental and physical health records of the adult which are in the

possession of any hospital, firm, financial institution, corporation, or other facility if necessary to complete the investigation mandated by this chapter. These records shall not be disclosed for any purpose other than the purpose for which they have been obtained.

(8) Any representative of the cabinet may with consent of the adult or caretaker enter any private premises where any adult alleged to be abused, neglected, or exploited is found in order to investigate the need for protective services for the purpose of carrying out the provisions of this chapter. If the adult or caretaker does not consent to the investigation, a search warrant may be issued upon a showing of probable cause that an adult is being abused, neglected, or exploited, to enable a representative of the cabinet to proceed with the investigation.

(9) If a determination has been made that protective services are necessary when indicated by the investigation, the cabinet shall provide such services within budgetary limitations, except in such cases where an adult chooses to refuse such services.

(10) In the event the adult elects to accept the protective services to be provided by the cabinet, the caretaker shall not interfere with the cabinet when rendering such services.

(11) The cabinet shall consult with local agencies and advocacy groups, including but not limited to long-term care ombudsmen, law enforcement agencies, bankers, attorneys, providers of nonemergency transportation services, and charitable and faith-based organizations, to encourage the sharing of information, provision of training, and promotion of awareness of adult abuse, neglect, and exploitation, crimes against the elderly, and adult protective services.

(12) (a) By November 1 of each year and in accordance with state and federal confidentiality and open records laws, each authorized agency that receives a report of adult abuse, neglect, or exploitation shall submit a written report to the cabinet that provides the current status or disposition of each case referred to that agency by the cabinet under this chapter during the preceding year. The Elder Abuse Committee established in KRS 209.005 may recommend practices and procedures in its model protocol for reporting to the cabinet under this section.

(b) By December 30 of each year, the cabinet shall provide a written report to the Governor and the Legislative Research Commission that summarizes the status of and actions taken on

all reports received from authorized agencies and specific departments within the cabinet under this subsection. The cabinet shall identify any report required under paragraph (a) of this subsection that is not received by the cabinet. Identifying information about individuals who are the subject of a report of suspected adult abuse, neglect, or exploitation shall not be included in the report under this paragraph. The report shall also include recommendations, as appropriate, to improve the coordination of investigations and the provision of protective services. The cabinet shall make the report available to community human services organizations and others upon request.

A flowchart which outlines how APS handles a complaint is attached at the end of this chapter.

**KRS 209.050 provides immunity from any civil or criminal liability for “anyone acting upon reasonable cause in the making of any report or investigation . . .”**

KRS 209.050 provides immunity from any civil or criminal liability for “anyone acting upon reasonable cause in the making of any report or investigation or participating in the filing of a petition to obtain injunctive relief or emergency protective services for an adult pursuant to this chapter, including representatives of the cabinet in the reasonable performance of their duties in good faith, and within the scope of their authority . . . Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or investigation and such immunity shall apply to those who render protective services in good faith pursuant either to the consent of the adult or to court order.”

One unique evidentiary aspect of KRS 209 is that KRS 209.060 allows a psychiatrist or spouse to testify about the abuse, neglect, or exploitation of an adult in a prosecution that is pursuant to this chapter.

**Neither the psychiatrist- patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult.**

***KRS 209.060 Privileged relationships not ground for excluding evidence***

Neither the psychiatrist-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.



In 2011, the General Assembly recognized the need to prohibit persons convicted of felony adult abuse from serving in a fiduciary capacity for the victim of the abuse or the victim's estate.

***KRS 209.115 Disqualification from serving in fiduciary capacity for felony conviction under KRS Chapter 209***

(1) Any person convicted of a felony under this chapter shall be disqualified from being appointed or serving as a guardian, limited guardian, conservator, limited conservator, executor, administrator, fiduciary, personal representative, attorney-in-fact, or health care surrogate as to the victim of the offense or the victim's estate. The sentencing judge shall inform the defendant of the provisions of this section at sentencing.

(2) Any interested person or entity, as that phrase is defined in KRS 387.510, shall have standing to contest the appointment or continued service of a person subject to the prohibition established in subsection (1) of this section.

(3) Actions of a guardian, limited guardian, conservator, limited conservator, executor, administrator, fiduciary, personal representative, attorney-in-fact, or health care surrogate disqualified from acting in that capacity due to the provisions of subsection (1) of this section shall remain valid as to third parties acting in good faith and without knowledge of the person's disqualification.

KRS 209.140 provides that information obtained by the Department of Community Based Services staff shall not be divulged to anyone outside the five categories of persons outlined in the statute (see below).

**\*\*\*Practice Tip\*\*\***

If discovery is filed as a part of the court record, prosecutors should be mindful of this statute when producing documents that would fall into this category, including but not limited to DCBS Form 115s and CQAs (now ADTs). (A blank DCBS Form 115 is included at the end of this chapter as an example). If Discovery is filed with the court, the prosecutor may want to file the documents that would fall within the purview of KRS 209.140 under seal. In addition, the prosecutor may want to ask the court for an order allowing the prosecutor to disclose the name of the complainant so that the prosecutor is in compliance with KRS 209.140(1).

### ***KRS 209.140 Confidentiality of Information***

All information obtained by the department staff or its delegated representative, as a result of an investigation made pursuant to this chapter, shall not be divulged to anyone except:

- (1) Persons suspected of abuse or neglect or exploitation, provided that in such cases names of informants may be withheld, unless ordered by the court;
- (2) Persons within the department or cabinet with a legitimate interest or responsibility related to the case;
- (3) Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case;
- (4) Cases where a court orders release of such information; and
- (5) The alleged abused or neglected or exploited person.

KRS 209.150 outlines who has standing to make a criminal complaint.

### ***KRS 209.150 Who may make a criminal complaint***

Any representative of the cabinet acting officially in that capacity, any person with personal knowledge of the abuse or neglect, or exploitation of an adult by a caretaker, or an adult who has been abused or neglected or exploited shall have standing to make a criminal complaint.

Elder abuse prosecutions have considerations that are sometimes not applicable in other types of criminal matters. Therefore, KRS 209.180 requires that each County or Commonwealth Attorney's Office shall have an attorney trained in this area if resources are available.

### ***209.180 Prosecution of adult abuse, neglect, and exploitation***

**KRS 209.180 requires that each County or Commonwealth Attorney's Office shall have an attorney trained in this area if resources are available.**

- (1) If adequate personnel are available, each Commonwealth's attorney's office and each county attorney's office shall have an attorney trained in adult abuse, neglect, and exploitation.
- (2) Commonwealth's attorneys and county attorneys, or their

assistants shall take an active part in interviewing the adult alleged to have been abused, neglected, or exploited, and shall inform the adult about the proceedings throughout the case.

(3) If adequate personnel are available, Commonwealth's attorneys and county attorneys shall provide for an arrangement that allows one (1) lead prosecutor to handle the case from inception to completion to reduce the number of persons involved with the adult victim.

(4) Commonwealth's attorneys, county attorneys, cabinet representatives, and other members of multidisciplinary teams shall minimize the involvement of the adult in legal proceedings, avoiding appearances at preliminary hearings, grand jury hearings, and other proceedings when possible.

(5) Commonwealth's attorneys, county attorneys, and victim advocates employed by Commonwealth's attorneys or county attorneys shall make appropriate referrals for counseling, private legal services, and other appropriate services to ensure the future protection of the adult when a decision is made not to prosecute the case. The Commonwealth's attorney or county attorney shall explain the decision not to prosecute to the family or guardian, as appropriate, and to the adult victim.

The penalties for violating KRS 209 are as follows:

**KRS 209.990 Penalties**

(1) Anyone knowingly or wantonly violating the provisions of KRS 209.030(2) shall be guilty of a Class B misdemeanor as designated in KRS 532.090. Each violation shall constitute a separate offense.

(2) Any person who knowingly abuses or neglects an adult is guilty of a Class C felony.

(3) Any person who wantonly abuses or neglects an adult is guilty of a Class D felony.

(4) Any person who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor.

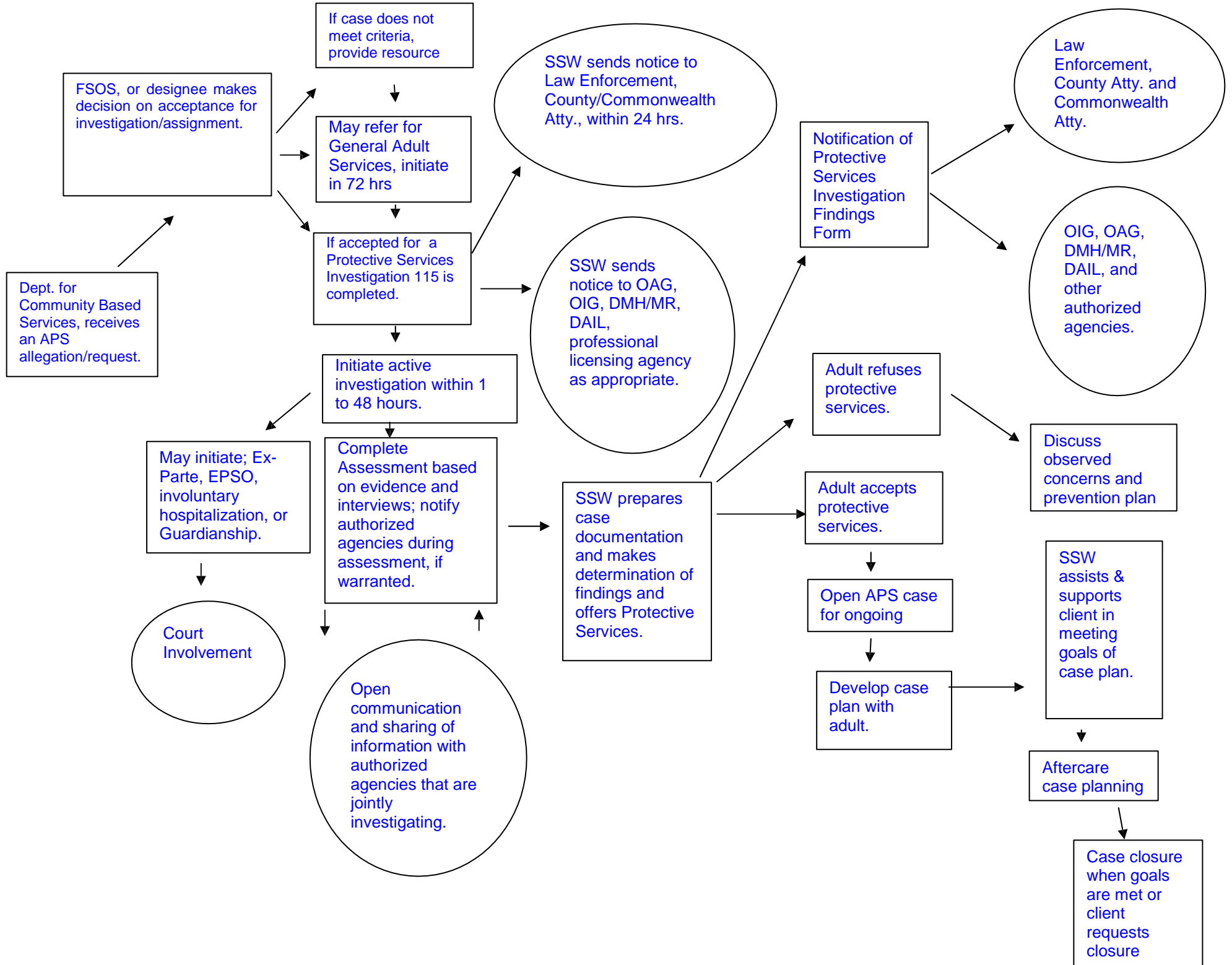
(5) Any person who knowingly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class C felony.

(6) Any person who wantonly or recklessly exploits an adult,

resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class D felony.

(7) Any person who knowingly, wantonly, or recklessly exploits an adult, resulting in a total loss to the adult of three hundred dollars (\$300) or less in financial or other resources, or both, is guilty of a Class A misdemeanor.

(8) If a defendant is sentenced under subsection (5), (6), or (7) of this section and fails to return the victim's property as defined in KRS 218A.405 within thirty (30) days of an order by the sentencing court to do so, or is thirty (30) days or more delinquent in a court-ordered payment schedule, then the defendant shall be civilly liable to the victim of the offense or the victim's estate for treble damages, plus reasonable attorney fees and court costs. Any interested person or entity, as defined in KRS 387.510, shall have standing to bring a civil action on the victim's behalf to enforce this section. The sentencing judge shall inform the defendant of the provisions of this subsection at sentencing.



CONFIDENTIAL SUSPECTED ABUSE/ NEGLECT, DEPENDENCY OR EXPLOITATION  
REPORTING FORM

DCBS Number:

DCBS Name:

REPORT DATE:

INCIDENT DATE(S):

COUNTY OF REPORT:

TIME REPORT RECEIVED:

REFERRAL NUMBER:

1. TYPE REPORT:

Child Protective Services (CPS):  Yes  No

Physical Abuse  Sexual Abuse  Emotional Injury  Neglect  Dependency

Adult Protective Services (APS):  Yes  No

Spouse Abuse  Neglect (list type):  Adult Abuse  Exploitation

2. REFERRAL TRACK:

CPS:  FINSA  INVESTIGATION

APS:  INVESTIGATION

3. Alleged Victim(s):

Name(s)	Age	Sex	Nature of Report

4. Current Address:

Telephone Number:

5. Describe the situation that causes the reporting source to suspect abuse/neglect, dependency or exploitation and explain how they became aware of the situation. List witnesses and/or collaterals:



6. Describe dangerous behaviors (violence, threats/use of weapons, substance abuse issues, mental health issues etc.) by any individual that may be a threat to DPP staff:

7. Alleged Perpetrators:

Name	Relationship	Address	County	Telephone Number

8. Person Taking Referral: Title:  
Telephone Number:

9. Worker Assigned to Investigate: County: Telephone Number:  
by: Family Services Office Supervisor:

**APS NOTIFICATION ONLY**

10. 24 Hour Notification pursuant to KRS 209.030 (5)(a) sent to:  
 County Attorney/Commonwealth Attorney County: Telephone Number:

Law Enforcement Agency County: Telephone Number:

**OPTIONAL BASED ON TYPE OF REPORT:**

- Office of Attorney General, Medicaid Fraud, and Abuse Control Division
- Office of Inspector General
- Department for Behavioral Health, Development and Intellectual Disabilities
- Long Term Care Ombudsman
- Licensing or Certifying Board, please specify:
- Other, please specify:

**CPS NOTIFICATION ONLY**

11. Notification sent to:  County Attorney/Commonwealth Attorney  Law Enforcement Agency  
 Other(s), please specify:

12. Notification of Initial Results of CPS Investigation: (72 Hour Status Report):  
Date of Initial Results Notification:

**CPS NOTIFICATION ONLY**

**NOTE: The information contained on this page is confidential and is only intended for use by Cabinet staff involved in the assessment of this report of suspected abuse, neglect, or dependency. IT IS NOT TO BE SENT WITH THE INITIAL NOTIFICATION OR THE 72 HOUR INITIAL RESULTS NOTIFICATION.**

**APS NOTIFICATION ONLY**

**NOTE: The information contained on this page is confidential and is only intended for use by Cabinet staff and authorized agencies involved in the assessment and /or investigation of this report of suspected abuse, neglect, or exploitation.**

<b>13. Person making referral:</b>	<b>Title/Relationship:</b>
<b>Address:</b>	
<b>Telephone number (s): Home:</b>	<b>Work:</b>



#### **IV. Kentucky's Adult Protective Services Caregiver Misconduct Registry**

Legislation became effective on July 15, 2014 to allow for the creation of an Adult Protective Services Caregiver Misconduct Registry based on validated substantiated findings of abuse, neglect, and exploitation by the Cabinet for Health and Family Services.

A key aspect of this law is that a vulnerable adult services provider shall query the Cabinet to determine whether a validated substantiated finding exists about a bona fide prospective employee. In addition, individuals who privately hire caregivers can request that the individual that is seeking employment request information from the Cabinet on whether or not there is a validated substantiated finding against them. With the individual's consent, the Cabinet can direct the result of the query to the alternative recipient.

The Cabinet will only indicate whether or not a validated substantiated finding exists. This law does not authorize the release of any additional information; however, the Open Records Act may allow the release of additional information in some circumstances, such as if the individual that is the subject of the validated substantiated finding makes the request.

Individuals are only placed on the registry after their due process rights have been exhausted. The individual must be afforded the right to have an administrative hearing and appeal to Circuit Court.

***209.032 Query as to whether prospective or current employee has validated substantiated finding of adult abuse, neglect, or exploitation -- Administrative regulations -- Central registry of substantiated findings made on or after July 15, 2014.***

(1) As used in this section:

(a) "Employee" means a person who:

1. Is hired directly or through a contract by a vulnerable adult services provider who has duties that involve or may involve one-on-one contact with a patient, resident, or client; or
2. Is a volunteer who has duties that are equivalent to the duties of an employee providing direct services and the duties involve, or may involve, one-on-one contact with a patient, resident, or client;

(b) "Validated substantiated finding of adult abuse, neglect, or exploitation" means that the cabinet has:

1. Entered a final order concluding by a preponderance of the

evidence that an individual has committed adult abuse, neglect, or exploitation against a different adult for whom the individual was providing care or services as an employee or otherwise with the expectation of compensation;

2. The individual has been afforded an opportunity for an administrative hearing under procedures compliant with KRS Chapter 13B, and an appeal to the Circuit Court of the county where the abuse, neglect, or exploitation is alleged to have occurred or, if the individual consents, to the Franklin Circuit Court; and

3. That any appeal, including the time allowed for filing an appeal, has concluded or expired; and

(c) "Vulnerable adult service provider" means:

1. Adult day health care program centers as defined in KRS 216B.0441;

2. Adult day training facilities;

3. Assisted-living communities as defined in KRS 194A.700;

4. Boarding homes as defined in KRS 216B.300;

5. Group homes for individuals with an intellectual disability and developmentally disabled (ID/DD);

6. Home health agencies as defined in KRS 216.935;

7. Hospice programs or residential hospice facilities licensed under KRS Chapter 216B;

8. Long-term-care hospitals as defined in 42 U.S.C. sec. 1395ww(d)(1)(B)(iv);

9. Long-term-care facilities as defined in KRS 216.510;

10. Personal services agencies as defined in KRS 216.710;

11. Providers of home and community-based services authorized under KRS Chapter 205, including home and community based waiver services and supports for community living services; and

12. State-owned and operated psychiatric hospitals.

(2) A vulnerable adult services provider shall query the cabinet as to whether a validated substantiated finding of adult abuse, neglect, or exploitation has been entered against an individual who is a bona fide prospective employee of the provider. The provider may periodically submit similar queries as to its current employees and volunteers. The cabinet shall reply to either type of query only that it has or has not entered such a finding against the named individual.

(3) An individual may query the cabinet as to whether the cabinet's records indicate that a validated substantiated finding of adult abuse, neglect, or exploitation has been entered against him or her. The cabinet shall reply only that it has or has not entered such a

finding against the named individual, although this limitation shall not be construed to prevent the individual who is the subject of the investigation from obtaining cabinet records under other law, including the Kentucky Open Records Act. An individual making a query under this subsection may direct that the results of the query be provided to an alternative recipient seeking to utilize the care or services of the querying individual.

(4) Every cabinet investigation of adult abuse, neglect, or exploitation committed by an employee or a person otherwise acting with the expectation of compensation shall be conducted in a manner affording the individual being investigated the level of due process required to qualify any substantiated finding as a validated substantiated finding of adult abuse, neglect, or exploitation.

(5) The cabinet shall promulgate administrative regulations to implement the provisions of this section. Included in these administrative regulations shall be:

(a) An error resolution process allowing an individual whose name is erroneously reported to have been the subject of a validated substantiated finding of adult abuse, neglect, or exploitation to request the correction of the cabinet's records; and

(b) A designation of the process by which queries may be submitted in accordance with this section, which shall require that the queries be made using a secure methodology and only by providers and persons authorized to submit a query under this section.

(6) If the cabinet does not respond to a query under subsection (2) of this section within twenty-four (24) hours and a vulnerable adult services provider hires or utilizes an employee provisionally, the provider shall not be subject to liability solely on the basis of hiring or utilizing the employee before having received the cabinet's response.

(7) This section shall only apply to instances of abuse, neglect, or exploitation substantiated on or after July 15, 2014, which shall be compiled into a central registry for the purpose of queries submitted under this section.

To determine the status of a defendant on the DCBS Caregiver's Registry, the CHFS Office of Legal Services can be reached at 502/564-7905.

\*\*\*Practice Tip\*\*\*

In addition, if you are prosecuting a defendant that received a substantiated finding of abuse or neglect after July 15, 2014 you

may want to consider adding language to your plea so that the defendant will agree to be placed on the registry and waive appeals.

In addition, please forward the plea sheets and judgments of persons who qualify for inclusion on the DCBS Caregiver Registry to the Office of Legal Services at the conclusion of your case. Many administrative appeals are held in abeyance until the criminal case is resolved. Even if the defendant does not agree to be placed on the list, the plea sheets and judgment will aid the Cabinet attorney for DCBS in placing the defendant on the registry.

## **V. ROLES and RESPONSIBILITIES of ALLIED PROFESSIONALS**

### **Emergency Medical Services**

Very often, the first lines of protection for victims of elder maltreatment are the men and women of Kentucky's Emergency Medical Services (EMS). Paramedics and Emergency Medical Technicians (EMTs) are frequently called to scenes where crimes against elderly and vulnerable adults are disguised as incidents or accidents attributable to the victims' medical conditions or cognitive states. These responders should receive training to identify these potential crime scenes and to report them to the Cabinet's Department for Community Based Services, Adult Protective Services (APS) and law enforcement for immediate investigation. Where appropriate, responders should be interviewed by law enforcement officers and prosecutors, and should always be subpoenaed to court proceedings.

### **Patrol Officers**

Often EMS will not be called to scenes of crimes against the elderly; instead, patrol officers will be the first responders. Until patrol officers are convinced that an injured, ill, or vulnerable adult is **not** the victim of a crime, the assumption should be that he is. The scene and potential evidence should be secured and witnesses, including family members and caretakers, should be kept available for interview by investigators in accordance with law enforcement training and "Chapter 6: Law Enforcement" in this Manual.

### **Investigators**

When investigators or detectives are called in to a case of suspected abuse, neglect or exploitation, every assumption should be that they are at the scene of a crime. In addition to following their training protocols, investigators should be familiar with the roles of other professionals in order to tap into information, knowledge and resources available from them.

### **Victim Advocates**

Victim advocates can be critical in assisting law enforcement and prosecutors with victim protection, interviews, court appearances, and many other aspects of the investigation and prosecution process. They are also a great resource in assisting prosecutors and victims to access civil remedies.

## **Coroners**

State law provides that coroners are to require autopsies to be performed in certain circumstances. KRS 72.025 should be carefully reviewed to see if an autopsy is required. Coroners should be mindful that crimes against vulnerable adults are often cleverly disguised by perpetrators as accidents or incidents that occur due to the victims' medical conditions or cognitive states. Coroners should remain aware of the unique vulnerabilities of these victims.

## **Forensic Evaluation**

The forensic evaluation of a possible elder maltreatment case is a valuable adjunct to the criminal investigation. In the clinical setting or at autopsy, non-abusive physical findings should be explained and differentiated from possible sources of abuse or neglect. Appropriate imaging studies, laboratory analysis, review of pertinent clinical findings and in the case of postmortem evaluation, histopathological examination should be utilized for the forensic evaluation of a presumed victim of maltreatment. As a branch of forensic pathology, Clinical Forensic Medicine is uniquely designed to evaluate the living elder victim of trauma and/or neglect for inflicted injuries. Practitioners of Clinical Forensic Medicine, including physicians and nurses, are equipped to thoroughly examine the elder patient and review medical records to assess the possibility of physical abuse. They are also fully qualified to provide expert medical opinions on injury mechanisms for potential legal ramifications. The physicians involved in Clinical Forensic Medicine also have the expertise to evaluate trauma and testify regarding deceased individuals.

## **Adult Protective Services**

APS workers, like EMS responders, are often the first line of protection for elderly and vulnerable adult victims. All abuse, neglect and exploitation must be reported to APS, as must suspicion of these acts. Trained to identify signs that may not be as readily apparent as those encountered in usual calls, the APS worker should be regarded as a valuable asset during all phases of a case.

## **Office of the Inspector General**

Survey staff from the Office of the Inspector General (OIG) are highly trained to identify situations in which the elderly have been subjected to abuse, neglect or exploitation in a health care facility. When these facilities fail to provide

necessary care, provide poor care, or fail to protect victims from predators, OIG staff can be of great help in establishing causation or a nexus between services poorly provided or not provided and a decline in the victim's health, often ending in death. The agency can also impose sanctions.

### **Ombudsmen**

Quite often the first professionals to be alerted to the abuse, neglect or exploitation of vulnerable adults are long term care ombudsmen. Ombudsmen take complaints from residents of long term care facilities or their families who have concerns with any aspect of care and services being delivered. Ombudsmen work on a regular basis with APS and OIG staff, in addition to their often ongoing work with facility staff. Ombudsmen are generally well aware of facilities' history of caregiving and compliance or noncompliance with state and federal laws and regulations governing care, and can provide a wealth of information in facility-involved cases.

### **Behavioral/Mental Health Professionals**

Behavioral/mental health professionals serve as a critical resource for prosecutors and victim advocates. They can assist in preparing elder abuse victims for court and related proceedings and provide psychological or psychosocial assessment of the behavioral health needs of victims or non-offending family members; crisis intervention services to assist with the emotional crises of the victims or family; ongoing therapeutic intervention to victims and families during and subsequent to the investigation and prosecution process; specialized consultation to professionals involved in service provision with a goal toward providing insight into the impact of the victimization on the individual and/or family members and interpreting behaviors within the context of trauma response; and court ordered evaluations of offenders charged with or convicted of elder abuse related crimes.

In the Commonwealth, behavioral health professionals may include psychologists, social workers, marriage and family therapists, psychiatrists, and psychiatric nurses, all of whom are certified under specific statutes.

## **Office of the Attorney General, Office Medicaid Fraud & Abuse**

The Office of Medicaid Fraud and Abuse (“MFCU”) in the Office of the Attorney General prosecutes fraud perpetrated by providers against the Medicaid program, the state program that provides health care for people based upon financial eligibility. In addition to fraud, detectives with the MFCU investigate crimes of abuse, neglect and exploitation against victims in health care facilities. MFCU staff are always available to assist local prosecutors in any way to bring to justice those who prey upon vulnerable citizens. The MFCU’s telephone number is 502/696-5405; to report suspected abuse and neglect call 1-877-ABUSE TIP (1-877-228-7384).

## **Office of the Attorney General, Office of Senior Protection**

The Office of Senior Protection (“OSP”) is responsible for administering and offering a “triage” of services and trainings to better equip senior Kentuckians and their families against, fraud, scams, and financial exploitation.

OSP will administer these services by creating an informational and networking “resource hub” for area agencies, non-profit organizations, academic and community groups, and other collaborating partners.

Resources provided by OSP include:

- Mediation/consumer complaint assistance;
- Consumer information;
- Scam Report and Fraud Assistance;
- Outreach programs; and
- Assisting with signing up consumers to SCAM ALERTS (text KYOAG Scam to GOV 311).

## **Office of the Attorney General, Office of Consumer Protection**

The Office of Consumer Protection protects consumers from unfair, false, misleading and deceptive trade practices and assists consumers with marketplace complaints. The Office also has a regulatory function which requires registration of funeral homes and cemeteries, crematories, telemarketers, health spas, debt consolidators, charitable solicitors, business opportunities, recreation and retirement use land sales, and several other areas of trade and commerce. In addition, the Office has a consumer education program and training



section to inform consumers and business entities of their rights and responsibilities. To reach the Office of Consumer Protection, call 502/696-5389.

**Office of the Attorney General, Office of Criminal Appeals**

The Office of Criminal Appeals handles post-conviction proceedings. The Assistant Attorneys General in this division are experts in many areas of the law and can provide guidance to prosecutors at nearly every stage of a proceeding. The telephone number for the Office is 502/696-5342.

**Office of the Attorney General, Office of Victims Advocacy**

Ensuring that victims of crime receive appropriate levels of service is the primary goal, but not the only goal of the Office of Victims Advocacy. Working with local prosecutors and various advocacy groups throughout the Commonwealth, the Office strives to raise awareness of victim issues and enforce victims' rights. This Office is an excellent source of guidance for the prosecutor who is starting a multidisciplinary council or local coordinating council in his judicial district. The Division can be reached by calling 502/696-5312.

## VI. LAW ENFORCEMENT ROLE

### INTRODUCTION

Many victims are people who, because of age, physical impairments, or mental decline cannot help themselves and are completely dependent on others to meet their most basic needs.

**Many victims are people who, because of age, physical impairments, or mental decline cannot help themselves and are completely dependent on others to meet their most basic needs.**

Elder abuse includes the physical, sexual, emotional, or financial abuse or neglect or abandonment of an older person and may be committed by a family member, a friend, a fiduciary, a caregiver, or any other person. Each year hundreds of thousands of vulnerable adults are abused, neglected, and exploited by those closest to them. Many victims are people who, because of age, physical impairments, or mental decline cannot help themselves and are completely dependent on others to meet their most basic needs.

Elder abuse can happen anywhere and be committed by anyone. In the past, many have failed to recognize certain aspects of elder abuse as a crime. Increased recognition and the fact that our nations' aging population continues to expand has caused an increased emphasis statewide on the investigation and prosecution of the individuals responsible for the commission of these crimes.

As the public becomes more aware of the fact that elder abuse occurs all around us, those involved in investigation and prosecution of these offenses will experience an increase in criminal cases in which seniors are targets of these horrible crimes. Justice for victims of elder abuse requires specialized training for police officers and other first responders, prosecutors, medical experts, and support professionals.

Elder abuse can take many forms, including but not limited to the following:

**Physical Abuse** is the causing of physical pain or injury. It includes, but is not limited to, hitting, slapping, shoving, cutting, burning, or forcibly restraining.

**Sexual Abuse** is any non-consensual sexual contact, or sexual contact with a person who is incapable of giving

consent. Examples include, but are not limited to, rape, sodomy, and coerced nudity.

**Psychological/Emotional Abuse** is the infliction of mental pain or anguish, which can be caused by name-calling, insulting, ignoring, threatening, isolating, demeaning, or controlling behavior.

**Financial Exploitation** is the illegal or improper use of the resources of an older individual for personal benefit, profit, or gain and may include, but not be limited to, the misuse of a Power of Attorney (POA).

**It should be noted that more than one form of abuse might be occurring simultaneously.**

**Caretaker Neglect** is the refusal or failure to carry out a care-giving responsibility, such as failure to provide food, medicine, or other services associated with daily living needs. Neglect can also include abandonment. Neglect can be passive or active.

**Passive Neglect** is the unintentional failure to fulfill a care-giving obligation. There is no willful attempt to inflict distress on the older person. In many situations it is the result of well-meaning family members or friends who take on the responsibility for a frail older person, but who are incapable of meeting that person's needs.

**Active Neglect** is the intentional failure to fulfill a care-giving responsibility.

**Caregiver stress, history of family violence, and drug addiction are among factors that play a significant role in the occurrence of elder abuse.**

It should be noted that more than one form of abuse might be occurring simultaneously. For example, emotional abuse often precedes or accompanies physical abuse or financial exploitation.

Abuse, neglect, and exploitation occurring in elders' private residences as well as healthcare facilities have been identified as a serious and growing concern. Significant effort at curbing these crimes is currently underway throughout Kentucky. One component of gaining control is identifying why these crimes are committed. Many reasons have been cited as to why elder abuse occurs, but as with other violent crimes, no single factor can be identified that, in and of itself, leads to elder abuse.

The following is by no means inclusive of every reason, but the factors listed below can play a significant role in why

elder abuse occurs:

- Caregiver stress, economic compensation, or remuneration of caregivers
- Level of mental and physical impairment of the dependent
- History of family violence
- Personal problems and addictions
- Overworked and understaffed caregivers

### **IDENTIFYING ELDER ABUSE**

**It is critical to determine actual cause of death and not assume the elder's death is attributable to disease processes.**

Investigating and prosecuting offenses involving elder abuse can be difficult. The victim may be unable or unwilling to report that abuse is occurring, witnesses may be hesitant to come forward for fear of similar acts being committed against them, physical evidence may be non-existent, and a time lapse may exist. Factors such as these make recognizing the signs of elder abuse crucial to a successful investigation and prosecution. Additionally, it can sometimes be difficult to distinguish between a disease process and an injury in an older adult. Many cases of elder abuse fall into a gray area where abuse and neglect are less clear because of physiological and psychological changes that occur during old age. Also, deaths, especially those occurring in a care facility, may not be evaluated in detail because it is routinely concluded that death was the result of old age and health related issues. As a result, autopsies are rarely performed on older adults. The following warning signs do not necessarily mean that elder abuse is occurring, but they do signal a need to investigate further:

**The presence of any of these signs should alert the first responder to the potential for adult abuse, neglect, and exploitation.**

#### **Signs of Physical or Emotional Abuse in the Victim**

- Inadequately explained bruises, cuts, or burns;
- Dehydration or malnutrition without an illness-related cause;
- Overly medicated or overly sedated;
- Indications of unusual confinement;
- Lack of cleanliness or grooming;
- Fear of speaking for oneself in the presence of a caretaker;
- Shame, fear, or embarrassment; or
- Allegations of abuse made by the victim.

### **Signs of Caretaker Neglect in the Victim**

- Persistent odor of urine or feces;
- Poor hygiene (unbathed, unclipped finger or toenails, etc.);
- Dehydration or malnutrition;
- Unsanitary conditions;
- Presence of decubitus ulcers;
- Frequent errors in administration of medications;
- Wounds that heal slowly; or
- Complaints of poor care made by the patient.

### **Signs of Financial Exploitation**

- Deviations in established financial habits;
- Numerous unpaid bills;
- Missing personal belongings, papers, or credit cards;
- Little money while awaiting next check;
- Unaware of monthly income;
- Frequent expensive gifts from elder to caregiver;
- Caregiver's refusal to spend money on elder;
- Checks frequently made out to cash;
- A disparity between assets and lifestyle;
- Recent Will when elder clearly incapable;
- Unprecedented transfer of assets to other(s); or
- Misuse of a Power of Attorney.

### **Signs in the Suspected Abuser**

- Gives conflicting stories;
- Offers inconsistent or implausible explanations for the victim's injuries;
- Is reluctant to let the elderly person be interviewed alone;
- Speaks on behalf of the elderly person;
- Handles the elderly person roughly or in a manner that is threatening, manipulative, or insulting;
- Has an alcohol or drug problem;
- Has a previous history of abusive behavior;
- Appears indifferent or angry towards the older person;
- Is reluctant, fails, or refuses to assist or attend to the older person;
- Always makes bank deposits/withdrawals for the senior;
- Uses elder's ATM cards;
- Makes all investment decisions for senior;
- Receives frequent expensive gifts from senior;
- Asks only financial questions, not caring questions;
- Refuses to spend money on elder's care; or
- Asserts powers based on unsupported Power of Attorney.

## UNEXPLAINED INJURIES

Any unexplained injury should be viewed as potential abuse until all reasonable possibilities pertaining to how the injury was obtained have been examined. Most accidental wounds tend to occur to arms and hands. Consideration should be given, however, to the possibility that hand and/or arm injuries might also be the product of the victim's effort to defend him or herself during an attack. Any injury, especially those that are unexplained or those that are inconsistent with the explanation given, may be indicative of abuse. Before finally concluding that an injury is the result of an abusive act, it is important to have the victim's medical history examined thoroughly by a professional in order to rule out any pre-existing medical condition that could account for the injury.

### Pertinent Terminology

For a complete list of medical terminology, please consult the "Common Medical Abbreviations, Definitions, Terms, Symbols and Acronyms" chapter of this manual.

- An ***abrasion*** is a wound caused by rubbing or scraping the skin against a hard, fixed object or surface.
- A ***contusion*** is commonly referred to as a bruise. It is an injury to tissue without a breakage of skin, generally due to blunt force trauma. It manifests itself in the form of swelling, discoloration, and sometimes tenderness. It is important to look for patterns of bruising such as clusters of bruises, bruises in different stages of healing, bruising that takes on the shape of the weapon used in the assault, and bruising on the insides of arms and thighs. The elderly bruise more easily and heal more slowly. It should also be noted that bruising can be increased as a result of a medication regimen, a medical condition, or nutritional supplements.
- An ***incision*** is simply a cut. It is a wound made by a sharp instrument or object.
- A ***laceration*** is a wound produced by a tearing or splitting of body tissue often from blunt impact. It usually occurs over a bony surface.
- A ***fracture*** is a break, rupture, or crack in a bone or cartilage. Fractures are a common injury in older adults and are often attributed to age-related factors such as osteoporosis.

- A ***decubitus ulcer*** is more commonly known as a bedsore, a pressure sore, or a pressure ulcer. Decubitus ulcers are the result of circulatory failure due to pressure resulting in dead tissue. The presence of decubiti may indicate that a bed-ridden patient is not being properly cared for or moved or turned by the caregiver. Multiple sites of decubiti and foul-smelling dead tissue are indicators of neglect. Decubiti are never normal.
- ***Malnutrition*** occurs when there is a decreased intake of necessary nutrients due to a poor diet or malabsorption (poor passage of materials through the walls of the intestine into the bloodstream). Malnutrition can develop as part of a natural aging process wherein there is a decline of smell and taste in the older adult, which results in a loss of appetite. Other causes of appetite loss in the frail elderly include depression, change in environment, change in medical condition, and under- or over-medication. In abuse victims, appetite loss is often the result of inappropriate or excessive medications that can affect swallowing or memory. Appetite loss may be exacerbated by a caregiver's ignoring of cultural food preferences (e.g., expecting an older person to eat unfamiliar foods). Force-feeding and other inappropriate feeding can lead to food revulsion, refusal to eat, depression, choking, aspiration, pneumonia, or death. Malnutrition can also result when inappropriate medications are introduced, including, but not limited to, psychotropic drugs, or it can be the result of medical conditions such as cancer, dementia, stroke, Parkinson's disease, a disorder of the esophagus, or Chronic Obstructive Pulmonary Disease, also referred to as COPD (e.g., chronic bronchitis, asthma, and emphysema.)
- ***Dehydration*** is excessive water loss from the body. The elderly are more prone to dehydration than other segments of the population, as both body water reserves and thirst drives are decreased in the older adult. Neglect may be present if inadequate fluids are provided and if the dehydration goes unrecognized for an extended period of time by medical or nursing personnel.
- The ***misuse of prescription drugs*** by older adults is frequently due to a lack of capacity or because they reject efforts by medical professionals to help them. Medications can also be used as a tool for abuse.

Abusers sometimes over-medicate to keep a person quiet and manageable. Under-medicating or withholding medication may occur when a caregiver is diverting drugs for his or her personal use. Over or under medication can result in medical or cognitive impairment. To detect abuse, explore the use of medications, their side effects, interactions with other medications, and the use of multiple medications.

## **DOMESTIC VIOLENCE**

Elder abuse can be committed by a spouse, partner, or family member. Domestic violence is not limited to the young. As couples age, emotional or physical violence may develop or worsen. Occasionally, how violence is manifested changes. Emotional abuse may escalate to physical abuse or neglect. If a long-time partner suddenly becomes abusive, he or she should be evaluated to rule out organic causes. Involuntary behaviors of physical and verbal abuse can be caused by the onset of dementia or Alzheimer's disease. All laws and procedures that relate to domestic violence remain in place regardless of the age of the victim or the perpetrator. KRS Chapter 209.020 provides the following definitions:

- "Adult" means a person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services.
- "Abuse" means the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury.
- "Neglect" means a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult.

KRS Chapter 209.030 mandates that any person, including but not limited to, a physician, a law enforcement officer, a nurse, a social worker, cabinet personnel, a coroner, a medical examiner, an alternate care facility employee, or a caretaker, who has reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of the chapter



to the Department for Community Based Services of the Cabinet for Health and Family Services. The death of the adult does not relieve one of the responsibilities to report the circumstances surrounding the death. Failure to report suspected abuse is a Class B misdemeanor, with each violation constituting a separate offense.

## **RESPONSE TO AN ELDER ABUSE INCIDENT**

**Law enforcement officers must constantly strive to overcome the attitude that their services can be better utilized elsewhere if the victim of elder abuse does not want their help.**

Law enforcement's response to an allegation of elder abuse should be handled in the same manner as any other call for service, demanding appropriate procedures and precautions to minimize the threat of injury to police officers and citizens on the scene. As with any other offense, the officer should:

- Identify the victim and respond to their immediate medical needs.
- Protect the crime scene.
- Identify any and all potential witnesses.
- Gather all relevant evidence.
- Conduct a sufficient preliminary investigation to verify or disprove the allegation.

Law enforcement officers should be constantly aware of the fact that persons who commit elder abuse, in many instances, know where their victims live and shop as well as their daily habits. The offenders know where the victim's family and friends live, which medical professionals they see, and what their vulnerabilities are. They should also be aware of the fact that victims fear retribution or embarrassment if they report criminal activity or participate in the prosecution of an abuser. Fragile adults are frequently dependent upon their caregivers for help and support with the simplest activities of daily living. In addition to the inherent desire to protect those closest to them, this dependency makes it extremely difficult for an abused elder to file complaints or seek prosecution. Law enforcement officers must constantly strive to overcome the attitude that their services can be better utilized elsewhere if the victim of elder abuse does not want their help. At the very least, it is the responsibility of the responding officer to insure the long-term protection of the victim whenever possible. There are important steps that can be taken to provide for the well-being of the elderly person, whether or not a crime or violation has been committed and whether or not an arrest has been made. Law enforcement officers can:

**Perform a safety check** – This involves inspecting the premises for safety issues that can mean the difference

between life and death for an elderly person. This is especially important if the elderly person lives alone. Some questions to consider:

- Is the home reasonably clean and cared for, inside and out?
- Are newspapers and mail collected regularly?
- Are there dangerous conditions in the home, such as clutter, that would make it easy for the older person to fall and get hurt?
- Is there food on the shelves and in the refrigerator?
- Is refrigerated food spoiled?
- If the elderly person has a hearing or vision problem, does he/she have the necessary glasses or hearing aids?
- Are there dangerous objects in the house? It is particularly important to check to see if there are guns in an elderly person's home, especially if the person is suffering from dementia or psychiatric disorder.

**Make a referral** – Community agencies can provide help with tangible problems of daily living or counseling for psychological distress, both of which may be exacerbated by the arrest and removal of a suspect from the family system. An older person may be stranded if the caregiver is removed. Referrals to community resources can help preserve the dignity and independence of the older adult or, in some cases, help an overwhelmed family care for their elderly relative. Community agencies to consider include:

**Courtesy, patience, and active listening will greatly assist law enforcement officers in securing information from elder abuse victims.**

- Local agency on aging;
- Home delivered meals programs;
- Adult Protective Services;
- Senior centers;
- Alzheimer's programs (Adult Day Centers);
- Domestic violence agencies;
- Sexual assault agencies; and
- Crime victim programs.

Law enforcement officers are required to report known or suspected abuse or neglect of an elder to the Department for Community Based Services of the Cabinet for Health and Family Services immediately by filing a properly completed JC-3 report. *See* KRS 209A.120.

### **INTERVIEWING ELDERLY VICTIMS**

The elder abuse victim may be traumatized by the abuse, ambivalent about acknowledging the abuse, or confused about what has happened. These things make the interview process more complicated for the law enforcement officer.

**Be prepared to use the strategies listed here when interviewing elder victims.**

On the positive side, older people tend to see the police as the “good guys”. Most associate police with authority, safety, and security. This can be built upon to gain their trust and to help them cope with a traumatic situation. Police officers may upon occasion find elderly crime victims reluctant or difficult to interview. The same physical and mental impairments that render them more vulnerable to criminals can make communicating with them a challenge. Implementing courtesy, patience, and active listening will greatly assist in the securing of information. The causation of unusual behaviors by seniors such as wandering, appearing intoxicated, or erupting into violence may not be clear at first. Until you can explain the behavior otherwise, assume that it could be the result of abuse. In their way, these people may be calling for your help and showing you how to approach them.

Interviewing older victims requires special care and patience. Simple measures such as treating the person with respect by asking permission to enter their living area or to be seated can help the victim feel less anxious.

Other strategies include:

- Ask permission to sit near the older person at eye level. Do not tower over him or her, as this can be intimidating.
- Indicate immediately that you are there to help.
- Speak slowly, clearly, and be patient in waiting for a response.
- Avoid leading questions.
- Let the elder use his or her own words.
- Keep your weapon out of sight – a weapon can be frightening.
- Address the victim by name, but do not use first names, as this is considered disrespectful by many elderly persons.
- To help the elder relax, begin the interview with friendly questions such as “How are you feeling today?”
- If there is any question about the elder’s mental capacity, ask orienting questions about day, date, time, and place which will give an idea as to how the elder is functioning mentally.
- Conduct a structured interview using predetermined questions.
- Elderly victims can sometimes take a very long time to tell their story. It is important to keep them focused and

**Before you begin an interview with an alleged victim of elder abuse, run a check on the address to see if there have been any other calls for service to that address.**

give them plenty of time to answer the specific questions you need to determine whether or not you can build a case.

- Ask one question at a time, using short, simple sentences. Older victims may be upset and confused due to the crimes or the crises that have occurred.
- Listen carefully to what is being said. This can be difficult when the older person is not communicating clearly. Ask for clarification when you need it, but do not interrupt.
- If the person is having difficulty remembering when an event occurred, offer memory cues like “What television program were you watching?”
- For hearing impaired persons, eliminate as much background noise as possible and use visual cues.
- Ask if the person is having difficulty hearing you, and whether he or she has a hearing aid that would help.
- Written communication can be used as an alternative.
- Some visually impaired people may not look directly at you because they see better in their peripheral zones.

**These strategies can greatly improve the quality of interviews with victims who have a disability.**

Before you begin an interview with an alleged victim of elder abuse, run a check on the address to see if there have been any other calls for service to that address. Check for instances of previously reported abuse involving the victim. Check court records for orders of protection that have been issued. If the name of the alleged perpetrator is known, run local, state, and federal background checks. If the alleged perpetrator has a probation officer, contact that officer. If possible, also contact Adult Protective Services and the area Ombudsman to see if they have an open case or history involving the victim. They will often be able to give you valuable information about the elderly person. Try to determine the preferred language of a victim who is not comfortable with English so that you can bring someone to interpret.

Some people develop disabilities as they age. Some, who already have disabilities, develop other physical or mental impairments as they age. For example, hearing loss and poor vision, common among older people, can be compounded by physical impairments, such as arthritis and osteoporosis, as well as mental impairments due to degenerative diseases such as Alzheimer’s. In addition to rendering them more vulnerable to abuse, these and other permutations of common conditions can pose challenges in

interviewing the elderly victim. The following will provide strategies for interviewing the hearing impaired, the visually impaired, and persons with dementia/Alzheimer's disease.

### **Communicating with a Hearing Impaired Person**

- Do not assume that all older adults are hard of hearing. However, if you suspect that a person has hearing loss, ask if he or she is having difficulty hearing; ask if he or she has a hearing aid (many people who have hearing aids choose not to wear them all the time).
- Ask if the person would prefer to use written communication.
- Most people with hearing loss pay more attention to visual cues. It is therefore important that the hearing impaired see your lips, facial expressions, and hands when you interview them.
- Do not cover your mouth when you speak or chew gum as this makes it more difficult for the hearing impaired person to read your lips.
- Eliminate as much background noise as possible.
- Position yourself between 3 and 6 feet away. Never speak directly into the person's ear.
- Establish eye contact before you begin to speak.
- Speak slightly louder than you normally would; but do not yell.
- Speak clearly and at your normal rate, but not too quickly. Do not over-articulate as this distorts both the sound of the speech and the face, making visual cues more difficult to understand.
- Use short simple sentences, but avoid a condescending tone.
- If the person does not appear to understand, rephrase the statement. Do not just repeat the same words.

### **Communicating with a Visually Impaired Person**

- With just a few minor considerations, your interview with a visually impaired older person should be conducted as normal.
- After making verbal contact with the visually impaired, position yourself a comfortable distance from the individual and maintain that position throughout the course of the interview. Move only when necessary and continue verbal communication so as you move, your location can be identified.

## **Communicating with Persons Suffering from Dementia**

**Begin the interview orienting information such as the purpose of the interview and what you would like to accomplish.**

Some background information on dementia may be helpful for the law enforcement officer who is confronted with a case involving a possible elder abuse victim who has dementia. Dementia is the overarching term given to a gradual deterioration in cognitive functioning, seen through impaired memory and perception, and decreased decision-making abilities. Alzheimer's disease, the most prevalent form of dementia, may culminate in a total dependency on others for all aspects of personal care. Dementia is not a part of normal aging. While dementia-like symptoms caused by delirium or depression may be reversed, those symptoms associated with Alzheimer's disease or cerebral vascular disease are irreversible. For this reason, it is important to obtain and have examined the individual's medical history. The course of dementia in Alzheimer's disease is gradual at onset with continuing cognitive decline. In the later states the patient may experience agitation and wandering as well as delusions, paranoia, or hallucinations. The progress of the disease differs for each person, but its course is similar. For the individual with early stage Alzheimer's disease, routine tasks and recent events become increasingly difficult to accomplish and recall. When confronted by an individual who appears physically fine, but does not seem to understand the nature of the activity around them, it will become necessary to obtain a quick medical assessment of the person's mental status.

It can be challenging to communicate with those who are confused or disoriented as a result of dementia. It should not be assumed, however, that they are unable to provide useful or accurate information. Periods of lucid thought are to be expected, particularly in the early stages of Alzheimer's disease. Be calm and reassuring as people with dementia are very sensitive to feelings. Pay close attention to their reactions; emotional responses may reveal what they cannot express in words. A sensitive approach to interviewing the person with dementia may yield valuable results. Following are some strategies that may make the police interview more productive:

- Keep the interview area quiet and as free as possible from environmental distractions such as a TV or open window with traffic noise.

- Begin the interview with orienting information such as the purpose of the interview and what you would like to accomplish.
- Offer a few words of reassurance.
- Relax and be yourself. Your degree of calmness is quickly sensed, just as any anxiety will be sensed.
- Acknowledge the person's feelings. It shows your concern and that you are trying to understand his or her point of view.
- Speak slowly and in a soothing tone, without infantilizing the individual.
- Give the person with dementia ample time to respond. The importance of patience cannot be overstated.
- Repeat questions as needed, using simple and concrete words.
- Remember that what has been asked may take longer to be understood.
- Give simple directions, one step at a time.

Distraction or redirection may help to calm and refocus an individual who is upset. Document non-verbal reactions. For example, if the individual becomes agitated, frightened, or mute when asked about a certain person or situation, there may be a reason.

It will be important to carefully assess allegations made by an individual whose medical history indicates diagnosis of mental impairment. While some degree of cognitive impairment may be evident, these allegations must not be disregarded as delusions without conducting a more in-depth interview. **Note that abusive situations may be permitted to continue under the assumption that the allegations can be attributed to dementia psychosis. If you have been unable to interview the victim effectively, consider the use of forensic experts such as psychologists, psychiatrists, and forensic accountants, who have expertise in interviewing elderly victims and can testify in court as to their findings.**

In order to effectively intervene in these situations, it is important to have an understanding of the cultural factors that might influence the victim or the victim's family.

On a similar note, investigators and prosecutors should never overlook the possibility that the person to be interviewed may be unable to read or write. In many instances, these

individuals are very self-conscious and embarrassed about their inability and will be hesitant to volunteer information about their impairment.

## **CULTURAL ISSUES**

**In order to effectively intervene in these situations, it is important to have an understanding of the cultural factors that might influence the victim or the victim's family.**

Culture embodies a number of concepts, including the ideas, customs, skills, and arts of a given group of people who generally share a common language and ethnic origins. Culture is passed from generation to generation through families and groups. Cultural values represent strengths in families and a source of strengths for individuals. Culture shapes all individuals, fostering beliefs which influence behavior. Culture may be based on gender, religion, sexual orientation, disability status, socioeconomic status, language, tradition, or country of origin, in addition to race and ethnicity. Our communities are increasingly becoming more diverse. Since no cultural/ethnic group is immune from elder abuse, it is likely that the victim and/or perpetrator in an elder abuse case may be from a culture different than your own. In order to effectively intervene in these situations, it is important to have an understanding of the cultural factors that might influence the victim or the victim's family.

Cultural factors may inhibit the reporting of elder abuse crimes or cooperation with the police if the crimes are reported:

**Be careful not to interpret an unwillingness to show injuries as an indication that there are no injuries.**

- Cultural norms of perseverance, silent suffering, and quiet endurance are valued in many communities. These qualities are also associated with victimization. Consequently, elders may not see themselves as victims of abuse. They may deny or minimize problems, or refuse to cooperate with authorities. Some cultures place great value on family interdependence and multi-generational households. They may fear the social consequences of bringing shame to the family.
- Some cultures believe that maintaining community or family honor is more important than the interests of the individuals and that the authorities should not be involved in what they consider "family matters." Laws and customs in some countries forbid intervention in family affairs without the permission of families.



- Some people distrust authority because they may have grown up in a part of the world where a police state or a corrupt legal system existed. They may not know they have rights in this country regardless of their immigrant status. They may fear deportation if the police get involved.

Empathy and reassurance can help to reduce these fears. Sensitive, culturally competent communications are vital for successful investigations. The following represent efforts that are typically successful in bridging cultural differences:

**Do not use jargon or speech patterns from the victim's culture in an attempt to fit in. Maintain his dignity and yours.**

- Address the victim/witness using last name unless you are asked to use first name.
- In some cultures, women customarily initiate handshakes with men.
- While a gentle touch on the shoulder may be comforting to some elderly victims, in some cultures this is considered an intrusion.
- Some victims may be reluctant to reveal injuries that are covered with clothing due to cultural customs of modesty or religious beliefs. Be careful not to interpret an unwillingness to show injuries as an indication that there are no injuries.
- Be conscious of your own body language. If the victim/witness is sitting, ask permission to sit. If you sit, sit upright at a distance that will help the person feel at ease.
- Some persons will not make eye contact with you. In many cultures, eye contact with authority figures is discouraged, and averted eyes are considered to be a sign of respect rather than an indicator of non-cooperation. In other cultures the reverse is true. Take cues from the individual regarding his or her preferences.
- Begin with carefully phrased, indirect or open-ended questions. In some cultures, direct questions may be considered offensive.
- Do not use jargon or speech patterns from the victim's culture in an attempt to fit in. Maintain his dignity and yours.
- A country of origin may not indicate a preferred language; therefore, it is best to ask what language the complainant/witness prefers.

**Many elders who live in ethnic communities do not speak English. In these situations it is important to use an impartial interpreter.**

While culture does play a significant role in shaping a person's behavior, it should not be seen as an automatic

**The significance of physical evidence is enhanced in crimes against the elderly because the victim might not be willing or able to testify at trial.**

predictor of how a given victim will respond. Each case is unique and should be assessed keeping relevant aspects of culture in mind.

Many elders who live in ethnic communities do not speak English. In these situations it is important to use an impartial interpreter. Good interpreters will almost always be native speakers of the target language. Avoid using a family member, friend, or neighbor to communicate with the victim or with the suspected offender. The interpreter may be involved in the abusive situation or may give an inaccurate translation due to their personal bias. The victim may also be reluctant to speak honestly in front of an acquaintance or family member.

## **EVIDENCE**

Physical evidence is an important component of every criminal prosecution but can become especially significant when the crime is committed against the elderly. Physical evidence may be used to document injury, corroborate victim and witness statements, to link a suspect to a crime scene, or to prove that a crime in fact occurred. The significance of physical evidence is enhanced in crimes against the elderly because the victim may not be willing or able to testify at trial.

**Investigators should identify and document any and all alterations to the scene since discovery of the offense.**

The information detailed below is not intended to be an all-inclusive list of possible evidentiary items; just a sample of those items that would commonly be associated with helping to establish crimes against an elderly victim. It is important to not only be creative but to use common sense in the identification and collection of evidence. There are times in elder abuse cases when the evidence of abuse or neglect may not be immediately obvious. Investigators must ask themselves why a particular situation or set of circumstances raise questions and what can be done to resolve those concerns. Investigators should always consider the need to secure a search warrant before processing a crime scene and/or collecting evidence. Each instance will present a unique set of facts that must be examined on a case-by-case basis. Investigators are encouraged to seek advice and direction from their prosecutor before proceeding.

**Photographs** – Investigators should photograph the crime scene in detail in compliance with established forensic

photographic techniques. Investigators should identify and document any and all alterations to the scene following discovery of the offense. Detailed measurements should be obtained that would assist in the recreation of the scene at a later date. Items of evidence relative to the offense should be identified and collected using standard law enforcement evidence collection protocol. Noting the absence of items that would, under normal circumstances, be considered evidence should be done during the evidence collection process.

**Digital images should be promptly printed and transferred for long term storage to a compact disc, a DVD, or other acceptable storage device and placed into evidence in accordance with agency policy.**

Because photographs can be important evidence when carefully obtained and evaluated, their authenticity and the integrity of the person obtaining them will often be questioned. The date, time, and location of the photographed image should be documented at the time the photograph is taken. The photographer should be identified and the specific equipment used to take the photograph should be documented. Along with the ease, convenience, and quality of digital photography come inherent problems. For example, digital photos can easily be enhanced by anyone with access to the proper computer software. For this reason, digital images obtained should be promptly printed and transferred for long term storage to a compact disc, a DVD, or other acceptable storage device. The storage device containing the images should be placed into evidence in accordance with agency policy. There should be documentation by the photographer which details every action associated with the photographs.

Photographic evidence should be considered in every investigation/prosecution involving an elderly abuse victim. Photographic evidence may include, but not be limited to:

- Photographs of the victim. Close-up shots depicting specific injuries should be accompanied by mid-range and full-body shots for identification of the person depicted and the specific location of the injury.
- Photographs of the suspect. Prosecutors may present photos of the accused showing lack of injuries in order to counter claims that the accused was injured by the victim.
- Photographs of the crime scene. These should include overall scene shots as well as specific items and locations within the scene. Crime scene photographs can establish living conditions, evidence of a struggle, absence or presence of required medical equipment,

**A victim's physical condition and mental state at the time an offense is committed against him is best determined by way of a comprehensive review conducted by a trained, medical professional.**

unsafe conditions, or proximity to other areas important to the establishment of probable cause.

- Photographs of evidence seized. Any item being seized as evidence should be photographed in place before removal. In addition to photographs of the item itself, photographs should be obtained which effectively identify the location of the item before seizure.
- Photographs of weapons. Physical abuse of the elderly seldom involves the use of a weapon. However, investigators should never overlook the possibility that a readily available item may be used as a dangerous instrument. Because crime scenes are frequently processed during the initial stages of an investigation, when very little information is known as to the chain of events, every item located in the immediate area should be documented through photography.
- Photographs of items that identify a particular lifestyle. Evidence of drug use is especially relevant to prove the abuser's motive to commit the crimes, including theft, assault, and neglect. The presence of alcoholic beverage containers may help in establishing the personality of the abuser. Magazines, clothing, and other sexually oriented paraphernalia may give insight to an allegation of sexual abuse.

**Medical Documents** – A victim's physical condition and mental state at the time of the offense is best determined in a comprehensive review conducted by a trained medical professional. Records maintained by the victim's treating physician, care facility, or hospital are readily available to law enforcement officers and those individuals/agencies tasked with healthcare oversight. Medical records may be obtained with the patient's authorization, by subpoena, or upon execution of a search warrant. Also, healthcare oversight agencies such as the Cabinet for Health & Family Services, Department for Community Based Services (DCBS), the Attorney General's Office of Medicaid Fraud and Abuse (OMFA), and Office of the Inspector General (OIG) as well as the Medical Licensure and Dental Boards have the authority to conduct an inspection of a victim's medical records upon demand. Medical records not only provide details concerning the victim's day-to-day care but also detail an established care plan that must be strictly followed by professional caregivers.

**When abuse of the elderly involves a professional caregiver, the suspect's personnel records should be secured and examined.**

**The victim should be asked for any writings he has.**

**Note any change in the victim's demeanor when the suspected abuser enters the room.**

**Financial Documents** – Financial documents include but are not limited to, bank statements, ATM receipts, bank withdrawal slips, past due notices, unpaid bills, deeds, powers of attorney, health care proxies and wills. An examination of financial records will help establish the possession and movement of funds belonging to the victim.

**Personnel Records** – When abuse of the elderly involves a professional caregiver, the suspect's personnel records should be secured and examined for levels of training, job positions held, instances of prior allegations, and any past disciplinary actions. Documentation that the suspect has received specific training may assist to establish that the suspect knew or should have known the proper method or technique when performing a function associated with caring for the elderly. Prior allegations and/or disciplinary actions taken against the suspect may help identify a pattern of criminal conduct.

**Physical Evidence** – The clothes the victim was wearing at the time of the offense, the victim's bed linens, damaged items, and the contents of trash cans are just a few examples of physical evidence that might indicate whether an offense occurred and who committed it. Daily journals, letters, and notes may assist in verifying commission of a crime or aid in identifying the offender. The victim should be asked to give the investigating officer any writings she may have, as many people save letters, cards, and notes. These documents may contain threats, apologies, or evidence of the defendant's motive, jealousy, or stalking behavior. They may also be useful as handwriting samples to compare with writings at issue in the trial. Incoming messages obtained from answering machines or recordings from other sources which contain threats of violence, coercion, deception, stalking, or financial ruin can become significant pieces of evidence used at trial to help identify the perpetrator's voice.

**Prescription/Drug Evidence** – Obtain information regarding past and present medications taken by the victim, as well as the pharmacy from which they were obtained. This includes not only prescribed medications, but homeopathic and over-the-counter remedies as well. Certain combinations of remedies, when not monitored by a physician, can be deadly. Kentucky All Schedule Prescription Electronic Reporting (KASPER) reports, prescription containers, and records documenting the administration of medication can

**Even instances occurring in the past may become relevant to current issues.**

**Always document all statements, no matter how insignificant they may seem at the time. A seemingly unimportant fact may be shown to be false at some later point in time, as additional facts and evidence are uncovered.**

**Every investigation of elder abuse, whether it is physical abuse, emotional abuse, neglect, or exploitation must be approached as if the victim will be unable to testify.**

help to identify motive or provide an explanation pertaining to a suspect's actions.

**Statements from Victims** – An effort to conduct an interview with an elderly victim should be attempted in every investigation. Even if the interview is unsuccessful, the attempt should be documented thoroughly. The victim's demeanor as well as the statement should also be documented. Note any change in demeanor when the suspected abuser enters the room.

**Statements from Witnesses** – Document names, addresses and telephone numbers of neighbors, friends, family, caregivers, or anyone else who may have seen, heard, or smelled something relative to the abuse. Even instances occurring in the past may become relevant to current issues. Obtain the names and contact information for all medical personnel who previously or currently treated the victim, including private doctors and hospitals. Specifically, investigators should look for a pattern of injuries sustained by the victim or for a lack of medical attention, which may be evidence of neglect. Information obtained from medical experts and medical personnel providing services to the victim can provide great insight to circumstances that would aid in establishing the elements of an offense, identifying a responsible party, or determining that no crime has been committed.

**Statements from Suspects** – Any statement or utterance made by a possible suspect should be documented as soon as possible, no matter how seemingly insignificant. Whenever possible, suspect statements should be formally documented in accordance with agency policy. Even an apparently unimportant fact, if noted, may be shown to be significant at some later point in time, as additional facts and evidence are uncovered. Second party statements and confessions can be just as significant as statements given to investigators. Statements made by the suspect to neighbors, a landlord, friends, family, an employer, medical personnel, or other law enforcement personnel should be documented in detail by the investigator. The date, time, and location the statement was made as well as the identity of all who were present should be included in the documentation.

## **THE INVESTIGATIVE PROCESS**

Every investigation of elder abuse, whether physical abuse, emotional abuse, caretaker neglect, or financial exploitation must be approached as if the victim will be unable to testify. Because of the victim's age, medical condition, or other factors, the possibility exists that the allegations will need to be proven without the victim's testimony or participation. Even if the victim does testify, the prosecutor will need to corroborate or support his testimony in every way possible.

### **Death Investigations**

**Law enforcement officers should investigate any questionable death of an elder as if it were a homicide until evidence is found that would prove otherwise.**

Law enforcement officers should investigate any questionable death of an elder as if it were a homicide until evidence is found that proves otherwise. One of the most critical elements of a death investigation is the involvement of the offices of the coroner and state medical examiner. It is through their efforts that cause and manner of death are determined.

Kentucky Revised Statute (KRS) 72.020 requires "any person, hospital, or institution, finding or having possession of the body of any person whose death occurred under any of the circumstances defined in subsections (1) through (12) of KRS 72.025, shall immediately notify the coroner, or his deputy, and a law enforcement agency, which shall report to the scene within a reasonable time."

### ***KRS 72.025 Circumstances requiring post-mortem examination to be performed by coroner.***

Coroners shall require a post-mortem examination to be performed in the following circumstances:

- (1) When the death of a human being appears to be caused by homicide or violence;
- (2) When the death of a human being appears to be the result of suicide;
- (3) When the death of a human being appears to be the result of the presence of drugs or poisons in the body;
- (4) When the death of a human being appears to be the result of a motor vehicle accident and the operator of the motor vehicle left the scene of the accident or the body was found in or near a roadway or railroad;
- (5) When the death of a human being occurs while the

person is in a state mental institution or mental hospital when there is no previous medical history to explain the death, or while the person is in police custody, a jail or penal institution;

- (6) When the death of a human being occurs in a motor vehicle accident and when an external examination of the body does not reveal a lethal traumatic injury;
- (7) When the death of a human being appears to be the result of a fire or explosion;
- (8) When the death of a child appears to indicate child abuse prior to the death;
- (9) When the manner of death appears to be other than natural;
- (10) When human skeletonized remains are found;
- (11) When post-mortem decomposition of a human corpse exists to the extent that external examination of the corpse cannot rule out injury or where the circumstances of death cannot rule out the commission of a crime;
- (12) When the death of a human being appears to be the result of drowning;
- (13) When the death of an infant appears to be caused by sudden infant death syndrome in that the infant has no previous medical history to explain the death;
- (14) When the death of a human being occurs as a result of an accident;
- (15) When the death of a human being occurs under the age of forty (40) and there is no past medical history to explain the death;
- (16) When the death of a human being occurs at the work site and there is no apparent cause of death such as an injury or when industrial toxics may have contributed to the cause of death;
- (17) When the body is to be cremated and there is no past medical history to explain the death;
- (18) When the death of a human being is sudden and unexplained; and



(19) When the death of a human being occurs and the decedent is not receiving treatment by a licensed physician and there is no ascertainable medical history to indicate the cause of death.”

**In addition to more traditional forms of abuse, use of physical restraints, force-feeding, and physical punishment may be considered physical abuse.**

If it is concluded that an individual has died at the hands of another, it becomes incumbent on the law enforcement investigator to determine if the actions of the suspect are intentional, wanton, reckless, or neglectful. The investigator must be cognizant of the fact that even though evidence may not exist to support a homicide charge, the suspect may still be responsible for violations under KRS Chapter 209. Investigators and prosecutors should review the section detailed to homicide investigations found in this manual.

### **PHYSICAL ABUSE INVESTIGATIONS**

Physical abuse can be generally defined as the use of physical force that results in bodily injury, physical pain, or impairment. Physical abuse may include but is not limited to acts of violence such as striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, and burning. In addition, inappropriate use of physical restraints, force-feeding, and physical

punishment may be considered physical abuse. Physical abuse rarely involves weapons or results in physical injury beyond minor cuts and bruises. Signs and symptoms of physical abuse include but are not limited to:

- bruises, black eyes, welts, lacerations, and rope marks;
- bone fractures, broken bones, and skull fractures;
- open wounds, cuts, punctures, and untreated injuries in various stages of healing;
- sprains, dislocations, and internal injuries/bleeding;
- broken eyeglasses/frames, physical signs of being subjected to punishment, and signs of being restrained;
- laboratory findings of medication overdose or underutilization of prescribed drugs;
- an elder's report of being hit, slapped, kicked, or mistreated;
- an elder's sudden change in behavior;
- a caregiver's refusal to allow visitors to see an elder alone.

KRS Chapter 508 provides for the enforcement and prosecution of offenses related to common assault and the physical abuse of adults.

### **Assault**

- KRS 508.010 (Assault in the First Degree) requires an intentional act resulting in serious physical injury to another person by means of a deadly weapon or dangerous instrument, or wanton conduct which manifests an extreme indifference to the value of human life which creates a grave risk of death to another and causes serious physical injury to another person. Violations under this statute are a Class B felony.
- KRS 508.020 (Assault in the Second Degree) requires an intentional act resulting in serious physical injury to another person; an intentional act resulting in physical injury to another person by means of a deadly weapon or dangerous instrument; or wanton conduct which causes serious physical injury to another person by means of a deadly weapon or dangerous instrument. Violations under this statute are a Class C felony.

- KRS 508.030 (Assault in the Fourth Degree) requires an intentional or wanton act that causes physical injury to another person; or reckless conduct which causes physical injury to another person by means of a deadly weapon or dangerous instrument. Violations under this statute are a Class A misdemeanor.
- KRS 508.100 (Criminal Abuse in the First Degree) requires the intentional abuse of a person or permitting another to abuse a person of whom he has actual custody, which results in serious physical injury, places a person in a situation that could cause serious physical injury, or causes torture, cruel confinement, or cruel punishment, to a person twelve (12) years of age or less, or who is physically or mentally helpless. Violations under this statute are a Class C felony.
- KRS 508.110 (Criminal Abuse in the Second Degree) requires wanton abuse of a person or permitting another to abuse a person of whom he has actual custody, which results in serious physical injury, places a person in a situation that may cause serious physical injury, or causes torture, cruel confinement, or cruel punishment, to a person twelve (12) years of age or less, or who is physically or mentally helpless. Violations under this statute are a Class D felony.
- KRS 508.120 (Criminal Abuse in the Third Degree) requires reckless abuse of a person or permitting another to abuse a person of whom he has actual custody, which results in serious physical injury, places a person in a situation that may cause serious physical injury, or causes torture, cruel confinement, or cruel punishment, to a person twelve (12) years of age or less, or who is physically or mentally helpless. Violations under this statute are a Class A misdemeanor.

### **Adult Abuse**

Chapter 209 of the Kentucky Revised Statutes provides for the enforcement and prosecution of offenses related to the abuse or neglect of an adult by any person.

- “Adult” means a person eighteen (18) years of age or older who, because of mental or physical

dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services”. KRS 209.020(4).

- "Abuse" means the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury” KRS 209.020(8).
- "Neglect" means a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult”. KRS 209.020(16).
- Any person who knowingly abuses or neglects an adult is guilty of a Class C felony. KRS 209.990(2).
- Any person who wantonly abuses or neglects an adult is guilty of a Class D felony. KRS 209.990(3).
- Any person who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor. KRS 209.990(4)

Additional information regarding Chapter 209 can be found at the chapter of this manual devoted to this topic.

While Chapters 209 and 508 are similar, there are some significant differences:

- Chapter 508 requires, at a minimum, physical injury while violations of Chapter 209 can be established based on mental injury or physical pain.
- Chapter 209 allows for prosecution of offenses based on one’s failure to act, while Chapter 508 requires some action on the part of the offender.
- The penalties under Chapter 209 can be considerably more stringent than those under the penal code, and almost any criminal act against a

vulnerable adult can be prosecuted under Chapter 209.

## **SEXUAL ASSAULT INVESTIGATIONS**

Sexual assault, as a term used in this section of the manual, includes offenses of Rape, Sodomy, Sexual Abuse, and Sexual Misconduct. These offenses are defined as follows:

### **Rape**

#### ***510.040 Rape in the first degree***

- (1) A person is guilty of rape in the first degree when:
- (a) He engages in sexual intercourse with another person by forcible compulsion; or
  - (b) He engages in sexual intercourse with another person who is incapable of consent because he:
    - 1. Is physically helpless; or
    - 2. Is less than twelve (12) years old.
- (2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

#### ***510.050 Rape in the second degree***

- (1) A person is guilty of rape in the second degree when:
- (a) Being eighteen (18) years old or more, he or she engages in sexual intercourse with another person less than fourteen (14) years old; or
  - (b) He or she engages in sexual intercourse with another person who is mentally incapacitated or who is incapable of consent because he or she is an individual with an intellectual disability.
- (2) Rape in the second degree is a Class C felony.

#### ***510.060 Rape in the third degree***

- (1) A person is guilty of rape in the third degree when:
- (a) Being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old;

- (b) Being at least ten (10) years older than a person who is sixteen (16) or seventeen (17) years old at the time of sexual intercourse, he or she engages in sexual intercourse with the person;
- (c) Being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than eighteen (18) years old and for whom he or she provides a foster family home as defined in KRS 600.020;
- (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she engages in sexual intercourse with a minor under eighteen (18) years old with whom he or she comes into contact as a result of that position; or
- (e) Being a jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice, or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he or she subjects a person who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to sexual intercourse.

(2) Rape in the third degree is a Class D felony.

## **Sodomy**

### ***510.070 Sodomy in the first degree***

- (1) A person is guilty of sodomy in the first degree when:
  - (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
  - (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
    - 1. Is physically helpless; or
    - 2. Is less than twelve (12) years old.
- (2) Sodomy in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

### ***510.080 Sodomy in the second degree***

- (1) A person is guilty of sodomy in the second degree when:
  - (a) Being eighteen (18) years old or more, he or she engages in deviate sexual intercourse with another person less

than fourteen (14) years old; or

- (b) He or she engages in deviate sexual intercourse with another person who is mentally incapacitated or who is incapable of consent because he or she is an individual with an intellectual disability.

(2) Sodomy in the second degree is a Class C felony.

**510.090 Sodomy in the third degree**

(1) A person is guilty of sodomy in the third degree when:

- (a) Being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than sixteen (16) years old;
- (b) Being at least ten (10) years older than a person who is sixteen (16) or seventeen (17) years old at the time of deviate sexual intercourse, he or she engages in deviate sexual intercourse with the person;
- (c) Being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than eighteen (18) years old and for whom he or she provides a foster family home as defined in KRS 600.020.
- (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she engages in deviate sexual intercourse with a minor less than eighteen (18) years old with whom he or she comes into contact as a result of that position; or
- (e) Being a jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice, or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he or she subjects a person who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to deviate sexual intercourse.

(2) Sodomy in the third degree is a Class D felony.

**Sexual Abuse**

**510.110 Sexual abuse in the first degree**

- (1) A person is guilty of sexual abuse in the first degree when:
  - (a) He or she subjects another person to sexual contact by forcible compulsion; or

- (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
    - 1. Is physically helpless;
    - 2. Is less than twelve (12) years old;
    - 3. Is mentally incapacitated; or
    - 4. Is an individual with an intellectual disability; or
  - (c) Being twenty-one (21) years old or more, he or she:
    - 1. Subjects another person who is less than sixteen (16) years old to sexual contact;
    - 2. Engages in masturbation in the presence of another person who is less than sixteen (16) years old and knows or has reason to know the other person is present; or
    - 3. Engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate; or
  - (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact or engages in masturbation in the presence of the minor and knows or has reason to know the minor is present or engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate.
- (2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

**510.120 *Sexual abuse in the second degree***

- (1) A person is guilty of sexual abuse in the second degree when:
- (a) He or she is at least eighteen (18) years old but less than twenty-one (21) years old and subjects another person who is less than sixteen (16) years old to sexual contact; or
  - (b) Being a jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice, or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of



offenders, he or she subjects a person who is at least eighteen (18) years old and who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to sexual contact.

- (2) In any prosecution under subsection (1)(a) of this section, it is a defense that:
  - (a) The other person's lack of consent was due solely to incapacity to consent by reason of being less than sixteen (16) years old; and
  - (b) The other person was at least fourteen (14) years old; and
  - (c) The actor was less than five (5) years older than the other person.
- (3) Sexual abuse in the second degree is a Class A misdemeanor.

#### **510.130 *Sexual abuse in the third degree***

- (1) A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent.
- (2) In any prosecution under this section, it is a defense that:
  - (a) The other person's lack of consent was due solely to incapacity to consent by reason of being less than sixteen (16) years old; and
  - (b) The other person was at least fourteen (14) years old; and
  - (c) The actor was less than eighteen (18) years old.
- (3) Sexual abuse in the third degree is a Class B misdemeanor.

#### **Sexual Misconduct**

#### **510.140 *Sexual misconduct***

- (1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.
- (2) Sexual misconduct is a Class A misdemeanor.

For the purposes of KRS Chapter 510, the following

definitions from 510.010 apply:

- “Physically helpless” means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act. “Physically helpless” also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug.
- “Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of an intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent.
- “Individual with an intellectual disability” means a person with significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined in KRS Chapter 202B.
- “Deviate sexual intercourse” means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by any body part or a foreign object manipulated by another person. “Deviate sexual intercourse” does not include penetration of the anus by any body part or a foreign object in the course of the performance of generally recognized health-care practices.
- “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

The offenses detailed herein apply to all adults and therefore, include offenses committed against the elderly. Sexual assault of the elderly is often difficult to detect because older adults may be reluctant to disclose it and find it difficult to discuss. Older adults become vulnerable to sexual assault through cognitive impairment and their physical inability to protect themselves. Abusers sometimes use sexual assault as a punishment. The forensic indicators of sexual assault may include, but are not limited to:

- Unexplained vaginal or anal bleeding
- Torn, stained, or bloody underclothing
- Bruising around the breasts or genital area

- Changes in the bowel or bladder
- Pain, itching, bruising, or burning in the genital area
- Unexplained venereal disease or vaginal infections
- Difficulty in walking, standing, or sitting
- An elder's report of being sexually assaulted or raped
- Bruising of the palate which may indicate forced oral copulation.
- Rope burns are signs of the victim having been restrained.

Behavioral indicators displayed by the elder victim of sexual assault may include but are not necessarily limited to:

- Withdrawal
- Fear
- Depression
- Anger
- Insomnia
- Increased interest in sexual matters
- Increased aggressive behavior

Sexual assault may be more prevalent in the cognitively impaired and those needing help with Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). ADLs are the core daily personal care activities, which are necessary for people to be able to live independently. ADLs are not always defined in the same way but generally include bathing, dressing, eating, mobility, transferring (e.g., moving from bed to chair to toilet), and toileting. IADLs generally include meal preparation, medication management, financial management, use of the telephone, use of transportation facilities, and the ability to work.

## **NEGLECT INVESTIGATIONS**

Neglect is another form of maltreatment. It typically means a refusal or failure on the part of a care giver to provide an elderly person with basic necessities as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials included in an implied or agreed-upon responsibility to the elder. It comes in many forms but generally involves the deprivation of services required to maintain the health and welfare of the dependent person. Neglect occurs when an adult does not properly care for the senior. This can include failing to provide appropriate nourishment or medical care for the senior, not providing assistance for tasks associated with routine daily living, or not caring for their personal hygiene. Neglect of

the elderly is the most frequent type of elder maltreatment reported. Signs and symptoms of neglect include but are not limited to:

- dehydration, malnutrition, untreated bed sores, and poor personal hygiene
- unreported or untreated health problems
- hazardous or unsafe living condition/arrangements (e.g., improper wiring, no heat, or no running water)
- unsanitary and unclean living conditions (e.g. dirt, fleas, lice on person, soiled bedding, fecal/urine smell, inadequate clothing)
- an elder's report of being mistreated

While a series of acts or failures to act serve to support neglect, nothing precludes the prosecution of an individual who has failed to provide a sufficient level of services to an adult entrusted to his care. Abandonment may also be considered neglect. Abandonment is the desertion of an elderly person by an individual who has assumed responsibility for providing care for an elder, or by a person with physical custody of an elder. Signs and symptoms of abandonment include but are not limited to:

- the desertion of an elder at a hospital, a nursing facility, or other similar institution
- the desertion of an elder at a shopping center or other public location
- an elder's own report of being abandoned

Chapter 209 provides for the prosecution of individuals who fail to provide services necessary to maintain the health and welfare of a vulnerable adult.

- KRS 209.990(2) directs that any adult who knowingly abuses or neglects an adult is guilty of a Class C felony.
- KRS 209.990(3) directs that any adult who wantonly abuses or neglects an adult is guilty of a Class D felony.
- KRS 209.990(4) directs that any adult who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor.

## EMOTIONAL ABUSE INVESTIGATIONS

**Emotional abuse is often the beginning of a downward spiral. It frequently escalates into other types of abuse such as physical and financial exploitation.**

Emotional or psychological abuse is the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional abuse includes verbal assaults, insults, threats, intimidation, humiliation, and harassment. Examples of emotional abuse include:

- treating an older person like an infant;
- isolating an older person from his or her family, friends, or regular activities;
- giving an older person the “silent treatment.”

Emotional abuse is often the beginning of a downward spiral. It frequently escalates into other types of abuse such as physical abuse and financial exploitation. Emotional and psychological abuse is the second most reported form of elder abuse.

Signs and symptoms of emotional/psychological abuse may include but are not limited to:

- being emotionally upset or agitated
- being extremely withdrawn and non-communicative or non-responsive
- unusual behavior, usually attributed to dementia (e.g., sucking, biting, rocking)
- an elder’s report of being verbally or emotionally mistreated

Chapter 209 provides for criminal penalties associated with acts that result in mental injury to an adult.

- KRS 209.990(2) directs that any adult who knowingly abuses or neglects an adult is guilty of a Class C felony.
- KRS 209.990(3) directs that any adult who wantonly abuses or neglects an adult is guilty of a Class D felony.
- KRS 209.990(4) directs that any adult who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor.

## FINANCIAL EXPLOITATION INVESTIGATIONS

Financial exploitation is the illegal or improper use of the resources of an older individual for personal benefit, profit or gain. Financial exploitation may also involve the misuse of a Power of Attorney. The perpetrator of financial exploitation can be anyone but frequently is a relative who is dependent on the elderly victim for financial support and may suffer from alcoholism, drug addiction, or physical/mental health issues. Other perpetrators of financial abuse of the elderly include, but are not limited to, paid caretakers, friends, and fiduciaries.

Perpetrators occasionally use emotional or physical abuse to accomplish their crimes but more frequently, financial exploitation is committed through acts of deception. Examples of financial crimes committed against the elderly by friends or family members may include, but are not limited to:

**Employees of financial institutions are often the first to notice signs that fraud or financial exploitation may be ongoing.**

- Taking possession of financial assets through Power of Attorney or guardianship
- Living Trust scams

Examples of financial crimes committed against the elderly by strangers may include, but not be necessarily limited to:

- Telemarketing fraud
- Identity theft
- Lottery scams
- Home-improvement frauds

Seniors generally maintain a relatively stable pattern of income and expenditures. They may get a pension and social security check directly deposited to their account and may get dividends from stocks and bonds. Their income usually does not fluctuate as does younger individuals'. Their expenses are also usually stable and include rent, utilities, property taxes, or other regular payments. During financial exploitation, withdrawals are often seen in addition to the fixed expenses. Withdrawals are usually in round number amounts such as \$500, \$1,000, and \$5,000 and occur over a relatively short period of time. A senior's entire life savings are often withdrawn within a short period of time.

When investigating these crimes, forensic accountants typically track the senior's pattern of banking for one year prior to the alleged exploitation. Large withdrawals can, of course, be made for legitimate purposes, such as an adaptation of the home to accommodate handicaps or a deposit on a retirement community home. Banks will often cooperate when the police, prosecutors or courts are involved and place an alert, restriction, or block on an account. These measures can be taken with the permission of the senior, by action of the bank, or by court order.

One very common form of financial exploitation is taking money from joint accounts of seniors. Often a friend, relative, or home care worker will put their name on a senior's joint account. This action gives the exploiter the legal right to take the senior's money out of the account without notifying them or asking their permission. It also gives them legal title to the account once the senior has passed away. Prosecution of this type of exploitation requires proof that the senior did not have the mental capacity to sign or did not sign the document opening the joint account.

**Professionals and others with the legal responsibility to safeguard a senior's funds may exploit them.**

Another common form of financial exploitation of seniors involves the forgery of checks or credit card purchases, in which persons with access to the senior's check book or credit cards use them for their own purposes. Again, prosecution would require proof that the senior did not possess the mental capacity to make the decision to sign the check or that the signature is a forgery.

In some instances, exploiters access the accounts of homebound older adults using ATM cards. Use of the card may have been authorized or simply not noticed. Detectives may be able to obtain films from banks to verify the identity of a card user. Excessive ATM or debit card use is a red flag for exploitation, especially since many older adults prefer traditional teller banking and do not use ATM or debit cards.

Seniors are often coerced into signing wills or property transfers that they do not wish to sign or do not have the capacity to sign. Home health aides and other exploiters have gained control of property by proposing an exchange whereby they promise to care for the older person for the rest of his or her life, avoiding nursing home placement. Professionals and others with the legal responsibility to safeguard a senior's funds may exploit them. Allegations of theft should be investigated, even if the accuser may have mental impairment and even if the alleged exploiter is a member of a respected profession.

A Power of Attorney is a document in which one party (the principal) gives another party (the agent) the right to handle designated financial transactions. These transactions include banking, stock and bond sales, real estate transactions, and many other financial matters. It is important to know that Powers of Attorney may only cover financial matters, and do not cover matters of person, such as medical treatment and placement in a nursing home. Often perpetrators will tell law enforcement officers that "I have Power of Attorney and can legally make all decisions for the senior." This may not be true; the agent can make some but not all decisions. Further, the Power of Attorney may have been obtained by coercion or the senior may not have had the legal authority to sign the document due to a diminished mental capacity. A Power of Attorney must be established voluntarily by a person who has the mental capacity to understand what he is signing and that the powers are being conveyed. If it can be proven that coercion was used, or that the elderly person was already losing mental capacity when he signed the Power of Attorney, it is not a legal document. Mental capacity can be assessed by a medical expert. Allegations involving issues related to Powers of Attorney, even where the Powers of Attorney appear to be legitimate, are not automatically civil in nature. A criminal prosecution might be justified if the Power of Attorney was obtained illegally, through coercion, or if the agent is misusing the principal's assets.



**Be aware of factors that may increase vulnerability to undue influence.**

To determine whether a Power of Attorney was obtained or used illegally:

- Obtain a copy of the power of attorney.
- Assess the senior's capacity at the time the document was obtained.
- Explore the circumstances under which it was obtained and the financial transactions that occurred using the document.

Elderly individuals with financial assets are vulnerable targets for undue influence. The consequences, both of the material loss and of the personal loss of power, can be devastating for the victim. Factors which increase vulnerability to undue influence include:

- Recent bereavement, which can make the person emotionally needy
- Physical disability, which can make the person dependent for help with such activities as shopping and transportation
- Isolation from friends, family, and community supports/activities
- Lacking knowledge about one's own finances
- Cognitive impairment

The perpetrator may take deliberate actions to gain control of the older person. They may isolate the victim from other people, convince the victim that no one else cares for them, or take steps to make or keep the victim dependent.

**Investigative Approach**

Any investigation conducted in connection with the abuse or neglect of an elderly individual should be complete and thorough in every respect. Listed below are a few guidelines that should be considered during the course of every investigation. However, they are not a limitation. Rather, the investigator should view every allegation on its own merits and constantly strive to seek out any and all facts and evidence that would provide insight to the truth.

- The investigator should become thoroughly familiar with the details of the complaint before initiating any action.

- KRS 209.030 requires that any person, including but not limited to law enforcement personnel, shall report any suspected abuse or neglect to the Department for Community Based Services (DCBS) of the Cabinet for Health and Family Services immediately.
- The established standard within the law enforcement community for this reporting is the creation of the JC-3 form which is forwarded to the appropriate regional DCBS office.

Investigations conducted by DCBS social workers are documented by way of an ADT. ADT is the acronym for Assessment and Documentation Tool. A copy of the ADT should be obtained from the regional DCBS office. DCBS also maintains information pertaining to prior complaints involving the victim, the suspect, and the involved facility. The investigator should determine what action DCBS is taking or has taken in connection with the complaint. They will generally label their conclusion as “substantiated” or “unsubstantiated”.

If the allegation involves the abuse of a patient in a care facility, the Cabinet for Health & Family Services, Office of the Inspector General (OIG) may have also conducted an investigation. The investigation conducted by OIG personnel is commonly referred to as a “survey”. As with DCBS, the results of their investigation will be labeled “substantiated” or “unsubstantiated”. The focus of the DCBS investigation is on each individual at the facility, while the focus of the OIG investigation is on the administration of the facility.

An interview should be conducted with the reporting source. The purpose of this interview is to verify the allegations as detailed in the complaint and to identify the circumstances surrounding the disclosure. It should specifically focus on gathering information that would aid in identifying the elements of the offense, identifying any and all possible witnesses, identifying specific items of evidence that would support the allegation, and identifying the suspect(s). The interview should be recorded or a detailed summary of the information obtained should be prepared with handwritten notes retained in support of the summary.

The investigator should secure the victim’s medical record and identify any documented medical diagnosis. If the

victim is a resident of a healthcare facility, the record obtained should be complete, not just for a time period surrounding the reported incident. The circumstances of the investigation will dictate whether original records or copies of those records are obtained. If the victim is deceased, the original record should be obtained. If there is suspicion that records have been or are likely to be altered, the original record should be obtained. The medical record will identify services rendered, and in many instances, a specific plan of care for the victim.

The record should be obtained through the most appropriate means, such as:

- A release signed by the victim or the individual legally representing the victim's best interest;
- A Grand Jury subpoena; or
- A healthcare oversight agency such as the Office of the Inspector General or the Attorney General's Office of Medicaid Fraud and Abuse.

The record should be examined by a trained medical professional who can report on the propriety of the services rendered.

An interview should be conducted with the victim. During this interview, an awareness of the victim's physical condition and mental health status should be maintained. The purpose of this interview is to secure specific details that establish the elements of the offense, identifies items of evidence, identifies possible witnesses, and aids in the identifying of the suspect(s). The interview should be recorded whenever possible. If recording is not possible, a detailed summary of the information obtained should be prepared with handwritten notes retained in support of the summary.

Interviews should be conducted with any and all potential witnesses. Witnesses may include medical personnel, family members, or in the case of victims who reside in care facilities, caregivers or other residents. Interviews should be recorded or a detailed summary of the information obtained should be prepared with handwritten notes retained in support of the summary.

A complete background investigation of the suspect(s) should be conducted. It should be determined whether or not the individual(s) have:

- A prior arrest history
- A history of domestic violence
- A history of patient abuse or caretaker neglect
- A license or certification in the field of medical service
- A history of financial problems

If the offense involves a caregiver, the individual's employment history and training record should be obtained.

An interrogation of the suspect should also be conducted. As with any interrogation, the purpose of this effort is to obtain admissions and/or statements that would verify the information detailed in the complaint. The interview should be recorded or a handwritten detailed statement should be prepared and signed by the person giving the statement. Recorded statements should be transcribed.

# C-3 FORM

## COMMONWEALTH OF KENTUCKY CHILD ABUSE, ADULT ABUSE, AND DOMESTIC ABUSE STANDARD REPORT

JC-3 (Rev. 6/92)

LAW ENFORCEMENT REPORTING AGENCY:		ORI AGENCY ID Ky	AGENCY INCIDENT REPORT NO.
ADDRESS/CITY: COUNTY		DATE REPORTED	TIME
<input type="checkbox"/> DOMESTIC VIOLENCE/ABUSE (KRS 403.785(1) KRS 209.030(2)) <input type="checkbox"/> PHYSICAL ABUSE/NEGLECT (ADULT) (KRS 209.030(2)) <input type="checkbox"/> PHYSICAL ABUSE/NEGLECT (CHILD) (KRS 620.030)		<input type="checkbox"/> SELF NEGLECT (KRS 209.030(2)) <input type="checkbox"/> NEGLECT BY CARETAKER (KRS 209.030(2))	
SEXUAL ABUSE/EXPLOITATION (CHILD) (KRS 620.030)		EXPLOITATION (ADULT) (KRS 209.030(2))	
DATE OF INCIDENT: / /		SEXUAL OFFENSES (SPOUSE) (KRS 510)	
TIME: / /		LOCATION/ADDRESS:	
COUNTY OF OCCURRENCE:			
NAME: Last First IA.		SOC. SEC. NO.	RACE DATE OF BIRTH
ADDRESS/CITY: (directions for rural areas)		PHONE: AM PM	LOCATION IF LEFT SCENE:
RELATIONSHIP: <input type="checkbox"/> SPOUSE <input type="checkbox"/> FORMER SPOUSE <input type="checkbox"/> UNMARRIED CHILD IN COMMON <input type="checkbox"/> UNMARRIED OTHER		TO PERPETRATOR <input type="checkbox"/> CHILD <input type="checkbox"/> STEPCHILD <input type="checkbox"/> PARENT <input type="checkbox"/> GRANDPARENT <input type="checkbox"/> OTHER	
ADVISED VICTIM OF RIGHTS (KRS 403, KRS 421) <input type="checkbox"/> YES <input type="checkbox"/> NO		GIVEN RIGHTS INFO (JC-3) <input type="checkbox"/> YES <input type="checkbox"/> NO	
NAME: Last First IA.		SOC. SEC. NO.	RACE SEX DATE OF BIRTH
ADDRESS/CITY: (directions for rural area)		LOCATION IF LEFT SCENE:	
OUTSTANDING PROTECTIVE ORDER? <input type="checkbox"/> YES <input type="checkbox"/> NO		NOTICE/SERVICE MADE? <input type="checkbox"/> YES <input type="checkbox"/> NO	PERPETRATOR AT SCENE WHEN OFFICER ARRIVED? <input type="checkbox"/> YES <input type="checkbox"/> NO
COUNTY: CASE#:		DATE:	BY:
NARRATIVE: (specify incident details) Use witnesses, address, phone.			
VICTIM INJURED		INJURIES VISIBLE	MEDICAL ATTENTION
PHOTOS OF INJURIES			
DYES DNO		DYES DNO	DYES D AT: BY: D NO
DESCRIBE INJURIES OR COMPLAINT OF PAIN:		WEAPONS INVOLVED: <input type="checkbox"/> Gun <input type="checkbox"/> hands/feet <input type="checkbox"/> knife <input type="checkbox"/> other:	CHILDREN PRESENT IN THE HOME: <input type="checkbox"/> YES list below <input type="checkbox"/> NO
DRUGS INVOLVED <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> DUNK.		ALCOHOL INVOLVED <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> DUNK.	
CRIME SCENE PHOTOS <input type="checkbox"/> YES <input type="checkbox"/> NO	PROPERTY DAMAGE AT SCENE <input type="checkbox"/> YES <input type="checkbox"/> NO	DESCRIBE DAMAGE:	
PERSON CALLING FOR ASSISTANCE: (Name, Address, Phone)			

NO  
W  
(!)

REPORT OF ABUSE/NEGLECT  D      REPORT AND ARREST  D      ARREST DATE: / /

CHARGE(S): (include violation of Protected Orders)

NAME:      BADGEID NO.

COMMENTS:

GIVE VICTIM INFORMATION- TEAR AT PERFORATED LINE

FORM 15A-190

## VICTIM RIGHTS INFORMATION

DOMESTIC VIOLENCE IS A CRIME. Anyone can be a victim. You have a right to be safe from abuse, harassment, and threats. Help is available for you and your family. DO NOT HESITATE TO CALL FOR HELP. These are your rights:

- See that you and your children are safe.
- You can call the nearest Spouse Abuse Center for confidential information and safe shelter.
- Call the police for protection. Under certain circumstances, the abuser may be arrested without a warrant.
- Get medical attention, copies of your records and photos of your injuries.
- If you are sexually assaulted: contact the nearest Spouse Abuse Center or Rape Crisis Center for confidential information and counseling. Go to a hospital for treatment. Do not bathe or change clothes. A rape examination and other related tests should be conducted within 72 hours following the assault. A rape examination is necessary for your own protection or should you need the findings for any legal action at a later date.
- You can file a criminal complaint with the local prosecutor and/or a petition for a Domestic Violence Protective Order through District Court (no fees or attorney). Your location may remain confidential. The abuser may be arrested for Violation of a Protective Order (EPO, DVO) or for violating conditions of release after arrest.
- Contact your LOCAL Department for Social Services to assist you and your family in obtaining protective and support services.
- Contact your regional Community Health Center for other counseling services.

**DEFINITIONS AND INSTRUCTIONS**

"Domestic Violence and Abuse" (KRS 403) means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.

"Family Member" (KRS 403 and KRS 431.005(2)) means a spouse, including a former spouse, parent, child, stepchild or other persons related by blood or marriage within the second degree (e.g., grandparent, child, sibling, etc.); willful (without arrest as provided for in KRS 431.005(2)) also specifies grandparent.

"Unmarried Couple" (KRS 403 and KRS 431.005(2)) means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.

"Adult Abuse or Neglect" (KRS 209) means the infliction of physical pain, injury or mental injury, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult, or a situation in which an adult, living alone, is unable to provide or obtain for himself the services which are necessary to maintain his health or welfare, or a situation in which a person inflicts physical pain or injury upon a spouse or deprives a spouse of reasonable services necessary to maintain the health and welfare of his spouse.

"Exploitation (Adult)" (KRS 209) means the improper use of an adult or an adult's resources by a caretaker or other person for the profit or advantage of the caretaker or other person.

"Child Abuse, Neglect, or Exploitation" (KRS 600) means a child whose health or welfare is harmed or threatened with harm when his parent, guardian or other person exercising custodial control or supervision of the child: inflicts or allows to be inflicted upon the child physical or emotional injury by other than accidental means; creates or allows to be created a risk of physical or emotional injury to the child by other than accidental means; commits or allows to be committed an act of sexual abuse & sexual exploitation, or prostitution upon the child; creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child; abandons or exploits such child; does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing his religious beliefs shall not be considered a negligent parent solely because he fails to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child.

**I. For Reporting Purposes:**

- A. All sections of this form shall be completed in all cases of known or suspected domestic violence and child abuse, neglect, or exploitation.
- B. Law enforcement officers shall immediately (within 48 hours) a copy of this report (page 2) to their local OFFICE of the Cabinet for Human Resources/Department for Social Services in cases of known or suspected domestic violence/abuse and cases of child abuse, neglect, or exploitation in order to comply with reporting statutes.

**II. For Warrantless Arrests:**

Warrantless arrests may be made in domestic violence cases for Assault in the Fourth Degree (KRS 508.030) and for Violation of a protective Order (KRS 403).

- A. Warrantless arrests for Assault in the Fourth Degree may be made under the authority of KRS 431.005(2) when the officer:
  - 1. Has probable cause to believe that if a person is not arrested he will present a danger or threat of danger to others if not immediately restrained, and;
  - 2. Has probable cause for believing that the person has intentionally or wantonly caused physical injury to a family member or a member of an unmarried couple.
- B. Warrantless arrests for Violation of a Protective Order may be made under the authority of KRS 403 when the officer:
  - 1. Has probable cause to believe a violation of a protective order (EPO, DVO) has occurred, and;
  - 2. After service on or notice to the respondent, the officer shall arrest the respondent without a warrant for Violation of a Protective Order.

The original report (JC-3) in these cases shall be forwarded to the custodian of records of the reporting law enforcement agency. A copy of this report (page 2) shall be immediately forwarded (within 48 hours) to the LOCAL OFFICE of the Cabinet for Human Resources/Department for Social Services (KRS 620.030; KRS 209.030; KRS 403.785). After the reporting form is completed, copies (pages 3 and 4) shall be delivered to the detention facility and forwarded to the court for the defendant's arraignment.

**III. For Spouse/Child Related Sexual Offenses (KRS 510, KRS 530, KRS 531):**

The spouse of a victim may be charged with a Sexual Offense under KRS 510 - Rape, Sodomy, Sexual Abuse, Sexual Misconduct (Effective 7/13/90). The Department for Social Services (DSS) investigates child sexual abuse cases where the alleged perpetrator is in a caretaking role (KRS 600.020(1)): Law enforcement may request DSS assistance in other child sexual abuse cases.

(Regional Victim Services Program Call Line 1-800-656-HOPE) (4673)

**KENTUCKY SPOUSE ABUSE CENTERS AND OUTREACH OFFICES\***

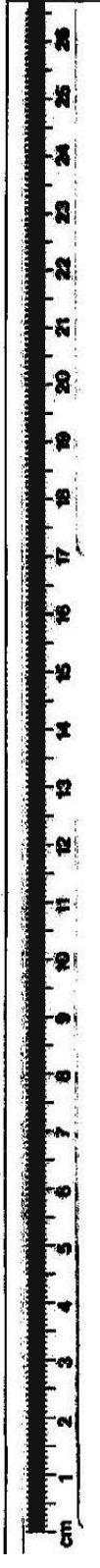
CITY	CENTER	TELEPHONE	CITY	CENTER	TELEPHONE
Ashland	Safe Harbor	(800) 926-2150	Maysville	Women's Crisis Center	(800) 928-6708
Beattyville	Resurrection Home	(606) 464-8481	Morehead	Safe Harbor	(606) 784-7980
Bowling Green	BRASS	(800) 928-1183	Newport	Women's Crisis Center	(800) 928-3335
Danville*	Lex. Spouse Abuse Ctr.	(859) 236-2293	Owensboro	OASIS	(800) 882-2873
Elizabethtown	Lincoln Trail Domestic Violence Program	(800) 767-5838	Paducah	Purchase Area Spouse Abuse Center	(270) 443-6001
Hazard	LKLP Safe Haven	(606) 435-129	Prestonsburg	Big Sandy Family Abuse Center	(606) 886-6025
Hopkinsville	Sanctuary, Inc.	(800) 766,00(0)	Renfro Valley	Family Life Abuse Ctr.	(800) 755-5348
Lexington	YWCA S.P.O.L.S. Abuse Center	(800) 554-2022 (59) 255-9808	Shelbyville*	Spouse Abuse Center	(502) 633-7800
Louisville	Spouse Abuse Center	(502) 581-7222	Somerset	Bethany House Family Abuse Center	(800) 755-2017

Attachment

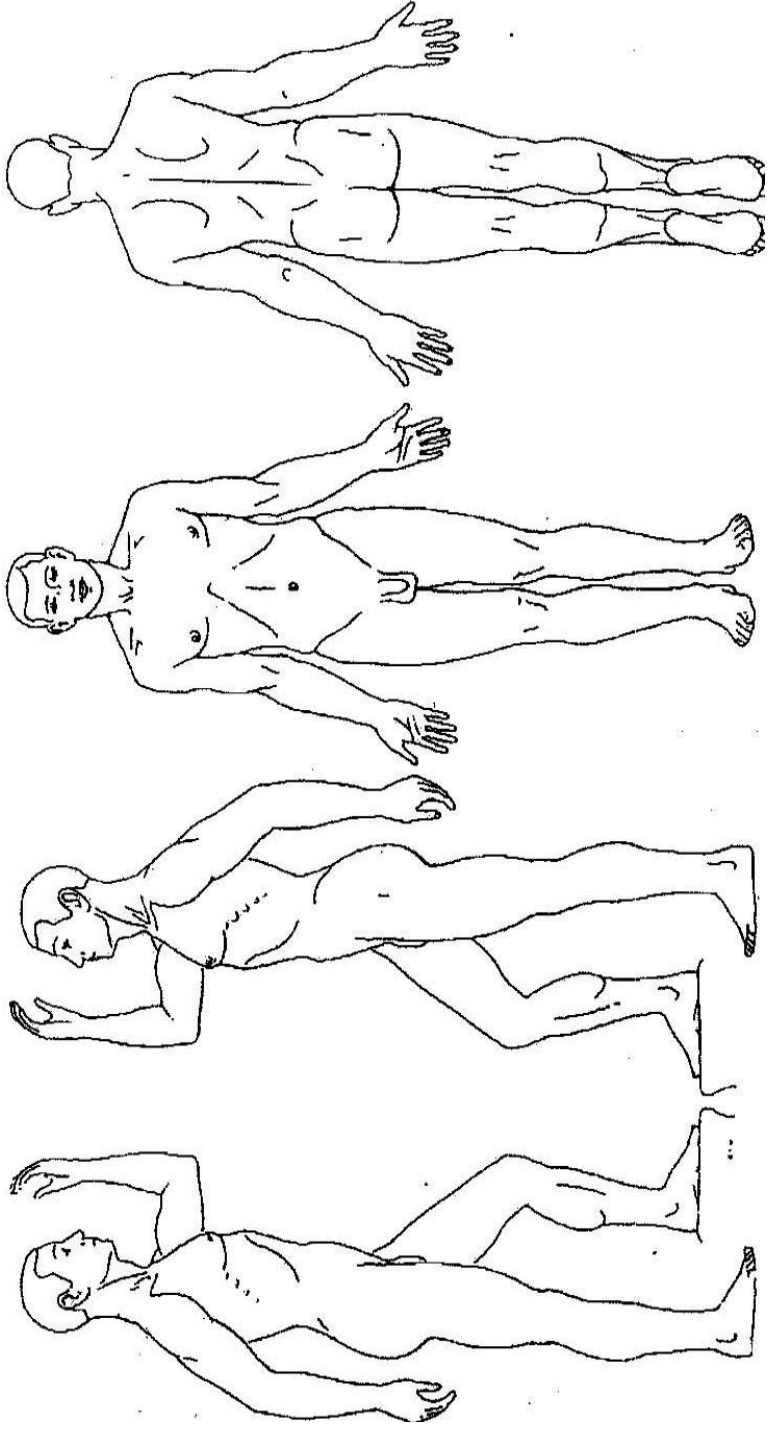
**Body Map for  
Documentation of Injury to  
Vulnerable Adult**





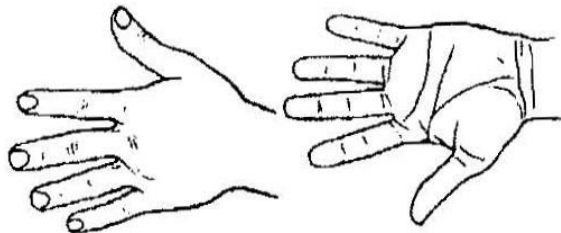
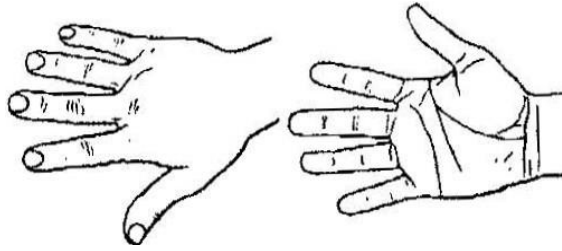
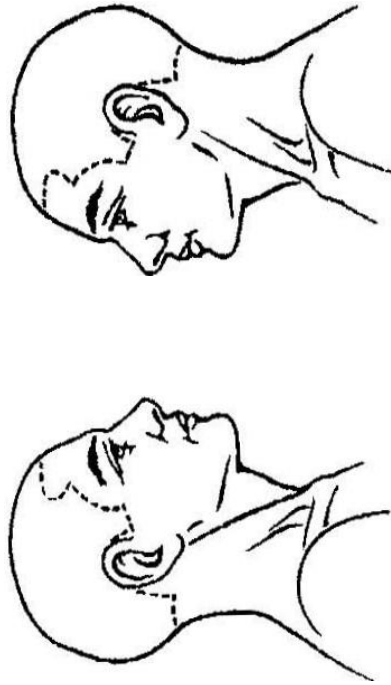


REPORTING OFFICER/UNIT #:



CASE NO \_\_\_\_\_

ex OIKVO  
ON:1O







## **VII. PROSECUTOR’S ROLE**

### **PREVENTION and PUBLIC AWARENESS**

#### **Community Education**

Public awareness is a critical tool in our efforts to eliminate and effectively prosecute elder abuse. As the elected prosecutor, you and your staff can play a critical role in educating your local community and future jury pools about this important issue. Information can be provided through such avenues as brief presentations or distribution of written materials to community groups including civic clubs, the faith community, nursing homes, and assisted living complexes.

#### **Multi-Disciplinary Teams/Local Coordinating Councils**

Commonwealth’s and County Attorneys are encouraged to actively participate on existing local multidisciplinary teams and/or local elder abuse coordinating councils and to coordinate such efforts where none currently exist. These multidisciplinary groups provide important tools for community education and awareness, systems improvement, more effective investigation and prosecution of elder abuse cases and better coordination of victim assistance services. (A map with contact information is located in the resource information chapter).

#### **Identifying and Reporting Abuse**

Each group listed below may be the first to recognize and report elder abuse, so it is important that a central team be in place to coordinate where the information gets disseminated. It should also be noted that KRS 209.030 requires any person associated with the entities listed below and “having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation” to report it. KRS 209.030(2).

- Cabinet for Health & Family Services: CHFS has primary responsibility for investigation and the provision of protective services under Chapter 209. KRS 209.030(1).

**CHFS has the primary responsibility for the investigation and provision of protective services under KRS Chapter 209.**

#### **Early Involvement by the Prosecutor**

Since elder abuse cases can involve victims who may be close to the end of their lives or victims who may be at the

onset of Alzheimer's or other dementia, it is important for the prosecutor to get involved with the case early to assess the victim's status and preserve testimony. KRS 209.030(5)(b) requires CHFS to notify the Commonwealth or County attorney when an investigation begins which should make it easier to become involved in these cases early on in the investigation. Authorized agency is defined by KRS 209.020(17). Notification is often made by the DCBS Form 115 and/or Notice of Findings being sent to the Commonwealth's or County Attorney's Office.

*\*Practice Tip\** You may want to designate someone in your office to review the 115s to determine if there are any incidents that may have the potential for criminal prosecution. If there are, you may want to contact DCBS when you become aware of the incident and coordinate investigative efforts with local law enforcement.

*\*Practice Tip\** You may want to facilitate a discussion with DCBS and local law enforcement on the types of incidents that you are interested in being made aware of at an early point in time so that you can determine whether any steps need to be taken to preserve testimony due to a victim's condition, such as calling the witness at a probable cause hearing.

## **PROSECUTING THE CASE**

### **Role of County Attorneys, Commonwealth's Attorneys and Office of Medicaid Fraud and Abuse**

- Commonwealth's Attorneys prosecute elder abuse and neglect cases when criminal activity has occurred which rises to the level of a felony.
- County Attorneys prosecute elder abuse and neglect cases where misdemeanor criminal activity has occurred. Additionally, County Attorneys present guardianship cases in which an older adult may be in need of a guardian or conservator to manage their personal affairs and finances. These cases are not originated by the County Attorney's Office and are not criminal proceedings, but are presented for a jury trial by the County Attorney for a determination of disability using a clear and convincing evidence standard. KRS 387.010, et seq.
- The Office of Medicaid Fraud and Abuse, Office of the Attorney General prosecutes any fraud against the

Medicaid program and abuse, neglect, or exploitation of a patient in a facility. It is not required that the victim actually be a Medicaid recipient.

### **PRETRIAL**

As soon as possible after receipt of the case, the prosecutor should determine if the case is of a criminal or civil nature or both. Prosecution of a criminal case should not be declined merely because the victim may have a civil remedy. The merits of the criminal case should be judged independently of the possible civil remedy. If, however, prosecution is declined in a particular case, the prosecutor is required to explain that decision to the adult victim and a family member or guardian where appropriate. KRS 209.180(5).

### **REQUIREMENTS OF KRS 209:**

KRS 209.180 also provides that prosecutors shall:

- Have an attorney trained in adult abuse, neglect, and exploitation, if adequate personnel are available. KRS 209.180(1).
- Take an active part in interviewing the adult alleged to have been abused, neglected, or exploited, and shall inform the adult about the proceedings throughout the case. KRS 209.180(2).
- Provide for an arrangement that allows one (1) lead prosecutor to handle the case from inception to completion to reduce the number of persons involved with the adult victim, if adequate personnel are available. KRS 209.180(3).
- Minimize the involvement of the adult in legal proceedings, avoiding appearances at preliminary hearings, grand jury hearings, and other proceedings when possible. KRS 209.180(4). However, prosecutors should refer to *Crawford v. Washington*, 541 U.S. 36 (2004) for potential ramifications of this decision.
- Make appropriate referrals for counseling, private legal services, and other appropriate services to ensure the future protection of the adult when a decision is made not to prosecute the case. KRS 209.180(5).



### **Emergency Protective Services**

CHFS may seek Emergency Protective Services under KRS 209.100 if appropriate. (Contact the Cabinet's Office of Legal Services at 502/564-7905.) KRS 387.010 *et seq.*

### **Seizure Orders (KRS 514.130)**

These orders may be helpful in financial abuse/exploitation cases to protect the liquid assets of the victim. For example, see *Commonwealth v. Batchelor*, 714 S.W.2d 158 (Ky. App. 1986), where the Court held that the Commonwealth was entitled to retain control over property which may be subject to forfeiture as an instrumentality of a theft until proceedings against the individual charged have been completed.

### **Assessing Victim's Status**

The prosecutor should assess the capability, competence, and cooperation of an elder victim as early as possible. This is especially important if the victim is in early stages of Alzheimer's disease or other dementia or has intermittent periods of lucidity. If appropriate, videotape or audiotape the victim's statement as well as photograph the victim's injuries or surroundings for use in trial. Such assessment and evidence gathering techniques may also be necessary for the victim's friends, relatives, or roommates who can testify about the offense. Keep in mind the victim's competency to testify under KRE 601.

### **Perpetuation of Testimony**

Pretrial Deposition, RCr 7.10 *et seq.*

RCr 7.10 authorizes the use of a deposition in a criminal case. This may be especially helpful if the elder victim is in the initial stages of Alzheimer's or dementia, or may soon become unavailable due to serious health issues or death. This procedure is authorized "if it appears that a prospective witness may be unable to attend or is or may be prevented from attending a trial or hearing..." The witness's testimony must be material and it must be necessary to take the witness's deposition in order to prevent a miscarriage of justice. A court order is required.

Under RCr 7.12, if the Commonwealth requests the deposition, it must pay in advance the reasonable expenses of travel and subsistence of the defendant and the defendant's attorney in attending the examination. If the defendant is incarcerated, a court order for his attendance is necessary.

RCr 7.20 provides for the use of depositions at the trial if

the witness is unavailable to testify.

- It is important to show unavailability, i.e., you must establish that the witness cannot testify as of the date of the trial. Appellate courts, as well as the United States Court of Appeals for the Sixth Circuit in habeas corpus proceedings, have reversed several cases where the Commonwealth failed to sufficiently prove the witness was unavailable, even where the defendant stipulated to the witness's unavailability.
- The prosecutor should refrain from making himself/herself a witness to the victim's unavailability and offering argument in a summary manner. If at all possible, get some live testimony or documentation into the record.
- It may take something as little as an affidavit from the victim's doctor stating that due to the patient's deteriorating mental state, he is not able to testify.

**Preliminary Hearing for Prosecutor** RCr 3.10(3)

This rule may be an additional tool in preserving testimony of an elder victim. Since witnesses are subject to cross-examination at the preliminary hearing, this should avoid any confrontation issues. RCr 3.10(3) provides for a preliminary hearing requested by the Commonwealth prior to the defendant being indicted. This hearing may serve as an additional tool in preserving testimony of an elder victim because a duly authenticated transcript of the preliminary hearing testimony of a witness is the equivalent of a deposition. RCr 7.22. The hearing is provided for even if the defendant waives his right to the preliminary hearing. Since the defendant may cross-examine the witnesses offered by the Commonwealth, the testimony preserved at the preliminary hearing should not be subject to a Confrontation Clause challenge. *See, California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (upholding the use of the transcript of a preliminary hearing).

Additionally, it should be noted that ordinary evidentiary rules, other than privileges, do not apply to preliminary hearings. KRE 1101(d)(5); RCr 3.14; *White v. Commonwealth*, 132 S.W.3d 877, 882-83 (Ky.App. 2003). For instance the finding of probable cause may be based upon hearsay evidence in whole or in part. RCr 3.14(2). Moreover, objections to evidence on the ground that it was acquired by unlawful means are not properly made at the

preliminary hearing. RCr 3.14(3).

The trial court has great discretion in controlling witnesses and evidence that are presented at the preliminary hearing. *Commonwealth v. Wortman*, 929 S.W.2d 199, 200 (Ky. App. 1996); *United States v. Jimenez*, 2014 WL 2816018 (W.D. Ky. June 23, 2014). This is because the preliminary hearing is not a mini-trial, nor is it a discovery tool for the defense. *Wortman*, at 200 citing, *King v. Venters*, 595 S.W.2d 714 (Ky. 1980). Since the sole purpose of a preliminary hearing is to determine whether there is probable cause to believe the defendant committed a felony and, if so, whether and under what conditions he is to be released pending indictment, any evidence tendered by the defendant must be relevant to the two issues “and those two issues only.” *Id.*

Preliminary hearing testimony is admissible as substantive evidence at trial if: (1) it was given under oath; (2) the declarant is unavailable to testify at trial; and (3) a reasonable opportunity for cross-examination on substantially the same issues was afforded the opposing party at the preliminary hearing. KYPRAC-CRP § 8:5 citing *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597, 7 Fed. R. Evid. Serv. 1 (1980) (abrogated by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004)) (witness's preliminary hearing testimony admissible at trial as long as opposing counsel at preliminary hearing had opportunity, even if not used, to cross-examine witness); *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (same); cf. *Wells v. Commonwealth*, 562 S.W.2d 622 (Ky. 1978), *cert. denied* 439 U.S. 861, 99 S. Ct. 181, 58 L. Ed. 2d 170 (1978) (where defendant and former spouse had remarried prior to defendant's second trial and spouse thereafter asserted privilege as defendant's spouse not to testify, spouse was considered an unavailable witness; transcribed testimony of spouse given in defendant's first trial for murder was properly read into evidence); *Commonwealth v. Howard*, 665 S.W.2d 320 (Ky. App. 1984) (if prior testimony of unavailable witness is found by trial court to be reliable and trustworthy and witness was subjected to cross-examination, testimony is admissible at defendant's trial, whether it comes by way of deposition, preliminary hearing, previous trial, or bond reduction hearing, provided that charge is the same). *See also, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which held that the Sixth Amendment Confrontation

Clause permits admission of testimonial (such as prior testimony from a preliminary hearing) hearsay when the person who made the statement is unavailable and the accused has had a prior opportunity to cross-examine the person who made the statement. *Ohio v. Roberts* is now applicable only to non-testimonial statements like casual remarks to an acquaintance. *Roberts* permits admission of out-of-court non-testimonial statements that are either trustworthy or part of a "firmly rooted" hearsay exception. KYPRAC-CRP § 8:5.

**Impact of *Crawford v. Washington* and *Davis v. Washington***

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that "testimonial statements made by non-testifying co-defendants or witnesses are not automatically admissible simply because the hearsay evidence falls within one of the "firmly rooted hearsay exceptions," thus overruling *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 LEd.2d 597 (1980), insofar as it held otherwise. In order to admit "testimonial" statements made by non-testifying witnesses under the Confrontation Clause, the prosecution must show that the witness is truly unavailable and that the defendant has had a prior opportunity to cross-examine the witness. Although the Court in *Crawford* found that a witness's statement to police may likely be "testimonial," the Court explicitly refused to define what is or is not "testimonial" evidence.

In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court fleshed out testimonial versus non-testimonial statements by addressing two separate cases involving domestic violence prosecutions. In *Davis v. Washington*, the Court found that a woman's 911 call describing the attack and naming her former boyfriend, Davis, as the one attacking her was not "testimonial" under *Crawford*, and thus could be admitted even where the woman did not testify. However, in *Hammon v. Indiana*, the Court found that the statements made by an abused wife to police were "testimonial." In *Hammon*, the victim's statements were made to police during an interrogation at the scene after the fight had ended. In attempting to give some guidance as to what is and is not "testimonial" within the meaning of *Crawford*, the Court stated,

Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or non-testimonial, it suffices to decide the present case as follows: Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

*Id.* at 822, 126 S.Ct. at 2273-74. Simply put, once the state agent ceases to determine “what is happening,” but rather attempts to determine “what happened,” *Crawford* applies. *Id.* at 830, 126 S.Ct. 2266.

The Court then used this reasoning to explain the different outcomes in the two cases by finding that, “[t]he statements in *Davis* were taken when McCottry [victim] was alone, not only unprotected by police (as Amy Hammon was protected), but apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. McCottry’s present-sense statements showed immediacy; Amy’s narrative of past events was delivered at some point removed in time from the danger she described.” *Id.* at 831-32, 126 S.Ct. at 2279.

The *Davis* Court recognized that a nontestimonial statement could become testimonial. “[F]or example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended...” *Id.* at 828, 126 S.Ct. at 2277. In that situation, the trial court “[t]hrough *in limine* procedure, ... should redact or exclude the portions of any statement that have become testimonial...” *Id.* at 829, 126 S.Ct. at 2277.

Of course, if a defendant procures the silence from the witness the Sixth Amendment does not protect him.

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.” 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-159). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

*Id.*, at 833, 126 S.Ct. at 2280.

Since 2004, the Kentucky appellate courts and the Sixth Circuit have issued many opinions attempting to explain the impact of *Crawford* and *Davis*.

In *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007), the Kentucky Supreme Court considered out-of-court statements within the parameters of the ongoing emergency framework, as outlined in *Davis*. *Id.* at 244. An officer was erroneously permitted to testify about what a victim told him pertaining to an attack made by the appellant. *Id.* The statements made by the victim to the officer were given after the emergency situation had passed and the victim was no longer in danger. Thus, the Court held that the victim's statements were clearly testimonial and should not have been allowed into evidence. *Id.* See also *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007) (Alleged assault victim's statements to officer who responded to domestic violence call were testimonial, and therefore subject to Confrontation Clause; police officer responded to a call, and victim then proceeded to tell officer “what happened,” recounting the assault by defendant). *But see United States v. Gibson*, 409 F.3d 325 (6<sup>th</sup> Cir.2005) (Statements made by the defendants to a government witness were not made to police in the course of an official investigation or in an effort to shift blame. The statements were non-testimonial and bore independent guarantees of trustworthiness; therefore, the statements did not offend the defendants’ rights under the Confrontation Clause.); *United States v. Franklin*, 415 F.3d 537 (6<sup>th</sup> Cir. 2005) overruling on separate issue recognized by

*Dorsey v. McKee*, 2009 WL 1874182 (a statement made to a friend by happenstance is not a “testimonial” statement); *United States v. Martinez*, 430 F.3d 317 (6<sup>th</sup> Cir. 2005) (A statement made by one conspirator to another during and in furtherance of a conspiracy is not a testimonial statement.).

In *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008), the Kentucky Supreme Court followed the third and seventh circuit cases of *United States v. Nettles*, 476 F.3d 508, 517 (7<sup>th</sup> Cir. 2007) and *United States v. Hendricks*, 395 F.3d 173 (3<sup>rd</sup> Cir. 2005), holding that an informant’s recorded statements “are not hearsay and thus that their admission does not violate *Crawford*, when they are offered not for their truth, but ‘to put [the defendant’s] admissions on the tapes into context, making the admissions intelligible for the jury.’” *Turner*, 248 S.W.3d at 545-46, quoting *Nettles*, 476 F.3d at 517 (citation and internal quotation marks omitted).

In *Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. App. 2007), the defendant appealed from a first-degree trafficking in a controlled substance conviction. *Id.* at 390. There, Detective Burch (carrying a recording device) and Daniels, a “cooperating witness,” tape recorded a drug transaction with Baker. After the transaction, the detective “took the tape recorder from his pocket and ended the recording by summarizing what had just transpired.” *Id.* During the trial, the Commonwealth introduced the recorded transaction even though the “cooperating witness” was not available for cross-examination and had made statements on the recording. *Id.* “On the recording, some time after the events of the drug buy itself, Daniels could be heard commenting on Burch’s statement that he had purchased drugs with the remarks, ‘Yes, you did. You gave that to him, and he had his hand out.’ Later in the recording, while Burch was giving his summary of the events surrounding the buy, Daniels could again be heard saying, ‘They’ve got ‘Percocet’ wrote right on them,’ in

reference to the pills purchased from Baker.” *Id.* at 390-91. Although the Court recognized the statements did not fit any exception to the hearsay rule, they did not violate *Crawford* or *Davis*.

After careful consideration, we conclude that Daniel's statements to Detective Burch were not sufficiently formal to implicate the Confrontation Clause. Daniel's comments were unprompted, unsolicited, and spontaneous and were not the result of any prompting from Burch. We also note that the situation surrounding Daniel's statements was somewhat unique in that she was doing nothing more than verifying a version of events that Detective Burch had personally witnessed. Because of his own direct involvement, Burch had full knowledge of what had occurred. He was not conducting a formal post-incident investigation that required reliance on any information that Daniel provided him. He himself had been a participant, and Daniel was not telling him anything that he did not already know. Daniel's statements were not made under formal conditions that would give a witness time for reflection. We conclude that Daniel's recorded comments were not sufficiently formal to fall within the realm of testimonial hearsay. Therefore, the Confrontation Clause was not implicated.

*Id.* at 394. *But see United State v. McGee*, 529 F.3d 691 (6<sup>th</sup> Cir. 2008) (although harmless, it was a violation of the Confrontation Clause when an officer testified to statements made by the informant identifying the defendant as the drug supplier); *United States v. Powers*, 500 F.3d 500 (6<sup>th</sup> Cir. 2007) (admission of confidential informant's statements regarding defendant's background and identification of defendant and his vehicle, when informant was not called as witness, although harmless, violated defendant's confrontation clause rights); *United States v. Cromer*, 389 F.3d 662 (6<sup>th</sup> Cir. 2004) (Statements made by a confidential informant to a police officer are “testimonial” under *Crawford*. The determination of whether something is “testimonial” is based in part on



whether the person making the statement could assume that the information would be used to further an investigation or prosecution.); *United States v. Gibbs*, 506 F.3d 479, 486-87 (6<sup>th</sup> Cir. 2007) (agent's testimony that parolee told him that defendant, who was charged with being felon in possession of firearms, had long guns hidden in his bedroom, was not hearsay, but instead was offered as background evidence to show why defendant's bedroom was searched, and was not offered for its truth, since it did not bear on defendant's alleged possession of pistol with which he was charged).

In *Commonwealth v. Walther*, 189 S.W.3d 570 (Ky. 2006), the Court held that maintenance and performance test records of breath-analysis instruments are not testimonial and so their admissibility is not governed or affected by *Crawford*.

In *United States v. Stone*, 432 F.3d 651 (6<sup>th</sup> Cir. 2005), the Sixth Circuit stated that since *Crawford* only applied to testimonial evidence at trial, it would not apply in sentencing proceedings. *See also United States v. Katzopoulos*, 437 F.3d 569 (6<sup>th</sup> Cir. 2006); *United States v. Kappell*, 418 F.3d 550 (6<sup>th</sup> Cir. 2005) (trial testimony of child witness from another room by closed circuit television, to which the defendant acquiesced, did not constitute a violation of the Confrontation Clause); *United States v. Kirby*, 418 F.3d 621 (6<sup>th</sup> Cir. 2005) (*Crawford*

does not apply to revocation of supervised release hearings, so the probation officer could testify to out-of-court statements made by victims and police officers). Under *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338 (Ky. 2006), *Crawford* is inapplicable to termination of parental rights cases as the Sixth Amendment does not apply to civil cases.

In *Staples v. Commonwealth*, 454 S.W.3d 803 (Ky. 2014), the Supreme Court of Kentucky reiterated that when out-of-court testimonial statements are admitted erroneously in violation of *Crawford*, those statements are subject to harmless error analysis. That is, a reviewing court must ask whether there is a reasonable possibility that the improper evidence contributed to the conviction.

## **Determination of Charges**

In determining the charges to be filed, the prosecutor will need to decide whether to proceed under KRS Chapter 209 (KRS 209.990), the Penal Code, or both.

## **Evidence Gathering**

The following is a list of items regarding potential evidence the prosecutor may want to consider. (Note: if the prosecutor becomes actively involved in the investigation, he can lose his immunity). This is not intended to replace the work of the trained, professional law enforcement officer, but to provoke the prosecutor's thought process:

- Bank Records: Perpetrator and Victim
- What did the perpetrator do with the money? If no clear answer:
  - What are all known regular expenses of victim?
  - What is all known income of victim?
  - What is unaccounted for?
  - Did perpetrator control the money?
- Bank Film/Footage
- 911 Tapes
- Handwriting Exemplars for Document Analysis
- Adult Protective Services Records
- Social Worker Witnesses
- Guardianship Court Records
- Documents Gathered by a New Guardian
- Medical Providers: records and interviews
- Notarized documents
- Powers of attorney
- Quitclaim deeds
- Refinance documents
- Wills
- Financial documents allowing transfers outside the Will
- Pension documents/Retirement account documents
- Records of the Office of the Inspector General – if the victim is in a regulated health care facility, such as a long term care facility

## **APS Records**

Sometimes APS will have had contact with a victim yet not realize the gravity of the events until after a considerable period of sub-standard care. By placing this together with other known events, the prosecution may be able to show that the Defendant successfully obscured and obstructed the ability of APS to fully discover the extent of neglect, and thus to further demonstrate a criminal motive (e.g., delaying

home inspections, moving the victim to new addresses).

### **Protective Orders**

If appropriate, the Commonwealth's Attorney or County Attorney should seek conditions of release and/or other court orders to protect the victim while the criminal case is pending; and, where appropriate, upon conviction, as a term and condition of probation. *See* RCr 4.12, 4.14, KRS 533.030. The prosecutor should also inform the victim or victim representative of his option of seeking a protective order pursuant to KRS Chapter 403 if that option is available.

### **Guardianship Court**

KRS Chapter 387 governs guardianships/conservatorships and is designed to protect disabled persons. "Disabled" in this Chapter is defined as a legal, rather than a medical, disability and is measured in functional abilities. Additionally, disabled refers to a person who is unable to make informed decisions with respect to personal affairs and/or a person who lacks the capacity to manage his or her property effectively. According to the statute, this inability should be evidenced by acts or occurrences within six months prior to the filing of a petition to have a guardian and/or conservator appointed.

The burden of proof is on the Commonwealth, through the County Attorney's office. A petition is filed by a family member or the Cabinet for Health and Family Services (if a disabled person is in need of a guardian, but has no family members to assume such a duty). It is important to note that these petitions are not originated from the County Attorney's office, but from private citizens, who may obtain the paperwork for filing a petition at the district court clerk's office. After a petition has been filed, an interdisciplinary investigation will take place utilizing at least three individuals – a physician, a psychologist, and a social worker. These individuals will prepare a report containing an opinion as to whether a guardianship or conservatorship is needed, the type of guardianship or conservatorship needed, and the length of time a guardianship or conservatorship may be needed.

After the filing of such a report, a hearing must be held and a guardian ad litem must be appointed for the respondent (or person subject to the disability hearing). The hearing takes place in the form of a jury trial where the Commonwealth has the burden of proving the disability or partial disability of the respondent by clear and convincing evidence. In order to do this, at least one member of the interdisciplinary team must testify in court as to the

findings of the team with regard to the respondent's disability. Additionally, the team's report should be submitted into evidence for the jury's consideration. At this trial, the respondent, through his counsel, is also entitled to present evidence. From there, it is up to the jury to determine to what extent (full or partial) the respondent is disabled, if at all, and the length of any proposed guardianship or conservatorship (indefinite or for a shorter term).

After the jury makes its findings regarding whether or not a guardian or conservator is needed, it is up to the judge to determine who should be appointed guardian and/or conservator and to determine whether or not that person must post a bond. If there are no family members or others willing to serve as guardian or conservator, the state, through the Cabinet for Health and Family Services, may be appointed guardian and/or conservator for the disabled person.

Emergency guardianships may also be available if it appears that there is imminent danger of serious impairment to the health or safety of the respondent or damage or dissipation to his property if immediate action is not taken. In an emergency proceeding, a hearing would be held within one week of the filing of an emergency petition and as in a regular guardianship proceeding, the burden would be on the Commonwealth to prove by clear and convincing evidence that an emergency guardian or conservator is necessary. See KRS § 387.740

For more information regarding the powers, duties, and responsibilities of guardians and conservators, see KRS Chapter 387.

The Commonwealth may be able to obtain disclosure of all guardianship proceedings regarding the victim.

### **Attorney Records**

Often those who prey upon vulnerable elders will attempt to gain legal control over the victim's resources in a variety of ways. In one case prosecuted by the Jefferson County Commonwealth Attorney's Office, *Commonwealth v. Sharon Franks*, the Defendant took the victim to an attorney of the Defendant's choosing to execute power of attorney, health care surrogate, and several other documents related to the victim's real estate. The Commonwealth argued that this attorney's client was the victim, not the Defendant, and obtained a waiver of attorney-client privilege on behalf of

the victim from the court-appointed guardian. Thereby, all of the attorney's records and conversations with both parties were available as evidence.

### **Spousal Privilege**

The Kentucky Rules of Evidence give the spouse of a party a privilege to refuse to testify against the party concerning: (1) events occurring after the date of their marriage; or (2) confidential communications made to the spouse during their marriage. KYPRAC-CRP §27:64, *citing* KRE504(a),(b). Similarly, a party has a privilege to prevent the spouse from testifying against the party about events in the same time frame or confidential communications made during the marriage. *Id.*, *citing* KRE 504(a),(b).

Under KRS 209.060, spousal testimony privilege does not bar admission of evidence regarding the abuse, neglect, or exploitation of an adult or the cause thereof in any judicial proceeding resulting from a report pursuant to the Kentucky Adult Protection Act.

### **Use of Medical Records**

Medical records can be an excellent source of information and can often be used for purposes beyond merely the medical forensics: several witnesses may be located; the records may demonstrate that the defendant was instructed on proper care; and the records may help recreate a history of the victim's time in Defendant's care.

### **Fines and Restitution**

The Commonwealth can seek fines and restitution for victims of abuse, neglect, and exploitation. Consider all losses the victim has sustained, including the cost of care for the period immediately following removal from care when the Defendant has neglected or abused her.

The following statutes pertain to restitution:

### **Penalties of Chapter 209 [KRS 209.990]**

(5) Any person who knowingly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class C felony.

(6) Any person who wantonly or recklessly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class D felony.

(7) Any person who knowingly, wantonly, or recklessly exploits an adult, resulting in a total loss to the adult of three hundred dollars (\$300) or less in financial or other resources, or both, is guilty of a Class A misdemeanor.

(8) If a defendant is sentenced under subsection (5), (6), or (7) of this section and fails to return the victim's property as defined in KRS 218A.405 within thirty (30) days of an order by the sentencing court to do so, or is thirty (30) days or more delinquent in a court-ordered payment schedule, then the defendant shall be civilly liable to the victim of the offense or the victim's estate for treble damages, plus reasonable attorney fees and court costs. Any interested person or entity, as defined in KRS 387.510, shall have standing to bring a civil action on the victim's behalf to enforce this section. The sentencing judge shall inform the defendant of the provisions of this subsection at sentencing.

*\*Practice tip\** You may want to consider reminding the court to inform the defendant of this at sentencing. In addition, you will need to make sure that the victim is informed of this, in the event that they need to pursue it.

***KRS 381.280 Forfeiture of right to property for killing or victimizing decedent -- Exemptions -- Escheat to elder and vulnerable victims trust fund***

(1) If the husband, wife, heir-at-law, beneficiary under a will, joint tenant with the right of survivorship or the beneficiary under any insurance policy takes the life of the decedent or victimizes the decedent by the commission of any felony under KRS Chapter 209 and in either circumstance is convicted therefor, the person so convicted forfeits all interest in and to the property of the decedent, including any interest he or she would receive as surviving joint tenant, and the property interest or insurable interest so forfeited descends to the decedent's other heirs-at-law, beneficiaries, or joint tenants, unless otherwise disposed of by the decedent. A judge sentencing a person for a offense that triggers a forfeiture under this section shall inform the defendant of the provisions of this section at sentencing.

(2) A forfeiture under subsection (1) of this section:

(a) Shall not apply in cases involving the commission of any felony under KRS Chapter 209 where the will, deed, or insurance policy was executed prior to January 1, 2012;

(b) Shall not apply in cases where the decedent, with knowledge of the person's disqualification, reaffirmed the right of the husband, wife, heir-at-law, beneficiary under a will, joint tenant with the right of survivorship, or insurance policy beneficiary to receive the property by executing a new

or modified will or codicil, insurance policy or policy modification, or deed; and

(c) Shall not apply in cases of a felony under KRS Chapter 209 committed prior to January 1, 2012.

(3) If, after the provisions of this section are applied, there are no other heirs-at-law, beneficiaries, or joint tenants of the decedent as to all or part of the interest forfeited, the forfeited interest shall escheat to the state under KRS Chapter 393. The Department of the Treasury shall, after liquidation of the interest, pay the proceeds into the elder and vulnerable adult victims trust fund established in KRS 41.305.

***KRS 431.200 Reparation for property stolen or damaged, from person convicted***

Any person convicted of a misdemeanor or felony for taking, injuring or destroying property shall restore the property or make reparation in damages if not ordered as a condition of probation. The court in which the conviction is had, if applied to by verified petition made within ninety (90) days of the date the sentence was pronounced, may order restitution or give judgment against the defendant for reparation in damages, and enforce collection by execution or other process. In a petition for restitution or reparation, the court shall cause the defendant, if in custody, to be brought into court, and demand of him if he has any defense to make to the petition. If he consents to the restitution or to reparation in damages in an agreed sum, the court shall give judgment accordingly. Otherwise a jury shall be impaneled to try the facts and ascertain the amount and the value of the property, or assess the damage, as the case may be. A failure to pursue this remedy shall not deprive the person aggrieved of his civil action for the injury sustained.

***KRS 532.032 Restitution***

(1) Restitution to a named victim, if there is a named victim, shall be ordered in a manner consistent, insofar as possible, with the provisions of this section and KRS 439.563, 532.033, 533.020, and 533.030 in addition to any other part of the penalty for any offense under this chapter. The provisions of this section shall not be subject to suspension or non-imposition.

(2) If pretrial diversion is granted, restitution shall be a part of the diversion agreement.

(3) If probation, shock probation, conditional discharge, or other alternative sentence is granted, restitution shall be a condition of the sentence.

(4) If a person is sentenced to incarceration and paroled, restitution shall be made a condition of parole.

(5) Restitution payments ordered under this section shall be paid by the defendant to the clerk or a court-authorized program run by the county attorney or the Commonwealth's attorney of the county.

### **Defense of Extreme Emotional Disturbance**

In the Jefferson County case of *Commonwealth v. Cecil Burks*, 04-CR-000157, the Defendant claimed that he became enraged because his mother soiled her diaper and was being difficult, therefore he should get an EED instruction. The trial court ruled that EED is unavailable as a matter of law in all cases prosecuted under KRS Chapter 209, because the legislature clearly chose not to incorporate it into the statutory scheme; and that the legislature could properly exclude any such defense in a statute of offenses based on status of the victim.

### **Recanting Victim**

Victims are sometimes hesitant to testify against family members or caregivers and periodically recant prior to or during trial. Prior to dismissing a case due to a recanting victim, efforts should be made to determine whether the case can still be prosecuted. In some instances, recorded jail phone calls may exist that could be used for impeachment testimony, to show the relationship of the defendant to the victim, or to demonstrate a motivation to lie.

### **Handwriting Expert**

In some financial exploitation cases, a handwriting expert may be useful in determining who signed checks or whether legal documents were forged.

In *Florence v. Commonwealth*, 120 S.W.3d 699, 703 (Ky. 2003), the Supreme Court of Kentucky held that a handwriting expert had achieved acceptance in Kentucky law. Therefore, such evidence is admissible without a *Daubert* Hearing, but an opposing party is entitled to be heard with evidence to the contrary. "In this respect, however, judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court." *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky. 1999). However, the *Florence* Court did relate that its holding "should not be understood as depriving a trial court of discretion to conduct a *Daubert* hearing if the



court believes a *Daubert* hearing would be helpful or doubts the reliability of the expert testimony.” *Florence, supra*. Once the court finds handwriting analysis acceptable, there is a burden shift from the party offering expert testimony to the party opposing the testimony. *Id.* The opposing party, when it so requests, has a right to present evidence that the scientific evidence at issue is not or is no longer scientifically reliable. *Id.*

### **Source of Bail Funds**

Although Kentucky does not have a statute on point, it may be useful for the prosecutor to request that the defendant prove the source of bail funds. This may be especially helpful in a financial abuse/exploitation case where the funds stolen may actually be used to post bail. The defendant may have pieced bond together from a combination of sources, including funds from the victim.

### **Trial Preference for Elder Victims**

Many prosecutors request “trial preference,” or an advanced place on the courts’ dockets in cases where the victim is ill or of advanced age. In these special circumstances, prosecutors are urged to argue *Crawford v. Washington* to demand a full Preliminary Hearing, not simply to establish probable cause, but to preserve the testimonial evidence of the victim. There will still be cases of abuse where it is not beneficial for the victim to attend or testify at the preliminary hearing. All factors must be carefully considered and balanced on a case by case basis.

## **VIDEOTAPED DEPOSITION FOR PURPOSES OF TRIAL**

### **Overview**

The goal of a videotaped deposition is to preserve the truth for presentation to a trier of fact. A videotape deposition can be especially important in the following situations:

- Victim becomes unavailable

- Victim can't recall (impeach, refresh recollection)
- Need to show victim's mental condition near time of incident

### **Preliminary Considerations**

- **Confrontation Clause.**
  - If the defendant is given an opportunity to be present and to examine the witness fully on cross-examination, the preservation of the testimony of a witness by means of a deposition does not violate the right of confrontation. KYPRAC-CRP §23:52. *See also, California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (upholding the use of the transcript of a preliminary hearing under similar circumstances).
- **Waiver**
  - *Parson v. Commonwealth*, 144 S.W.3d 775, 783 (Ky. 2004) (Defendant waived his right to confront physical therapist who had treated the victim, where defense counsel, with defendant's acquiescence, agreed that testimony of medical witnesses could be presented by deposition.)
  - *Richmond v. Commonwealth*, 637 S.W.2d 642, 646 (Ky. 1982) (Defendant who could have been present at the taking of companion's deposition, but who chose not to be present thereby waived the right of confrontation when the deposition was taken.)

Unless the witness is shown to be excusably absent at trial, the introduction of the deposition against the defendant would appear to violate other constitutional rights associated with a fair trial. KYPRAC-CRP §23:52.

### **Grounds for Taking Deposition**

Upon motion and notice to the parties, the prosecution may request the taking of a deposition of a prospective witness's testimony if the witness may be unable to attend or is or may be prevented from attending a trial or hearing. RCr 7.10. The trial court must find that the witness may be unable to attend or is or may be prevented from attending,

that the testimony is material, and that the taking of the deposition is necessary to prevent a failure of justice. RCr 7.10.

The trial court may not be required to make the findings if the deposition is conducted in a trial-like setting presided over by the judge. *See, Richmond v. Commonwealth*, 637 S.W.2d 642, 647 (Ky. 1982) where the deposition of a witness was not rendered invalid on grounds that it was not taken pursuant to an order of court after notice and hearing, where defense counsel was present and made his objections, and all of the protections designed to be effected by procedure specified by rules of criminal procedure were satisfied by trial-type setting in which evidence was taken.

### **Case Law**

*Smith v. Commonwealth*, 734 S.W.2d 437, 450 (Ky. 1987) (trial court properly refused to order deposition of two sons of victim where defendant failed to show that they were unavailable or unable to attend the trial).

*Richmond v. Commonwealth*, 637 S.W.2d 642, 646 - 47 (Ky. 1982) (Witness, who was subsequently married to defendant, and who had given deposition so that she could get out of jail, was entitled to claim marital privilege and not testify at trial; however, the effect of her claim of protection was to make her unavailable so as to render her deposition admissible).

### **Notice of Taking Deposition**

The party requesting the deposition shall give to every party reasonable written notice of the time and place for taking the deposition. RCr 7.14(1). In the absence of good cause shown, notice of less than 72 hours is not reasonable. RCr 7.14(1).

- Notice must state name and address of each person to be examined. RCr 7.14(2).
- Opposing party may change the time or place of taking deposition for cause shown.

*Harrod v. Commonwealth*, 552 S.W.2d 682, 683 (Ky. App. 1977) (trial court should have set the taking of the deposition of the chemist at a time when defendant's counsel could have been present).

## **Taking Depositions**

### **Place of Deposition**

The deposition is to take place in the county where the criminal case is pending if practicable. RCr 7.12(1).

### **Expenses by Commonwealth**

If a deposition is taken at the insistence of the Commonwealth, the Commonwealth shall pay, in advance, the reasonable expenses of travel and subsistence of the defendant and the defendant's attorney in attending such examination. RCr 7.12(2).

### **Appointment of Counsel**

If the defendant is without counsel when the Commonwealth requests a deposition, the court shall advise the defendant of his or her right thereto and assign counsel to represent the defendant unless the defendant elects to proceed without counsel or is able to obtain counsel. RCr 7.16.

### **Presence of Defendant and Counsel**

If the deposition is taken by the Commonwealth, the order signed by the trial court must contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant. RCr 7.12(1). *See Waiver, supra.*

The defendant has a right to be kept in the presence of the witness during examination. RCr 7.12(3).

If the defendant is in custody, the custodian must produce him at the examination. RCr 7.12(3).

### **Manner of Taking Depositions**

Depositions are to be taken in the manner provided in the Civil Rules. RCr 7.18. Unless the defendant requests that a deposition be taken on written interrogatories, the deposition will be taken orally. RCr 7.18. The deposition shall be taken before an examiner: a judge, clerk, commissioner or official reporter of a court, a notary public, or before other persons authorized by law. RCr 7.18, CR 28.01. The examiner shall put the witness under oath. RCr 7.18, CR 30.03(1).

The testimony shall be recorded stenographically or recorded by any other means ordered by the court such as videotape. RCr 7.18, CR 30.03(1). CR 30.02(4) provides

the requirements for a videotaped deposition and should be consulted.

The examination and cross-examination of the witness may proceed as permitted at the trial. RCr 7.18, CR 30.03(1). Evidence objected to shall be taken subject to the objections. RCr 7.18, CR 30.03(2). Failure to object to evidence that could have been cured at the time of the taking of the evidence is waived. RCr 7.20(2)(a) & (b). A party objecting to the manner in which the deposition is being conducted may recess the deposition and seek a protective order from the court. KYPRAC-CRP § 23:59, CR 30.04, RCr 7.18.

Upon the request of any party, the officer taking a deposition shall prepare a transcript of the deposition. KYPRAC-CRP §23:59, CR 30.03, RCr 7.18. The transcript shall contain a certificate that the witness was sworn and that the deposition is a true record of his testimony. KYPRAC-CRP §23:59, CR 30.06(1), RCr 7.18. Upon the written request of a party, the officer shall also submit the transcript to the witness for signature or changes. KYPRAC-CRP §23:59, CR 30.05, RCr 7.18. If the witness is unable or refuses to sign, the officer shall certify the facts with the deposition. KYPRAC-CRP § 23:59, CR 30.05, RCr 7.18.

The original deposition must be filed promptly with the clerk of the court. KYPRAC-CRP § 23:59, CR 30.06(1), RCr 7.18.

### **Use of Depositions**

#### **Unavailable Witness**

If the witness is dead, unable to attend or testify because of sickness or infirmity, etc. the deposition may be introduced. KRE 804(a); RCr 7.20(1).

The use of depositions should not be so narrowly construed to preclude other circumstances when a witness is unavailable. *Commonwealth v. Willis*, 716 S.W.2d 224, 231 (Ky. 1986); *Wells v. Commonwealth*, 562 S.W.2d 622 (Ky. 1978).

*St. Clair v. Commonwealth*, 140 S.W.3d 510, 539 (Ky. 2004) (Defendant's ex-wife who resided in Oklahoma was "unavailable" to testify, for purposes of allowing her

deposition testimony, in capital murder trial, where wife was unable to travel due to complications with pregnancy).

### **Showing Unavailability**

The prosecution must not only show the witness's unavailability at time of trial but that it has made a good faith effort to obtain his presence at the trial. *Harrod v. Commonwealth*, 552 S.W.2d 682, 684 (Ky.App. 1977). *See also, Barber v. Page*, 390 U.S. 719, 724-25, 88 S.Ct. 1318, 1321-22, 20 L.Ed.2d 255, 260 (1968) ("In short, a witness is not 'unavailable' for purposes of ... the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."); *St. Clair v. Commonwealth*, 140 S.W. 3d 510, 539 (Ky. 2004) (same).

When the question is one of the health of the witness, there must be "the requisite finding of necessity" which is "case specific" in order to dispense with confrontation in open court. *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

When the government is claiming witness unavailability due to illness, the specific inquiry must focus on both the severity and duration of the illness. The court must inquire as to the specific symptoms of the illness to determine what tasks the patient is able to perform, and the court must determine whether there is the probability that the illness will last long enough "so that, with proper regard to the importance of the testimony, the trial cannot be postponed." *Stoner v. Sowders*, 997 F.2d 209, 212 -13 (6<sup>th</sup> Cir. 1993). (citations omitted).

In *Stoner*, the Sixth Circuit found that a doctor's brief affidavit stating that the witnesses were in extremely poor physical health and that their health would be impaired if they were subjected to the rigors of sitting through jury trial was insufficient to establish unavailability and justify allowing deposition testimony in lieu of live testimony under Kentucky Rules. *Id.*

The admissibility of matters contained in a deposition is subject to the rules of evidence. KYPRAC-CRP §23:60; KRE 804(a); RCR 7.20(1).

Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the

deponent as a witness. RCr 7.20(1). If only a part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce at that time all of it which is relevant to the part introduced or may later introduce any other parts so relevant. RCr 7.20(1).

## **Technical Considerations**

### **Equipment**

Test equipment before leaving for interview; conduct a sample clip before beginning deposition. Ensure that microphones are in working order and that you have more than enough recording media than you expect to need. If you are using a device with batteries, make sure you have an extra set.

### **Victim**

Elders tend to be more alert mid-morning and tired in afternoon, so plan your deposition accordingly. Allow the elder plenty of time in which to answer your questions, even if his responses seem slow to you. Use concise, open-ended questions to begin the inquiry, and then direct the interview with pointed follow-up questions as necessary.

### **Environment**

Have the camera operator pan around the room in which the videotaping will occur. This will give the later viewers a better overall sense of the deposition and give them a more specific feel of the deponent's physical and mental limitations.

Because a videotape is such powerful evidence, it is imperative to videotape an interview in almost every elder abuse case. For those cases in which there is a high likelihood the victim will be unavailable for trial, a court ordered deposition will be highly beneficial. Keep in mind the common goal: Preserve the truth for presentation to a trier of fact. Abiding by the legal and technical considerations will help to achieve this goal.

### **Transcript**

It may be helpful to obtain a transcript of the interview for purposes of trial. Should the trial court call for wholesale redactions, a transcript will be easier to redact. Also, a transcript will be quicker and more efficient in the case of impeaching a witness's testimony.

## **POST-TRIAL**

Appropriate punishment will be sought by the prosecutor upon conviction of any person for elder abuse. When probation is granted, the prosecutor will seek specified terms and conditions of that probation, intended to safeguard the public from future physical, mental and/or financial exploitation of vulnerable populations by the perpetrator. KRS 533.030. Victim restitution should be sought wherever appropriate including criminal garnishment when authorized under KRS 532.160. *See also* KRS 532.032 (Restitution), KRS 532.033 (Order of Restitution), KRS 532.356 (Reimbursement and Restitution as Additional Sanctions).



# Sample Pleadings

COMMONWEALTH OF KENTUCKY  
\_\_\_\_\_  
JUDICIAL CIRCUIT  
\_\_\_\_\_  
CIRCUIT COURT  
INDICTMENT NO. \_\_\_\_\_ -CR- \_\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

DEFENDANT

**NOTICE OF MOTION TO TAKE AND USE VIDEO DEPOSITION**

Pursuant to RCr 7.10(1) and 7.14(1) please take notice that the Commonwealth will be conducting a video deposition in the above-styled case. The deposition shall be conducted at [place] on [date] at [time], such time being greater than 72 hours from filing of this notice. [RCr 7.14(1)]. The name of the person to be examined is [Victim], whose address is [Address]. [RCr 7.14(2)].

\_\_\_\_\_  
Assistant Commonwealth's Attorney

COMMONWEALTH OF KENTUCKY  
\_\_\_\_\_  
JUDICIAL CIRCUIT  
\_\_\_\_\_  
CIRCUIT COURT  
INDICTMENT NO. \_\_\_\_\_-CR-\_\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

\_\_\_\_\_  
DEFENDANT

**MOTION TO TAKE AND USE VIDEO DEPOSITION**<sup>4</sup>

The Commonwealth, pursuant to RCr 7.10(1), requests an Order authorizing the taking of the deposition of [Victim] for use in the trial of this case. The Commonwealth would show that due to the exceptional circumstances of the case it is in the interest of justice that the testimony of this witness be taken and preserved for use at trial. Counsel for the Commonwealth has interviewed the witness whose affidavit is attached hereto as Exhibit A. Said [Victim], as [his/her] affidavit relates, is the victim in the present case. Further, the Commonwealth would show that due to [state facts] said witness may be unavailable at trial as more particularly set forth in the affidavit of [medical doctor] attached hereto as Exhibit B.

Based on the foregoing the Commonwealth would move for an Order allowing the deposition of said witness under such conditions as the Court deems fit and proper.

Respectfully submitted,

\_\_\_\_\_  
(Name)  
(Address)  
Counsel for the Commonwealth

\_\_\_\_\_  
<sup>4</sup> KYPRAC-CRP § 23:61; 23:62.

COMMONWEALTH OF KENTUCKY  
\_\_\_\_\_  
JUDICIAL CIRCUIT  
\_\_\_\_\_  
CIRCUIT COURT  
INDICTMENT NO. \_\_\_\_\_ -CR- \_\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

DEFENDANT

**AFFIDAVIT IN SUPPORT OF MOTION  
TO TAKE AND USE VIDEO DEPOSITION<sup>5</sup>**

The Affiant, [Name], after first being duly sworn, states as follows:

1. That [he/she] is an Assistant Commonwealth's Attorney representing the Commonwealth in the above-styled action.
2. [Witness] is a material witness to the offense described in the above-captioned indictment, and said witness has advised Affiant that [state facts to show unavailability].
3. The above-named witness will therefore be unavailable for trial of this action set in this Court for [date].
4. It is necessary for the above-named witness's video deposition be taken and used at trial in order to prevent a failure of justice in this case.

\_\_\_\_\_  
Affiant

[Jurat]

\_\_\_\_\_  
<sup>5</sup> KYPRAC-CRP § 23:63

COMMONWEALTH OF KENTUCKY  
\_\_\_\_\_  
JUDICIAL CIRCUIT  
\_\_\_\_\_  
CIRCUIT COURT  
INDICTMENT NO. \_\_\_\_\_ -CR- \_\_\_\_\_

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

\_\_\_\_\_

DEFENDANT

**ORDER**

The Court, having considered the motion filed by the Commonwealth and the affidavits attached thereto and finding that [witness] may be unable to attend or is or may be prevented from attending the trial, and that the testimony of the witness is material, and that the taking of the deposition is necessary to prevent a failure of justice, and that reasonable written notice of the time and place for the taking of the deposition has been provided to all parties, does hereby order that the motion be granted.

The examination of [witness] shall be held on [date] at [time] at [place].

Pursuant to RCr 7.12(2) the Commonwealth shall pay in advance the reasonable expenses of travel and subsistence of the defendant and the defendant's attorney in attending such examination.

The court further orders that [custodian] produce the person of [defendant] at the deposition in compliance with RCr 7.12 subsections (1) and (3) and that the defendant be kept in the presence of the witness during the examination pursuant to RCr 7.12(3).

The deposition will be taken in the manner provided in the Civil Rules pursuant to RCr 7.18.

Thus done and signed this \_\_\_\_ day of \_\_\_\_\_ 201\_\_, in  
\_\_\_\_\_, \_\_\_\_\_ County.

---

JUDGE

# RESPONSIBILITIES OF PROSECUTORS

## CRIME VICTIMS' BILL OF RIGHTS CHECKLIST

**I** Case Name:

**I** Victim Name:

**I** Case#:

### INFORMATION

*The attorney for the Commonwealth shall make a reasonable effort to insure that the **victim** receives available information:*

DATE PROVIDED

- |                            |                                                                                                                                                                                                                                                                                                                                                   |                          |                                                |
|----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|------------------------------------------------|
| <input type="checkbox"/> D | Protective services                                                                                                                                                                                                                                                                                                                               | <input type="checkbox"/> | D Crime victim compensation (where applicable) |
| <input type="checkbox"/> D | Emergency services                                                                                                                                                                                                                                                                                                                                | <input type="checkbox"/> | D Restitution (where applicable)               |
| <input type="checkbox"/> D | Social services                                                                                                                                                                                                                                                                                                                                   | <input type="checkbox"/> | D Obtaining assistance from a victim advocate  |
| <input type="checkbox"/> D | Medical services                                                                                                                                                                                                                                                                                                                                  | <input type="checkbox"/> | <b>D</b> Community-based treatment programs    |
|                            |                                                                                                                                                                                                                                                                                                                                                   | <input type="checkbox"/> | D Submitting a written victim impact statement |
| <input type="checkbox"/> D | How to register with VINE to be notified when a person has been released from a prison, jail, juvenile detention facility, (or psychiatric facility or forensic psychiatric facility if the case involves a violent crime as defined in KRS 439.3401 and the person charged with or convicted of the offense has been involuntarily hospitalized) |                          |                                                |
| <input type="checkbox"/> D | How to receive information on being protected from intimidation, harassment, and retaliation                                                                                                                                                                                                                                                      |                          |                                                |
| <input type="checkbox"/> D | The Victim-Witness Protection Program                                                                                                                                                                                                                                                                                                             |                          |                                                |

### NOTIFICATION

***//victims** so desire and if they provide a current address and telephone number: the attorney for the Commonwealth shall provide prompt notification, if possible, of judicial proceedings relating to the case, including but not limited to the following:*

- Defendant's release on bond and any special conditions of release
- Charges filed against the defendant
- The defendant's pleading to the charges
- Trial date
- Changes in custody of the defendant
- Changes in trial dates
- Trial verdict
- Right to submit a victim impact statement to the court at the time of sentencing
- Sentencing date
- Dates of Parole Board hearings held for the defendant
- Scheduled hearing for shock probation  resulting order
- Scheduled hearing for bail pending appeal  resulting order

*The attorney for the Commonwealth shall make a reasonable effort to insure that*

- Victims and witnesses** who are required to attend criminal justice proceedings are notified promptly of any scheduling changes that affect their appearances

**OTHER PROVISIONS**

*The attorney for the Commonwealth shall consult victims on case disposition including:*

- Case dismissal
- Release of defendant pending judicial proceedings
- Any conditions of release
- A negotiated plea
- Defendant's entry into pre-trial diversion program

*The attorney for the Commonwealth shall:*

- Promptly return a victim's property held for evidentiary purposes unless there is a compelling reason for retaining it
- Upon the request of the victim or witness, inform employers that the need for victim or witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work
- Inform the victim that the Attorney General shall make a reasonable effort to notify the victim promptly if an appeal of the conviction is pursued by the defendant, the status of the appeal and the final decision

*The attorney for the Commonwealth may:*

- Provide a personalized safety plan form
- Request a speedy trial where the victim is less than sixteen (16) years old and the crime is a sexual offense

**NOTES**



## **VICTIM /WITNESS PROTECTION PROGRAM**

### **O Protective Services**

Protective services are provided at the discretion of the law enforcement agency handling the case (Kentucky State Police, sheriff's offices and county and city police departments) to crime victims, witnesses and their families as defined in KRS 421.500 (1). Protective services are limited to six (6) months per person.

*Any Commonwealth's attorney or county attorney may apply to the Office of the Attorney General for funding services to be considered for reimbursement are limited to:*

Physical protection of the person

Physical security measures for the person's residence, vehicle, workplace, or a combination of these measures

Short-term relocation

*Utilization of this program is at the discretion of the law enforcement agency handling the case.*

### **O Special Advocates**

If the court believes that the health, safety, or welfare of a victim who is a minor or is legally incapacitated would not otherwise adequately be protected, the court may appoint a special advocate to represent the interest of the victim and to exercise those rights provided for by KRS 421.500 to 421.575. Communication between the victim and the special advocate shall be privileged.

**A PRACTICAL APPROACH TO THE  
CROSS-EXAMINATION OF PSYCHIATRIC  
AND PSYCHOLOGICAL WITNESSES**

(2001)

George Williamson  
Deputy District Attorney  
Solano County District Attorney  
Reprinted with Permission

**TABLE OF CONTENTS**

Preamble .....	168
I. Introduction .....	169
II. Preliminary Preparation .....	169
A. Required Background Reading .....	
B. Required Legal Reading .....	
C. Required Knowledge of the Tools of the Trade .....	
III. Actual Case Preparation .....	174
A. Initial Work-Up .....	
B. Discovery from the Defense .....	
C. Follow-Up Preparation .....	
IV. Development of Overall Approach Tactical Considerations .....	178
V. Other Prefatory Considerations .....	13
A. <i>In Limine</i> Matters .....	
B. Jury Voir Dire .....	
VI. Constructing the Cross-Examination Plan .....	180
A. Overview .....	
B. Setting the Stage ... Obtaining All of the Data the Expert Developed or Possessed, i.e., Establishing the Base-Line .....	
C. Exposing the No Written Report Ploy .....	
D. Challenging the Expert's Qualifications .....	
E. Establishing Bias .....	
F. Attacking the "Science" .....	
G. Attacking the Current/Retrospective Diagnosis and the Basis for the Diagnosis .....	
H. Attacking the Forensic Expert's Opinion on the Ultimate Issue .....	
VII. Conclusion .....	193

*A psychiatrist, "if he is scrupulously honest," when asked to describe "the manner in which the (defendant's mental) abnormality affected those mental and emotional processes relevant to the criminal act," will limit himself to a statement along these lines: the abnormality "has substantially affected his mental or emotional processes in ways which I find difficult to understand and explain to you and this has possibly, but maybe not, substantially affected his behavior controls in ways which could be, but are not necessarily, relevant to the criminal act of which he is accused..." Diamond, From Durham to Brawner: A Futile Journey, Wash. Univ. Law Quarterly, Vol. 1973: 109, at p. 114.*

## I. INTRODUCTION

The use of forensic mental state experts by criminal defendants to mitigate their crimes and or to avoid penal responsibility is becoming increasingly prevalent. Thus, forensic psychiatrists and forensic psychologists are commonly, encountered by prosecutors at five or six stages in the criminal justice system, i.e., at pre-trial competency proceedings<sup>1/</sup>, at the guilt phase<sup>2/</sup>, at the sanity phase<sup>3/</sup>, at the penalty phase of a capital case<sup>4/</sup>, at the sentencing proceedings<sup>5/</sup> and during post-conviction habeas corpus litigation.<sup>6/</sup> Forensic mental state experts are also encountered at other "quasi- criminal" proceedings, i.e., mentally disordered offender actions and sexually violent predator actions.<sup>7/</sup>

Unfortunately it has been my experience that these so called "expert" witnesses offer little or no meaningful evidence bearing upon a defendant's true moral or criminal responsibility. Rather than offering objective and scientifically validated opinions, these witnesses generally testify as advocates for the defendant and benignly or purposely obfuscate the truth.

Many of these "experts" pay little attention to established facts and the reasonable inferences which may be drawn therefrom. Consequently, after attempting to cloak themselves with the aura of medical science, these witnesses often have the arrogance to address legal and moral judgments within the construct of a medical diagnosis.

As a prosecutor, I believe it is critical to point out to the finders of fact that there is a large and growing body of respectable authority to the effect that a psychiatric diagnosis is really nothing more than the opiner's socio/legal judgment rather than a valid medical finding; that psychiatry and psychology are not sciences; and that psychiatric diagnoses are subjective, speculative and inherently unreliable. The most effective tool that I have found to demonstrate these points has been cross-examination. Thus, the purpose of this outline is to provide a common sense and practical approach to dealing effectively with psychiatric and psychological witnesses. As a practice guide, this outline necessarily dwells on the obvious, i.e., that the crux of successful cross-examination of such experts is thorough preparation, clear organization, common sense and a solid grasp of the facts. Above all, this outline will hopefully help prosecutors to be able to demonstrate effectively that psychiatric opinions, as with all other opinions, are only as good as the facts upon which they are based. Fortunately, most mental state experts offered by the defense are strangers to the real facts!

<sup>7</sup>Penal Code §1367, et seq.

2. See, e.g., Penal Code §§ 22(b), 26, 28, 29.

3. Penal Code § 1026, et seq.

4. Penal Code § 190.3(d)(h)(k)

5. California Rules of Court, Rule 401 et seq.; Penal Code § 25(c)

6. Penal Code § 1473, et. seq.; 28 U.S.C. § 2254

7. Welfare and Institutions Code §§ 6500; 6600

## **II. PRELIMINARY PREPARATION**

### **A. Required Background Reading**

—In order to attack effectively a forensic mental state expert on cross-examination, it is critical that a prosecutor conduct pertinent, preliminary research in the field. With respect to both forensic psychiatry and forensic psychology, abundant literature and studies exist to educate prosecutors as to the clear shortcomings and fallibility of mental state diagnoses.

The following list of background materials provide an essential backdrop for developing an overall perspective from which to approach the cross-examination of the forensic expert. Although not an exhaustive reference list, the materials referred to below constitute recognized and accepted authority addressing -the problems attendant to offering psychiatric or psychological formulations in a criminal courtroom. These various articles and studies make it clear that: (1) forensic mental state formulations are more "art" than science; (2) forensic experts cannot reliably and uniformly diagnose current mental illnesses; (3) forensic experts cannot retrospectively diagnose past mental states with any degree of accuracy; and (4) no medical or scientific tests exist to demonstrate mental competency or insanity.

#### **1. Reference list**

##### **a. Key Literature on Child Abuse and Violent Criminal Behavior**

Widom, C.S., *Does Violence Beget Violence? A Critical Examination of the Literature*, (1989, Psychological Bulletin, 106 (1), 3-28).

Widom, C.S., *Victims of Childhood Sexual Abuse - Later Criminal Consequences*, (1995, Research in Brief. Washington, D.C.: U.S. Department of Justice).

Widom, C.S., *The Cycle of Violence*, (1989, Science, 244, 160166).

Widom, C.S., *Child Abuse, Neglect and Adult Behavior: Research Design and Findings On Criminality, Violence and Child Abuse*, (1989, American Journal of Orthopsychiatry, 59(3), 355-367).

Pincus, Jonathan H., *"Base Instincts-What Makes Killers Kill,"* (2001, W. W. Morton and Company).

##### **b. Traditional Psychiatric / Psychological Materials**

J. Ziskin and D. Faust, *Coping with Psychiatric and Psychological Testimony*, 4<sup>th</sup> Edition (1988, Law and Psychology Press).

T. Szasz, *The Myth of Mental Illness*, (1974, Harper and Row).

Ennis and Litwack, *"Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,"* (1964, 62 California Law Review, p. 693).

B. Diamond, *"From Durham to Brawner, a Futile Journey,"* (1973, Washington Univ. Law Quarterly, Volume 1973).

Temerlin and Trousdale, *"The Social Psychology of Clinical Diagnosis,"* (1969, *Psychotherapy: Theory, Research and Practice*, (Volume 6).

R. Slovenko, *Psychiatry and Law*, (1973, Little and Brown Co.).

S. Pollack *"Principles of Forensic Psychiatry for Psychiatric -Legal Opinion Making,"* (1971, Legal Medicine Annual).

Scher, *"Expertise and the Post Hoc Judgement of Insanity -The Antenostician and the Law,"* (1962, 57 Northwestern Law Review).

A. Bauer, *"Legal Responsibility and Mental Illness,"* (1962, 57 Northwestern Law Review).

Fingarette, *The Meaning of Criminal Insanity*, (1972, U.C. Press). Kaplan, Freedman and Sadock, *The Comprehensive Textbook of Psychiatry*, Fourth Edition.

D. Rosenhan, *"On Being Sane in Insane Places,"* (1973, Science, Vol. 17 and 13 Santa Clara Law Review).

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder*, Fourth Edition-Revised (1994).

Morse, "Experts and the Unconscious", (1982, 68 University of Virginia Law Review).

R. Rogers, "Clinical Assessment of Malingering and Deception, " (1988, the Guilford Press).

E. Green, *The Intent to Kill - Making Sense of Murder*, (1993, Clevedon Books).

S. Brodsky, *Testifying in Court (Guidelines and Maxims for the Expert Witness)*, (1991, American Psychological Association).

American Psychological Association, "Specialty Guidelines for Forensic Psychologists, " (1991, Law and Human Behavior, Vol. 15 No. 6).

American Academy of Psychiatry and the Law, *Ethics Guidelines For The Practice of forensic Psychiatry*, (adopted May; 1987 -Revised October, 1989, 1991 and 1995).

H. Kutchins and S. Kirk, *Making Us Crazy - DSM The Psychiatric Bible and the Creation of Mental Disorders*, (1997, The Free Press).

M. Hagen, *Whores Of The Court: The Fraud of Psychiatric Testimony and the Rape of American Justice*, (1997, Regan Books).

Jonathan Kellerman, *Savage Spawn: Reflections on Violent Children*, (1999, Ballantine Publisher Group).

Robert D. Hare, PhD, *Without Conscience: The Disturbing World of the Psychopaths Among Us*, (1999, the Guilford Press).

### **c. Neuropsychological Materials**

D. Faust, J. Ziskin and J. Hiens, *Brain Damage Claims: Coping with Neuropsychological Evidence*, (1991, Law and Psychology Press, Vols. 1-2).

D. Lezak, *Neuropsychological Assessment - Third Edition*, (1995, Oxford University Press, Inc.).

H. Doerr and A. Carlin, *Forensic Neuropsychology ... Legal and Scientific Bases*, (1991, The Guilford Press).

D. Martell, "Forensic Neuropsychology and the Criminal Law, " (1992, Law and Human Behavior, Vol. 16, No. 3).

## **B. Required Legal Reading**

Fundamental to any effective cross-examination is a clear understanding of the basic rules of law which govern the issue being litigated. This is especially true in the area of forensic psychiatry and forensic psychology. Generally speaking, forensic mental state experts can, and routinely do, testify to their opinion on the ultimate issue pursuant to Evidence Code § 805. Thus, whether the issue is present competency, diminished actuality, insanity or IAC/*Strickland* claims, the expert's knowledge and application of the legal test should be subjected to vigorous cross-examination. More often than not, the forensic experts do not understand the legal test questions they purport to address. Moreover, to support their "formulations", the experts often misdefine or misinterpret the meanings of the words contained in the legal test. Consequently, to be able to effectively exploit the expert's bottom-line opinion, it is imperative that the crossexaminer master the applicable law including the following provisions:

1. Law of present mental competence (and restoration/extension hearings)

Penal Code § 1367 et seq; *People v. Rells* (2000) 22 Cal. 4th 860;

CALJIC 4.10 - 4.17.

2. Law of Insanity

Penal Code § 1026 et seq.

CALJIC 4.00

See also, *People v. Skinner* (1985) 39 Cal.3d 765; *People v. Stress* (1988) 205 Cal.App.3d 1259; and *People v. Coddington* (2000) 23 Cal. 4<sup>th</sup> 529.

With a thorough understanding of the controlling law or legal test question, coupled with some creative thinking, a prepared cross-examiner can quickly demonstrate that the forensic expert has no special training, ability or skill with which to hazard a guess on the ultimate issue. Illuminating lines of questioning result from really thinking about the applicable law. For example, regarding the sanity test, questioning along the following lines may be appropriate:

- Insanity is a moral and legal test and not a scientific or medical test, isn't that true?
- How many classes did you take in medical school on the subject of California's sanity test?
- Can you name just one scientific test that can accurately and reliably determine if a person is sane or insane presently?
- Can you identify just one scientific test that can accurately and reliably determine if a person was sane or insane when he committed ...?
- Can you identify for the jury just one objective and scientific test which can determine if the defendant knew right from wrong?
- Besides not having any objective scientific test which can determine if the defendant knew right from wrong, can you name one particular psychological test that can do this?
- Can you actually state, to a reasonable medical certainty, that the defendant did not know it was legally or morally wrong to ... ?
- What scientific test do you base the foregoing opinion on?
- What do you believe the phrase "nature and quality of his/her act" means in the law of sanity?
- Where did you get this definition?
- Did you just make up your own definition?
- With respect to the nature and quality of the act, wouldn't it be important for us to know if the defendant understood that the act of murder involves the killing of a human being?
- The defendant killed a human being in this case, didn't he Doctor?
- He didn't kill a car or a fire hydrant, did he?
- When he chose to kill a human being, the defendant also selected the right implement with which to kill, didn't he?
- If a person has enough mental wherewithal to know that he wants to kill another human being, wouldn't it also be important to know if the person picked a weapon that he could kill with?
- Wouldn't the proper choice of a killing weapon demonstrate that the defendant was capable of understanding the nature of his act?
- In this case, the defendant chose to use a real lethal weapon, didn't he? (gun, knife, etc.)
- He had enough mental wherewithal not to try to kill with a fly swatter, didn't he?

- If the question is whether the defendant understood the quality of killing a human, wouldn't it also be important to know if he (shot/stabbed) the victim in a potentially lethal area of the body?
- In this case the defendant shot the victim in the head three times, true Doe?
- Is there any doubt in your mind that the defendant chose to shoot the victim in an area that would result in the victim's death?
- He didn't try to shoot him in the foot, did he?
- Etc., etc.

### **C. Required Knowledge of the Tools of the Trade**

In order to prepare for and carry out a successful cross-examination of a forensic psychiatric or psychological expert it is axiomatic that the prosecutor utilize every tool available to gather pertinent information, to limit the impact of the anticipated expert testimony and to fully exploit all of the forensic expert's vulnerabilities in front of the fact finder.

At a minimum, a prosecutor should be cognizant of the following miscellaneous rules, provisions and authorities. Without mastery of these necessary tools, you will find it difficult to develop an effective and dramatic cross examination:

1. *People v. Bonillas* (1984) 48 Cal.3d 757 - (OK to conduct post-arrest mental exam of the defendant by your expert prior to invocation of or attachment of Sixth Amendment right to counsel).
2. *People v. Danis* (1973) 31 Cal.App.3d 782 (right of prosecution expert to examine defendant after he or she tenders mental issue). See also, *People v. McPeters* (1992) 2 Cal.4th 1148 ... Note, prosecutor may cross-examine his expert regarding defendant's failure to cooperate with prosecutor's evaluating expert.
3. Penal Code § 21 (b) - ("capacity" evidence not admissible at guilt phase).
4. Penal Code § 22(a) - (evidence of voluntary intoxication not admissible to negate the capacity to form any mental state ...).
5. Penal Code § 25(a) - (diminished capacity abolished for guilt determinations).
6. Penal Code § 25.5 - (insanity defense cannot be based solely upon a personality disorder, adjustment disorder, or addiction to an intoxicant). See *People v. Robinson* (1999) 72 Cal.App. 4<sup>th</sup> 421.
7. Penal Code § 28 - (evidence of mental disease, defect, disorder not admissible to negate capacity to form any mental state for guilt determinations).
8. Penal Code § 29 - (at guilt phase, expert cannot testify as to whether defendant had or did not have the required mental states). See also, *People v. McCowan* (1986) 182 Cal.App.3d 1; *People v. Nunn* (1996) 50 Cal.App.4th 1357.
9. Penal Code § 1027 - (appointment of experts upon plea of insanity). Note, 12 either side can call appointed expert as witness and no rule prevents prosecution from having a voice in the selection of the experts.
10. Penal Code § 1054.3 - (reciprocal discovery of witness statements, reports or statements of experts, results of mental exams, scientific tests, ... and any real evidence which the defendant intends to offer at trial). See *People v. Hines* (1993) 20 Cal.App.4<sup>th</sup> 1818; *Woods v. Superior Court* (1994) 25 Cal.App.4<sup>th</sup> 178 and *Andrade v. Superior Court* (1996) 46 Cal.App.4<sup>th</sup> 1609.



11. Penal Code §§ 1368-1369 - (Doubts as to present competency, appointment of experts, trial).
12. Evidence Code § 721 - (scope of cross-examination of expert witness OK to cross examine on texts and treatises that expert referred to, considered or relied upon in forming opinion). See, e.g., *People v. Kozel* (1982) 133 Cal.App.3d 507; *People v. Clark* (1993) 5 Cal.4th 950 1013 1014. Note, on direct examination, psychiatrist cannot have treatise information admitted, *People v. Coleman* (1985) 38 Cal.3d 69.92; *People v. Nicholas* (1991) 54 Cal.3d 551 at p. 583. Note, for cross examination where psychiatrist testified that he disregarded defendant's statement regarding the crimes, prosecutor can still cross-examine the expert on defendant's statement, *People v. Caro* (1988) 46 Cal.3d 1035, 1059-1061; *People v. Breaux* (1991) 1 Cal.4th 281, 303.  
Note, 1997 amendment permitting cross-examination on treatise materials if the writing is a reliable authority in the field. . .Evidence Code § 721(b)(3).
13. Evidence Code '§ 722 - (OK to cross-examine on compensation of expert ... bears on credibility).
14. Evidence Code § 771 - (allows party to obtain all documents that witness used to refresh recollection).
15. Evidence Code §§ 800-801 - (scope of permissible expert opinion).
16. Evidence Code § 803 - (expert cannot base opinion on improper matter). See *People v. Coleman* (1985) 38 Cal.3d 69, but see *People v. Valdez* (1997) 58 Cal.App.4th 494 ... (hearsay basis of expert's opinion admissible).
17. Evidence Code § 804 - (expert can base opinion upon opinions/statements of others... right to call such other person). See, e.g., *People v. Coleman* (1989) 48 Cal.3d 112 and *People v. Robertson* (1983) 33 Cal.3d 21, 52 fn. 3.
18. Evidence Code § 805 - (expert can opine on ultimate issue).
19. *People v. Rich* (1988) 45 Cal.3d 1036 - (OK to cross-examine expert about conflicts between his opinion and the opinions of other experts; OK to cross examine expert with suppressed evidence if expert read and considered it in forming his opinion). Note, *People v. Price* (1991) 1 Cal.4th 324, 456-457 - (expert can be cross-examined about prior testimony in cases involving similar issues).
20. *People v. Montiel* (1993) 5 Cal.4th 877 - (OK to cross examine expert about report/statements that he didn't have, overlooked or ignored).
21. *People v. Bell* (1988) 49 Cal.3d 502 - (OK to cross-examine expert on logical information that he or she failed to consider).
22. *People v. Hendricks* (1988) 44 Cal.3d 635 - (OK to impeach expert with other crimes evidence). See also, *People v. Caro* (1988) 46 Cal.3d 1035.
23. *People v. Osband* (1996) 13 Cal.4th 622 - (OK to provide defense psychiatrist with defendant's criminal history and to cross expert on same if he read and considered it).
24. Federal Rules of Civil Procedure (Federal Habeas Litigation Discovery).

### **III. ACTUAL CASE PREPARATION**

#### **A. Initial Work-Up**

In my experience, the key to building a foundation for successful cross-examination of forensic mental state experts is thorough factual preparation. As will be discussed in more detail below, most mental state cases turn on the facts, i.e., the facts of

the offense, the facts concerning the defendant's background and the facts that are pertinent to his or her claimed mental assertion. Without exception, I have found defense experts to be woefully unprepared as to the "real" facts. Such factual ignorance, whether inadvertent or intentional makes their ultimate opinion, and its underlying basis, inherently vulnerable to attack. Remember, an opinion is only as good as the facts upon which it is based. If the factual basis is incorrect or incomplete, the opinion is worthless.

It necessarily follows that the prosecutor is responsible for gathering and mastering all of the relevant factual information which may have a bearing upon the defendant's mental assertion. You can be guaranteed that the defense expert will not have done the factual preparation necessary to support his opinion. Consequently, your factual preparation will provide you with the upper hand on cross-examination.

Unlike conventional criminal prosecutions where the factual preparation normally enters upon the corpus of the crime, the connecting evidence and potential defenses, preparation for the cross-examination of forensic experts focuses upon the defendant's mental state before, at, and after the crime. With this in mind, the offense reports need to be read from the perspective of the legal test in issue, i.e.: What do the facts of the crime (including defendant's statements or acts) reveal as to any potential mental impairment? Do the defendant's acts or statements demonstrate that he knew what he was doing? Were his actions planned? Did his actions manifest goal directed behavior? What facts or evidence suggest rational motivation as opposed to being the product of some mental impairment?

In summary, the initial workup and initial investigation must focus upon determining whether the defendant has a mental problem, whether the problem is reliably documented, whether the condition or problem caused any impairment in mental functioning, and whether the condition or problem had a causal relationship to the defendant's past or present mental status.

Generally speaking, adequate factual development of a mental state case at its initial stages requires at a minimum that the following be collected or considered:

1. Consider retaining a reputable forensic consultant (before the defense takes him out of the box!).
2. Have the defendant examined by your own forensic expert (See *People v. Bonillas, supra*).
3. Obtain a complete set of offense reports concerning the charged offense.
4. Obtain both state and federal rap sheets.
5. Obtain juvenile criminal history.
6. Obtain complete sets of offense reports for each and every arrest entry on defendant's adult or juvenile rap sheet.
7. Obtain court records of conviction for every criminal adjudication. Records should include any psychiatric evaluations and probation reports to the extent that they are not under seal or otherwise confidential.
8. Obtain all district attorney case files on each previously filed case against defendant.
9. Interview defendant's family members, co-workers, employers, friends, school mates, teachers, and/or anyone acquainted with the defendant who would logically have information regarding his mental state, his ability to get along with others, his behavior before, during and after the crime, his mental impairment if any, his day to day functioning, his medical and psychiatric history including dates, times and places of treatment, and names of treating professionals.

10. Obtain school records including any psychiatric testing results.
11. Obtain military records.
12. Obtain all psychiatric records, both out-patient and in-patient.
13. Obtain all psychiatric reports and records resulting from previous court-appointed examinations and/or compulsory commitments by the court, e.g., Atascadero files. (See, *People v. Williams* (1988) 44 Cal.3d 833.)
14. Obtain all jail medical and psychiatric treatment records.
15. Obtain all jail custody logs.
16. Obtain jail visit records (establish periodic up-date procedure). Note, prosecutor's access to such records is now the subject of current litigation.
17. Monitor court file in the current case to identify any ex-parte removal orders for any mental testing, evaluation or treatment of the defendant.
18. Gather from CDC all prison records pertaining to the defendant.

### **B. Discovery from the Defense**

Discovery from the defendant in criminal actions is governed by Penal Code § 1054.3. (See Federal Rules of Civil Procedure for discovery practice in federal habeas corpus matters.) Discovery of experts' reports, raw data and notes pursuant to § 1054.3 has recently been addressed in *People v. Hines* (1993) 20 Cal.App.4th 1818; *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, and *Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609. In order to adequately prepare for cross-examination of defense psychiatrists or psychologists, it is a must to utilize the applicable reciprocal discovery rules at the earliest permissible opportunity in order to obtain the items set forth below.

1. Names of all forensic experts intended to be called at trial.
2. Names of any and all lay witnesses intended to be called at trial on the issue of the defendant's mental state. (See, e.g., Evidence Code § 870(a).)
3. Resume of professional training and experience of each forensic expert intended to be called at trial.
4. As to each "intended expert witness" ...
  - a. written reports generated on behalf of the defense
  - b. raw notes
  - c. list of tests administered
  - d. raw test data
  - e. test results
  - f. written report of clinical interview of defendant (cf. *Andrade v. Superior Court, supra*)
  - g. tapes or notes of clinical interview of defendant (cf. *Andrade v. Superior Court, supra*)
  - h. list of any and all reports or materials provided by defense counsel to the expert which were read and considered i. list of (and copies) of all materials received by and considered by the forensic expert, and the source thereof
5. List of all prior mental examinations and/or mental health treatment of the defendant.

### **C. Follow-Up Preparation After Receipt of Discovery from Defense and/or Court Appointment of Mental State Experts**

Following initial workup and receipt of defense discovery, a well prepared prosecutor should have sufficient information at hand to discern what defendant's claimed mental disorder is, what diagnoses or "labels" describe this claimed disorder, which forensic experts will be expected to testify and the bases of the forensic expert's conclusions (i.e., clinical interview data, mental health history, defendant interview data and test data).

At this juncture it is absolutely critical for the prosecutor to learn everything there is to know about: (1) the defendant's claimed mental illness or disorder, (2) the testimonial background of his forensic experts (or the court appointed experts), and (3) the psychological or psychiatric tests administered to the defendant. Thus, appropriate follow-up efforts should include at a minimum:

1. Obtaining transcripts of previous testimony given by intended defense experts. (Note: CDAA and local district 19 attorneys routinely maintain expert witness transcript files.)
2. Discussing the relative qualities of the intended defense experts with other prosecutors who have cross-examined them in the past.
3. Obtaining all relevant writings, publications or presentations made by the intended expert witnesses.
4. As to each psychiatric or psychological test administered to the defendant, obtaining applicable test protocols governing test administration and test interpretation.
5. As to each psychiatric or psychological test administered to the defendant, obtaining original research monograph regarding the development of the test and any validation studies conducted on the test. Validation study data should include demographic and social data relating to the control groups.
6. Researching the claimed mental illness (diagnosis) in the accepted psychiatric and psychological textbook literature.
7. Researching the claimed mental illness (diagnosis) in the *DSM IV* (1994).
8. Researching each of the administered tests in *Burrough's Mental Measurement Yearbook* and in Ziskin's publication cited above.
9. Researching alternative diagnoses in the *DSM IV* (1994) including antisocial personality disorder.
10. Researching malingering in accepted psychiatric textbooks and the *DSM IV* (1994).
11. Providing to your consultant all reports and data received in discovery from the defense for his evaluation and commentary.

The final step in your follow-up preparation is perhaps the most important one. At this point the written forensic report of defendant's mental state expert, if one is supplied, must be critically analyzed and compared against all of the other hard data that you have read and compiled.<sup>s/</sup> Here you must pay particular attention to the existence of any discrepancies between what the expert states in his or her report and what the real facts are as reflected in the other reports and materials available to you. Do not be surprised to find that the expert lacked critical data, omitted or ignored critical data, misstated or exaggerated data, misdiagnosed the claimed mental problem and misunderstood or misapplied the bottom line legal test. Obviously such factual exaggerations, omissions and misstatements must be noted in order to fully exploit them during cross-examination.

#### **IV. DEVELOPMENT OF OVERALL APPROACH ...TACTICAL CONSIDERATIONS HAVING A BEARING ON CROSS-EXAMINATION**

Typically, three basic approaches exist relative to prosecuting mental defense cases. I call the first approach "running naked." Using this tactic, the prosecutor eschews the use of rebutting forensic experts and, instead, conducts through vigorous cross-examination, an all out attack upon the "science", upon the expert's credibility and upon the expert's conclusions.

I refer to the second approach as "the battle of the experts." Under this scenario the prosecutor tactically decides to counter the defense experts with forensic experts of his own. Consequently, the prosecutor cannot credibly conduct a "crash and burn" cross-examination of the "art." After all, he will be calling his own artists to the stand! With this approach, the cross examination demonstrating the shortcomings of psychiatrists and psychologists to be able to currently diagnose and/or retrospectively diagnose mental problems proceeds much more diplomatically. However, the attack upon the defense experts' conclusions and bases for their opinion remain similar to the "running naked" approach.

The third approach commonly employed by prosecutors involves the use of an "anti-shrink shrink."<sup>9</sup> This tactical approach involves the affirmative use of a qualified forensic expert, albeit a realistic cynic, to testify to the effect that the "science" is bogus, that it doesn't belong in the courtroom, that the legal test questions cannot be answered by reputable psychiatrists or psychologists, and that all of the clinical interview and psychological testing is nothing more than hocus pocus with little or no value for the trier of fact. Clearly, this scenario requires a crash and burn type of cross-examination similar to that employed where the "running naked" tactic is used.

-----  
8. After the passage of Proposition 115, the newest defense tactic is to instruct their expert not to prepare a written forensic report. Obviously this little trick enables the defense to avoid pre-trial discovery of the expert's opinion and its underlying basis as required by Penal Code § 1054.3. Thus, you may find yourself doing the critical analysis based upon your trial notes and the daily transcript after the direct examination has been completed. All is not lost, however, as the tactic can be exposed for what it is during cross-examination. See section VI,C, infra.

9. Use of "anti-shrink shrink" approved in *People v. Smithey* (1999) 20 Cal.4th 936.

In summary, whichever overall tactical approach you choose to employ, your cross-examination must be consistent with that approach or your credibility will be impaired.

#### **V. OTHER PREFATORY CONSIDERATIONS**

##### **A. In Limine Matters**

1. Having a daily transcript of the defense expert's testimony is extremely useful for the final preparation of cross-examination and for use in argument. Thus, request a daily from your court reporter.
2. Should existing law limit the scope of an expert's likely testimony, file a well researched in limine motion to apprise the court of applicable rules (see e.g., Penal Code §§ 28; 29).

## **B. Jury Voir Dire**

It has been my experience that a well conceived jury voir dire sets the stage for the subsequent cross-examination of mental state experts. Practically speaking, jury selection presents the earliest opportunity for the prosecutor to broach the subject of the problems inherent in forensic psychiatric and psychological testimony.

While remaining consistent with your overall tactical approach, a well crafted voir dire should focus the jurors upon each and every major area that you will be likely to exploit during cross-examination. Here, the key is to be creative and to walk as close to the edge of indoctrination and argument as you are permitted. The possibilities for "stage setting" voir dire questions are limited only by your own creativity. A few such potential questions are presented merely by way of example.

- Have you, your family or close friends ever been examined or treated by a psychiatrist or a psychologist?
- Have you, your family or close friends ever received counseling from anyone in the mental health field?
- Do you have any opinions about psychiatrists or psychologists testifying in a criminal trial? If so, what are your opinions?
- Do you believe that psychiatry is an exact science?
- Have you read or heard anything about any controversies over psychiatrists testifying in criminal courtrooms?
- Have you ever received an opinion from a doctor but wanted another, second opinion?
- Would you agree that a psychiatrist or psychologist, just like anyone else, can be wrong?
- Do you believe that a psychiatrist or psychologist can tell if someone is lying better than the average person like you?
- Wouldn't you agree that any opinion, even that of an expert, is only as good as the facts on which the opinion is based?
- If a psychiatrist's or psychologist's opinion is based upon incorrect or incomplete facts, do you think you would be able to decide whether the opinion is worthy of belief?
- If you were satisfied, after hearing all of the evidence, that a psychiatrist's or psychologist's opinion is simply wrong, would you have any difficulty rejecting that opinion?
- Do you think that a psychologist or psychiatrist is infallible just because of his or her title?
- Have you read or followed any criminal cases in which psychiatrists testified on behalf of criminal defendants?
- Have you heard anything about the psychiatric testimony in the Menendez Brothers' case? The Dan White case in San Francisco? If you have, did you form any opinions about psychiatric experts testifying in criminal cases?
- If an expert witness was only provided selected, incomplete or inaccurate information to base his opinion on, would you be able to evaluate such problems and decide whether the opinion makes any sense?
- Have you ever studied psychiatry or psychology either formally or informally?

- Do you have any thoughts as to whether or not somebody can fool a psychiatrist or psychologist?
- Have you ever known anybody who acted sick instead of facing their responsibilities?

Since the passage of Proposition 115, the ability of counsel to conduct voir dire has been dramatically curtailed. (See Code of Civil Procedure § 223.) However, in all mental state cases the prosecutor should request that the court permit voir dire by counsel. If the request is denied you must submit your written voir dire questions to the court and request that the judicial voir dire cover all of your inquiries. Remember, imaginative voir dire can provide the jury with the appropriate perspective to appreciate your planned cross-examination!

## **VI. CONSTRUCTING THE CROSS-EXAMINATION PLAN**

### **A. Overview**

The formulation of your cross-examination plan will require a tremendous amount of time and thought. Indeed, the level of success normally achieved in the cross-examination of mental state experts will be directly related to the amount of focused, pre-examination preparation effort expended. There are no short-cuts! Consequently, the development of an effective plan of attack represents the final step in your preparation, requiring the synthesis of your background reading, your mastery of the "facts", your organizational skills and your creative thinking. As with any cross-examination your plan should be organized and designed to accomplish specific objectives. In most cases, depending upon which tactical approach is chosen, your plan of attack should exploit the following areas of vulnerability:

1. The information available to the expert
2. The expert's qualifications or expertise
3. The expert's biases (professional, pecuniary, "philosophical")
4. The expert's credibility
5. The "science" itself - it is not scientific it is art, at best
6. The inability of any expert to reliably diagnose either present or past mental states
7. The impreciseness or inaccuracy of the expert's diagnosis, including the failure to consider damaging alternative diagnoses such as antisocial personality disorder or malingering
8. The lack of a sound basis to support the expert's diagnosis, i.e., flaws in the expert's information including the clinical interview, psychological and other testing, etc.
9. The inappropriateness of a mental state expert's attempts to address the ultimate factual/legal test question in issue
10. The lack of reliable factual data to support the expert's ultimate opinion as to the factual/legal test question in issue

## **B. Setting the Stage ... Obtaining all of the data the expert developed or possessed, i.e., establishing the base-line.**

Generally, the initial chore which should be completed in cross-examination is identifying and collecting every piece of information the expert witness received or generated in connection with the case. After all, such information comprises the baseline data upon which the expert witness bases his opinion. If, after obtaining all of this information, you discover that the expert did not gather or possess pertinent information, he will be vulnerable to attack. Similarly, if you discover that the defense "spoon-fed" the expert witness with selectively chosen information, the credibility and believability of the expert and his ultimate opinions will be severely impacted.

You must not assume that the defense has provided you with all of the appropriate information during the discovery process. Moreover, discovery conducted pursuant to Penal Code § 1054.3 is necessarily limited in scope. Unfortunately, you should also recognize that some defense attorneys can and do "sandbag" prosecutors by failing to provide full and open disclosure of relevant information. Thus, the objectives of an initial information gathering cross-examination are twofold: (1) to ensure that you obtain all of the information that was considered by the witness and (2) to establish a "base line" of data in front of the jury such that subsequent cross-examination can exploit critical gaps in the information that the expert utilized in forming his opinions.

## **C. Exposing The "No Written Report" Ploy**

As noted at footnote 8, on page 14 of this outline, more and more defense attorneys seek to avoid advance discovery requirements by not requesting a written forensic report from their intended expert witness. Clearly such a tactic places the prosecutor at a disadvantage in terms of his ability to conduct a fully prepared cross-examination.

This ploy should be exposed for what it is during initial cross examination. For example, the following line of questions may well prove fruitful to show the jury that the expert's failure to provide such a written report is nothing more than a sleazy trick which bears upon the expert's bias and lack of objectivity:

- Doctor, after completing all of your clinical interviews of the defendant, and after completing all of your mental testing of the defendant, you did not prepare a written report containing the findings and conclusions that you have testified to. Is that true?
- In fact, you did not even bother to provide a written report detailing the precise information upon which you based your in court opinions and conclusions, did you?
- Doctor, you are familiar with the "scientific method" are you not?
- Isn't the scientific method the cornerstone of objective scientific proofs?
- Doctor, wouldn't you agree that the primary principle underlying the scientific method is that a scientist publishes his findings and conclusions such that other independent and objective people can examine them to see if they are valid?
- You are also intimately familiar with the concept of peer review as it applies to your field, aren't you Doc?
- Peer review means that a professional like yourself provides written reports detailing his or her work in order for it to be evaluated by others in the field, is that true?



- In fact, virtually everything of any import developed in the field of psychiatry/psychology is written up and subjected to the peer review process, is that right?
- Isn't this an application of the scientific method?
- In your training Doctor, didn't your instructors teach you to write up and report your data, your findings and your conclusions such that other objective people could review them?
- Of course, you didn't make a written report in this case in contravention of both your training and the scientific method ... isn't that true?
- You have been appointed by the court on many occasions in the past as a forensic expert, haven't you?
- Doctor, on each and every occasion of such an appointment, weren't you required to provide a written report of your examination findings and of your conclusions to the court?
- You are also aware that your written reports were provided to the parties involved, aren't you?
- Doctor, haven't you also been retained as a prosecution expert in the past?
- Doctor, has arms prosecutor ever asked you not to provide a written report of your findings and conclusions?
- You are aware Doctor that, under California discovery law applicable to criminal cases, your written report would be turned over to the other side before trial, aren't you?
- In fact, you have often been thoroughly cross-examined in the past based upon your written reports, isn't that true? Yet, you did not do a written report in this case, did you?
- Did these defense attorneys tell you not to provide a written report?
- When you were asked by these defense attorneys not to write a report, did you inform them that the request was in contravention of both your training and the scientific method?
- Did you tell these lawyers that ethical and reputable psychiatrists/psychologists routinely report their findings by way of written reports?
- Were you afraid to report your work in writing because I would have had time to review it before I had to cross-examine you?
- Are you really saying that you went against your training and the scientific method only because the defense bought you with money?
- Doctor wouldn't you agree that a truly objective and unbiased psychiatrist / psychologist would not hesitate to write up their findings such that a proper independent review could occur?

**D. Challenging the qualifications, expertise and/or experience of the forensic expert (where appropriate).**

While it is relatively uncommon, prosecutors occasionally encounter situations where the purported forensic expert lacks the necessary education, training or experience to qualify as an expert witness pursuant to Evidence Code § 801. Alternatively, it

sometimes happens that an otherwise qualified expert is called to the stand for purposes of opining in areas other than his or her expertise.

Whatever the situation, it is incumbent upon the prosecution to demonstrate to the court, usually through voir dire of the proffered witness, that the required expertise is lacking. If the prosecutor is successful, the anticipated "expert" testimony may be barred or severely limited. In most cases, however, the proffered mental state witness will possess minimally sufficient education, training and experience to qualify as an expert for purposes of rendering forensic opinions. Consequently, attempts to establish that the witness lacks the basic foundational qualifications through voir dire will likely be fruitless. However, a prosecutor should consider conducting a limited voir dire as a tactic to place the witness' credentials and/or the witness' credibility in the proper perspective at the earliest opportunity, i.e., at the start of defendant's direct examination. Common areas to detect and exploit in limited voir dire include:

- Embellishment or exaggeration of the expert's credentials (Note - read the expert's c.v. critically and, if necessary, do some investigation into the expert's claimed background);
- Lack of Board Certification;
- Lack of specific experience/expertise upon the precise subject being discussed (See, Evidence Code § 801(b));
- Prior testimony wherein the expert's qualifications have been called into question;
- Past difficulties with professional licensing authorities.

#### **E. Establishing bias on the part of the forensic expert.**

Believe it or not most, if not all, so called forensic mental state experts are not objective and impartial "scientists" in the context of criminal litigation. Despite their education and training these forensic witnesses are usually nothing more than partisan advocates who will fiercely defend their position, no matter how unreasonable that position may be. Thus, experts' opinions are often driven more by their pro defense philosophy and/or who is paying them rather than the established facts in the case.

With this in mind, it is usually productive to devote a portion of your initial cross-examination to establishing potential bias on the part of the witness. Areas of inquiry should include the following topics if appropriate:

- Establish how the expert came into the case, i.e., whether he was appointed or retained.
- If a retained expert, establish that he was "hired" by the defense and not appointed as an independent expert by the court.
- If a retained expert, establish that the majority or all of his forensic work is done on behalf of criminal defendants rather than the prosecution.
- If a retained expert, establish that he expects to be paid for the work. (See Evidence Code § 722(b).)
- Find out the hourly rate at which the witness expects to be paid.
- Have the expert testify to the total number of hours he has spent on the case to date.
- Have the expert document the number of hours he spent in reviewing reports, reviewing records, interviewing the defendant, writing reports, conducting mental testing, consulting with the defense attorneys and preparing for testimony.

- Emphasize how little time the expert personally spent with the defendant pursuant to the "clinical" interview.
- If a retained expert, establish that a substantial portion of his yearly income is derived from being hired by criminal defendants as opposed to treating real patients.
- If a retained expert, establish that he never consulted with you (the prosecutor) or the cops as he did with the defense. For example, be sure to ask the expert whether he bothered to contact the prosecution to ensure that all of the necessary information had been provided.
- If the retained expert is an "out of town hitter", establish that fact. Make it clear to the jury that this particular witness is a "have opinion, will travel" expert.
- If an appointed expert, establish that he spent considerable time with the defense and little or no time with the prosecution.

Whether dealing with an appointed or retained expert, touch upon his "therapeutic bias." Remember, mental health professionals are trained to believe that a patient is truthfully seeking help for a problem and their role is to provide this help. This ingrained therapeutic bias usually operates such that the expert blindly accepts the defendant's description of the "problem", assumes it to be absolutely true, and fashions a diagnosis therefrom. (See Pollack, *Principles of Forensic Psychiatry for Psychiatric-Legal Opinion-Making* (Legal Medicine Annual 1971, Appleton, Century, Crofts).

## **F. Attacking the "Science" ... Putting Psychology / Psychiatry in the Courtroom on Trial.**

### 1. Controversy Regarding Ability to Reliably Diagnose Current Mental Illness

As suggested in the introduction section of this outline, there is an ever growing body of respectable authority to the effect that psychological/psychiatric diagnoses are really nothing more than socio/legal judgments rather than exact medical findings; that psychology and psychiatry are not sciences; and that psychological / psychiatric diagnoses are subjective, speculative and inherently unreliable (See, e.g., Szaz, *The Myth of Mental Illness*, Harper and Row, 1974; Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. Law Review 693 (1964).

With this in mind the well prepared prosecutor can utilize Evidence Code § 721 and the literature in the field to demonstrate the problems inherent in the expert's ability to provide a reliable and meaningful current diagnosis. An abbreviated example of a frontal approach to this topic is as follows:

- Doctor, would you agree with me that psychology/psychiatry is an art and not an exact science?
- What about your current diagnosis of this defendant's claimed problem ... wouldn't you agree with me that there is not a scientific test in existence to validate such an opinion?
- Isn't it true that there is currently a considerable controversy as to whether psychologists/psychiatrists can reliably and accurately diagnose mental illness?
- Doctor, in that regard, are you familiar with the reported studies wherein the inability of psychologists/psychiatrists to accurately and reliably diagnose claimed mental illness has been discussed?

- Have you read and considered the studies of Doctor David Rosenhan from Stanford University as published in an article entitled *On Being Sane in Insane Places?* (Note, to inquire further as to a reported study or treatise, the witness must have read and considered the matter referred to ... Evidence Code § 721; *People v. Kozel* (1982) 133 Cal.App.3d 507.)
- Didn't the Rosenhan studies establish a 100% diagnostic failure rate on the part of mental health experts?
- In fact, in the study eight sane people presented themselves to mental institutions claiming to hear noises and all of them were diagnosed as schizophrenics or manic depressives... isn't that correct?
- In other words, every one of these people were incorrectly diagnosed as suffering from a severe mental illness, isn't that true?
- Yet you still maintain that psychologists/psychiatrists can accurately and reliably diagnose current mental states?
- What about Dr. Bernard Diamond? Have you read and considered his writings in connection with his criticisms concerning the unreliability of psychiatric judgments?
- Dr. Diamond is an eminent authority in the field of forensic psychiatry, is he not?
- Doesn't Dr. Diamond maintain that a scrupulously honest psychiatric expert simply cannot testify with any credibility as to whether a defendant even has a mental disease?
- Haven't you read the writings of Dr. Diamond in his published article, *From Durham to Brawner: A Futile Journey?*
- Have you read and considered the writings of Professor Ralph Slovenko in connection with the lack of objectivity and imprecision involved in psychiatric diagnoses?
- You have read Professor Slovenko's criticisms as published in *Psychiatry and Law* haven't you? (Slovenko, *Psychiatry and Law*, Little, Brown and Co. 1973, p. 33.)
- Do you agree with Professor Slovenko that a psychiatric diagnosis is often subjective?
- Subjective means that something cannot be independently and scientifically documented, doesn't it?
- Do you also agree with Professor Slovenko's comments in that publication that "A diagnostic framework suitable for treatment or research may be quite inappropriate for forensic purposes. The mere fact that diagnostic categories exist does not mean that they represent objective facts, or that they must be used in the law, does it?"
- In fact, isn't Professor Slovenko's position presently shared by the American Psychiatric Association?
- Do you know what, if any, position the American Psychiatric Association has taken on this subject?
- Have you read and considered the writings of Professor Jay Ziskin concerning the inability of psychologists/psychiatrists to reliably and accurately diagnose a person's current mental state?

- Do you agree that a psychiatric diagnosis of a current mental claim is subjective and not subject to scientific principles?
- Are you familiar with the writings of Dr. Karl Menninger?
- Dr. Menninger's work is well recognized in the field, is it not?
- Do you know whether or not Dr. Menninger shared the views of Dr. Diamond, Professor Ziskin and others on the subject of the unreliability and subjectivity of present diagnoses?
- [Note: If your forensic expert is too illiterate or too lazy to have read and considered any of the propositional literature published on this subject, he will be fair game for a *People v. Bell* (1988) 49 Cal.3d 502 cross-examination for failing to consider logical information bearing upon his opinion. Additionally, you may wish to ask such an expert if he deliberately ignores professional writings which cast doubt upon the utility of psychologists/psychiatrists in the courtroom, etc.
- Doctor, can you name for me just one objective, scientific test which can be used to determine if your subjective diagnosis is valid and reliable?
- Well doctor, we do know that your diagnosis as to the claimed present mental problem is not a scientific deduction, don't we?
- Would you agree doctor, that another psychologist/psychiatrist could examine this defendant and come to a different diagnostic impression?

## 2. Controversy Regarding Ability to Reliably Diagnose Past Mental Claims ... The Problem of Retrospective Diagnosis.

In addition to the well documented problems associated with forensic psychologist/psychiatrist attempts to reliably and accurately diagnose a present mental condition, the problems are greatly magnified when an expert offers an opinion or diagnosis as to the defendant's state of mind at some point in the past. Virtually all of the respected forensic authorities are universal in pointing out that such retrospective diagnoses, aka "postdictions", are unreliable and subjective. As the pioneer of forensic psychiatry, Dr. Seymour Pollack has commented, it seems obvious that "an opinion about a past mental state generally holds a greater risk of error ... than does a diagnosis of a current mental state." (Pollack, *Principles of Forensic Psychiatry for Psychiatric-Legal Opinion Making*, Legal Medicine Annual, 1971) Similarly, the writings of another leading forensic scientist, Dr. Bernard Diamond, express the same misgivings about retrospective psychiatric diagnoses. (See, Diamond, *From Durham to Brawner: A Futile Journey*, supra.) Dr. Scher, in his writings, makes the same point:

"It is patently absurd to attempt to determine the state of mind of an individual at some time in the near or distant past..." "However qualified, neither the psychiatrist (nor perhaps anyone) can play antenostician in so complex a setting as (the forensic psychiatrist) is often called upon to do to, and in which he, unfortunately, too frequently acquiesces." (Scher, *Expertise and the Past Hoc Judgement of Insanity...*, 57 Northwestern Univ. Law Review, Vol. 4 (1962-1963), at p. 11.)

Armed with the foregoing authorities and a little common sense one can, at a minimum, make the testimonial life of a postdicting expert witness most uncomfortable. At a maximum, sharp cross-examination on this topic can force the expert to admit that

retrospective diagnoses are not only subjective, but about as reliable as divining tea leaves or reading pig entrails.

### **G. Attacking the Current/Retrospective Diagnosis and the Basis For the Diagnosis.**

In their courtroom testimony forensic mental state experts typically offer an opinion of diagnosis as to the defendant's claimed mental problem and thereafter attempt to describe how the mental impairment operated to cause the defendant to commit the crime or to demonstrate why the defendant should not be legally responsible. In arriving at the diagnostic impression and its behavioral implications, the expert witness usually relies upon numerous sources of information. In most cases the information base utilized by the expert consists of the following:

- Information derived from the defendant during the clinical interview.
- Information concerning the defendant's social, educational and medical background as derived from family, friends, school records and medical records.
- Information relating to the defendant's current crimes and his previous criminal background.
- Results of psychological testing performed upon the defendant.
- Results of medical testing performed upon the defendant relevant to possible organically caused mental impairment.
- Information from other examining forensic experts.
- Diagnostic criteria derived from treatises and textbooks, e.g., *Diagnostic and Statistical Manual of Mental Disorders, Vol. IV*; *Modern Textbook of Psychiatry*, etc.

The key to constructing an effective cross-examination in the area of the diagnostic impression and its underpinnings is to remember the axiom: An opinion is only as good as the facts upon which it is based. Thus, if your cross-examination can demonstrate that the expert had incomplete information, had inaccurate or unreliable information, ignored critical information or utilized skewed data, the expert's opinion can be rendered meaningless. Moreover, if your cross-examination can also establish that the forensic expert mischaracterizes information in order to better support the diagnostic formulation, or that the expert fails to consider other logically supported alternatives as an explanation for the defendant's behavior, the expert will never be worthy of belief. With the foregoing in mind, your cross-examination should focus upon the diagnosis itself and then upon those matters which the expert did or did not consider in formulating his opinion.

#### **1. Attacking the diagnosis itself**

- a. Where appropriate, establish that the diagnosis fails to meet diagnostic criteria established within the field. In their desire to find a mental illness explanation for the defendant's behavior, forensic experts are often less than scrupulous in adhering to the rules and criteria governing diagnosis.

These rules and criteria are commonly found in the literature, i.e., the *DSM IV*, the *Comprehensive Textbook of Psychiatry*, etc. If the established criteria for the expert's diagnostic impression are not present, be sure to point this out.

- b. Establish that no scientific studies exist to validate the testifying expert's diagnostic impression. Get the expert to agree that the diagnosis is not only subjective but subject to empirical validation only.
- c. Establish that the expert failed to consider alternative diagnoses, i.e., antisocial personality disorder, malingering, etc. As intimated above, most forensic experts automatically lean toward wanting to find some mental infirmity to explain or mitigate the defendant's behavior. Often this predilection to find a severe mental problem blinds the forensic expert from considering the obvious- that the defendant is just a mean and evil person (a psychopath) or that the defendant is faking it (a malingerer).

[Note: Pure antisocial behavior is not necessarily a mental illness for purposes of California insanity (See *People v. Fields* (1983) 35 Cal.3d 329; *DSM IV*, pp. 342-346; Penal Code § 25.5).]

- d. Establish that there is no scientifically observable linkage between the defendant's diagnosed mental problems and his behavior.

A particularly troublesome area insofar as psychological / psychiatric diagnoses are concerned is causation. At trial, the legal tests raise the questions of whether the defendant's behavior is/was caused by mental disease. Unfortunately, many forensic experts attempt to address this causation link. The truth of the matter is that the forensic experts cannot relate the defendant's diagnosed mental illness to any particular behavior with any degree of reliability.

Thus, during cross-examination of the diagnosis and its behavioral implications you may wish to point out that psychiatrists, as a group, have been outspoken about their inability to establish, with any degree of reliability, a causal relationship between mental illness and violent behavior. (See Guttmacher, *The Role of Psychiatry in the Law*, Chas, C. Thomas, 1968, pp. 49-77. Here it may be particularly appropriate to have the forensic expert admit that psychological/psychiatric diagnoses have little or no bearing upon moral or social responsibility. Use the caveat section in *DSM IV* at p. XXIX or the American Psychiatric Association's position statement to challenge attempts by the forensic expert to link a mental illness diagnosis to specific behavior and/or legal or moral responsibility.

## 2. Attacking the basis for the diagnosis

- a. Attack the data derived during the clinical interview-show the defendant to be an unreliable and unbelievable information source. Be prepared to demonstrate the paucity of information obtained during the clinical interview. In my experience I have found forensic psychologists/psychiatrists to be some of the most gullible and naive people in the world. They literally accept as true every lie and exaggeration which flows from the defendant's lips during the clinical interview process. Whether a result of their "therapeutic bias," or a result of by whom they are being paid, forensic experts usually believe the defendant is telling them the gospel truth, notwithstanding his history of lying or his patent motive to "look bad" in the face of pending criminal charges. Consequently, you likely will be able to establish on cross-examination that the expert's reliance upon the defendant's statements, as a basis for diagnosis, is sadly misplaced. To accomplish this, consider the approach set forth below.

- Point out every lie that the defendant has ever made in his life ... to cops, to friends, to anyone (use rationale of *People v. Hendricks* (1988) 44 Cal.3d 635; *People v. Caro* (1988) 5 Ca1.4th 877).
- Demonstrate that the defendant is a selective historian, i.e., that he omits, glosses over, or "can't remember" all those damning facts which exist in police reports or other information sources. [Note: If the expert did not possess or consider all the various reports and statements reflecting the defendant's lies, you are permitted to confront the witness with such data. See, *People v. Bell, supra*; *People v. Montiel, supra*.
- Force the expert to admit that he or she didn't have this information and that he didn't seek it from the defense attorney! Establish that the first time that the defendant ever expressed mental problems (heard voices, etc.) was after he was arrested and charged. Point out that the defendant has a perfect motive to lie about his problems or exaggerate his problems ... after all, he's facing heavy charges and does not want to be convicted.
- If appropriate, establish that the defendant is a malingerer, i.e., he exaggerates his symptoms for personal gain.
- Pay particular attention to the logical questions that the forensic expert did not ask during the clinical interview of the defendant. They never ask the defendant the hard questions, i.e., Did you know it was wrong when you shot the guy? If you didn't think it was wrong why did you run after you shot? Why did you throw the gun away? Confront the expert with his failure to ask the critical questions of the defendant!
- Establish that the expert simply accepted the defendant's version and either did not have, overlooked or intentionally ignored all of the other existing evidence in the case which demonstrates the defendant's version to be false or exaggerated.
- Have the expert admit that he did not conduct an independent investigation either to verify the truthfulness of the defendant's statements or to ascertain if the defendant has a history of lying. The experts never do this. They simply rely upon what the defendant said during the interview and upon the selected materials provided-by the defendant's attorney.
- Pay particular attention to discrepancies between what the forensic expert testifies to on direct exam and what the defendant actually said or did not say during the clinical interview. Often you will find that the testifying expert "escalates" what the defendant actually related or "glosses over" significantly damaging admissions.

b. Exploit holes in the background information relied upon by the forensic expert. Generally the background information provided to the expert witness by the defendant's attorney is incomplete and/or selectively chosen. If the materials are voluminous you can usually count on the expert not to have reviewed the materials carefully. Consequently, critical data is often omitted, overlooked or ignored. Finally, expert witnesses often escalate or exaggerate details concerning the defendant's background in order to better support their diagnosis. Thus the objective of the cross-examiner in this area is to establish that the witness lacked complete and accurate background information which would have a logical relationship to the diagnosis and/or its behavioral implications.



- Establish that the expert witness was "spoon-fed" selective bits of background information by the other side. Confront the expert with all of the damaging background information that he never received from the defendant's attorney ... even though you had discovered the information to the defense.
- Pay particular attention to discrepancies between what the forensic expert testifies to on direct examination by way of relevant background and what the actual reports indicated. Point out erroneous generalizations or factual "escalations" on part of the witness.

c. Utilize the facts surrounding the defendant's current crimes and/or his previous criminal history to dispel the idea that the defendant's mental illness was/is causally related to his behavior. In guilt phase and sanity phase litigation the defendant's past state of mind is best evidenced by his words and actions immediately before, at and after the commission of the crime. Usually, the crime-related facts and the defendant's prior criminal history clearly establish knowing, thinking and purposeful conduct on the part of the defendant which is utterly inconsistent with the forensic expert's opinion of "madness" or severe impairment. Thus, it is **ABSOLUTELY CRITICAL** that you devote a significant portion of your cross-examination to the "real facts" and to the logical inferences that can be drawn therefrom. In doing so hammer the expert by focusing upon the hard evidence which fairly suggests or proves that the defendant had sufficient mental wherewithal to engage in purposeful, goal-directed thinking activity at the time in question. Relevant "hard evidence" which can be effectively employed may include:

- Evidence of motive
- Evidence of pre-existing animus
- Evidence of pre-offense preparation including acquiring weapons, etc.
- Evidence of ability to make appropriate selection of victim
- Evidence of ability to carry out the crime
- Evidence of pre-commission ability to conceal criminal objective from others
- Evidence of post-commission cover-up, flight or actions indicating a consciousness of guilt
- Evidence of prior similar criminal acts by the defendant

d. Putting the psychological tests into perspective

While myriad psychological tests exist which purportedly assess such areas as intelligence, ability, personality and psychopathology only one or two important points need to be kept in mind when constructing your cross-examination in this area. First, there are no psychological tests that are designed to measure or assess legal or moral issues. For example, no psychological test has been designed or validated to determine if a person is capable of knowing right from wrong or to determine if a person is capable of knowing the nature and quality of certain acts. Second, there is no body of validated scientific knowledge to reliably extrapolate test performance to particular individual's past or future behavior. (See, Ziskin, *Coping With Psychiatric and Psychological Testimony*, supra, pp. 200-250.)

With these general principles in mind your cross-examination of psychological testing should exploit the following areas of vulnerability:

- The adequacy of test standardization and norm groups

- The lack of generalizability from one population to another
- Lack of test reliability
- Lack of test validity
- Failure to follow test protocols governing administration and interpretation
- Problems of examiner influence
- Potential of "malingered" test results
- Environmental or situational influences upon tests
- Lack of any reliable correlation between test performance and specific past behavior.

When cross-examining in the area of the psychological tests, and the projective tests in particular, you may find it particularly useful to have the actual test/test questions available to show to the jury. For example, when jurors actually get to see the Rorschach cards, the defendant's renderings in the draw-a-person test and hear the goofy questions comprising the MMPI, the "tests" lose their mystique. In fact most jurors I have spoken to, after being exposed to the actual tests, think that they are a joke.

e. Coping with neuropsychological and other medical tests relevant to claims of organic brain dysfunction

One of the latest trends in mental state litigation is to attempt to establish that the defendant's mental problems are related to a real, identifiable organic defect in the brain. In support of a claim of "organicity", the defendant typically will offer into evidence the results of neuropsychological tests such as the Luria-Nebraska or the Halstead-Reitan test batteries. Alternatively the defense may utilize a neurologist to extol the defendant's test findings resulting from the latest type of brain-mapping technology such as the BEAM EEG, PET SCAN or SPECT SCAN. Here, as with the conventional psychological tests, the cross-examiner must clearly and effectively point out that there is not one scintilla of reliable scientific authority to link a particular neuropsychological test result or a particular brain mapping test result to the defendant's behavior, his behavior controls or to his ability to exercise his free will. To date, the relevant scientific literature on the subject of brain tomography, i.e., brain mapping, reflects that such technology has limited diagnostic application in the forensic criminal arena. For example, the PET scan (Position Emission Tomography) is only accepted as a clinical tool for diagnosing only a few widely studied disease entities such as seizure disorders, brain tumors, Alzheimer's disease, and dementia. Accordingly, the PET scan is not generally accepted or approved for evaluating head trauma in general or to predict behavior. *People v. Protsman* (2001) 88 Cal. App. 4th 509; see also, Society of Nuclear Medicine Brain Imaging Council, "Ethical Clinical Practice of Functional Brain Imaging," Vol. 37; 1256-59, July, 1996; Mayberg, Helen, "Functional Brain Scans As Evidence In Criminal Court: An Argument For Caution," Journal of Nuclear Medicine, Vol. 33, No. 6, June, 1992.)

f. Attacking the forensic expert's diagnosis with the opinions of other experts.

It is common in most mental state cases for multiple forensic experts to have examined the defendant at one time or another after arrest. Usually the testifying expert witness has been furnished with reports of these other examining psychologists / psychiatrists. To the extent this has occurred, and to the extent that the expert witness concedes that he read and considered such reports, you may be able to utilize this effectively in cross-examination.

## **H. Attacking The Forensic Expert's Opinion As To The Ultimate Issue**

The ultimate judgment with respect to criminal responsibility (whether the defendant should be held responsible and, if so, at what level, given his claim of mental impairment) is a moral, ethical and legal judgment, not a medical one. It is a judgment to be made by the jury, after consideration of all of the circumstances, for purposes of attributing moral blame to the defendant. In that regard the jury's determination should reflect the jury's sense of the community's standards of blameworthiness.

In today's criminal and quasi-criminal proceedings few, if any, forensic mental state experts have any reservations whatsoever about invading the jury's province and rendering an opinion on the ultimate non-medical issue of blameworthiness or moral responsibility. It is this quantum leap from a medical construct to a legal and moral construct which makes the expert and his ultimate opinion so vulnerable to cross examination. With this in mind, you should consider bringing three main points home to the jury during cross-examination in this subject area.

1. Establish that the ultimate issue being addressed by the forensic expert is not a medical issue. (See illustrative questions at Section II-B, above.)

If the expert is permitted to opine in terms of legal constructs such as premeditation, malice aforethought or deliberation, make the expert admit that these are not medical terms. Make the expert admit that there are no classes in medical school on malice aforethought, etc. Make the expert admit that there is no psychological or psychiatric test in the world that can reliably assess these legal and moral concepts. Using CALJIC jury instructions, give the expert a mini-law examination to demonstrate that he does not even understand the proper definitions of these terms, e.g., What is your understanding of the meaning of express malice? Is hatred or ill will required for malice? What is the difference between meaningful deliberation and plain deliberation? Etc.

If the expert opines as to the ultimate issue of sanity, the same approach is applicable, for example:

- Have the expert admit that sanity is not a medical concept.
- Have the expert admit that sanity is a legal and moral concept.
- Have the expert admit that he is not an expert in determining moral responsibility.
- Have the expert admit that he is not an expert in determining legal responsibility ... he's not a judge or a juror.
- Have the expert admit that there is no medical training that exists on the subject of insanity as defined by the California Penal Code.
- Have the expert admit that there is no scientific test in the world that can determine sanity.
- Ask the expert if there is a medical definition of right or wrong.
- Have the expert admit that there is no recognized medical test that exists to determine if the defendant knew right from wrong at the time of the crime.
- Have the expert admit that the term "nature and quality of the act" is not a medical concept.

Quiz the expert on his definition of the term "nature and quality of the act." If the expert is addressing present mental competence a similar approach may be utilized, especially in the area of what is really required by a defendant to assist his attorney in conducting a defense in a rational manner.

2. Along the same lines as the foregoing, establish that the expert's willingness to address a non-medical construct contravenes the caveats enunciated in the ASM IV and the stated position of the American Psychiatric Association.

3. Most importantly, "gutter shoot" the forensic expert's ultimate opinion on the legal test question with the "real facts". (See, e.g., Section VI, G-2, above.) In guilt phase mental state litigation and sanity phase litigation the critical facts which necessarily guide jurors in determining legal and moral responsibility are those circumstances surrounding the commission of the crime. Consequently it is again **ABSOLUTELY CRITICAL** that you be creative and utilize the evidence in your case to demonstrate that, whether or not the defendant was mentally ill, he had sufficient mental faculties to be held legally and morally responsible.

Carefully scrutinize every proven fact and every proven inference concerning the defendant's actions and words just before, during and after the crime. If at all possible use these facts and inferences to demonstrate that the defendant's crimes were really driven by well understood base motivations, i.e., anger, greed, lust, etc. On the other hand, if the impetus for defendant's crime was truly connected to his mental illness, utilize the underlying facts to demonstrate that sufficient residual mental capabilities existed such that the defendant should be held responsible under the applicable legal standard. Accordingly, confront the expert with facts that can be reasonably explained only as evidence of the defendant's ability to:

- plan
- reason
- consider choices
- consider alternatives
- follow other rules
- exercise self-control
- engage in goal-directed behavior
- manifest an awareness of consequences (to him and to others)
- follow a plan
- know that his actions were wrong

Remember, deliberate and purposeful behavior designed to accomplish a psychotic (delusional) objective will normally support a finding of maximum criminal responsibility, if the defendant knew what he was doing, that it was wrong and criminal and that he had enough capacity for self-control such that he can justly be held fully responsible.

## VII. CONCLUSION

Hopefully the matters discussed in this outline will serve to provide you with some practical hints which may be of use in the cross-examination of psychologists and psychiatrists. It is fully recognized that everyone has his own approach to trying any kind of a case. Thus, what works for me will not necessarily work for you. At a minimum, however, this outline and the attached appendices offer a limited view of one approach. Good luck!

## **VIII. PHYSICAL, SEXUAL, AND EMOTIONAL ABUSE AND NEGLECT**

### **SCOPE of the PROBLEM**

According to the Centers for Disease Control and Prevention, one in ten adults who live at home and are over the age of sixty are abused, neglected, and/or exploited<sup>1</sup>.

Elder abuse often goes unreported for many reasons including:

- Fears about retaliation (if perpetrator learns of report)
- Fears about public exposure and outside intervention
- Concern that the report will not be believed
- Belief that the victim is somehow responsible
- Fear of loss of caregiver
- Fear of being alone
- Fear of being placed in a nursing home
- Concerns about loss of privacy and family relationships

### **Forensic Investigation of Abuse, Neglect and Death in the Elderly**

Elder maltreatment often has subtle physical findings as the only indication of inflicted trauma or neglect. Healthcare practitioners and forensic investigators are skillful in the identification of elder abuse. With growing emphasis on the needs of the geriatric population, health concerns, including suspected maltreatment, are being addressed more readily in clinical medicine. A thorough physical examination – with a complete review of the medical history, including laboratory results – optimize the investigation and help uncover subtleties of abuse and neglect in this population. A similar exhaustive investigatory approach applies to deaths surrounded by questionable circumstances or characterized by suspicious physical findings. The autopsy is the final chance to determine whether abuse or neglect caused or contributed to the death.

The National Aging Resource Center on Elder Abuse (NARCEA) classifies elder maltreatment into the following five broad categories: physical, psychological (emotional), financial, sexual and neglect. Two less defined categories, self-abuse (self-neglect) and miscellaneous, are also included. The term “elder maltreatment” encompasses both elder abuse and neglect. Frequently, physical and non-physical markers co-exist in the maltreated elder. Physical abuse consists of violent acts intended to cause pain or injury. Physical abuse can result from sources such as blunt force trauma, sharp force injuries, and cutaneous markings resulting from inappropriate

---

<sup>1</sup> <http://www.cdc.gov/features/elderabuse/>

or excessive employment of various kinds of restraints, human bite marks and signs of malnourishment. Evaluation of physical injuries necessitates consideration of the type, amount and extent, pattern, location, and potential pathophysiological consequences. Sexual abuse is reported in less than 1% of all elder abuse cases. Contact with the genitalia, mouth, or anus are considered sexual molestation. Kissing, fondling, or improper handling of the elder during grooming are included in this definition.

Neglect results in the inability of the elder to properly thrive in his/her surroundings and includes intentional (active) or unintentional (passive) acts. Intentional neglect is the willful failure to fulfill legal or contractual responsibilities in order to punish or harm the elder. Examples of intentional neglect include withholding items of necessity, such as food, medication, or bathroom privileges. Unintentional neglect is often attributed to the physical or psychological impairment of the caregiver, who is declared incapable of providing proper care to the elder. Passive neglect may also result from the caretaker's ignorance or lack of skills. Nonspecific signs and symptoms of neglect (including self-neglect) include poor personal hygiene, dehydration and malnutrition, hazardous, unsanitary or unclean living conditions, lack of specific medical aids that help with activities of daily living, inadequate housing, or homelessness. Self-neglect refers to the elder who often lives alone and is not able to provide for his or her mental or physical health, thereby threatening overall safety or well-being.

Nonphysical abuse includes psychological humiliation, financial fraud, and violation of the elder's rights. The psychological abuser intends to cause emotional distress to the elder, which often accompanies physical abuse. Nonverbal threats or verbal insults are frequent components of psychological abuse.

Subtle signs of elder maltreatment are often difficult to diagnose because of the coexistence of chronic or debilitating diseases. Ten percent of elders suffer from various types of degenerative or debilitating diseases. Approximately 80% of all elderly persons 65 years of age or older in the United States have at least one chronic condition and about 50% have at least two. Sequelae of urinary or fecal incontinence, delirium and dementia-related behavioral disorders may be over-interpreted as signs of abuse.

The examiner's high index of suspicion is paramount to the

differential diagnosis of elder maltreatment because it occurs in all races and spans all socioeconomic groups. Inconsistency between the appearance of physical trauma and the explanation(s) offered for the creation of the injuries is a strong indicator of elder abuse. Hallmark presentations highly suspicious for elder maltreatment include delays between injury and medical intervention, exemplified by healing fractures and cutaneous lacerations which should have been treated prior to the examination identifying these injuries. Although physical signs do not always yield conclusive diagnosis of abuse, the following examples heighten the index of suspicion: bilateral or parallel injuries which suggest control marks of forceful restraining; burns or scalds on the soles, palms or buttocks sustained during hot water baths; and poorly treated, extensive, deep or purulent decubitus ulcers. Historical, psychological and laboratory factors aiding in the diagnosis of elder maltreatment include frequent doctor visits for chronic debilitating diseases without proper care; injuries or illnesses that are not explained adequately by the patient or the caretaker; and signs and symptoms attributable to lack of or misadministration of medicines; and levels of drugs – whether sub-therapeutic or toxic – that are inconsistent with the reported care provided.

### **IDENTIFYING the PERPETRATOR**

Those who are perpetrators of elder abuse fall into a number of categories. These include spouse, adult child, and other family members who serve as caregivers, paid caregivers, medical facility personnel and residents; those serving in a fiduciary relationship such as guardians, those in a position of trust such as those who “help” by paying bills, and strangers.

### **DOMESTIC ELDER ABUSE**

While neglect may often be a problem in nursing homes and long-term care facilities, domestic elder abuse appears to be perpetuated almost entirely by family members. According to the National Center on Elder Abuse, as many as 90% of the perpetrators of domestic elder abuse are family members. Though researchers disagree about which family members present the greatest proclivity to harm their elders, one study found that two-thirds of the offenders were adult children or spouses. (Administration on Aging, 1998. National Elder Abuse Incident Study). The bottom line is that elder abuse is often a family issue.

### **What is Domestic Violence/Domestic Elder Abuse?**

Domestic violence is a pattern of assaultive and coercive behavior in which an individual uses violence against an intimate to achieve power and control. It can take a number

of forms including isolation, financial control, intimidation and threats, physical abuse, sexual abuse, verbal abuse, emotional abuse and even neglect. Although studies have found that over one million women over the age of 64 are victims of domestic violence each year, older battered women have traditionally been a population that is underserved by the criminal justice community as well as domestic violence and aging service providers.

Special patterns of domestic violence among the elderly have been identified. In “*spouse abuse grown old*,” the victims have been abused for most of their lives; “*late onset*” abuse begins late in life by partners who had not previously been abusive; “*new relationship*” abuse occurs in relationships beginning later in life where the abuser is typically the victim’s second or third spouse or intimate partner; and battering by adult children may occur, regardless of whether the children act as caregivers.

Domestic violence is not self-neglect, stranger abuse, abuse by a paid caregiver, or abuse by a batterer whose behavior is solely caused by a medical or mental health condition or by a reaction to medication. Domestic violence is not caused by caregiver stress. However, because caregiver stress and domestic violence can look similar, it is important that professionals working with the elder population be well-trained and capable of distinguishing between caregiver stress and on-going domestic violence.

## **Dynamics**

### ***Power and Control***

The primary cause of domestic elder abuse is not caregiver stress, but domestic violence. Domestic violence is about power and control which is the abuser’s primary motivation and reward. Abusers use physical and sexual violence, emotional degradation, social isolation, economic deprivation and threats of abuse to create fear in the victim and cause the victim to yield to the abuser’s demands. Abusers believe they are entitled to use any means necessary to get what they want.

### ***Barriers to Leaving***

All victims of domestic violence face numerous barriers to leaving the abusive situation. These barriers can include a fear of reprisal, a desire to keep the family together, a lack of financial resources, religious beliefs, isolation from support systems, and love for the abuser. Older victims of domestic violence face additional barriers such as fear of alienating or losing a caregiver, adult children who discourage them, fear of being placed in a nursing home, loss of health insurance, internalized generational values and health issues.



**Indicators** (see specific sections on physical, sexual, and psychological/emotional abuse and neglect below).

### **Legal Considerations and Applicable Law**

KRS Chapter 209A

#### **Purpose**

- To identify victims of domestic violence and abuse and to provide protective or therapeutic services for those who choose to accept them.
- A victim of domestic violence who has a mental or physical disability or who cannot carry out the activities of daily living or protect himself or herself without the assistance of others may be served under the provisions of KRS Chapter 209A.

#### **Definitions [KRS 209A.020]**

*“Dating violence and abuse”* means physical injury, serious physical injury, stalking, sexual assault, strangulation, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, strangulation, or assault occurring between persons who are or have been in a dating relationship. (As defined in KRS 456.010.)

*“Domestic violence and abuse”* means physical injury, serious physical injury, stalking, sexual abuse, strangulation, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, strangulation, or assault between family members or members of an unmarried couple. (As defined in KRS 403.720).

*“Victim”* means an individual who is or has been abused by a spouse or former spouse or an intimate partner who meets the definition of a member of an unmarried couple as defined in KRS 403.720, or a member of a dating relationship as defined in KRS 456.010.

#### **Who must report? [KRS 209A.100]**

KRS 209A.100 requires, upon the request of a victim, a professional to report an act of domestic violence and abuse or dating violence and abuse to a law enforcement officer.

#### **Penalty for Failure to Report [KRS 209A.030]**

A professional knowingly or wantonly violating the provisions of this chapter shall be guilty of a Class B misdemeanor and penalized in accordance with KRS 532.090. Each violation shall constitute a separate offense.

#### **Privilege [KRS 209A.060]**

Neither the psychotherapist-patient privilege nor the husband-

wife privilege shall be a ground for excluding evidence regarding the domestic violence and abuse or dating violence and abuse or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.

**Immunity from Liability** [KRS 209A.050]

Anyone acting upon reasonable cause in complying with the provisions of this chapter shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such compliance.

**ADULT ABUSE, NEGLECT, AND EXPLOITATION**  
KRS Chapter 209

**Purpose** [KRS 209.010]

- To provide for the protection of adults who may be suffering from abuse, neglect, or exploitation
- To provide that any person who becomes aware of such cases shall report them to a representative of the cabinet
- To prevent abuse, neglect, or exploitation and
- To promote coordination and efficiency among agencies and entities that have a responsibility to respond to the abuse, neglect, or exploitation of adults.

**Definitions** [KRS 209.020]

*"Adult"* means a person eighteen (18) years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services;

*"Abuse"* means the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury;

*"Caretaker"* means an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily or by contract, employment, legal duty, or agreement;

*"Exploitation"* means obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources;

*"Neglect"* means a situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult;

### **Legal Considerations and Applicable Law**

#### **Who Must Report [KRS 209.030]**

Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.

#### **Where and How is the Report Made? [KRS 209.030]**

An oral or written report shall be made immediately to the Cabinet for Health and Family Services (CHFS) upon knowledge of suspected abuse, neglect, or exploitation of an adult. The report may be made through use of the Adult/Child Reporting Hotline 1-877-597-2331 or by reporting directly to a local CHFS, Department for Community Based Services (DCBS) office.

#### **Details Required (if known) [KRS 209.030(4)]**

- The name and address of the adult or any other person responsible for his care.
- The age of the adult.
- The nature and extent of the abuse, or neglect, including any evidence of previous abuse or neglect.
- The identity of the perpetrator, if known.
- The identity of the complainant, if possible.
- Any other information that the person believes might be helpful in establishing the cause of abuse or neglect.

#### **Responsibilities of the Cabinet [KRS 209.030(5)]**

Upon receipt of a report the cabinet shall:

- Notify within twenty-four (24) hours of the receipt of the report the appropriate law enforcement agency;
- Notify each appropriate authorized agency;
- Initiate an investigation of the complaint; and
- Make a written report of the initial findings together with a recommendation for further action, if indicated.

**Confidentiality of Information** [KRS 209.140]

All information obtained by the department staff or its delegated representative, as a result of an investigation made pursuant to this chapter, shall not be divulged to anyone except: (1) Persons suspected of abuse or neglect or exploitation, provided that in such cases names of informants may be withheld, unless ordered by the court; (2) Persons within the department or cabinet with a legitimate interest or responsibility related to the case; (3) Other medical, psychological, or social service agencies, or law enforcement agencies that have a legitimate interest in the case; (4) Cases where a court orders release of such information; and (5) The alleged abused or neglected or exploited person.

**Immunity from Liability** [KRS 209.050]

Anyone acting upon reasonable cause in the making of any report or investigation or participating in the filing of a petition to obtain injunctive relief or emergency protective services for an adult pursuant to this chapter, including representatives of the cabinet in the reasonable performance of their duties in good faith, and within the scope of their authority, shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report or investigation and such immunity shall apply to those who render protective services in good faith pursuant either to the consent of the adult or to court order.

**Privilege** [KRS 209.060]

Neither the psychiatrist-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding the abuse, neglect, or exploitation of an adult or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.

**Emergency Protective Services** [KRS 209.100]

If an adult lacks the capacity to consent to receive protective services in an emergency, these services may be ordered by a court on an emergency basis... provided that: (a) The adult is in a state of abuse or neglect and an emergency exists; (b) The adult is in need of protective services; (c) The adult lacks the capacity to consent and refuses to consent to such services; and (d) No person authorized by law or court order to give consent for the adult is available to consent to emergency protective services or such person refuses to give consent.

**Penalties for Failure to Report** [KRS 209.990(1)]

Anyone knowingly or wantonly violating the provisions of

KRS 209.030(2) shall be guilty of a Class B misdemeanor as designated in KRS 532.090. Each violation shall constitute a separate offense.

**Penalties [KRS 209.990]**

- Any person who knowingly abuses or neglects an adult is guilty of a Class C felony.
- Any person who wantonly abuses or neglects an adult is guilty of a Class D felony.
- Any person who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor.
- Any person who knowingly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class C felony.
- Any person who wantonly or recklessly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class D felony.
- Any person who knowingly, wantonly, or recklessly exploits an adult, resulting in a total loss to the adult of three hundred dollars (\$300) or less in financial or other resources, or both, is guilty of a Class A misdemeanor

**PHYSICAL ABUSE**

*Definition* (working not legal)

Physical abuse is the use of physical force that may result in bodily injury, physical pain or impairment. Physical abuse may include, but is not limited to, acts such as hitting, beating, pushing, shoving, slapping, kicking, pinching, and burning. Physical abuse can also include inappropriate use of drugs or physical restraints, force-feeding, and physical punishment of any kind.

The following is a list of indicators of abuse, which is meant to be illustrative and not exhaustive.

***Indicators of Abuse***

- Victim
  - Physical
    - Bruises, welts, lacerations, broken bones, burns. Hemorrhaging below the scalp line.
    - Signs of confinement such as rope burns and bindings. Withholding of medications or over medicating. Untreated injuries.
    - Physician or hospital hopping. Repeated injuries or accidents.
    - Frequent need for emergency hospital care.

- Intense fear reaction to people in general or certain individuals in particular.
- Nightmares, sleep disturbances. Phobic behaviors.
- Mistrust of others.
- Extreme reactions to being cared for or bathed. Self-destructive or suicidal.
- Regressive or aggressive behaviors.
- Evidence of overall poor health (e.g. unkempt, malnourished, dehydrated).
- Behavioral
  - Easily frightened/fearful. Exhibiting denial. Agitated, trembling. Hesitation to talk openly. Implausible stories.
  - Confusion or disorientation.
  - Contradictory statements not due to mental dysfunction.
- Suspect
  - Concealment of victim's injury.
  - Inconsistent explanations for victim's injuries. Unexplained injuries or injuries not mentioned by suspect, if suspect provides history.
  - Delay in seeking treatment/care for victim without an appropriate reason.
  - Projects cause of injury onto the victim.
  - Speaks for victim when victim can speak for himself. Doesn't want to leave the victim alone.
  - Shows detachment or lack of sensitivity for victim. Verbal threats are reported.
  - Irrational thought processes. Dependent on victim for income. Often a relative.
  - Often a drug or alcohol abuser. May have been an abused child.

## **KRS Chapter 508 Assault and Related Offenses**

### **Assault in the first degree [KRS 508.010]**

A person is guilty of assault in the first degree when: He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person. Assault in the first degree is a Class B felony.

### **Assault in the second degree [KRS 508.020]**

A person is guilty of assault in the second degree when: He intentionally causes serious physical injury to another

person; or He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument. Assault in the second degree is a Class C felony.

**Assault in the fourth degree [KRS 508.030]**

A person is guilty of assault in the fourth degree when: He intentionally or wantonly causes physical injury to another person; or with recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument. Assault in the fourth degree is a Class A misdemeanor.

**Assault of a family member or member of an unmarried couple; enhancement of penalty [KRS 508.032]**

If a person commits a third or subsequent offense of assault in the fourth degree under KRS 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in KRS 403.720, then the person may be convicted of a Class D felony. If the Commonwealth desires to utilize the provisions of this section, the Commonwealth shall indict the defendant and the case shall be tried in the Circuit Court as a felony case. The jury, or judge if the trial is without a jury, may decline to assess a felony penalty in a case under this section and may convict the defendant of a misdemeanor. The victim in the second or subsequent offense is not required to be the same person who was assaulted in the prior offenses in order for the provisions of this section to apply. In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered by a court of competent jurisdiction.

**Assault under extreme emotional disturbance [KRS 508.040]**

In any prosecution under KRS 508.010, 508.020 or 509.030 in which intentionally causing physical injury or serious physical injury is an element of the offense, the defendant may establish in mitigation that he acted under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

An assault under extreme emotional disturbance is: A Class D felony when it would constitute an assault in the first degree or an assault in the second degree if not committed under the influence of an extreme emotional disturbance; or a Class B

misdemeanor when it would constitute an assault in the fourth degree if not committed under the influence of an extreme emotional disturbance.

**Menacing [KRS 508.050]**

A person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury. Menacing is a Class B misdemeanor.

**Wanton endangerment in the first degree [KRS 508.060]**

A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person. Wanton endangerment in the first degree is a Class D felony.

**Wanton endangerment in the second degree [KRS 508.070]**

A person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct which creates a substantial danger of physical injury to another person. Wanton endangerment in the second degree is a Class A misdemeanor.

**Criminal Abuse in the first degree [KRS 508.100]**

A person is guilty of criminal abuse in the first degree when he intentionally abuses another person or permits another person of whom he has actual custody to be abused and thereby: causes serious physical injury; or places him in a situation that may cause him serious physical injury; or causes torture, cruel confinement or cruel punishment to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless. Criminal abuse in the first degree is a Class C felony.

**Criminal abuse in the second degree [KRS 508.110]**

A person is guilty of criminal abuse in the second degree when he wantonly abuses another person or permits another person of whom he has actual custody to be abused and thereby: causes serious physical injury; or places him in a situation that may cause him serious physical injury; or causes torture, cruel confinement or cruel punishment to a persons who is twelve (12) years of age or less, or who is physically helpless or mentally helpless. Criminal abuse in the second degree is a Class D felony.

**Criminal abuse in the third degree [KRS 508.120]**

A person is guilty of criminal abuse in the third degree when he recklessly abuses another person or permits another person



of whom he has actual custody to be abused and thereby: causes serious physical injury; or places him in a situation that may cause him serious physical injury; or causes torture, cruel confinement or cruel punishment to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless. Criminal abuse in the third degree is a Class A misdemeanor.

### **Other Statutes**

#### **Unlawful Imprisonment in the first degree [KRS 509.020]**

A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury. Unlawful imprisonment in the first degree is a Class D felony.

#### **Unlawful imprisonment in the second degree [KRS 509.030]**

A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person. Unlawful imprisonment in the second degree is a Class A misdemeanor.

#### **Harassment [KRS 525.070]**

A person is guilty of harassment when, with intent to intimidate, harass, annoy, or alarm another person, he or she:

(a) Strikes, shoves, kicks, or otherwise subjects him to physical contact;

(b) Attempts or threatens to strike, shove, kick, or otherwise subject the person to physical contact;

(c) In a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present;

(d) Follows a person in or about a public place or places;

(e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose or...

Except as provided in paragraph (b) of this subsection, harassment is a violation. Harassment as defined in paragraph (a) of subsection (1) of this section is a Class B misdemeanor.

### **SEXUAL ABUSE and ASSAULT**

Some elders may be dependent on others for basic needs. Reliance on others to assist with activities of daily living increases a person's vulnerability and exposure to sexual violence. Older adults may be unable to leave a violent relationship due to a lack of money, accessible housing, or attendant care. Offenders often use this lack of resources as a

threat: “If you tell, they will send you to a nursing home,” or “if you tell, I won’t help you anymore,” in order to keep their control over the victim. For older adults who live in institutional settings, the disparity of power between staff and residents, the high staff turnover rate, and the sense of isolation due to the lack of individual attention that many people experience in these settings are all factors that increase the risk of sexual assault. Caregivers may discount verbal disclosures or fail to recognize nonverbal evidence of sexual assault because they are not aware of the high risk of sexual abuse, and, therefore, do not consider sexual abuse to be a likely occurrence.

### **Motive**

Why does sexual assault occur? Rape is a crime of violence, not a crime of sex. It is a crime of power and control. Rape is the sexual expression of aggression.

### **Dynamics**

Because victims often feel ashamed, dirty and traumatized following the sexual assault, they often fail to report the sexual assault or they report it late and in a conflicted manner.

### **Definition** (working, not legal)

Sexual abuse/assault is non-consensual sexual contact of any kind with an elderly person and includes sexual contact with any person who is incapable of giving consent. It includes, but is not limited to, rape, sodomy, sexual abuse, and sexually explicitly photographing.

The following list of indicators is meant to be illustrative and not exhaustive.

### **Indicators**

- Victim
  - Physical
    - Genital or anal pain, irritation or trauma or unexplained bleeding
    - Genital discharge or infections
    - Bruises on external genitalia or inner thighs
    - Difficulty walking or sitting
    - Torn, stained or bloody underclothing
    - Sexually transmitted diseases
    - Signs of physical abuse
    - Psychosomatic symptoms such as stomach aches or headaches.
  - Behavioral
    - Any significant change in behavior

- Inappropriate, unusual, or aggressive sexual behavior.
  - Eating disturbances, substance abuse
  - Depression, withdrawal, suicidal feelings or excessive crying spells
  - Fears, phobias, overly compulsive behavior
  - Displays atypical attachment, inappropriate age behavior or regressive behavior such as bed wetting or thumb sucking
  - Sleep disturbances: e.g. nightmares, fear of going to sleep, excessive sleeping
  - Displays shame or guarded responses to questions about physical signs
  - Sudden avoidance of specific people, specific genders or situations
  - Noncompliance or over compliance Resist examination by doctors Shying away from being touched
  - Wearing multiple layers of cloths
  - Urinating or defecating in clothing.
- Suspect (if caretaker)
    - Extreme over protectiveness toward victim. Extreme caretaker dominance.
    - Hostility toward interviewers. Tendency to be socially isolated.
    - Past history/criminal record of abusive behavior. Refusing to follow directions when providing personal care
    - Devaluing attitudes
    - Treats the person like an object
    - Use of pornography
    - Overly intrusive during personal care
    - Inappropriate boundaries such as sharing a bed, leaving doors open when bathing/changing etc.

### **Legal Considerations and Applicable Law**

[See also the chapter in this manual on the Law Enforcement Role for the elements of the statutes]

#### **Rape in the first degree [KRS 510.040]**

A person is guilty of rape in the first degree when: he engages in sexual intercourse with another person by forcible compulsion; or he engages in sexual intercourse with another person who is incapable of consent because he: is physically helpless; or is less than twelve (12) years old. Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

**Rape in the second degree [KRS 510.050]**

A person is guilty of rape in the second degree when: being eighteen (18) years old or more, he or she engages in sexual intercourse with another person less than fourteen (14) years old; or he or she engages in sexual intercourse with another person who is mentally incapacitated or who is incapable of consent because he or she is an individual with an intellectual disability. Rape in the second degree is a Class C felony.

**Rape in the third degree [KRS 510.060]**

A person is guilty of rape in the third degree when: (a) Being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old; (b) Being at least ten (10) years older than a person who is sixteen (16) or seventeen (17) years old at the time of sexual intercourse, he or she engages in sexual intercourse with the person; (c) Being twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than eighteen (18) years old and for whom he or she provides a foster family home as defined in KRS 600.020; (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she engages in sexual intercourse with a minor under eighteen (18) years old with whom he or she comes into contact as a result of that position; or (e) Being a jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice, or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he or she subjects a person who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to sexual intercourse. (2) Rape in the third degree is a Class D felony.

**Sodomy in the first degree [KRS 510.070]**

A person is guilty of sodomy in the first degree when: he engages in deviate sexual intercourse with another person by forcible compulsion; or he engages in deviate sexual intercourse with another person who is incapable of consent because he: is physically helpless; or is less than twelve (12) years old. Sodomy in the first degree is a Class B felony unless he victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

**Sodomy in the second degree [KRS 510.080]**

A person is guilty of sodomy in the second degree when: being

eighteen (18) years old or more, he or she engages in deviate sexual intercourse with another person less than fourteen (14) years old; or he or she engages in deviate sexual intercourse with another person who is mentally incapacitated or who is incapable of consent because he or she is an individual with an intellectual disability. Sodomy in the second degree is a Class C felony.

**Sodomy in the third degree [KRS 510.090]**

A person is guilty of sodomy in the third degree when: (a) Being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than sixteen (16) years old; (b) Being at least ten (10) years older than a person who is sixteen (16) or seventeen (17) years old at the time of deviate sexual intercourse, he or she engages in deviate sexual intercourse with the person; (c) Being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than eighteen (18) years old and for whom he or she provides a foster family home as defined in KRS 600.020; (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she engages in deviate sexual intercourse with a minor less than eighteen (18) years old with whom he or she comes into contact as a result of that position; or (e) Being a jailer, or an employee, contractor, vendor, or volunteer of the Department of Corrections, Department of Juvenile Justice, or a detention facility as defined in KRS 520.010, or of an entity under contract with either department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he or she subjects a person who he or she knows is incarcerated, supervised, evaluated, or treated by the Department of Corrections, Department of Juvenile Justice, detention facility, or contracting entity, to deviate sexual intercourse. (2) Sodomy in the third degree is a Class D felony.

**Sexual abuse in the first degree [KRS 510.110]**

A person is guilty of sexual abuse in the first degree when: (a) He or she subjects another person to sexual contact by forcible compulsion; or (b) He or she subjects another person to sexual contact who is incapable of consent because he or she: 1. Is physically helpless; 2. Is less than twelve (12) years old; 3. Is mentally incapacitated; or 4. Is an individual with an intellectual disability; or (c) Being twenty-one (21) years old or more, he or she: 1. Subjects another person who is less than sixteen (16) years old to sexual contact; 2. Engages in masturbation in the presence of another person who is less than sixteen (16) years old and knows or has reason to know the other person is present; or 3. Engages in masturbation while using the Internet, telephone, or other electronic

communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate; or (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact or engages in masturbation in the presence of the minor and knows or has reason to know the minor is present or engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate. (2) Sexual abuse in the first degree is a Class D felony, unless the victim is less than twelve (12) years old, in which case the offense shall be a Class C felony.

**Sexual misconduct [KRS 510.140]**

A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent. Sexual misconduct is a Class A misdemeanor.

**Applicable Case Law**

Penetration is not required under the sodomy statute. *Bills v. Commonwealth*, 851 S.W.2d 466 (Ky. 1993).

Sexual contact includes "other intimate parts" not just sex organs. *Bills v. Commonwealth*, 851 S.W.2d 466 (Ky. 1993).

Sexual contact requires actual touching for the purpose of sexual gratification but the contact need not be directly with the body. Touching a person's sex organs through clothing would be within the definition. *Bills v. Commonwealth*, 851 S.W.2d 466 (Ky. 1993).

Actual physical force is not needed to prove forcible compulsion. A subjective standard is applied to determine if a victim submitted due to an implied threat which placed him or her in fear. *Yarnell v. Commonwealth*, 833 S.W. 2d 834 (Ky. 1992).

Forcible compulsion requires the use of physical force or the threat of physical force and the fear must be of "immediate death, physical injury to self ..., fear of the immediate kidnap of self ... or fear of any offense under [KRS Chapter 510]." *Murphy v. Commonwealth*, 509 S.W.3d 34(Ky. 2017).

Jury was properly instructed on first degree rape where the theory was that the physical injuries inflicted during the rape of the 74 year old victim created a substantial risk of death

where the victim suffered from a chronic pulmonary condition and was choked and bruised extensively before and during the rape. *Cooper v. Commonwealth*, 569 S.W. 2d 668 (Ky. 1978).

A victim does not have to physically resist an attacker in order for the definition of “forcible compulsion” to be met to sustain a conviction of first degree sodomy. *Gordon v. Commonwealth*, 214 S.W.3d 921 (Ky. Ct. App. 2006).

## **EMOTIONAL and PSYCHOLOGICAL ABUSE**

### **Definition** (working, not legal)

Emotional or psychological abuse is the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes, but is not limited to, verbal assaults, insults, threats, intimidation, humiliation and harassment. In addition, it can include treating an older person like an infant; isolating an elderly person from his or her family, friends or regular activities; giving an older person the “silent treatment”. (Source: National Center on Elder Abuse).

The following list of indicators is meant to be illustrative and not exhaustive.

### **Indicators**

- Victim
  - Physical
    - Significant weight loss or gain that is not attributed to other causes
    - Stress-related conditions, including elevated blood pressure
  - Behavioral
    - Has problems sleeping
    - Exhibits depression and confusion
    - Cowers in the presence of abuser
    - Is emotionally upset, agitated, withdrawn, and non-responsive
    - Exhibits unusual behavior usually attributed to dementia (e.g., sucking, biting, rocking)
- Perpetrator
  - Usually a family member, caregiver or acquaintance.
  - Isolates the elder emotionally by not speaking to, touching, or comforting him or her.

## **Legal Considerations/Applicable Law**

### **Terroristic threatening in the third degree [KRS 508.080]**

Except as provided in KRS 508.075 or 508.078, a person is guilty of terroristic threatening when: he threatens to commit any crime likely to result in death or serious physical injury to another, or likely to result in substantial property damage to another person. Terroristic threatening in the third degree is a Class A misdemeanor.

### **Unlawful Imprisonment in the first degree [KRS 509.020]**

A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury. Unlawful imprisonment in the first degree is a Class D felony.

### **Unlawful imprisonment in the second degree [KRS 509.030]**

A person is guilty of unlawful imprisonment in the second degree when he knowingly and unlawfully restrains another person. Unlawful imprisonment in the second degree is a Class A misdemeanor.

### **Harassment [KRS 525.070]**

[See definition in previous section]

### **Menacing [KRS 508.050]**

A person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury. Menacing is a Class B misdemeanor.

### **Wanton endangerment in the first degree [KRS 508.060]**

[See definition in previous section]

### **Wanton endangerment in the second degree [KRS 508.070]**

[See definition in previous section]

## **NEGLECT**

### **Definition** (working, not legal)

Neglect is the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Typically, neglect includes the refusal or failure to provide an elderly person with such life necessities as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials. It may include failure of a person with a fiduciary duty to provide care (i.e. pay for necessary home care) or failure on the part of an in-home service provider to provide



necessary care.

The following list of indicators is meant to be illustrative and not exhaustive.

### **Indicators**

- Victim
  - Physical
    - Poor personal hygiene including soiled clothing, dirty nails and skin, matted or lice infected hair, odors, and the presence of feces or urine
    - Unclothed, or improperly clothed for the weather
    - Bedsores
    - Skin rashes
    - Dehydration, evidenced by low urinary output, dry fragile skin, dry sore mouth, apathy, lack of energy, and mental confusion
    - Untreated medical or mental conditions including infections, soiled bandages, and unattended fractures. Absence of needed dentures, eyeglasses, hearing aids, walkers, wheelchairs, braces, or commodes
    - Exacerbation of chronic diseases despite a care plan
    - Worsening dementia
  - Behavioral
    - Exhibits emotional distress such as crying, depression, or despair
    - Has nightmares or difficulty sleeping
    - Has had a sudden loss of appetite that is unrelated to a medical condition
    - Is confused and disoriented (this may be the result of malnutrition)
    - Is emotionally numb, withdrawn, or detached
    - Exhibits regressive behavior Exhibits self-destructive behavior Exhibits fear toward the caregiver
    - Expresses unrealistic expectations about their care (e.g. claiming that their care is adequate, when it is not, or insisting that the situation will improve).
  - Home
    - Absence of necessities, including food, water, heat. Inadequate living environment evidenced by lack of utilities, sufficient space, and ventilation

- Animal or insect infestations
- Signs of medication mismanagement, including empty or unmarked bottles or outdated prescriptions
- Housing is unsafe as a result of disrepair, faulty wiring, inadequate sanitation, substandard cleanliness, or architectural barriers
- Caretaker Characteristics
  - Substance abuser (often a relative)
  - Hostile, verbally abusive towards caretaker or caseworker
  - Apathetic/passive/detached. Unresponsive attitude Depressed
  - Unconcerned for victim
  - Displays irrational/bizarre behavior
  - Expresses anger, frustration, or exhaustion
  - Isolates the elder from the outside world, friends, or relatives
  - Obviously lacks care-giving skills
  - Is unreasonably critical and/or dissatisfied with social and health care providers and changes providers frequently
  - Refuses to apply for economic aid or services for the elderly and resists outside help

## **IX. ELDER HOMICIDE DEATH INVESTIGATIONS**

### **Introduction**

The following are sections concerned with elder death cases. This is not intended to be an all-inclusive guide to death investigations. In cases involving an obvious criminal agent of death, such as a gunshot injury, typical homicide investigation techniques would, of course, apply. The objective of these sections is to focus the reader on those situations which are both unique to elder homicide and often so subtle they escape detection as an unnatural or untimely death. The first section is fundamentally a checklist designed to introduce basic considerations of elder homicide investigation. The following material includes research offered to give the investigator insight into the issues specific to “gray murders.”

### **Typical Means of Elder Homicide**

In cases where there is not an obvious criminal agent of death, the possibility of homicide should not be ruled out until it can be done so conclusively. Among the less obvious agents of death are:

- Active neglect
- Asphyxiation
- Starvation
- Over/under medicating (check therapeutic levels)
- Drowning
- Falls
- Apparent suicide
- Poison
- Arson

### **Cause of Death in Neglect Cases**

Cause of death is unique in neglect cases because it doesn't necessarily involve a foreign body or substance or traumatic injury.

Sometimes the immediate cause is an otherwise “natural” disease process gone untreated. For example, intentionally, wantonly or recklessly failing to medicate a known diabetic where a legal duty exists to provide such care, thereby causing death, would be criminal homicide even though the “natural” course of diabetes was the immediate medical cause of death. Accordingly, medical opinions about cause are important to a degree, but may not be conclusive. Critical to causation in such cases is finding evidence of the suspect's actions, inactions, and state of mind at relevant times. As a result, this may involve assembling a circumstantial picture of interaction between suspect and victim over several months,

and even years, prior to the death.

Any such case should include a screening of medications and other substances in the bodily fluids of the decedent. Body fluids should also be screened by the pathologist or medical examiner for levels of naturally occurring substances in order to determine the existence of malnutrition or dehydration.

**Sometimes, the immediate cause is an otherwise “natural” disease process gone untreated. For example, intentionally, wantonly or recklessly failing to medicate a known diabetic, where a legal duty exists to provide such care, thereby causing death, would be criminal homicide even though the “natural” course of diabetes was the immediate medical cause of death.**

The first responding officers will need to determine if the death was criminal, non-criminal or suicide. These officers are not expected to determine the cause of death, but rather be the eyes and ears for the Medical Examiner, detectives, and physicians. Categories of the causes of death may include:

- Traumatic
  - Obvious injury that caused or contributed to death
  - Suicides are included in this category
- Apparently Natural
- Undetermined
  - Drug usage should be included in this category

### **Documenting Scene of Death**

The following are questions to consider if called to the scene of an elder’s death.

**Approach the scene as if you were the elder. Considering all the evidence surrounding you, imagine what occurred. Who would have a reason to harm you?**

- Describe the immediate surrounding area, including the weather, public access, and security of the scene.
- Does the scene appear to be staged? Carefully review the environment.
- Develop a mental picture of the victim.
- Look for signs of neglect.
- Consider likely perpetrators and the motivation.
- Consider the relationship of the victim and others in his life.
- Where did the victim spend the majority of his day and night?
- Does the furniture fit the scene?
- Look for the victim’s medication and personal need items. Does their location make sense?
- Was the area recently cleaned or did the home have an overall clean appearance?
- Imagine that you are the elder.
  - What was your day-to-day routine?
  - What did you see and hear?
  - Who took care of your needs?
- Location and state of the body.
  - Describe WHERE the body was found.

**Do the victim's immediate needs appear to have been met on a daily basis? What seems "off" and why?**

- Describe HOW the body was found.
- Describe the CONDITION of the body.
- Evidence and Property. Describe:
  - What was found?
  - Where it was found? Who is the owner?
  - Why it was impounded? Where it was impounded?
  - A list of property that was taken by the M.E.
  - A list of all medications, prescribing physicians, dosage, amount left, when it was last filled, the pharmacy name, and WHERE it was found. Be especially aware of unlabeled prescription bottles, mixed medications and uncapped medications.
  - Check all trash containers.
- General Considerations
  - Enter the death scene as a "crime scene" (i.e. Homicide).
  - Was the door locked? Did you have to force entry?
  - When was the deceased last seen? By whom?
  - Check for ID, wallet, checkbook, etc.
  - Who was present when the elder died?
  - Examine the scene, including the immediate area around the body.
  - Any medical equipment?
  - Next of kin, family, (local or out of town).
  - Neighbors?
  - What type of appliances were on? Stove/heaters?
  - Any food in the residence? Where? Any animals in the house?
  - Alcohol related items?
  - Answering machines, the phone to obtain last number called.
  - DNR? Where is it, or who has it? Check on the mail, and look for the last postmark.
  - Who writes the checks for the house bills?
  - Is the R/P anxious to dispose of the victim?
  - If the coroner waives jurisdiction on the death investigation, then look around and examine the scene in its totality.
- Medical and Social History of Victim
  - Medical history (list all sources of information)
  - List names of all physicians, last time they were seen and for what reason.
  - Who is supplying this information?
  - Who is the caregiver? Does the elder even have one?
  - Is there a Do Not Resuscitate (DNR) order at the residence? Who has access to it?
  - Who did the grocery shopping?

- Were ambulatory services used?
- How often did the victim get to the doctor's office?
- Who cleaned the victim's home? How often?
- Check all trash containers.
- Psychological History
  - List names of all physicians, last time they were seen, and for what reason.
  - Alcohol, tobacco, drug use?
  - Past suicide attempts or recent ideations?
  - Recent loss of loved one?
  - Recent diagnosis of terminal disease?

## **Primary Official Players in Death Investigations**

### ***Last Medical Provider***

Very often, the actual death of a disabled or elderly person occurs in the custody of a medical provider, such as a hospital emergency room. Accordingly, such entities may have several witnesses on staff with important information. This may include doctors, nurses and other adjunct medical personnel, ***but may also include hospital social workers, chaplains, and other non-medical personnel, whose observations should not be overlooked.***

Medical records from this entity should be sought immediately if an investigation is determined necessary. These records may not prove anything conclusive about a cause of death, but they will contain very valuable information about the immediate witnesses to events in the hospital or facility.

The criminal investigator or prosecutor is encouraged to seek the immediate in-person assistance of a field worker with Adult Protective Services in any such case, because of the APS worker's statutory authority under KRS.

209.030(7), to demand immediate access to medical records of the elderly or disabled person without a subpoena. If this avenue is unsuccessful, prosecutors are encouraged to immediately contact the Attorney General's Office of Medicaid Fraud and Abuse at (502) 696-5405 if the patient was a resident at a Medicaid funded facility.

### ***EMS or other First Responder***

The investigator should move quickly to get the records or "run sheet" of EMS personnel, and interview the EMS employees who responded to a scene that ended with a death.

EMS personnel are often very observant and sympathetic witnesses, and often provide very valuable information beyond

**Often, suspects will speak to APS social workers when they will not speak to police; and will very often tell the APS worker a completely different version of events from that given to police or medical providers.**

what they deemed necessary to type in their “run sheet.”

### ***APS Worker***

If an APS worker is already involved, the investigator or prosecutor should interview her without delay.

If APS has not been notified or involved, they should be so immediately. This has several useful purposes: (a) APS workers have authority to demand immediate access to medical and other records without the delay of a subpoena; and (b) the APS worker provides manpower for additional interviews, and another “layer” of interviews. Often, suspects will speak to APS social workers when they will not speak to police; and will very often tell the APS worker a completely different version of events from that given to police or medical providers.

### ***Law Enforcement Officer***

The role of the police in a death investigation is well known to prosecutors and need not be detailed.

Some points unique to deaths involving elderly or disabled persons:

- The prosecutor may have to prepare to overcome biases among local police against investigating such deaths as possible homicides.
- If such biases are not overcome, the prosecutor may have to work with an investigator or police department resistant to work an investigation, and thus valuable evidence is lost forever.
- Collaboration with local law enforcement should begin far in advance of its need.

### ***Coroner***

KRS Chapter 72 establishes and governs the office of coroner under Kentucky law. There is no requirement that a coroner be a physician or have any medical education. As a matter of fact, many coroners are elected to this position as a result of their interest in elected politics more than their interest in the forensics of death. The Commonwealth’s Attorneys are cautioned to know their local coroners. To the extent a coroner or deputy coroner has any background in homicide investigations at all, it may be limited to the very traditional “traumatic” types of homicide such as gunshots and stabbings. Death as a result of active neglect may be an entirely new issue for such officials, as it often is for local law enforcement.

Coroners are very important players in an elder or disabled person's death. The coroner may be the only official summoned to such a scene, even where the police were not. Accordingly, the coroner may be the only fact eyewitness to the immediate setting of a death scene.

### ***Biases against Criminal Investigations***

Unfortunately, many local coroners are subject to the same prejudices and preconceptions regarding homicide and neglect that are common among the public. Some of these biases are listed here, not because they are never true, but because: (a) they should not be the default conclusion where circumstances appear otherwise; and (b) some of these conclusions are not appropriately within the purview of the coroner, but rather should be decisions made by the local prosecutor, or by the judiciary or a jury. **These biases include:**

- A death by neglect is an unfortunate accident, not a crime.
- The caretaker was so limited in their own physical abilities that they could not be criminally responsible for the death of the elder or disabled adult.
- The suspect in this death will be ruled legally incompetent or not criminally responsible.
- The suspect in a death is sympathetic, and has very different characteristics from the typical "street" criminal.
- A conclusively criminal cause of death is never going to be found anyway.
- The death does not obviously fit any of the categories for "coroner's cases," (see below and KRS 72.410).

**It is advisable to encourage the coroner to develop a regular contact with the prosecutor's office in every, or most, deaths of elderly or disabled persons who come to the attention of the coroner. The coroner became involved in such cases for a reason, so some review by the prosecutor may be in order.**

Maintaining a good ongoing relationship with the coroner is essential to successful investigation and prosecution of deaths of elders and disabled persons. The prosecutor is encouraged to speak regularly with this official, and make their views known concerning such deaths.

It is advisable to encourage the coroner to develop a regular contact with the prosecutor's office in every, or most, death(s) of elderly or disabled persons, which comes to the attention of the coroner. The coroner became involved in such cases for a reason, so some review by the prosecutor may be in order.

### ***Medical Examiner***

Medical Examiners are created and governed by KRS 72.210



to 72.275.

The role and authority of the medical examiner is largely to provide forensic medical evidence (usually concerning deaths) as an adjunct to the coroner. “[I]t is not the intention of the General Assembly to abolish or interfere with the coroner in his role as a constitutionally elected peace officer. It is the intention of the General Assembly for the office [of Medical Examiner] to aid, assist and complement the coroner in the performance of his duties by providing medical assistance to him in determining causes of death.” KRS 72.210. Kentucky law does not provide independent authority to the medical examiner to mandate an autopsy in any particular death. Rather, the coroner has been given this gate-keeping authority, with some authority for County and Commonwealth’s Attorneys to seek a judicial overruling of a decision not to order an autopsy.

#### **Autopsies: How Demanded and Prosecutor’s Authority to Demand When Coroner will Not Act**

**Pursuant to KRS 72.445, a prosecutor can request that an autopsy be performed if initially declined by the coroner. See sample letter attached at the end of this chapter.**

The prosecutor or investigator is reminded that time is of the essence in seeking an autopsy following a death. Corpses begin decomposition very quickly, and valuable evidence may be lost to the medical examiner due to delay.

A coroner’s authority to seek an autopsy is governed by whether a death is considered a “coroner’s case”. KRS 72.405(2). “Coroner’s case” means a case in which the coroner has reasonable cause for believing that the death of a human being within his county was caused by any of the conditions set forth in KRS 72.025. KRS 72.405(2).

KRS 72.025 sets out the circumstances under which a coroner **shall** require a post-mortem examination. Note, particularly, the “catch-all” provision of KRS 72.025(1) which may include any death where criminal neglect has occurred:

#### ***KRS 72.025 Circumstances requiring post-mortem examination to be performed by coroner.***

Coroners shall require a post-mortem examination to be performed in the following pertinent circumstances:

- (1) When the death of a human being appears to be caused by homicide or violence;
- (2) When the death of a human being appears to be the result of suicide;
- (3) When the death of a human being appears to be the result

of the presence of drugs or poisons in the body;

(5) When the death of a human being occurs while the person is in a state mental institution or mental hospital when there is no previous medical history to explain the death, or while the person is in police custody, a jail or penal institution;

(9) When the manner of death appears to be other than natural;

(11) When post-mortem decomposition of a human corpse exists to the extent that external examination of the corpse cannot rule out injury or where the circumstances of death cannot rule out the commission of a crime;

(12) When the death of a human being appears to be the result of drowning;

(17) When the body is to be cremated and there is no past medical history to explain the death;

(18) When the death of a human being is sudden and unexplained; and

(19) When the death of a human being occurs and the decedent is not receiving treatment by a licensed physician and there is no ascertainable medical history to indicate the cause of death.

### **Legal Considerations and Applicable Law**

This section deals primarily with law relevant to the most common criminal homicide committed against the elderly and disabled, non-intentional death through some form of abuse or neglect. These include Wanton Murder, Manslaughter First Degree and Second Degree, and Reckless Homicide. Of course, in any given case, especially with the prevalence of financial motives in crimes against such victims, the prosecutor is reminded that intentional murder may always be an applicable charge in a given case. For such cases, consult the general law governing intentional murder.

### **KRS 507.020 Murder**

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation

under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

### ***Wanton Murder***

The sole element distinguishing wanton murder from manslaughter second degree is “extreme indifference to human life,” Commentary to KRS 507.020. Thus, Manslaughter Second Degree (and possibly Reckless Homicide) are the usual lesser included offenses of Wanton Murder.

The definition of “wantonly” in wanton murder statute makes no reference to the defendant’s state of mind with respect to his conduct, instead referring only to his state of mind regarding the result of that conduct or the circumstance which prompted the conduct. *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004). And the decision as to whether extreme indifference to human life and grave risk of death to another was present in a particular case is best left to the jury. *Id.*

The Wanton Murder statute is not void for vagueness, for failing to further define “extreme indifference to human life.” *Brown v. Commonwealth*, 975 S.W.2d 922 (Ky. 1998).

Running a red light is not extreme indifference to human life. *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994).

Driving on wrong side of road with five different drugs in system is extreme indifference to human life. *Estep v. Commonwealth*, 957 S.W.2d 191 (Ky. 1997).

Speeding, while intoxicated, swerving, no attempt to stop is extreme indifference to human life. *Love v. Commonwealth*, 55 S.W.3d 816 (Ky. 2001).

### **KRS 507.030 *Manslaughter in the First Degree***

(1) A person is guilty of manslaughter in the first degree when:

(a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person;

or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020; or

(c) Through circumstances not otherwise constituting the offense of murder, he or she intentionally abuses another person or knowingly permits another person of whom he or she has actual custody to be abused and thereby causes death to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.

(2) Manslaughter in the first degree is a Class B felony.

#### **KRS 507.040 *Manslaughter in the Second Degree***

(1) A person is guilty of manslaughter in the second degree when he wantonly causes the death of another person, including, but not limited to, situations where the death results from the person's:

(a) Operation of a motor vehicle; or

(b) Leaving a child under the age of eight (8) years in a motor vehicle under circumstances which manifest an extreme indifference to human life and which create a grave risk of death to the child, thereby causing the death of the child.

There are two theories under which a defendant can be convicted of second-degree manslaughter. First, the Government can argue that the defendant acted without intent to kill but with awareness and conscious disregard of the substantial and unjustifiable risk that his action would result in the victim's death. Second, the defendant acted either with or without intent to kill but under actual but mistaken belief that circumstances required the use of physical force in self-protection, and with the awareness and conscious disregard of the substantial and unjustifiable risk that such a belief was mistakenly held. *Saylor v. Commonwealth*, 144 S.W.3d 812 (Ky. 2004).

#### **KRS 507.050 *Reckless Homicide***

(1) A person is guilty of reckless homicide when, with recklessness he causes the death of another person.

(2) Reckless homicide is a Class D felony.

#### ***Breach of Duty as Manslaughter or Reckless Homicide***

In *West v. Commonwealth*, 935 S.W.2d 315 (Ky. App. 1996), the Court of Appeals recognized that breach of a duty of care

**In *West*, the Court held that the defendant could properly be convicted for the death of his disabled sister, by malnutrition and lack of proper medical care, where the defendant had assumed the duty to care for her.**

by a caretaker may form the basis for a homicide prosecution, even where the duty arose from voluntarily assuming such duty. In *West*, the Court held that the defendant could properly be convicted for the death of his disabled sister, by malnutrition and lack of proper medical care, where defendant had assumed the duty to care for her.

Questions about whether a defendant had an ongoing legal duty to the victim are questions of law that should be brought to the court's attention. *Bartley v. Commonwealth*, 400 S.W.3d 714 (Ky. 2013). Failure to perform a legal duty can constitute assault. *Id.*

### **Four Situations Where Breach of Duty May Impose Criminal Liability**

In quoting the famous federal case *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962), the Court in *West* recognized four situations where a duty or care arose, and failure to act would result in criminal liability:

1. Where a statute imposes a duty to care for another;
2. Where one stands in a certain "status" relationship to another;
3. Where one has assumed a contractual duty to care for another;
4. Where one has voluntarily assumed the care of another and has so secluded the helpless person as to prevent others from rendering aid.

Any of the above situations, especially 3 or 4, may apply in the death of an elderly or disabled person. The prosecutor is also referred to KRS Chapter 209, which defines legal duty in its definition of "caretaker." Thus, if a Defendant meets the definition of "caretaker" in KRS 209.020(6), they will likely have the requisite duty of care for wanton or reckless causation of death:

"Caretaker" means an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily or by contract, employment, legal duty or agreement. KRS 209.020(6).

### ***Causation***

In a death resulting from the breach of duty, especially against a disabled person with various pre-existing medical

**The mere existence of even several serious medical conditions does not in itself negate criminal causation of death.**

conditions, lack of causation is likely to be raised defensively. The mere existence of even several serious medical conditions does not in itself negate criminal causation of death. Causation is governed by KRS 501.060:

***KRS 501.060 Causal Relationships***

(1) Conduct is the cause of a result when it is an antecedent without which the result in question would not have occurred.

(2) When intentionally causing a particular result is an element of an offense, the element is not established if the actual result is not within the intention or the contemplation of the actor unless:

(a) The actual result differs from that intended or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm intended or contemplated would have been more serious or more extensive; or

(b) The actual result involves the same kind of injury or harm as that intended or contemplated and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(3) When wantonly or recklessly causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of recklessness, of which he should be aware unless:

(a) The actual result differs from the probable result only in respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) The actual result involves the same kind of injury or harm as the probable result and occurs in a manner which the actor knows or should know is rendered substantially more probable by his conduct.

(4) The question of whether an actor knew or should have known the result he caused was rendered substantially more probable by his conduct is an issue of fact.

Causation is an essential element for any homicide and must be proved beyond a reasonable doubt with the burden of proof resting on the Commonwealth. *Muse v. Commonwealth*, 551 S.W.2d (Ky. 1997).

There are two prongs to causation in criminal law, cause-in-fact and legal causation.

### ***Cause-in-Fact***

Under KRS 501.060(1) a defendant's conduct is the cause-in-fact of a result when it is "an antecedent without which the result in question would not have occurred." Any antecedent which contributes to a given result can be said as a matter-of-fact to have caused that result. Commentary to KRS 501.060. A particular cause-in-fact does not necessarily have to be the sole cause of a result to be the cause-in-fact. *Flynn v. Commonwealth*, 302 S.W.2d 851 (Ky. App. 1957).

### ***Examples of Cause-in-Fact***

In the following cases, the defendant's conduct was found to be a criminally culpable cause-in-fact, even though it may not have been the sole cause of death:

Defendant shot victim with a gun, and victim died 14 days later of a pulmonary embolism. *Muse v. Commonwealth*, 551 S.W.2d 564 (Ky. 1997). Defendant hit the elderly victim several times on the head and victim died later that night of a cerebral hemorrhage. *Flynn v. Commonwealth*, 302 S.W.2d 851 (Ky. App. 1957). Defendant fought with victim, and victim died shortly afterwards of a heart attack. *Mason v. Commonwealth*, 423 S.W.2d 532 (Ky. App. 1967).

**The "reasonableness" of the victim's conduct, or his own blame worthiness for his death, is not relevant to causation. The issue of causation focuses upon the defendant's point of view.**

Defendant's failure to provide proper nutrition and medical care to disabled sister was cause of sister's death. *West v. Commonwealth*, 935 S.W.2d 315 (Ky. App. 1996).

### ***Legal Causation or "Proximate Cause"***

Legal Causation is a highly fact dependent issue. *Lofthouse v. Commonwealth*, 13 S.W.3d 236 (Ky. 2000).

Even when an intervening cause exists, if the intervening cause was a reasonably foreseeable consequence of the defendant's conduct, causation may be proven. *Phillips v. Commonwealth*, 17 S.W.3d 870 (Ky. 2000); *Sanders v. Commonwealth*, 50 S.W.2d 37 (Ky. App. 1932); *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002).

Legal Causation involves a review of the *mens rea* of a crime, together with a determination of whether a particular result was within the risk of which the defendant was aware. *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002).

Officer's death following a foot pursuit of the defendant was legally caused by the defendant, where it was reasonably foreseeable that officer would be seriously injured in such

pursuit. *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002) (case includes a lengthy and in- depth discussion of causation, including specified jury instructions on this issue). Whether the victim acts in a manner negligent or careless does nothing to exonerate defendant for his role. The "reasonableness" of the victim's conduct, or his own blame worthiness for his death, is not relevant to causation. The issue of causation focuses upon the defendant's point of view. That is, whether the harm that occurred was a reasonably foreseeable consequence of his conduct at the time he acted. *Robertson v. Commonwealth*, 82 S.W.3d 832 (Ky. 2002). *Robertson* may be cited in rebuttal to a common defense claim that, even though the defendant was a caretaker in a situation of neglect, the victim in some way caused his own neglect.

### **Other Cases on Causation**

Defendant shot victim who died two months later. Victim, at time of shooting, was in feeble condition and probably would not have lived long even if not so wounded. Death was accelerated or hastened by the wound, so defendant's conviction of murder was proper. *Hopkins v. Commonwealth*, 80 S.W. 156 (Ky. App. 1904).

Victim's jumping from a moving vehicle was foreseeable consequence of defendant's act of threatening victim with a deadly weapon. *Sanders v. Commonwealth*, 50 S.W.2d 37 (Ky. App. 1932).

Mere fact of having furnished drugs to victim, who subsequently died from ingesting those drugs, is insufficient evidence of causation. Under the particular facts of this case, causation was not found; but Court notes that causation is always heavily fact dependent. *Lofthouse v. Commonwealth*, 13 S.W.3d 236 (Ky. 2000).

Victim's death from heart attack not probable or natural consequence of defendant's act of resisting arrest. *Hubbard v. Commonwealth*, 202 S.W.2d 634 (Ky. App. 1947).

**It has long been the law in Kentucky that when a victim's death was accelerated or hastened by the wound (inflicted by defendant), the defendant's conviction of murder was proper.**



Attachment

**January 1, 2020**

**Via Facsimile:**

(555)555-5555

\_\_\_\_\_ County Coroner

ATTN: Deputy Coroner Wyatt Erp

Please accept this request on behalf of the Commonwealth Attorney's Office, to have an autopsy performed by the Office of the Medical Examiner, of decedent, Mary Doe, DOB 12/1/24, DOD on or about 12/31/15 in \_\_\_\_\_ County. This request is made pursuant to KRS 72.445.

Based upon the description of investigators for Adult Protective Services and \_\_\_\_\_ Police, provided to me at 10:45 AM this morning, this matter may constitute some level of homicide by a caretaker. We would request any forensics necessary (such as analysis of bodily fluids) to determine the state of health, nutrition, hydration, and any other factors of neglect or abuse, be performed.

Should your office have any disagreement with this request, please let me know immediately at the above number so that we may proceed with appropriate proceedings before the Court. Thank you very much for your consideration.

Sincerely,

\_\_\_\_\_  
Assistant Commonwealth's Attorney

cc: Medical Examiner

## **X. Financial Fraud and Exploitation**

Financial fraud and exploitation is the illegal or improper use of another person's resources for personal profit or gain. Unfortunately, this type of abuse is more difficult to detect and often receives less attention than other forms of elder abuse. Transactions which appear to be exploitative could merely be an unwise but legitimate financial transaction. Furthermore, financial abuse is often considered a "family problem" or "family secret" as the victim may have knowledge of the abuse, but remains silent for fear of being isolated from family or retaliated against. Many seniors are embarrassed that family members or those whom they have trusted would exploit them, so they continue to suffer in silence.

The impact on victims is tragic. Because of their age, the elderly have less time to recoup their losses. Without savings, upon which they have been so dependent, they are often unable to meet their needs and expenses. This depletion of assets often results in the loss of independence and security for the elder. Other ramifications include more stress and dependence on others – especially those who may have been the initial perpetrator. Elder victims of financial abuse, who once had the resources to live independently of welfare programs, often find themselves becoming dependent on these social programs, and experience a significant decrease in their quality of life.

### **Understanding the Dynamics**

Understanding the dynamics of these silent victims, and the myths associated with prosecuting a financial exploitation case, may help those involved in the prosecutorial process not only realize the devastating impact on the lives of victims, but may assist them in feeling more confident that these cases can be successfully prosecuted.

Remember, many seniors have warranted and unwarranted fears. As one grows older, the fear of losing financial independence, the fear of losing their means of independent living, being isolated from those they love and trust, increased dependence on others, etc., all become issues of concern. Seniors' fears of being financially exploited are compounded. They become concerned that exposure of the crimes committed against them will lead not only to the aforementioned fears, but will be accompanied by threats from the perpetrator. Often these perpetrators are family members and the senior victim is ashamed. Collectively, this

leads to under-reporting of the abuse.

### **Myths Associated With Seniors and the Prosecution of Financial Exploitation Cases:**

#### **Myth #1: Elderly people make terrible witnesses.**

One must avoid stereotyping elder victims as forgetful, senile, long-winded, fragile, or disabled in other ways. Often, seniors can make a credible witness. [The appearance of a senior victim in the courtroom can make a tremendous impact on the jury or judge.]

#### **Myth #2: If an elderly victim refuses to provide information, there is nothing that can be done.**

A case can still be built by talking to other key witnesses. Adult Protective Service workers and law enforcement can assist with witnesses and with the victim's silence.

#### **Myth #3: If the elderly victim declines to testify against the perpetrator, the case cannot be prosecuted.**

This is simply not true. There are many lessons that can be learned from domestic violence cases. Prosecutors CAN convict even without the assistance of the victim; if not punished, the perpetrator will abuse again. Abuse is a crime and NOT just against the abused, but against the peace and dignity of the Commonwealth.

#### **Myth #4: If an elderly victim gives the money voluntarily, it is not a crime.**

Exploitive transactions, as mentioned earlier, can be difficult to distinguish from unwise, ill-advised financial decisions/transactions. To complicate the parameters of financial exploitation further, both the elderly person and the perpetrator may feel that the perpetrator is entitled to assets of the older person for providing care. This should not be a deterrent to prosecutors. An exploitive transaction could result from undue influences, duress, fraud, or a lack of informed consent. Furthermore, the exploitation can occur over a period of time when the perpetrator initially provided helpful advice regarding financial investments, but as the elder person's cognitive abilities deteriorated, the perpetrator ultimately misappropriated funds for themselves.

#### **Myth #5: If the financial institution reimburses the elderly victim and then declines to seek prosecution, we have no victim.**

This is simply not true. A crime still has occurred! Even if the elderly victim is reimbursed, there is still a victim. Payment of restitution does not excise the crime. [One has to

ask if the financial institution is fearful of litigation against their establishment by family members if restitution is not made.]

**Myth #6: If the victim is deceased before we discover the theft, we cannot prosecute.**

Wrong. In situations such as this, prosecutors should treat the case as if it were a murder case. There are some situations in which the victim is not needed for a prosecution.

**Myth #7: Any case where the elderly victim is involved in a home repair and there is a dispute over money, this is ALWAYS a civil matter.**

Not necessarily so. Prosecutors should examine whether or not the “contractor” is licensed if such license is required in the area where the victim is located. Are there other victims out there? Was the money obtained before any work was done? What services did he promise? What did he deliver? Often seniors are vulnerable to these types of home improvement scams as their neighborhoods are often targeted.

Case histories from the Kentucky Cabinet for Health and Family Services indicate the following from an actual case investigated by the Cabinet and law enforcement which support dispelling this myth:

*Two men came to an 84 year old man’s house and told him his chimney needed repairs. The victim didn’t authorize any repairs, but the perpetrator returned days later, claiming he had finished the work while the victim was out, and demanded \$4,200. The victim wrote a check for that amount, but then stopped payment.*

*Two days later, the perpetrator again returned and asked why the payment had been stopped. The victim was intimidated and wrote another check for \$2000. The other con man then cashed the check.*

*Both perpetrators were arrested and charged with theft by deception. They were also charged in connection with similar scams elsewhere.*

**Indicators of Financial Exploitation by People Known by the Elderly Victim**

Most family members provide vital assistance to elders; however, for this very reason, it makes the elder particularly vulnerable to exploitation. Most cases reported indicate that financial exploitation occurs more often by adult children, grandchildren or other relatives, professional or hired caretakers, or close friends or others in positions of trust

rather than by strangers. Listed below are some indicators of financial exploitation most commonly perpetrated by people known by the elder. These include:

- Deliberately mismanaging income or misusing assets, e.g., using power of attorney or conservatorship or trust for purposes beyond those for which it was originally executed;
- Signing checks or documents without the elder's consent to gain control of assets;
- Charging excessive fees for rent or caregiver services;
- Theft of money or property;
- Obtaining money or property by undue influence, misrepresentation or fraud.

Warning Signs of Undue Influence:

- Isolation of elder from social contact, family, friends;
- Control of elder's mail, phone calls, visitors, outings;
- Promises to elder she/he will be taken care of for life in exchange for money or property;
- Manipulation/withholding elder's food or medication;
- Threatening elder with abandonment, harm, neglect;
- Insisting business transactions be finished at once;
- Telling elder that he/she will be put into a nursing home;
- Telling elder that the perpetrator is the only one who cares about him/her;
- Emphasis on unpleasant consequences of delay;
- Use of multiple persuaders;
- Transaction taking place at unusual time or place or under unusual circumstances.

Other Warning Signs of Financial Exploitation:

- Unusual activity in bank account by elder; sudden large withdrawals, expenditures that are not consistent with past financial history;
- Use of ATM machines when the elder has no history of using ATMs or cannot walk or get to an ATM;
- A recent Will when the elder seems incapable of writing a Will;
- Elder signs rights away on legal papers without understanding what the papers mean;
- Elder has unpaid bills, such as house payment, rent, taxes, utilities;
- Elder has lack of food, clothing, or personal supplies;
- Title to home signed over in exchange for a promise

- of “lifelong care”;
- Missing personal belongings such as art, silverware, jewelry, TV;
- Elder is charged excessive fees for rent or caregiver services;
- Signing checks or documents without the elder’s consent;
- Recent acquaintance expressing affection for elder with assets.

### **Exploitation by Strangers or Those Unknown to the Elder**

Unfortunately, the elderly are also targets of frauds and scams perpetrated by professional crime groups. These cons see them as easy targets for the following list of scams:

*Sweetheart Scams or Sweetheart Swindlers* - This often occurs when an elder is lonely or has lost a spouse and welcomes the opportunity to engage in companionship. The perpetrator first steals the elder’s heart and then his/her money. Unscrupulous in-home care workers or other strangers who learn of the elder’s vulnerability are often the perpetrators of this scam.

*Telemarketing Scams* - These scams have a wide range of sales “pitches” from discount prescription medicine to magazines. Often names and telephone numbers are obtained from previous responses made by the elder from other or similar products. The goal of the perpetrator is to obtain a bank account or credit card account number for the “purchase”. Money is withdrawn and no product, or a slight representation of the product, is sent. An increasing number of these calls originate from Canada or other foreign countries.

Sometimes telemarketing scams can involve a solicitation for charitable contributions. Although most charities are legitimate, many elders may find themselves giving to all charities that contact them for assistance. Some of these “charitable” entities are nothing more than a ploy to obtain money from unsuspecting, generous elders. Often their “mission” is attractive and plays on the emotions of the elder to provide support for veterans, children and the homeless; however, their money only provides funds for those soliciting.

*Sweepstakes and Foreign Lottery Scams* - These are becoming more common, and the tactics used by the perpetrators to con money from the elder are very creative. Elders are called or sent a piece of mail indicating that they

are winners of a major sweepstakes or lottery. Often these originate from Canada, Costa Rica, The Netherlands, and Spain. Elders are led to believe that the callers are government officials such as “IRS agents” or “Custom Agents” and are told to send up front “custom fees” or “taxes” via wire transfer in order to receive the prize money. Once the elder responds by sending money, nothing is received in return. Instead, the perpetrator continues to mislead the elder by asking for more money. In addition, the elder’s name is now added to “sucker lists” and sold to other crime groups.

A new twist to the sweepstakes and lottery scams involves counterfeit checks. Elders receive what appears to be a cashier’s check or certified check to help pay the fees owed in order to claim the prize. The elder is instructed to deposit the money into his/her bank account and wire the money back to the “promoter”. Once the elder responds, the bank determines that the check is counterfeit and demands re-payment of the funds withdrawn. Consequently, the elder is doubly victimized by this counterfeit check scam.

*Investment Scams* - These range from “hot tips” by “brokers” to the Nigerian letter scam. Investments may be bogus or elders may invest with brokers who do not have the elder’s best interest in mind. The Nigerian letter scam is a ploy from a foreigner asking for assistance in transferring millions of dollars from a foreign country to the elder’s bank account. If the bank account is given to the perpetrator, instead of the money being transferred into the account of the elder, money is withdrawn.

*Home Improvement Scams* - These scams have a wide range of scenarios from driveway blacktopping to furnace inspectors. Perpetrators usually target older neighborhoods for these types of scams and may use bogus credentials to obtain access to the elder’s home to make initial “inspections”. Often the perpetrators are fly-by-night operators who are only in the area for a short period of time. They collect money up front and never return to complete the job, or they perform shoddy work with no means for the elder to contact them.

*Predatory Lending Scams* - These scams range from elders who sign away his/her home for a loan with an interest rate impossible to repay to high-interest loans becoming due with a balloon payment beyond the means for an elder to repay or refinance. These predatory lenders usually prey on those in need of money to pay for medical bills, property taxes or home repairs. Instead of providing access to money with

reasonable rates and terms, predatory lenders push upon the lenders ones with high rates of interest with unreasonable fees and collection tactics that border on harassment.

*Identity Theft Scams* - This is the fastest growing crime in the nation and the elderly are not immune. Identity thieves are not necessarily looking for victims with a lot of money, but target those with the ability to obtain credit. Elders often fall within this category. Elders are victimized by perpetrators opening accounts, obtaining loans, establishing utility services, and committing crimes in their names.

*Grandchildren Scams* – This type of scam involves a stranger gaining access to information about the elder’s family members, usually from an internet site such as Facebook. The stranger will call the elder and pretend to be a grandchild claiming to be in another country and in need of money to bail them out of jail, to pay for medical expenses, or to pay for some other emergency. There is sometimes a request to not tell the “grandchild’s” parents or other family members for fear of the “grandchild” getting in trouble. Account information is provided or a check is mailed to the “grandchild.”

### **Protection of Adults – KRS Chapter 209**

As set forth in KRS 209.010, the purpose of KRS Chapter 209 is to:

- Provide for the protection of adults who may be suffering from abuse, neglect, or exploitation and to bring those cases under the purview of the Circuit or District Court;
- Provide that any person who becomes aware of such cases shall report them; and
- Promote coordination and efficiency among agencies and entities with a responsibility to respond to the abuse, neglect or exploitation of adults.

KRS Chapter 209 applies to the protection of adults from the abuse, neglect or exploitation inflicted by a person or caregiver, but is not intended to apply to victims of domestic violence unless the victim is also an adult as that term is defined in KRS 209.020(4).

KRS 209.020 contains the definitions applicable to the Chapter. Notable definitions include:

“*Adult*” means a person eighteen (18) years of age or older



who, because of mental or physical dysfunction, is unable to manage his own resources, carry out the activities of daily living, or protect himself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services. [KRS 209.020(4)]

*“Protective services”* means agency services undertaken with or on behalf of an adult in need of protective services who is being abused, neglected, or exploited. These services may include, but are not limited to, conducting investigations of complaints of possible abuse, neglect, or exploitation to ascertain whether or not the situation and condition of the adult in need of protective services warrants further action; social services aimed at preventing and remedying abuse, neglect, and exploitation; and services directed toward seeking legal determination of whether or not the adult in need of protective services has been abused, neglected, or exploited and to ensure that he obtains suitable care in or out of his home. [KRS 209.020(5)]

*“Caretaker”* means an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily or by contract, employment, legal duty, or agreement. [KRS 209.020(6)]

*“Deception”* means, but is not limited to:

- Creating or reinforcing a false impression, including a false impression as to law, value, intention, or other state of mind;
- Preventing another from acquiring information that would affect his or her judgment of a transaction; or
- Failing to correct a false impression that the deceiver previously created or reinforced, or that the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship. [KRS 209.020(7)]

*“Abuse”* means the infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that result in physical pain or injury, including mental injury. [KRS 209.020(8)]

*“Exploitation”* means obtaining or using another person's resources, including, but not limited to, funds, assets, or property, by deception, intimidation, or similar means, with the

intent to deprive the person of those resources. [KRS 209.020(9)]

“*Investigation*” shall include, but is not limited to:

- A personal interview with the individual reported to be abused, neglected, or exploited. When abuse or neglect is allegedly the cause of death, a coroner's or doctor's report shall be examined as part of the investigation;
- An assessment of individual and environmental risk and safety factors;
- Identification of the perpetrator, if possible; and
- Identification by the Office of Inspector General of instances of failure by an administrator or management personnel of a regulated or licensed facility to adopt or enforce appropriate policies and procedures, if that failure contributed to or caused an adult under the facility's care to be abused, neglected, or exploited. [KRS 209.020(10)]

“*Neglect*” means a situation in which an adult is unable to perform or obtain for himself the goods or services that are necessary to maintain his health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult. [KRS 209.020(16)]

As noted in KRS 209.060, neither the husband/wife privilege nor the psychiatrist/patient privilege is a ground for excluding evidence regarding abuse, neglect or exploitation of an adult.

KRS 209.990 sets forth the penalties for violations of KRS Chapter 209. With regard to exploitation offenses, any person who knowingly exploits an adult resulting in a total loss to the adult of more than three hundred dollars in financial or other resources, or both, is guilty of a Class C felony. Any person who knowingly, wantonly, or recklessly exploits an adult resulting in a total loss to the adult of three hundred dollars or less in financial or other resources, or both, is guilty of a Class A misdemeanor. Administrative regulations governing investigations by the Cabinet for Families and Children are located at 922 KAR 5:070.

### **Theft Offenses**

Theft from elderly victims may take several forms, including larceny, deceit or fraud, embezzlement or undue influence.

Typical theft scenarios are detailed in other sections of this manual and often involve jewelry, checks, ATM cards, credit cards, transfers of real property through a Power of Attorney or quitclaim deed, investment scams, sweepstakes/telemarketing frauds, or home improvement scams. Perpetrators often fall into one of four categories: (1) adult children, grandchildren or other relatives; (2) professional or hired caretakers; (3) friends or others in a position of trust; and (4) professional crime groups that target the elderly and dependent adults. KRS Chapter 514 contains various theft offenses that may be applicable to crimes against the elderly, as outlined below.

**Theft by Unlawful Taking or Disposition.** [KRS 514.030]  
The elements of this crime are:

- Taking or exercising control over movable property of another, with the intent to deprive the victim of the property; or
- Obtaining immovable property of another (or any interest therein), with the intent to benefit the perpetrator or other person not entitled to the property.

KRS 514.010 provides the definitions for theft offenses.

KRS 514.010(1) defines “*deprive*” to mean (i) withholding the property of another person permanently or for such a period of time as to appropriate a major portion of the property’s economic value, or with an intent to restore the property only upon payment of a reward or other compensation; **or** (ii) disposing of the property in such a way as to make it unlikely that the owner will recover it.

“*Property*” is broadly defined as anything of value, including real estate, tangible and intangible personal property, contract rights, documents, choices-in-action, and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink. [KRS 514.010(6)].

“*Movable property*” is defined as property whose location can be changed including things growing on, affixed to, or found in land, and documents even if the rights represented thereby have no physical location. [KRS 514.010(3)].

“*Immovable property*” is defined as all other property. *Id.*

“*Obtain*” means, in the case of property, to bring about a transfer or purported transfer from another person of a legal

interest in the property to either the obtainer or another person. [KRS 514.010(4)].

It is a defense to a charge of Theft by Unlawful Taking that the defendant took or exercised control over the property under a claim of right. Once such a defense is raised, the Commonwealth has the burden to disprove it and the absence of a valid defense becomes an element of the offense. *See* KRS 514.020(1)(b), *infra*; KRS 500.070(3).

Theft by unlawful taking or disposition is a Class A misdemeanor unless the value of the property is five hundred dollars or more, in which case it is a Class D felony. If the value of the property is \$10,000 or more, it is a Class C felony. If the property taken is a firearm, this offense is a Class D felony regardless of the value of the firearm. If the property taken is a credit or debit card, see KRS 434.580, *infra*. [KRS 514.030].

#### **Theft by Deception [KRS 514.040]**

The elements of this crime are:

- Obtaining the property or services or another;
- By deception;
- With intent to deprive the person thereof.

“Deception” is found where the perpetrator *intentionally*:

- Creates or reinforces a false impression (includes false impressions as to the law, value, intention, or other state of mind), or
- Prevents another from acquiring information which would affect the person’s judgment of a transaction, or
- Fails to correct a false impression which the deceiver previously created/reinforced, or
- Fails to correct a false impression the deceiver knows to be influencing another, and the deceiver stands in a fiduciary or confidential relationship to the other person, or
- Fails to disclose a known lien, adverse claim, or other legal impediment on property which the person transfers or encumbers in consideration for property obtained (whether the impediment is or is not valid or is not a matter of official record), or
- Issues or passes a ‘bad check’ or similar sight order knowing that it will not be honored by the drawee.

Under KRS 514.010(7), “*property of another*” as used in the theft by unlawful taking and theft by deception statutes is

defined to mean property in which any person other than the actor has an interest in which the actor is not privileged to infringe, regardless of the fact that the actor may also have an interest in the property, and regardless of the fact that the other person may be precluded from civil recovery.

Note that KRS 514.040(2) provides that the term “*deceive*” does not include falsity as to matters which have no pecuniary significance or “puffing” that is unlikely to deceive ordinary persons. This exception could prove troublesome with elderly victims where a perpetrator argues that the victim “misunderstood” the nature of the transaction. Reliance is a necessary element of the offense. *Brown v. Comm.*, 656 S.W.2d 727 (Ky. 1983).

Subsection (3) of the statute notes that deception as to a person’s intention may not be inferred merely from the fact that he or she did not subsequently perform a promise. The intent to deceive must exist at the time the promise was made. *See, e.g., Rowland v. Commonwealth*, 355 S.W.2d 292 (Ky. App. 1962) (annotation under former KRS 434.050); *Commonwealth v. Miller*, 575 S.W.2d 467 (Ky. 1978) (this provision is the reverse of a presumption and should not be included in jury instructions).

Theft by deception is a Class A misdemeanor unless the value of the property, service, or amount of check or sight order is five hundred dollars or more, in which case it is a Class D felony. If the property taken is a credit or debit card, see KRS 434.580, *infra*.

### **Theft by Failure to Make Required Disposition of Property [KRS 514.070]**

The elements of this crime are:

- Obtaining property by agreement (or subject to a known legal obligation) to make a specified payment or other disposition (the agreement or obligation may involve disposition of the obtained property or of its proceeds); and
- He intentionally deals with the property (or proceeds) as his own; and
- He fails to make the required payment or disposition.

This statute applies even in a situation where it is impossible to identify particular property as belonging to the victim at the time of the failure to make the required payment or disposition. [KRS 514.070(2)]. Property is broadly defined in KRS 514.010(6) to mean “anything of value, including real estate, tangible and intangible personal property, contract rights,

documents, choices-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink.”

Theft by failure to make required disposition is a Class A misdemeanor unless the value of the property is five hundred dollars or more, in which case it is a Class D felony. If the value of the property is \$10,000 or more, it is a Class C felony. [KRS 514.070]

### **Aggregation of Theft Offenses**

Individual acts of theft may be aggregated into one offense so as to constitute a felony through application of the “continuous criminal intent” test. *Commonwealth v. Caudill*, 812 S.W.2d 158 (Ky. App. 1991).

### **Theft of Identity [KRS 514.160]**

The elements of this crime are:

- Knowingly possessing or using any current or former identifying information of the other person, or family member or ancestor of the other person.
- Identifying information may include things such as name, address, telephone number, electronic mail address, Social Security number, driver’s license number, birth date, personal identification number or code, and any other information which could be used to identify that person;
- With the intent to represent that he/she is the other person for the purpose of:
  - Depriving the other person of property, or
  - Obtaining benefits or property to which he/she is not otherwise entitled, or
  - Making financial or credit transactions using the other person’s identity, or
  - Avoiding detection, or
  - Commercial or political benefit.

This statute does not apply to credit or debit card fraud under KRS 434.550 to 434.730. KRS 514.160(4). (Credit/debit card fraud is discussed elsewhere in this manual.) Theft of identity is a Class D felony, and if the person violating this section is a business that has violated this section on more than one occasion, then that person also violates the Consumer Protection Act, KRS 367.110 to 367.360.

### **Trafficking in stolen identities [KRS 514.170]**

The elements of this crime are:

- Manufacturing, selling, transferring or purchasing (or possessing with intent to manufacture, sell, transfer or purchase);
- The personal identity of another person or person;
- For any of the purposes listed in KRS 514.160(1) (*see* above).

The statute provides that the possession of five or more separate identities shall be prima facie evidence that the identities are possessed for the purpose of trafficking. Trafficking in stolen identities is a Class C felony. If the person violating this section is a business that has violated this section on more than one occasion, then the person also violates the Consumer Protection Act, discussed *infra*.

KRS 514.020 contains general provisions which apply to each of the foregoing statutes, including a defense to prosecution for theft where the actor can demonstrate that he/she:

- Was unaware that the property or service was that of another, or
- Acted under a claim of right to the property or service involved or a claim that he had a right to acquire or dispose of it as he/she did, or
- Took property “exposed for sale” intending to purchase and pay for it promptly, or reasonably believing the owner would have consented if present.

### **Forgery Offenses**

Offenses against the elderly involving forgery may take several forms and primarily center around a written instrument.

#### **Definitions**

“*Written instrument*” is defined as any instrument or article containing written or printed matter or its equivalent used for the purpose of reciting, embodying, conveying, or recording information, or constituting a symbol or evidence of value, right, privilege, or identification, which is capable of being used to the advantage or disadvantage of some person. [KRS 516.010(11)].

The definition section separately defines “complete written instrument” and “incomplete written instrument.”

To “*falsely make*” means to make or draw an instrument which purports to be an authentic creation of the ostensible maker or drawer, but which is neither because the ostensible maker or drawer is fictitious, or because, if real, he did not authorize the making or drawing thereof. [KRS 516.010(7)].

To “*falsely complete*” means to transform, by adding, inserting, or changing matter, an incomplete written instrument to a complete one, without the authority of anyone entitled to grant it, so that the complete instrument appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer. [KRS 516.010(6)].

To “*falsely alter*” means to change, without the authority of anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner so that the instrument in its altered form appears or purports to be in all respects an authentic or authorized creation. [KRS 516.010(5)].

#### **KRS 516.020 *Forgery in the First Degree***

(1) A person is guilty of forgery in the first degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be or is calculated to become or to represent when completed:

(a) Part of an issue of money, stamps, securities or other valuable instruments issued by a government or governmental agency (i.e., government issue); or

(b) Part of an issue of stock, bonds or other instruments representing interests in or claims against a corporate or other organization or its property.

(2) Forgery in the first degree is a Class C felony.

#### **KRS 516.030 *Forgery in the Second Degree***

(1) A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be or is calculated to become or represent when completed:

(a) A deed, will, codicil, contract, assignment, commercial



instrument, credit card or other instrument which does or may evince, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or

(b) A public record or an instrument filed or required or authorized by law to be filed in or with a public office or public employee; or

(c) A written instrument officially issued or created by a public office, public employee or governmental agency.

(2) Forgery in the second degree is a Class D felony.

**KRS 516.040 *Forgery in the Third Degree***

(1) A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.

(2) Forgery in the third degree is a Class A misdemeanor.

The 1974 Commentary to this Chapter provides as examples of written instruments which would fall within this degree: private records, accounts and letters, diaries, diplomas, theater tickets, bus tokens, prescriptions, and identification and membership cards.

**KRS 516.050 *Criminal Possession of a Forged Instrument in the First Degree***

(1) A person is guilty of criminal possession of a forged instrument in the first degree when, with knowledge that it is forged and with intent to defraud, deceive, or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.020.

(2) Criminal possession of a forged instrument in the first degree is a Class C felony.

**KRS 516.060 *Criminal Possession of a Forged Instrument in the Second Degree***

(1) A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.030.

(2) Possession of a forged instrument in the second degree is a Class D felony.

***KRS 516.070 Criminal Possession of a Forged Instrument in the Third Degree***

(1) A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument.

(2) Criminal possession of a forged instrument in the third degree is a Class A misdemeanor.

The 1974 Commentary notes that the degree and penalty progressions for possession of forged instruments rest upon the same factors as do those of the forgery offenses, primarily the types of instruments forged, and observes that the separation between forgery and possession is traditional to cover situations where the forger and the person who ultimately uses the forged instrument do not act as accomplices.

**Offenses against Property by Fraud**

Credit or debit card crimes are set forth in KRS 434.550 to 434.730. KRS 434.580 prohibits the taking of a credit or debit card without the consent of the cardholder or issuer, as well as the receipt of a credit or debit card with intent to use, sell or transfer it where the receiving party has knowledge that the card has been so taken. Taking a card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses, false promise or extortion.

KRS 434.580(2) provides that a person who possesses (or has under control) two or more credit or debit cards taken or obtained in this manner is presumed to know that the credit or debit cards have been so taken or obtained. Theft of a credit or debit card is a misdemeanor subject to the penalties set forth in KRS 434.730(1).

**Consumer Protection: Offenses with Criminal Sanctions and Civil Remedies - KRS Chapter 367**

Kentucky's Consumer Protection Act, KRS Chapter 367,

enforced by the Attorney General's Consumer Protection Division, includes offenses that often involve elderly victims. At its core, the Act prohibits "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce." KRS 367.170(1).

"Unfair" means unconscionable. KRS 367.170(2).

The Consumer Protection Act regulates certain types of entities that may transact business with the elderly, most notably charities/professional solicitors, telemarketers, and funeral homes. A working familiarity with these regulations and the availability of both criminal and civil sanctions may assist a prosecutor when dealing with elderly victims.

**Professional solicitors and fundraising consultants** that solicit funds in Kentucky on behalf of any **charitable organization** are required to be registered with the Attorney General's Consumer Protection Division and must supply specific information through this registration, including the percentage of donations that are actually paid to the charitable organization for charitable purposes. KRS 367.652. These entities must also post a bond with the Division. In addition, professional solicitors and fundraising consultants are prohibited from employing as solicitors any person who has been convicted in any state or federal court of a felony or a misdemeanor involving moral turpitude or arising from his conduct as a solicitor or consultant for a charitable organization. KRS 367.652(8).

Other requirements include the filing of contracts between a charitable organization and a professional solicitor or fundraising consultant [KRS 367.653], and financial reports at the conclusion of each campaign [KRS 367.658].

Disclosure requirements regarding solicitations are found in KRS 367.668. Any person who knowingly violates these or other provisions of the charities registration statutes, or who knowingly gives false or incorrect information in the required filings may be prosecuted for a Class D felony. KRS 367.990(10)(c). In addition to this criminal sanction, civil remedies and sanctions may be pursued by the Attorney General, as discussed in greater detail below.

**Telemarketers** or entities engaging in "**telephone solicitations**" by calling into Kentucky are also required to be registered and

bonded with the Attorney General's Consumer Protection Division. KRS 367.46971 and KRS 367.46981. Prohibited telephone solicitation acts are set forth in KRS 367.46955. Some of these prohibitions cover scams often aimed at elderly victims, including: representations that the telemarketer is endorsed or approved by a governmental agency; sending a courier or other pickup service to obtain immediate receipt of the consumer's payment (unless the goods are delivered with an opportunity to inspect prior to collection of payment); threatening, intimidating or using profane or obscene language; or utilizing any method to block caller identification services.

Telemarketers are also prohibited from engaging in any "unfair, false, misleading or deceptive practice" during a telephone solicitation. KRS 367.46955(19). Telemarketers that knowingly and willfully violate the Zero Call list three times in one year may be prosecuted for a Class D felony. KRS 367.990(23). In addition to this criminal sanction, civil remedies and sanctions may be pursued by the Attorney General, as discussed in greater detail below.

Information on the National Do Not Call Registry is located at <https://www.donotcall.gov>

**Funeral homes or other entities** that accept pre-need funds for funeral services or money for pre-need merchandise (but not including cemetery lots or mausoleum space) are also regulated by the Consumer Protection Division. KRS

367.934 imposes specific trusting requirements on funeral homes with regard to funds received by the funeral home in advance of the need for funeral services. These pre-need funeral funds are required to be placed in a trust account in a bank or trust company. The funeral director acts as the agent of the funds; the financial institution is to act as the trustee for these funds and is not to release the funds until a certified statement is furnished to the institution by the agent stating that all of the terms and conditions of the agreement have been performed. The consumer is permitted to obtain a full refund of his or her funds by the giving of written notice to the agent and/or trustee. KRS 367.936. These funeral homes are required by KRS 367.940 to be licensed with the Attorney General and must file an annual report with an itemized listing of all pre-need burial contracts sold within the previous twelve months.

Similarly, **cemetery companies or other entities** who sell pre-

need cemetery merchandise are required in certain circumstances to place funds in trust in order to protect the consumer buyer. KRS 367.954. Criminal penalties are found in KRS 367.991, which provides that any person subject to the provisions of KRS 367.932 to 367.974 who willfully violates the trust provisions is guilty of a Class C felony. Each violation of any trust provision is deemed a separate offense, and either the Attorney General or the appropriate Commonwealth's Attorney may prosecute violators. In addition to this criminal sanction, civil remedies and sanctions may be pursued by the Attorney General, as discussed in greater detail below.

### **Civil Remedies under the Consumer Protection Act**

In addition to the criminal sanctions discussed above, the Consumer Protection Act provides several civil remedies designed to address consumer victimization. As set forth above, the heart of the Act is its prohibition against unfair, false, misleading or deceptive acts or practices in trade or commerce found in KRS 367.170. Regulatory violations are also defined by statute to be a violation of KRS 367.170. Where the Attorney General believes such acts or practices are occurring and that proceedings would be in the public's interest, KRS 367.190 empowers him to immediately move in the name of the Commonwealth for a restraining order or temporary or permanent injunction to prohibit the use of such an act or practice. Under KRS 367.190(3), it is not necessary for the Attorney General to prove that an adequate remedy at law does not exist, or that irreparable injury, loss or damage will result if injunctive relief is denied.

Proceedings for a restraining order or injunction are to be brought in the Circuit Court in the county in which the alleged violator resides or has his principal place of business, or the Circuit Court of the county in which the method, act or practice alleged to be unlawful has been committed or is

about to be committed. With the consent of the parties, such an action may be brought in Franklin Circuit Court. KRS 367.190(1).

Under KRS 367.240, the Attorney General is authorized to issue a civil investigative demand in circumstances where he has reason to believe a person has engaged in, is engaging in, or is about to engage in any act or practice declared unlawful by the Consumer Protection Act, including alleged regulatory violations. The investigative demand may require the person or

entity to which it is directed to furnish, under oath, testimony and/or relevant documentary material or physical evidence.

Any person with actual notice that an investigation has begun or is about to begin, and who intentionally conceals, alters, destroys or falsifies material is guilty of a Class A misdemeanor.

KRS 367.250 provides for the use of subpoenas but mandates that any information obtained through this or any power conferred by the Act (including the foregoing civil investigative demand) not be made public or disclosed beyond the extent necessary for law enforcement purposes in the public interest.

Additional civil tools available to the Attorney General under the Consumer Protection Act are the ability to seek the revocation of any license or certificate authorizing any person to engage in business in the Commonwealth [KRS 367.290] as well as the appointment of a receiver [KRS 367.200 and 367.210]. Private parties are authorized under KRS 367.220 to bring legal action for violations of the Act.

Finally, the Consumer Protection Act provides the Attorney General with authority to seek civil penalties for violations. The civil penalties are set forth at KRS 367.990 and include

\$2,000 for each and every violation of KRS 367.170 (unfair, false, misleading, or deceptive act or practice). This civil penalty may be increased to \$10,000 per violation where the defendant's conduct is directed at a person aged sixty (60) or older if the trier of fact determines that the defendant knew or should have known that the person aged sixty or older is substantially more vulnerable than other members of the public. KRS 367.990(2). A civil penalty of \$5,000 may be sought for each violation of the Act's telemarketing provisions. KRS 367.990(25)(a). Any person violating the terms of a temporary or permanent injunction issued under KRS 367.190, discussed *supra*, may be assessed a civil penalty of \$25,000 per violation. KRS 367.990(1).

For further discussion of general causes of action in financial elder abuse cases, see the following resources:

1. James L. Buchwalter. *Cause of Action for Financial Elder Abuse Under State Statute*, 55 Causes of Action 2d 157 (2012);
2. Julia L. Birkel, John M. Byrne, Dr. Susan I. Bernatz,

*Litigating Financial Elder Abuse Claims*, L.A. Law. (Oct 2007).

## **XI. VICTIMS ADVOCACY**

### **Crime Victim Bill of Rights**

#### ***Victim Defined***

For purposes of the Crime Victims' Bill of Rights (KRS 421.500 – 421.575), “victim” is defined as “an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications, intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, human trafficking, or incest. If the victim is...legally incapacitated, "victim" means a...guardian, custodian or court-appointed special advocate.<sup>1</sup>

#### ***Deceased Victims***

If the victim is deceased, surviving relations, excluding the defendant, in the following order, shall be designated as “victim” for purpose of exercising those rights contained in the Crime Victim Bill of Rights: spouse, adult child, parent, sibling, and grandparent.

#### ***Special Advocates***

If the court believes that the health, safety or welfare of a victim who is a minor or is legally incapacitated would not otherwise adequately be protected, the court may appoint a special advocate to represent the interest of the victim and to exercise those rights provided for by the Crime Victims' Bill of Rights. Communication between the victim and the special advocate shall be privileged. See KRS 421.500(2).

#### ***Case Law***

Although KRS 421.500 and KRS 421.520 define a “victim” whose statements shall be considered by the court prior to sentencing, the trial judge is not precluded from considering statements from other family members or friends of the victim. *Hoskins v. Maricle*, 150 S.W.3d 1, 26 (Ky. 2004).

**Prosecutors should consider requesting appointment of a special advocate for elderly victims with no support system.**

---

<sup>1</sup> The language of KRS 421.500 – 421.575 is subject to change pending the results of the general election on November 3, 2020. “Marsy’s Law,” a legislatively proposed constitutional amendment that would add a new section relating to crime victim’s rights to the Kentucky Constitution, will once again be on the ballot. The amendment was previously approved by 63% of voters in 2018, but the Kentucky Supreme Court subsequently held that the amendment had been unconstitutionally adopted. *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019). If “Marsy’s Law” is ratified in the upcoming general election, the majority of KRS 421.500 – 421.575 may be repealed and reenacted with new statutory language throughout.



The prosecutor has an obligation to consult with the victim on the disposition of the case, including a negotiated plea, and if the victim is unable to prevail upon prosecutor, he or she may seek solace from the judge. *Id.*

Although KRS 421.500 did not include third degree burglary in its definition of “victim,” the Kentucky Court of Appeals has held that a victim of this crime was properly allowed to testify at the sentencing of the defendant. *Brand v. Commonwealth*, 939 S.W.2d 358 (Ky. App. 1997).

KRS 421.500 and KRS 421.520 authorize victim impact statements even though the sentencing statutes for felonies make no provision for the considerations of an impact statement by the victim. *Nichols v. Commonwealth*, 839 S.W.2d 263 (Ky. 1992).

### **Law Enforcement’s Role and Responsibilities**

#### ***Upon Initial Contact with the Victim***

Law enforcement personnel shall ensure that victims receive information on available protective, emergency, social and medical services.

#### ***As Soon as Possible Thereafter***

The victim shall be provided information on: the availability of crime victims compensation; community-based treatment programs; the criminal justice process as it involves the participation of the victim or witness; the arrest of the accused; how to register to be notified when a person who has been charged with or convicted of a crime is released from custody and how he or she may be protected from intimidation, harassment and retaliation.

#### ***Other***

Law enforcement shall promptly return a victim’s property held for evidentiary purposes unless there is a compelling reason for retaining it and upon request assist in informing employers that the need for the cooperation of the victim or witness in the prosecution of the case may necessitate absences from work.

### **Prosecutor’s Role and Responsibilities Information**

Attorneys for the Commonwealth shall ensure that victims are informed of the following: protective, emergency, social and medical services; crime victim compensation, where applicable; restitution; obtaining assistance from a victim advocate where applicable; community based treatment

<p><b>Attorneys for the Commonwealth have specific responsibilities to crime victims under KRS 421.500.</b></p>
-----------------------------------------------------------------------------------------------------------------

**It is important to ensure that crime victims receive prompt notification of any schedule changes that affect their appearances.**

**Crime victims must be consulted on case dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and the defendant's entry into a pre-trial diversion program.**

programs; and how to register to be notified when a person who has been charged with or convicted of a crime is released from incarceration. Attorneys for the Commonwealth shall provide information to victims and witnesses on how they may be protected from intimidation, harassment and retaliation as defined in KRS 524.010 or 524.066. KRS 421.500(4).

### ***Notification***

The Attorney for the Commonwealth shall also make a reasonable effort to ensure that victims who are required to attend criminal justice proceedings are notified promptly of any scheduled changes that affect their appearances. If victims so desire – and provide the attorney for the Commonwealth with a current address and telephone number – they shall receive prompt notification, where possible, of judicial proceedings relating to their case, including but not limited to: charges filed against the defendant; the defendant's release on bond and any special conditions of release; changes in the custody of the defendant; the defendant's pleading to the charges; trial dates and verdicts; the date of sentencing; the victim's right to make an impact statement for consideration by the court at the time of sentencing of the defendant; and, the victim's right to receive notice of any parole board hearing held for the defendant. The Office of the Attorney General will notify the victim if an appeal of the conviction is pursued by the defendant, of scheduled hearings for shock probation or bail, and any orders resulting from said hearing.

### ***Consultation***

The Attorney for the Commonwealth shall consult the victim(s) on case disposition including: case dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea and the defendant's entry into a pre-trial diversion program.

### ***Other***

The attorney for the Commonwealth shall: promptly return a victim's property held for evidentiary purposes unless there is a compelling reason for retaining it; provide information on obtaining protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts; and upon request by the victim assist in informing employers that the need for victim cooperation in the case may necessitate absences from work.

**Upon the request of the victim, the victim advocate shall be allowed to accompany the victim during any court proceedings.**

### **Victim Advocate's Role**

Each victim advocate shall perform those duties necessary to ensure compliance with the Crime Victim Bill of Rights. In all court proceedings a victim advocate, upon the request of the victim, shall be allowed to accompany the victim during the proceedings to provide moral and emotional support and shall be allowed to confer orally and in writing with the victim in a reasonable manner. The victim advocate shall not provide legal advice or legal counsel in violation of KRS 421.570 and 524.130. KRS 421.575.

### **Role of the Office of the Attorney General**

The Attorney General shall, where possible, provide: notification to the victim of the defendant's initial appeal, status of the case and the decision of the appellate court, if the defendant seeks appellate review and the Commonwealth is represented by the Attorney General; and upon request, technical assistance to law enforcement agencies and Attorneys for the Commonwealth for establishing a victim assistance program.

### **Other Victim Rights**

#### ***Attendance at Juvenile Court Proceedings***

Subject to Rule 43.09 of the Rules of Civil Procedure, the court shall permit the victim, the victim's parents or legal guardian, or, if emancipated, the victim's spouse, or the other legal representation of any of these, to attend all juvenile court proceedings. KRS 610.060(5). Each District Court shall establish the means of notification and the person or agency responsible for notifying the victim and/or the persons specified above of the date, time and location of all court proceedings. KRS 610.060(6).

#### ***Access to Juvenile Court Records***

Unless a specific provision of KRS Chapter 600 to 645 specifies otherwise, all juvenile court records of any nature shall be deemed confidential and shall not be disclosed except to the child, parent, victims or other persons authorized to attend a juvenile court hearing. KRS 610.070(3), KRS 610.340(1)(a).

***Conditions of Release/Free Certified Copy*** (for victims of domestic violence or crimes covered by KRS Chapters 508 and 510).

The victim or an individual designated by the victim in writing shall be entitled to a free certified copy of the defendant's conditions of release or modified conditions of

release, upon request to the clerk of the court that issued the order releasing the defendant. The victim or the victim's designee may personally obtain the document at the clerk's office or may have it delivered by mail. KRS 431.064(6).

### ***Restitution***

Restitution shall be ordered and shall not be subject to suspension or non-imposition. If pre-trial diversion, conditional discharge, probation, shock probation or other alternative sentence is granted, restitution shall be a condition of the sentence. If a person is sentenced to incarceration and paroled, restitution shall be made a condition of parole. KRS 532.032.

### ***Victim Impact Statements***

In all felony cases, during the hearing in which the jury will determine the punishment to be imposed, evidence may be offered by the Commonwealth relevant to sentencing, including the impact of the crime on the victim and a description of the nature and extent of any physical, psychological or financial harm suffered by the victim. KRS 532.055(2)(a)(7).

**Consider videotaping the victim's impact statement if he is in the advanced stages of dementia or suffers from a terminal illness.**

### ***Sentencing Judge***

The attorney for the Commonwealth must notify the victim, upon conviction of the defendant, that he or she has the right to submit a written victim impact statement to the probation officer responsible for preparing the presentence investigation report. The impact statement shall be included in the report or submitted to the sentencing judge should such a report be waived by the defendant. The impact statement may contain, but need not be limited to, a description of the nature and extent of any physical, psychological or financial harm suffered by the victim, the victim's need for restitution and whether the victim has applied for or received compensation for financial loss, and the victim's recommendation for an appropriate sentence. The impact statement shall be considered by the court prior to any decision as to sentencing or release including shock probation. KRS 421.520.

### ***Parole Board***

If a defendant is sentenced to a period of incarceration and his release is subject to the authority of the Parole Board, a written impact statement which shall be considered when making a decision on the release of the defendant. The impact statement may contain, but need not be limited to, a description of the long-term consequences of the crime, including but not necessarily limited to the physical, psychological and financial

harm suffered by the victim and whether the victim has applied for or received compensation for financial loss. KRS 421.530.

### *Victim Advocates*

**Prosecutors are increasingly turning to advocates to assist crime victims in staying safe, accessing needed services such as medical, social and mental health services and providing information about the individual case and criminal justice system generally to victims while aiding the prosecutor in improving conviction rates.**

Effective and sensitive prosecutors are increasingly turning to lay advocates to assist crime victims in staying safe, accessing needed services such as medical, social and mental health services and providing information about the individual case and criminal justice system generally to victims while aiding the prosecutor in improving conviction rates. These advocates may be victim witness workers within the prosecutor's office or an advocate from a community program such as a domestic violence program/shelter, a rape crisis program or a program designed specifically to assist elder victims of crime.

### *Types of Programs and Roles*

Two of the most common kinds of advocacy programs are victim witness programs internal to the legal system (i.e. prosecutors' office, law enforcement agencies, courthouse) and community advocacy programs external to the legal system (i.e. domestic violence programs/shelters, rape crisis centers). Each may serve a different primary purpose and may have different strengths and limitations. However, scarce resources for advocacy services means it is necessary to focus on the common goals and look for ways to coordinate victim advocacy and assistance functions between internal victim witness and external community based programs to provide the best and most comprehensive victim assistance services for each community.

### Advocates Internal to the Legal System: Roles

- Assisting in compliance with the Crime Victims' Bill of Rights.
- Court Accompaniment.
- Assisting prosecutors in handling and proving cases.
- Assisting law enforcement in working with crime victims and in gathering evidence that a crime was committed.

### Advocates External to the Legal System: Roles

- Assisting in compliance with the Crime Victims' Bill of Rights.
- Court Accompaniment.
- Assisting in accessing resources and services such as mental health, medical and social services, housing, government benefits and safety planning.

**Defense attorneys have attempted to subpoena advocates and records. Filing motions to quash such attempts is a critical role a prosecutor can and should play to protect local advocacy programs as a resource for victims.**

- Advocating on behalf of the interest of the individual crime victim in general with systems such as legal, welfare, housing, etc. The focus is on the needs of the victim as defined by the victim (rather than as defined by the legal or other system.) Prosecutors are increasingly turning to lay advocates to assist crime victims in staying safe, accessing needed services such as medical, social and mental health services and providing information about the individual case and criminal justice system generally to victims while aiding the prosecutor in improving conviction rates.

### ***Confidentiality***

KRE 506 includes non-prosecutor-based victim advocates in the definition of counselor for purposes of the counselor- client privilege. Defense attorneys have attempted to subpoena advocates and records. Filing motions to quash such attempts is a critical role a prosecutor can and should play to protect local advocacy programs as a resource for victims. If a prosecutor needs testimony from a non- prosecutor-based victim advocate, the advocate will need to get a release from the victim.

### ***Where to Locate a Victim Advocate***

In addition to victim advocates employed in the offices of County and Commonwealth’s Attorneys, victim advocates that serve victims of a wide range of crimes are sometimes employed by law enforcement agencies or county or local governments. In some areas, members of local crime victim rights groups serve as volunteer victim advocates. Elder victims of domestic violence and sexual assault can access the services of a victim advocate through the regional domestic violence and sexual assault programs. In some areas agencies that provide a wide range of services to elders provide or are beginning to provide crime victim assistance services.

### **Victim Services**

#### ***Crime Victims Compensation***

*Eligibility* The victim of criminally injurious conduct; a surviving spouse, parent or child of a victim of criminal injurious conduct who died as a direct result of such conduct; a dependent of a victim of criminal injurious conduct who died as a direct result of such conduct; or any person who is legally responsible for the medical expenses or funeral expenses of a victim may file a claim for compensation.

**Elder victims of domestic violence and sexual assault can access the services of a victim advocate through the regional domestic violence and sexual assault programs.**

**Be aware that there are time limitations within which a crime victim must file his request for compensation from the Kentucky Claims Commission.**

### ***Additional Requirements***

To be eligible for compensation the crime must have been reported within 48 hours after the occurrence, unless the delay is found to be justified. An application must be filed not later than five (5) years after the crime.

### ***Making a Claim***

The Crime Victims Compensation Program is administered by the Kentucky Claims Commission. In order to make a claim, you may contact the Commission directly at (502) 782-8255 or visit their website: <http://kycc.ky.gov/>. Application forms are available on the website in both English and Spanish.

### ***Sexual Assault Examinations***

Every hospital in Kentucky that offers emergency services is required to have a physician or sexual assault nurse examiner available on-call twenty-four hours each day for the examination of persons reported to any law enforcement agency to be the victim of a sexual offense. In some communities these examinations may be performed at sexual assault examination facilities. Payment for the examination is provided by funds administered by the Kentucky Claims Commission. (contact information above). The victim may not be charged for the examination. The fund will also provide reimbursement to any out-of-state hospital, physician or credentialed nurse for sexual assault examinations provided for a victim of a sexual assault that occurred in Kentucky.

### ***Victim, Witness, and Family Protection Program***

This program provides funding to law enforcement agencies for protective services provided to crime victims, witnesses and their families as defined in KRS 421.500(1). To be eligible, a person must be at substantial risk of imminent serious physical injury and unable to provide protective services for his or herself. Services which will be considered for reimbursement are limited to those for physical protection of the person; physical security for the person's residence, vehicle, workplace; short term relocation or a combination of these services. Protective services are limited to six months. Any Commonwealth's or County Attorney may apply to the Prosecutors Advisory Council for funding.

**Kentucky's Victim, Witness and Family Protection Program can provide physical protection for the person; physical security for the residence, vehicle and workplace; short-term relocation or a combination of these services.**

### ***VINE (Victim Information and Notification Everyday)***

Victims, prosecutors, and the general public have 24-hour access to the Victim Information and Notification Everyday (VINE) system which provides information on status, location, parole eligibility, release and housing location of offenders

including juvenile violent offenders and violent offenders that have been involuntarily hospitalized.

The Department of Corrections in cooperation with local and regional jailers and juvenile detention center directors has developed this computerized notification system. In order to use this service, you may register on the website: <https://corrections.ky.gov/Victim-Services/Pages/VINE-Info.aspx> or by calling: (800) 511-1670.

### ***Kentucky Offender Online Lookup (KOOL)***

The Department of Corrections maintains a 24-hour access website providing information on the status of criminals who are currently incarcerated in a state or private prison, county jail or halfway house. In order to access the Kool database, visit: <http://kool.corrections.ky.gov/>. More information on KOOL can be found on the following website: <https://corrections.ky.gov/About/kool/Pages/default.aspx>.

### **Sex Offender Information**

#### ***Sex Offender Registry***

Kentucky's Sex Offender Registration Act, sometimes referred to as "Megan's Law" requires certain sex offenders to register with the probation and parole office in their county of residence. The Kentucky State Police have established a web site, that is accessible to the public, containing information on all offenders who are required to register and may include a photograph of the offender. No information identifying the victim is included. For more information, visit their website at: <http://kpsor.state.ky.us/> or call (502) 227-8700.

#### ***Sex Offender Alert Line***

The Kentucky State Police has also established the Kentucky Sex Offender Alert Line. Similar to VINE, the Sex Offender Alert Line allows anyone to register for automated notification when a sex offender moves into an area. To register call 866-564-5652. Once registered, the system will call you whenever a sex offender moves into the zip code specified. The web site can then be accessed to obtain further information.

### **Special Considerations for Working with Elderly Victims**

#### ***Accommodating Special Needs***

The Office for Victims of Crime makes the following recommendations for assisting elder victims of crime:

- Immediately assess the victim's need for emergency financial assistance.
- Provide frequent breaks when interviewing the elderly



**The Office for Victims of Crime offers several recommendations, listed here, for assisting elderly victims of crime.**

victim.

- Be aware that elderly victims may have complicated medication schedules or illnesses that call for frequent meals or snacks.
- Talk to the victim or the victim's family to determine the time the victim will be most alert and schedule appointments or court appearances around those times when possible.
- Determine if the physical space in your office or in the courtroom needs to be adjusted to meet the needs of the elderly victim.
- Consider having program brochures or other informational resources printed in larger type for elderly victims.
- If feasible, conduct "home or hospital" visits to obtain all related case information including restitution, victim compensation or presentence information rather than making the victim come to you.
- Determine the transportation needs of the elderly victim.

### ***Effective Communication***

The Office for Victims of Crime also suggests that the following techniques be used for more effective communication with older victims of crime:

- Do not assume that an older adult has a sensory or cognitive impairment.
- Choose an environment most conducive for communication.
- Assure adequate lighting without glare.
- Sit or stand facing the older adult at their eye level.
- Keep instructions short and simple.
- Keep your voice and mannerisms calm.
- Do not shout. If necessary speak slightly louder without shouting or yelling.
- Ask questions to clarify confusion.
- Be sensitive to whether the older adult is tired, not feeling well or becoming too upset.
- Observe closely for nonverbal clues to see if you have been understood.
- Be patient.
- Never interrupt.

**The Office for Victims of Crime also suggests techniques that promote more effective communication with elderly victims.**

### **Create Innovative Programs for Responding to Elder Abuse**

#### ***Multidisciplinary Case Review Teams***

In jurisdictions such as Jefferson and Fayette Counties, teams made up of representatives from the fields of prosecution, law

enforcement, social services, victim advocacy, mental health, medicine and others meet regularly to discuss cases with the goals of providing comprehensive victim services, better investigation and more effective prosecution. These teams are often modeled after the child sexual abuse multidisciplinary teams mandated by KRS 431.600.

### ***Fatality Review Teams***

According to *Elder Abuse Fatality Review Teams*:

A *Replication Manual* published by the American Bar Association and the Office for Victims of Crime, the concept of fatality review teams “involves bringing together a group of professionals to examine deaths that result from or relate to a certain cause in order to improve the thing or system that caused, contributed to, or failed to prevent the death and, thus, prevent similar deaths in the future. This means that the primary goal of [an Elder Abuse Fatality Review Team] is the improvement of services to victims so that they receive the services and interventions they need.”

Suggested team members or consultants include: Adult Protective Services, Aging Services, Animal Protection, Attorney General, Coroner, Disability Services, Domestic Violence Program, Elder Law, Emergency Services, Facility Regulator, Funeral Home Director, Geriatrician, Gerontologist, Law Enforcement, Legislators, Long Term Care Ombudsman, Medicaid Fraud Control Unit, Medical Examiner, Mental Health Services, Nursing (geriatric), Physician, Dentist or other health care providers, Pharmacologist, Prosecution, Public Guardian, Public Health Agency, Sexual Assault Program, Victim Advocate, and Vital Statistics.

### ***Local Coordinating Councils***

In Kentucky there are Local Coordinating Councils on Elder Abuse in every Area Development District. These Councils are formed under the leadership of the Area Agencies on Aging and the local Adult Protective Services staff of the Kentucky Cabinet for Health and Family Services. Members of local Councils include APS staff, law enforcement, judges, prosecutors, bankers, care providers, and other advocates for the elderly. The goals of the Councils are to:

- Develop and build an effective community-wide system of prevention and intervention that is responsive to the needs of victims, perpetrators, family members and formal or informal caretakers.
- Identify and coordinate the roles and services of local agencies that work with abused, neglected, or exploited victims and to investigate or prosecute elder abuse

cases.

- Monitor, evaluate, and promote the quality and effectiveness of services and protection in the community.
- Promote a clear understanding of elder abuse, current laws, elder rights and resources available in the community, and serve as a clearinghouse for information on elder issues. (Adapted from the Cabinet for Health and Family Services, Elder Abuse website: <https://chfs.ky.gov/agencies/dcbs/dpp/apb/Pages/elderabuse.aspx>).

### ***Emergency Crisis Response Team (ECRT)***

ElderServe, Inc. provides a crisis response service which provides an advocate and home care worker on call 24 hours a day, seven days a week. The ECRT provides immediate, short-term emergency shelter and home care services to Metro Louisville seniors (age 60+) who are experiencing abuse, neglect or exploitation as a result of crime. Senior victims of domestic violence, sexual assault, robbery, assault, financial exploitation and related crimes are eligible for services. Victims suffering from mental illness or drug or alcohol abuse must be evaluated for approval. Victims of self-neglect are not eligible. Clients MUST be able to administer their own medications and must be referred through Adult Protective Services or other appropriate referral sources. For more information, call (502) 587-8673 or visit the website: <http://elderserveinc.org/>.

## RESOURCE DIRECTORY

### State Resources

#### **Office of the Kentucky Attorney General:**

- Office of Medicaid Fraud and Abuse  
(502) 696-5405  
<https://ag.ky.gov/about/OfficeDivisions/OMFA/Pages/default.aspx>

*Elder Abuse and Medicaid Fraud Hotline*  
(877) ABUSE-TIP (228-7384)

- Office of Consumer Protection  
(502) 696-5389  
<https://ag.ky.gov/about/OfficeDivisions/OCP/Pages/default.aspx>

*Consumer Protection Hotline*  
(888) 432-9257

- Office of Victims Advocacy  
(502) 696-5312  
<https://ag.ky.gov/about/OfficeDivisions/OVA/Pages/default.aspx>

*Victims Advocacy Hotline*  
(800) 372-2551

#### **Cabinet for Health and Family Services:**

- Department for Aging and Independent Living (DIAL)  
(502) 564-6930  
<https://chfs.ky.gov/agencies/dail/Pages/default.aspx>
- Department for Behavioral Health, Developmental and Intellectual Disabilities (DBHDID)  
(502) 564-4527  
<https://chfs.ky.gov/agencies/dbhdid/Pages/default.aspx>
- Department for Community Based Services (DCBS)  
(502) 564-3703  
<https://chfs.ky.gov/agencies/dcbs/Pages/default.aspx>

*Adult Protection Branch*  
(502) 564-7043  
<https://chfs.ky.gov/agencies/dcbs/dpp/apb/Pages/default.aspx>

*Child/Adult Abuse Hotline*  
(877) KYSAFE1 (597-2331) or (800) 752-6200

*Family Violence Prevention Branch*

(502) 564-6852

<https://chfs.ky.gov/agencies/dcbs/dpp/fvpb/Pages/default.aspx>

*Additional violence prevention resources available at:*

<https://chfs.ky.gov/agencies/dcbs/dpp/fvpb/Pages/violenceprevention.aspx>

- Office of the Ombudsman and Administrative Review (OOAR)  
(502) 564-5497 or (800) 372-2973  
<https://chfs.ky.gov/agencies/os/omb/Pages/default.aspx>

**Commonwealth of Kentucky, Department of Corrections**

(502) 564-4726

<https://corrections.ky.gov/Contact/Pages/probationandparole.aspx>

*Statewide Probation and Parole List:*

<https://corrections.ky.gov/Probation-and-Parole/Documents/Statewide%20PP%20Phone%20List%2012-13-19.pdf>

- Victim Information and Notification Everyday (VINE)  
(502) 564-5061 or (877) 687-6818  
<https://corrections.ky.gov/Victim-Services/Pages/VINE-Info.aspx>

*Register with VINE Now:*

(800) 511-1670

- Kentucky Online Offender Lookup (KOOL):  
<http://kool.corrections.ky.gov/?offenderType=INCARCE RATED%20INMATES&pageNumber=598&returnResults=True>

**Kentucky Claims Commission**

(502) 782-8255

<http://kycc.ky.gov/>

*Crime Victims Compensation Form:*

[http://kycc.ky.gov/Documents/KCC\\_CrimeVictimsCompensationClaimForm.pdf](http://kycc.ky.gov/Documents/KCC_CrimeVictimsCompensationClaimForm.pdf)

**Kentucky Parole Board**

(502) 564-3620

<https://justice.ky.gov/Pages/Parole-Board.aspx>

*Victim Services*

(800) 221-5991

<https://justice.ky.gov/Pages/Victim-Services.aspx>

**ElderServe (Louisville Metro Area)**

*Emergency Crisis Response Team:*

**(502) 587-8673**

<https://www.elderserveinc.org/>

**Kentuckians' Voice for Crime Victims**

(502) 244-4120

<https://kvcv.org/contact/>

**Kentucky Association of Sexual Assault Programs  
(KASAP)**

(502) 226-2704 or (866) 375-2727

<https://www.kasap.org/>

**Kentucky Sex Offender Registry**

(502) 227-8700

<http://kspsor.state.ky.us/>

*Sex Offender Alert Line:*

(866) 564-5652

*National Resources*

**National Center on Elder Abuse (NCEA)**

(855) 500-ELDR (3537)

<https://ncea.acl.gov/>

*Elder Care Locator*

(800)677-1116

<https://eldercare.acl.gov/Public/Index.aspx>

**National Council on Aging (NCOA)**

(571) 527-3900

<https://www.ncoa.org/>

**National Center for Victims of Crime**

(202) 467-8700

<https://victimsofcrime.org/>

**National Organization for Victim Assistance**

(703) 535-5500

<https://www.trynova.org/>

*Victim Assistance Helpline:*

(800) TRY-NOVA (879-6682)

**National Association of Crime Victim Compensation  
Boards (NACVB)**

(703) 780-3200

<http://www.nacvcb.org/index.asp?sid=1>

**National Domestic Violence Hotline**

(800) 799-SAFE (7233) or (800) 787-3224

<https://www.thehotline.org/>

*If unable to speak safely, log onto thehotline.org or text LOVEIS to (800)331-9474*

**National Sexual Violence Resource Center (NSVRD)**

(717) 909-0710 or (877) 739-3895

<https://www.nsvrc.org/>

*Local Resources (fill in blanks for quick access)*

County Attorney:

---

Commonwealth's Attorney:

---

Law Enforcement:

---

Victim Advocate:

---

Rape Crisis Center:

---

Domestic Violence Shelter/Program:

---

Agency for Aging:

---

## EXAMPLE

### **Minimum Standard Protocols for Multidisciplinary Teams or Local Coordinating Councils**

1. Every county should have an interagency protocol agreement for the investigation of elder and dependent adult abuse, neglect and exploitation developed and agreed upon (signed) by the directors of the following core agencies:
  - Commonwealth's Attorney
  - County Attorney
  - Law Enforcement (Sheriff, Chiefs of Police, KSP)
  - Medical Examiner
  - Adult Protective Services (APS) or equivalent agency administering elder welfare
  - Public Health
  - Public Guardian/Public Conservator

This protocol agreement may include but is not limited to the following additional entities:

- Probation & Parol
  - Courts
  - Clergy
  - Regional Centers
  - Mental Health
  - Ancillary Law Enforcement (such as the federal government and the military)
  - Victim-Witness Programs
  - Hospitals
  - Health and Family Services
  - Medicaid Fraud and Abuse Control Unit, Office of the Attorney General
2. Protocols should include the following:
    - Mission goal and mission statement
    - Written standards and procedures
    - Procedure for periodic review by all agencies involved
    - Procedures for dissemination to all parties involve
    - Procedure for training about this protocol
    - Recognition of the need for ongoing training procedures for professionals involved in the investigation of elder and dependent adult abuse
  3. Protocols should address all dependent adults and elders, including elders with special needs, suspected of being abused or neglected in the following situations:
    - Intra-family or in-home
    - Out-of-home (e.g., adult day care, residential care facilities for the elderly, licensed health care facilities, including skilled nursing facilities)
    - Perpetration by a stranger
    - Homes with domestic violence



4. Protocols must address a “cascade” or sequence of responses that takes into account the emotional and physical well-being of the elder or dependent adult victim.
  - Initial response following a referral should be coordination among first responders (i.e., APS and law enforcement) to reduce redundant interview with or questions to the victim. Specifically, the protocol should outline the procedures by which first responders share information with each other.
  - Investigative procedures for forensic evidence gathering
  - Reporting procedures and cross-reporting procedures
  - Minimum standards for levels of professional competency
  - Knowledge of legal authority
  - Procedures for sharing information with all parties involved in the investigation
  - Procedures for removing and transporting an elder or dependent adult: Who takes the victim where, and under what conditions
  - Procedures to ensure that a victim receives any prescribed medication or had needed eye glasses, hearing aid, or special equipment such as a cane, walker, or wheelchair

Procedures must also include the following considerations for forensic evidentiary interviews and medical exams:

- Qualification of personnel conducting the interview or exam
  - Location of the interview or exam
  - Procedures for documentation
  - Guidelines for deciding which agency budget will cover the cost of the exam or interview
  - Definition of criteria under which an elder or dependent adult qualifies for an exam or interview
5. Protocols should address the following issues:
    - Procedures for denial of entry for any of the responders to a referral for elder or dependent adult abuse
    - Procedures for sharing of information among mandated reporters, first responders, professionals, follow-up investigation
    - Procedures for sharing information among professional elder or dependent adult abuse investigators that address issues of confidentiality. (Legal confidentiality is narrower than often assumed.)
    - Procedures for providing information about protective orders, prior history criminal background checks, court actions, and placement orders
    - Procedures for emergency situations or professional judgment that allow for deviation from the protocol
  6. Protocols must explain how the interagency protocol for elder or dependent adult abuse investigation interfaces with or acknowledges the protocols of individual agencies involved and must include procedures for resolving any conflicts among those protocols.

## **A Prosecutor's Experience**

*I have just completed an elder financial abuse jury trial and felt that I should share one of the many highlights of working with an elderly witness in court.*

*I prosecuted a former caregiver [ex-felon of course!] for stealing checks belonging to the elderly couple who had been married for over 62 years. The wife [86] sadly had severe dementia and did not testify. The husband [87] did testify and was able to identify several checks as NOT bearing his signature or that of his wife.*

*The defense argument [straight from opening statement] was that the husband was SO old and SO forgetful that he no longer recognized the signature of either himself or his wife. The defense attorney further bolstered that argument by hiring a "handwriting" expert to testify that many of the questioned checks were written by the husband. The police document examiner had been unable to make any determination of authorship [which is not surprising] based on lack of known samples from the defendant.*

*My primary victim - the 87 year old husband - naturally wanted to meet with me in preparation for his testimony just before trial. But I refused. I did not want the defense attorney to gain the satisfaction of asking my victim about "preparation" time with the prosecution.*

*The victim testified and handled my "spontaneous" questions brilliantly.*

*During cross-examination the defense attorney sought to undermine my victim's credibility by testing his recent memory. In one memorable exchange [for which I would have paid money for a front row seat!] the attorney asked as follows:*

*"Sir, what did you have for breakfast this morning?"*

*Victim paused, reflected, and then provided the information.*

*Trying to score an advantage, the attorney then asked "Sir, what did you have for breakfast three days ago?"*

*Victim paused again, reflected, and gave his answer - including details about the way his egg had been cooked.*

*Then the 87 year old victim leaned forward, looked right into the eye of the defense attorney and said politely "Now, what did YOU have for breakfast three days ago?"*

*Is it any wonder that after 6 days of testimony, the jury deliberated for just 2 hours and returned guilty verdicts on six counts against the defendant.*

*Give me an elderly witness any day! You cannot write a better script...*

Paul Greenwood  
Deputy District Attorney  
Head of Elder Abuse Prosecution Unit  
San Diego DA's Office  
Reprinted with permission

## **XII. MEDICAID FRAUD & ABUSE CONTROL UNIT**

Medicaid is a joint federal/state funded program designed to serve the economically disadvantaged. The Medicaid Fraud and Abuse Control Unit (MFCU) is a division of the Attorney General's Office and that has the responsibility to conduct a statewide program for the investigation and prosecution of health care providers who defraud the Medicaid program and to investigate and prosecute persons who commit fraud in the administration of the Medicaid program. KRS 15.010; 42 USC § 1396b(q). Additionally, the MFCU has statutory responsibility to investigate and prosecute those who abuse, neglect or exploit adults in facilities.

**The Kentucky Medicaid Fraud & Abuse Control Unit stands ready to assist local prosecutors in any way possible to assure the most effective prosecution of those who abuse the elderly. Call 502/696-5405 at any time.**

Though initially voluntary, since 1995 under federal law each state must have an MFCU, unless the state can certify to the Secretary of the Department of Health and Human Services that a Unit is unnecessary because minimal fraud exists in the state's Medicaid program. Kentucky has had a MFCU since February of 1980.

Under federal law, the MFCU is designed to operate as a strike force, and contains auditors, investigators and prosecutors trained and experienced in the detection and prosecution of criminal fraud and financial crimes. In addition, the MFCU has a nurse on staff and employees who are certified medical coders.

The MFCU has original jurisdiction under KRS 205.8469 to prosecute "provider fraud". This is separate and apart from what is sometimes called welfare fraud, for those crimes focus on the recipient of services. The providers with whom the MFCU is concerned include, but are not limited to:

- doctors
- nurses
- dentists
- clinics
- ambulance and transportation companies
- hospitals
- nursing homes

- boarding homes
- laboratories
- pharmacies
- home health care providers
- medical equipment suppliers

In many states the primary source of provider fraud referrals is from the agency responsible for auditing and reviewing the provider billing claims. In past years that has been true in Kentucky, though lately referrals have come more frequently from other sources, including employees of the provider, patients, anonymous hotline complaints and data uncovered while investigating other providers.

Investigators, auditors, nurses and prosecutors of the MFCU are required to be trained in the detection and prosecution of provider Medicaid fraud. Usually within the first year of employment with the unit, staff is required to undergo an intensive week long training and orientation program offered by the National Association of Medicaid Fraud and Abuse Control Units. This highly specialized training is developed and coordinated by the Training Committee of the national organization.

In addition to the Basic Training Course, staff are offered opportunities for participation in intensive trial practice institutes and intermediate courses on specialized topics ranging from dental fraud prosecution, to corporate abuse and neglect prosecutions. An annual week long conference of the National Association Medicaid Fraud and Abuse Control Units offers further focused training, and is attended by personnel of the Kentucky MFCU.

The Kentucky MFCU stands ready to assist local prosecutors in any way possible to assure the most effective prosecutions of those who abuse the elderly and other vulnerable adults. We can offer prosecutorial assistance, resource materials, trial strategy materials, and where necessary a nurse to review medical records and to provide testimony at trial. Through our continuing relationship with the state survey and licensing agency, our statewide contacts with DCBS and APS personnel, we believe we can assist your important efforts. Importantly, with our experience in the investigation and

prosecution of Medicaid fraud cases, we are anxious to discuss the possibility of coordinated abuse and fraud prosecutions, where claims for medical services have been made in an atmosphere of widespread abuse.

Finally, Medicaid providers who are convicted of abuse or neglect are subject to exclusion from future participation as a health care provider. Upon conviction of any provider, please contact the Kentucky MFCU with case data and we will work to see that the individual is placed on an exclusion list. When there is any question about whether a defendant is a provider, or about whether exclusion is appropriate, please forward the information and it will be analyzed. The telephone number is 502/696-5405.

### **XIII. CIVIL REMEDIES**

#### **GUARDIANSHIP and ALTERNATIVES: A *GUIDE to MAKING INFORMED DECISIONS***

##### **What are Guardianship and Conservatorship?**

Guardianship/Conservatorship is the legal relationship between a capable adult, the *guardian*, and the *ward*, a person who has been determined to be legally disabled. A legally disabled person is an individual found to be unable to make informed decisions about his personal or financial affairs. A conservator handles only financial affairs.

Following the determination by a jury that an individual is partially or fully disabled, the judge will rule who shall be guardian and what responsibilities the guardian will have (personal, financial, or both). In the event of a partial disability determination the judge will decide what rights the ward will maintain (i.e., right to vote, drive, enter into contracts, etc.)

The appointment will legally enable the guardian to make decisions for and act on behalf of the disabled adult. The guardian uses the ward's money to provide food, shelter and clothing for the ward and consents to medical procedures with some restrictions.

Because guardianship will mean **a loss of individual rights** it is very important to first **consider any other options such as:**

##### **Power of Attorney**

A competent individual may sign a document called a Power of Attorney. This allows another adult to handle his financial affairs while still maintaining his personal rights. This may be done through a private attorney and does not require court involvement.

##### **Health Care Surrogate**

The law also allows an adult to designate another adult to authorize medical decisions for him or her. This is similar to a *power of attorney*, but focuses on medical issues versus financial affairs.

##### **Representative Payee**

A representative of a consenting adult may become payee of government benefits like Social Security, Supplemental Security Income (SSI) and Veteran's benefits. This person

is then able to manage these funds on behalf of the individual. Payees are established through the specific agencies and not through the court system.

### **Curator**

An aged or infirmed person may request a curator through the district court. The curator appointed by the court is responsible for managing the individual's real or personal property or business. The curator must post a bond and is accountable to the District Court.

### **When should guardianship or conservatorship be considered?**

When an individual is not capable of exercising all the rights of an adult and family/friends are unable to provide protection, it may be necessary to appoint a guardian or conservator.

An Emergency Hearing may be considered if it is believed that the respondent is in *imminent danger* to his health or safety, or that his money is being stolen or excessively wasted.

Examples of appropriate petitions may be:

- An adult who is unable to meet his or her own daily needs due to profound mental illness or dementia (i.e., bills go unpaid, starvation, poor hygiene, incidents of wandering);
- Proof of abuse, neglect or financial exploitation by a caretaker;
- An adult diagnosed with intellectual disability;
- Serious accidents that result in trauma to the brain impacting the person's ability to care for him or her self;
- Frequent substantiated referrals to Adult Protective Services.

### **Who may file a petition for guardianship?**

Any person concerned with the welfare of an individual may file a petition for guardianship. The concerned person will be the petitioner, and the other individual will be the respondent on court documents.

### **Who may serve as guardian?**

The court must first consider the respondent's wishes, such as a previously appointed power of attorney, and must also consider any appropriate family member who may be willing and able to serve as guardian. However, in cases of exploitation or family disagreement, the court may appoint a third party to serve as guardian. A third party may also be necessary when the petitioner is unable to be bonded due to bankruptcy or other reasons.

### **How is a Petition filed in Disability Court?**

Petitions are filed in the District Court Clerk's Office in the county where the respondent currently resides.

### **When filing a Petition, you must bring with you:**

- The filing fee;
- A list of the respondent's financial assets (income, bank accounts, real estate, stocks etc.);
- Proof of the respondent's social security number;
- Names and addresses including zip codes, of the respondent's next of kin.

For further information on guardianship refer to the Kentucky Revised Statutes Chapter 387.

### **ALTERNATIVES to GUARDIANSHIP**

Guardianship takes away the civil and Constitutional rights of a disabled adult and should only be utilized to the extent absolutely necessary to protect a disabled adult from harm [KRS 387.500(3)]. To protect the rights of disabled adults, all alternatives to guardianship should be explored and exhausted before filing for guardianship of an adult. Alternatives to guardianship include power-of-attorney, joint accounts, direct deposit, bill-paying services, representative payee, health care surrogates and trusts.

Most of the alternatives to guardianship are voluntary arrangements or contracts entered into by an adult (the grantor) to authorize someone to act on the behalf of the grantor. A threshold issue in any voluntary arrangement is the capacity of the grantor to consent to the agreement they are entering into. Capacity is the ability to make and communicate informed and rational decisions. Capacity requires the grantor to have the ability to understand and communicate the essential underlying facts and the risks and benefits of the decision being made. A person may have capacity to make some decisions, and not have the capacity to make others. Capacity is much more than the ability to say yes or no, or to sign one's



name. Assessing capacity takes planning and time. An expert with experience in gerontology (doctor, psychologist, social worker, or attorney) may be consulted to evaluate the capacity of an individual to enter into a particular arrangement. Contracts and agreements entered into without capacity are subject to challenge in court based on lack of capacity. Persuading the grantor to sign a document when you know they are unable to understand the document violates the basic rules of legal ethics, and may be the commission of a fraud. Assisting another in the execution of documents by someone who lacks capacity is generally the assistance of another in the commission of a fraud and is also prohibited by the rules of ethics. Before asking anyone to execute advance-planning documents, always verify that the grantor has the capacity to understand the risks and benefits of the agreement they are entering into.

Management of money can be a tool in ending or avoiding elder neglect and exploitation and there are several tools for managing money.

Direct deposit is a simple and free tool to assure that income is deposited into the account of the beneficiary. The loss, theft or forgery of checks is very common in cases of elder abuse, neglect and exploitation. Elders in all income ranges are subject to exploitation and neglect. Higher income individuals tend to have savings and other assets beyond income, making direct deposit a less useful tool for protecting them from exploitation. Low-income seniors are frequently dependent on income and have little savings to be stolen. Social Security, Veterans benefits, and most pensions can be direct deposited into a bank account as long as the name of the beneficiary is on the account. Direct deposit assures that the income is received and deposited on time each month. Direct deposit reduces the likelihood that the checks will be lost, stolen or forged. With few exceptions, all seniors should be encouraged to take advantage of direct deposit (the exception would be seniors who have outstanding judgments making the account subject to being frozen by possible garnishments.) To enter into direct deposit, the beneficiary of the funds must have the capacity to execute the necessary contractual agreements (understand what his income is, where it comes from, and that this agreement will arrange for the income to be directly deposited into a particular bank account).

Once the money is in the account, expenses of the beneficiary can be paid one of several ways. The beneficiary retains the right to access the account and do with the money anything that they want to, so they can pay bills out of the account. A joint account holder can write checks to pay the necessary bills. Using a reliable joint account holder can be a valid tool to remedy self-neglect. The attorney-in-fact (agent) under a power-of-attorney may also be able to access the account to pay for the necessary expenses of the grantor, as long as the bank recognizes the power-of-attorney document as valid. Many bills, such as utilities, mortgage payments and rent, can be paid by automatic withdrawal from the account. Automatic bill payment is an excellent tool for dealing with self-neglect (and caregiver neglect). All of these tools only work if the disabled adult and any potential abusers allow them to work. They do not stop the disabled adult from withdrawing and wasting the money deposited into the account. Hence, they are not the answer all of the time, but they frequently work. Direct deposit with a method to pay the bills is the least restrictive alternative and should be utilized when it will remedy abuse, neglect or exploitation.

Social Security and the Veterans Administration have programs known as “representative payee” (Social Security) and “fiduciary” (Veterans Administration) for sending the benefits checks of a disabled beneficiary to a third party known as a payee. A representative payee is appointed for a person who lacks the capacity to manage his income (hence it is a tool to use when a person lacks capacity to enter into a contract or agreement). The payee must keep the funds of the disabled adult in a separate account and may be required to report to the Social Security Administration (SSA) or Veterans Administration (VA) regarding the expenditure of funds. Only the payee has the legal authority to withdraw and expend the funds in the payee account. The payee will normally provide the disabled adult with a modest personal allowance to be spent as the person wishes.

To apply for representative payee on Social Security any interested person must appear in person at the local Social Security field office. The applicant needs to complete a form (SSA-11, Request to be Selected as Payee) show documentation to prove his or her identity, and provide his or her social security number. A criminal background check is run on the proposed payee. Once approved, the benefits are direct deposited into the payee account in the name of the payee. The payee is required to keep the funds in a separate bank account and may be required to file an annual accounting with Social Security regarding the money.

Representative payee can be an excellent tool for helping someone who is self-neglecting. The payee can assure that the person's needs are met and paid for. Because there is no formal finding of incapacity needed, the disabled adult is protected from the legal process for determination of disability. The payee system only deals with income from that source, making it much less restrictive than guardianship. Representative payee is a less restrictive alternative that should be explored before guardianship is considered.

Representative payee can also be used to eliminate financial exploitation. If the disabled adult no longer has direct access to the income, it is much harder for someone to financially exploit him.

An *inter vivos* trust can also be used as a tool to prevent self-neglect and exploitation. A trust needs to be created when the grantor has very broad capacity. The trust document should specify how the person's financial affairs are to be managed; how authority is to be transferred in the event that the trustee becomes incapacitated (and how incapacity is defined for the purposes of the trust.) Actions can be filed in circuit court to force the trustee to account for and deliver the assets of the trust, and for the removal of a trustee who is failing to act or is in breach of his fiduciary duties to the trust. Trusts governed by a well-established set of accountability standards offer many remedies for breach of fiduciary duty by the trustee. A well-written and fully funded trust controls the assets and delegates all financial authority to the trustee. If the trust is accompanied by appointment of an attorney in fact and health care surrogate, guardianship can be avoided (as long as all decision makers act as required.) Trusts are not terribly common, as they are complex, time consuming and can be expensive to establish.

Health decision-making is regulated in Kentucky under KRS 311.621 and subsequent sections. A person has the legal right to make health care decisions until his treating physician has determined in good faith that he lacks decisional capacity [KRS 311.629(2)]; or when a court has determined in a guardianship action that the adult lacks capacity to make health care decisions. When a person lacks decisional capacity, the person(s) named in a properly executed document naming a health care surrogate overrides all other persons in authority, including a court-appointed guardian. If the patient has not named a health care surrogate, KRS 311.631 names the following persons to make health care decisions for him:

- A court-appointed guardian, if medical decisions are

- within the scope of the guardianship; if none
- The attorney-in-fact named in a durable power of attorney, if the durable power of attorney specifically includes authority for health care decisions; if none
- A spouse; if none
- The majority of the adult children of the patient who can be reasonably contacted; if none
- The parent(s); if none
- The majority of the nearest living relatives who can be reasonably contacted.

Kentucky has a standard Living Will form that names a health care surrogate [KRS 311.625]. The designation of a person to make health care decisions can be made in another document such as a power of attorney. To include health care decision-making, the power of attorney must specifically say that it includes the authority to make health care decisions. Any document establishing authority to make health care decisions must be signed by or at the direction of the grantor in the presence of two subscribing witnesses or a notary. The witnesses may not be a family member, health care provider, person responsible for paying medical expenses or a person who would benefit from the death of the grantor. The notary should not be any of the above, except he may be employed by a health care provider [KRS 311.625(2)].

## **Guardianship**

### **Why File for Guardianship?**

With all of the alternatives available, in theory, it is possible to avoid the need to file guardianship. Because guardianship strips disabled adults of their civil rights, guardianship should only be considered if no alternative would remedy abuse, neglect or exploitation.

The first condition that needs to exist before you consider recommending a guardianship filing is that legal decisions need to be made and no one has the legal authority and is willing to make those decisions. Guardianship is really warranted if the decisions that need to be made are essential legal decisions. The kind of issues that warrant guardianship include necessary financial transactions to pay for the care of the disabled adult, necessary health care decisions that no one is able to make (either no family member is willing and able to make health care decisions or the class of family members that need to make health care decisions are hopelessly deadlocked). If there is not an issue of authority to make necessary legal decisions, guardianship is an unnecessary intrusion into the life of the disabled adult.

Guardianship is occasionally needed to prevent the disabled adult from making bad decisions that endanger the health and safety of him and others. Sometimes guardianship is necessary to take control of decision-making and prevent self-neglect. Guardianship may be used to stop a disabled adult from wasting money when the disabled adult is unable to understand the impact of his decision. Inappropriate reasons for filing for guardianship include having someone who can decide what the disabled adult should wear or if he should have his hair colored (these reasons have been seen in court.)

With proper planning someone can be designated to make all necessary decisions in the event the elder becomes unable to do so. Many people do not make such contingency plans and for others the planning that has been done fails. Planning may fail because it does not authorize anyone to make decisions that later become legally necessary. Planning may also fail if the person named to make decisions declines or is unable to act. Planning fails catastrophically if the person named to make decisions is abusing, neglecting or exploiting the disabled adult. When a lack of planning or failed planning leads to the abuse, neglect, or exploitation of a disabled adult, and no other alternatives work to overcome the problem, guardianship may be pursued to remedy the situation.

Before someone files for guardianship they need to confirm that the alleged disabled person lacks the capacity to make informed and rational decisions necessary to protect himself from harm. It is helpful to consult with a physician, psychologist and social worker experienced in geriatric

evaluations for their opinions on the alleged disabled person's capacity. The local Cabinet for Health and Family Services, Adult Protective Services office should be able to provide a trained social worker to assist in determining if filing for guardianship is appropriate. It is good practice to ask the APS social worker to visit the disabled adult and tell you if they support the idea of filing for guardianship, before any paperwork is filed. It is not always possible to gain the advice of these professionals prior to filing. The professionals may be concerned about privacy and privilege. Many of these professionals will answer simple preliminary questions, viewing it as protecting their disabled client/patients from harm. Lawyers should be careful about doing the evaluation of the alleged disabled person themselves before the filing. It is very easy to enter into an attorney/client relationship with the disabled adult, resulting in an ethical minefield if the attorney later represents anyone else in the guardianship process. It is best for the attorney for the petitioner to avoid talking to the alleged disabled person.

District court has the jurisdiction to hear adult guardianship cases and the court in the county that the alleged disabled person resides in is the proper venue. [KRS 387.520] The issue of venue can be tricky if the alleged disabled person has recently moved from one county to another (not uncommon for nursing home residents or for someone fleeing neglect, abuse or exploitation). When in doubt, ask the county attorney how the judge normally deals with venue issues.

The guardianship process begins with the filing of standard forms provided by the Administrative Office of the Courts (AOC). The first is Petition to Determine if Disabled (AOC-740), stating the nature of the disability and the facts or reasons supporting the need for guardianship and asking the court to make a determination of disability. [KRS 387.530] The Petition must include a second form, an Application for Appointment of Fiduciary (AOC-745). This form sets forth the name, address, and qualifications of the person seeking appointment as guardian and that person's relationship to the individual needing guardianship.

In some counties the AOC forms are obtained from and filed with the court clerk, who then sends them to the county attorney. In other counties the county attorney completes the paperwork for the filing with the court clerk (find out how it is normally done before anyone files anything). It is also possible for the individual seeking guardianship to retain private counsel to handle the filing. Most filings are pro-se or through the county attorney's office. If there is a great likelihood that several people will be asking the court to be appointed as guardian, it is

best to recommend that private counsel represent those seeking to be appointed as guardian.

Once the paperwork has been filed, the court will sign an order for examination compelling the alleged disabled person to submit to evaluations to be performed by a team of qualified professionals. [KRS 387.540(7)] This may be the only way to get the alleged disabled person to see specialists for an evaluation. The team must include at least three individuals, including a physician, an advanced practice registered nurse, or a physician assistant, a psychologist, and a qualified social worker. [KRS 387.540] In some counties the person requesting the guardianship must supply the names of the professionals who will perform the evaluations. In other counties the evaluation team is selected and appointed by the court. Contact the court clerk or county attorney for that county regarding the process in a particular jurisdiction.

The evaluation team, either as a group or individually, must prepare a report containing a description of the nature and extent of the disability of the alleged disabled person, information about the alleged disabled person's condition, and an opinion regarding the need for guardianship [KRS 387.540]. This report is standardly prepared using the ACO form, Report of Interdisciplinary Evaluation Team (AOC-765), and must be filed with the court. Because the examination and report are court ordered, they override the issues of confidentiality and privilege.

Unless a notice of appearance of an attorney is filed on behalf of the alleged disabled person within seven days of the filing of a petition for determination of disability, the court will appoint an attorney to represent him or her. [KRS 387.560] The court appointed attorney is a defense attorney for the alleged disabled. The court appointed attorney owes all of his ethical duties to the alleged disabled person. Attorneys unfamiliar with this role should carefully review the ethics rule found at Rules of the Supreme Court (SCR) Rule 3.130, Rules of Prof. Conduct Rule 3.130(1.14). A copy of this rule can be located at the end of this chapter.

Notice of the filing of a petition to determine disability must be sent to the alleged disabled person's next of kin and designated durable power of attorney or health care surrogate. [KRS 387.550] The only person who can object to the determination of disability is the alleged disabled person; the other family members are entitled to voice an opinion about who should be appointed, including filing a motion to be appointed themselves.

Guardianship is a two-part process. The first step is the determination of disability and the second is the selection and appointment of a guardian. The determination of disability is sought by the Commonwealth and is decided by a jury. The selection of a person to serve as a guardian is made by the judge.

The statute calls for a hearing on the guardianship to be held within 60 days of the filing of the petition for determination of disability unless the court finds reason to delay. [KRS 387.550]. The most likely reason for delay is a delay in filing the report of the interdisciplinary evaluation team. The statute requires the report to be filed 10 days prior to the hearing date [KRS 387.540(7)]. The person requesting the guardianship can aid in a timely hearing by following up to assure that the report is filed on time. At the hearing, at least one member of the interdisciplinary team must testify on behalf of the team. [KRS 387.570] Often the social worker testifies on behalf of the interdisciplinary evaluation team.

While the guardianship is pending, the alleged disabled retains all of his rights and no action can be taken based on the mere filing unless the court orders a temporary emergency appointment of a guardian. To do so, the court must find that there is danger of serious impairment to the health or safety of the alleged disabled person or damage or dissipation of his property if immediate action is not taken. [KRS 387.740(1)] A hearing on an emergency petition must be held within one week of the filing of an emergency petition. [KRS 387.740(3)]. The emergency appointment lasts until a full hearing can be made to determine if it is appropriate to appoint a permanent guardian.

## **OTHER CIVIL REMEDIES**

The majority of the time when there is elder abuse, caregiver neglect, or financial exploitation, there is a civil cause of action. Most of the causes of action have a basis in basic tort law or contract law. Below is a review of the basic causes of action and some of the difficulties associated with these causes of action.

If a caregiver has a duty to provide services and has failed to do so, there may be a cause of action either in contract law or in negligence. Not all caregivers have a duty to provide services; many are volunteers. If a duty to provide care can be established, and the caregiver breaches that duty, a negligence case may be viable. To be viable the breach of duty must result in injury and damages. Other caregivers have a duty



based on contract law. If the caregiver fails to live up to the terms of the contractual agreement there may be a cause of action based on breach of contract. The negligence claim will generally allow for more in damages because damages for pain and suffering are included. Damages for breach of contract are generally limited to the value of the services not provided and incidental and consequential damages.

When there is physical or sexual abuse there is generally a civil cause of action for assault and/or battery. For an assault, proof is generally required to show that the perpetrator intended to make harmful contact with the victim and that the victim was aware of the imminent and harmful contact. Proving this can be a challenge if the victim has limited capacity. For battery, the plaintiff generally has to show an intentional harmful bodily contact. Victims and their advocates should be encouraged to have the facts reviewed by an experienced tort attorney to see if there is a viable case.

False imprisonment requires an intentional effort to prevent a person from leaving. An important element here is that the victim must be aware that they are being prevented from leaving. The reasonable believe by the victim is all that is necessary to establish this element. The attempt to keep the victim from leaving must be intentional on the part of the perpetrator. False imprisonment is frequently a secondary claim in a case for caregiver neglect. On a national level, there have been several successful false imprisonment claims against in-patient care facilities that conspired to keep private pay patients from leaving so that the facility could continue to collect for care. In several cases the care provided was negligent or failed to meet the standards set forth in the contract for care.

Civil claims involving the elderly are difficult for several reasons. If the elder is incapacitated it may be necessary to have a guardian appointed to have standing to file on behalf of the senior. If you lack a credible complaining witness it can be difficult to meet the burden of proof and establish the elements of the claim. Judgments can be very hard to collect unless you have a corporate defendant (most people that steal from a senior waste the proceeds). For personal injury claims a significant part of the calculation of damages is for lost wages, and most seniors are unable to prove a loss of earnings capacity. In a breach of contract case, damages are frequently limited to the value of services and consequential damages. Victims and their loved ones should have these cases reviewed by an attorney with expertise in civil tort litigation.

## **Medicaid Beneficiary and Unauthorized Gifting**

When a person applies for Medicaid to pay for nursing home services, Medicaid requires that the person signing the application disclose in writing all gifts, transfers of assets within the preceding 60 months, and all transfers to trusts of property for less than fair market value made within the preceding 60 months. A transfer for less than fair market value is treated as part sale, part gift. Transfers to revocable trusts are treated as though the grantor still owned the asset; transfers to irrevocable trusts within the 60 month look back period are subject to the penalty calculated as explained below. A knowing failure to disclose gifts or transfers is the commission of Medicaid fraud (the knowing requirement protects people making application on behalf of another person from prosecution based on facts that they would have no way of knowing).

Disclosure of gifts and transfers is required, but these gifts and transfers do not always result in disqualification for Medicaid. Medicaid allows unlimited transfers (gifts) between a husband and wife, because Medicaid considers all assets of a married couple, no matter how owned to be available to pay for the care of the nursing home resident.

Homestead property is given special treatment. The transfer of homestead property to or for the benefit of a spouse, a child who is under the age of 21 or blind or disabled, a child who lived with the applicant for two years prior to institutionalization and provided care to the applicant to prevent institutionalization in a nursing home, or to a sibling with an equity interest in the home who lived with the beneficiary for one year prior to the beneficiary's institutionalization are exempt under 907 KAR 20:030, Section 1(11).

The transfer of non-exempt resources is subject to a penalty or waiting period. The uncompensated value of the non-exempt resource is divided by the transferred resources factor and the resulting number is the number of months of ineligibility for Medicaid. The period of ineligibility starts with the month of Medicaid eligibility and runs for a period of time that is determined based in part on the total uncompensated value of the transferred resource. If more than one transfer occurs, the ineligibility period begins with the month of Medicaid eligibility for nursing facility services. Large transfers within the 60-month window can result in long periods of ineligibility. Financial exploitation is sometimes revealed when Medicaid denies eligibility based on un-authorized transfers.

Medicaid fraud occurs when gifts and transfers for less than fair market value are knowingly not reported to Medicaid or when assets are knowingly not reported on the Medicaid application. The non-disclosure may be committed by the Medicaid applicant, or by someone acting on his behalf. It is common in cases of financial exploitation for transfers to be made and not disclosed by the person committing the financial exploitation. This comes to light either when the exploiter refuses to file for Medicaid (thereby not committing Medicaid fraud) or when the application is denied based on improper transfers (revealing the financial exploitation.)

People with capacity have the right to give away all of their assets and disqualify themselves from Medicaid. This happens. These acts constitute elder abuse when Medicaid applicants lack capacity and they are exploited resulting in the transfer of assets. It is also common to find that the person who is exploiting the elder has made the transfers. If the transfers are not reported on the Medicaid application, criminal exploitation, the crime of false swearing and Medicaid recipient fraud may be issues.

If the transfers are made using a power of attorney the document should be examined to determine if the power of attorney included the authority to make gifts of the grantors property as required under Kentucky's Uniform Power of Attorney Act. [KRS 457.010 *et seq*] If the transfers were made without legal authority a theft crime has been committed. These thefts frequently come to light when the elder is no longer able to pay a nursing home bill, and the "responsible party" suddenly loses interest. (Look for these cases in involuntary discharge actions from nursing homes.)

Attachment

**NOTE:** Kentucky adopted the Uniform Power of Attorney Act in 2018. That Act governs powers of attorney in Kentucky and provides rules relative to execution, validity, effect, and termination of a power of attorney. *See* KRS 457.010 *et seq.* The Act also contains a statutory form power of attorney, which can be found in KRS 457.420. The following article was written prior to Kentucky's enactment of the Uniform Power of Attorney Act.

# KENTUCKY ATTORNEYS IN FACT

*Brandon M. Howell*

*University of Louisville, Brandeis School of Law*

*June 2005*

*Reprinted with permission.*

\*

This report was prepared in conjunction with the Brandeis School of Law's Greenebaum Public Service Program and at the direction of attorney Jason Snyder of the Commonwealth Attorney's Office, Louisville, Kentucky.

## TABLE OF CONTENTS

KEY DEFINITIONS .....	3
TYPES OF POWERS .....	3
POWER OF ATTORNEY FORM REQUIREMENTS.....	4
DUTIES OF ATTORNEYS IN FACT .....	5
IMPORTANT KENTUCKY POWER OF ATTORNEY CASES .....	6
<u>Deaton v. Hale</u> , 592 S.W.2d 127 (Ky. 1979).....	6
<u>Wabner v. Black</u> , 7 S.W.3d 379 (Ky. 1999).....	7
<u>Priestley v. Priestley</u> , 949 S.W.2d 594 (Ky. 1997).....	8
<u>Rice v. Floyd</u> , 768 S.W.2d 57 (Ky. 1989) .....	9
FOUR PROBLEMS IN KENTUCKY POWER OF ATTORNEY LAW .....	10
SOLUTIONS .....	14
APPENDICES .....	19

## **\*KEY DEFINITIONS<sup>2</sup>**

1. Power of Attorney – A form whereby a person authorizes another to act as his or her agent or attorney in fact: “*Bryan and Carrie both signed the Power of Attorney form.*” The term also represents the authority granted: “*Ramona was granted Power of Attorney over Phillip’s estate and affairs.*” Generally, the authority is to transact all business for and in the name of the principal that the principal could transact himself.
2. Principal – The person granting or creating the power in another.
3. Attorney in Fact – The agent of the principal as designated in the Power of Attorney, appointed to carry out requested tasks or exercise control over the principal’s property or business.

## **\*TYPES OF POWERS**

1. General (or Full) – Power to conduct all business and all affairs of the principal.
2. Special (or Limited) – Power to perform certain or specified transactions in a certain or specified manner.
3. Durable – Power intended to remain in legal existence beyond the incapacity of the principal. Specifically authorized in *KRS §386.093*. Note that a Durable Power of Attorney may grant General or Special powers.
4. Springing – Power intended to come into legal existence upon the occurrence of some specified event, date, or other standard. Specifically authorized in *KRS §386.093*. Note that a Springing Power of Attorney may grant General or Special powers and be Durable in nature.
5. Naked – Power that merely grants authority to transact business and oversee affairs without granting the attorney in fact any actual interest in the subject matter of the power.
6. Coupled (or Coupled with Interest)<sup>3</sup> – Power that grants both authority to act and actual interest to the attorney in fact.

---

<sup>2</sup> Information not specifically cited gathered generally from:  
Cunningham, Jack R. “Durable Power of Attorney,” Kentucky Estate Planning, First Ed., Sect. 15 (UK/CLE 1996).

Diakow, Peter G. “Powers of Attorney,” Kentucky Forms and Transactions, Prepared by Wyatt, Tarrant, and Combs, Second Ed. Vol. 1, Chap. 4 (West 2004).

<sup>3</sup> A thorough discussion of Naked and Coupled Powers of Attorney can be found in Moore v. Scott, 759 S.W.2d 827 (Ky. Ct. App. 1988).

## **\*POWER OF ATTORNEY FORM REQUIREMENTS**

### **1. Language**

In Kentucky, the language of a Power of Attorney is subject to almost no statutory governance. *KRS §386.093* specifies that language resembling “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time” or “This power of attorney shall become effective upon the disability or incapacity of the principal” must exist to create a Durable Power of Attorney.

Simply put, the principal must make a clear expression of his or her desires.<sup>4</sup>

“A power of attorney is nothing more than an instrument of writing appointing an attorney in fact for an avowed purpose and setting forth his powers and duties”.<sup>5</sup>

### **2. Execution & Recordation**

While statutes in many states have simplified the process by enacting statutory power of attorney forms, the Kentucky legislature has not provided such a provision. See *Conn. Gen. Stat. §1-43* for an example of such a provision.

A tenet of agency law is the assumption that Power of Attorney forms must be signed by the Principal and the Attorney in Fact and that neither of those signatures may be forged. For general requirements of legal documents, see *KRS §§382.130-150*.

No Kentucky statute mandates the recording of Power of Attorney forms; however, *KRS §§382.300* and *382.370* both authorize the recordation of Powers of Attorney. *KRS §382.370* reads only that powers of attorney “may” be recorded, acknowledged, and proved in the same manner as other conveyance documents.

If a Power of Attorney form is to be recorded by the county clerk, then it must be acknowledged before a notary public. Though *KRS §382.335* forbids county clerks from recording documents that do not contain the name, address, and signature of the preparer, *OAG 73-736* dictates that the section does not apply to Power of Attorney forms. Thus, clerks will accept Power of Attorney forms without these things.

Note: *KRS §382.370* does require a Power of Attorney form to be recorded when a conveyance which must be recorded is made pursuant to that

---

<sup>4</sup> Mullins v. Commonwealth, 200 S.W. 9, 11 (Ky. 1918).

<sup>5</sup> Id.

Power. If the form is being recorded as required by *KRS §382.370*, then the form must be recorded in the same county as the other recorded conveyance.<sup>6</sup>

## **\*DUTIES OF ATTORNEYS IN FACT**

In his article on Powers of Attorney<sup>7</sup>, Jack Cunningham identified the four primary duties ascribed to attorneys in fact<sup>8</sup>:

### **1. *Duty of Loyalty to Principal***

A general, overarching concept of loyalty to the principal governs every action of the attorney in fact. Rather than being wholly separate notions, the remaining three duties expand upon this idea.

### **2. *Duty to Obey Principal's Orders***

Unless the principal requests of the attorney in fact the performance of an action that is illegal or contrary to public policy, the attorney in fact is bound by the agreement to perform the task.

### **3. *Duty to Exercise Ordinary Care, Diligence, and Skill in the Performance of Assigned Duties***

Since 1932, the Kentucky courts have employed a standard of "utmost good faith" when examining the performance of an attorney in fact.<sup>9</sup> Note that this standard contains two distinct facets: first, the actions of the attorney in fact must primarily be performed in good faith; second, it must be determined whether such good faith was of the "utmost".

### **4. *Duty to Account to Principal***

---

<sup>6</sup> *Godsey v. Standifer*, 101 S.W. 921 (Ky. 1907).

<sup>7</sup> Cunningham, Jack R. "Durable Power of Attorney," *Kentucky Estate Planning*, First Ed., Sect. 15 (UK/CLE 1996).

<sup>8</sup> See Appendix A (*Deaton v. Hale*) for additional duties implicitly ascribed by the Kentucky Supreme Court.

<sup>9</sup> *Georgia Casualty Co. v. Mann*, 46 S.W.2d 777, 780 (Ky. Ct. App. 1932).



The freedom of contract certainly allows parties to expressly eliminate the attorney in fact's duty of accounting, but unless they choose to do so, attorneys in fact must provide a requesting account of "any and all property, real or personal, that is received by [the attorney in fact] from or for the principal."<sup>10</sup>

Of course, this duty correlates to the principal's right to request an accounting, which is a pure right, not subject to court or party discretion.<sup>11</sup>

## **\*IMPORTANT KENTUCKY POWER OF ATTORNEY CASES**

### **1. Deaton v. Hale, 592 S.W.2d 127 (Ky. 1979)<sup>12</sup>**

Elderly George Hale executed a [general?] power of attorney naming his also elderly wife, Minnie as his attorney in fact, granting her the power to sell or convey any and all of his property without limitation. Pursuant to this power, Minnie made numerous transactions involving George's property and finances. George's counsel advised him that Minnie had disposed of certain stocks and bonds, but did not identify them and did not inform George of the disposition of the proceeds from the sales. Determined competent to do so by two psychiatrists, George ratified Minnie's sales and transfers.

Minnie died months later and, just weeks after her death, George was adjudged incompetent. Elizabeth Deaton was appointed to be George's committee. Ms. Deaton soon filed suit against Minnie's executors charging that Minnie had breached her fiduciary duty to George by wrongfully administering his estate. Apparently, though estimated to be an accumulation nearing \$500,000 in value, George's estate had been reduced to a bank account containing \$13,284, a small duplex, and worthless stocks. Ms. Deaton sought an accounting of Minnie's transactions, damages of \$500,000, and punitive damages of \$250,000. As a corollary, Ms. Deaton charged that the "ratification" of Minnie's sales and transfers, executed by George, was invalid as a result of undue influence.

The trial court ordered restoration of certain monies to George's estate, based on the finding that George did not know what he was approving when he signed the ratification. However, the trial court did not require Minnie's executors to prepare an accounting of her transactions as George's attorney in fact.

Ms. Deaton appealed, asserting that trial judges do not have discretion as to whether or not attorneys in fact must prepare requested accountings, but rather that such accountings are mandatory. The Court of Appeals disagreed and

---

<sup>10</sup> Deaton v. Hale, 592 S.W.2d 127, 130 (Ky. 1979).

<sup>11</sup> Id.

<sup>12</sup> For more key concepts, complete with citations, appearing in Deaton v. Hale, see Appendix A.

affirmed the trial court's decision not to require an accounting. Ms. Deaton filed her appeal with the Supreme Court, which granted discretionary review.

**The Supreme Court REVERSED the previous rulings and agreed with Ms. Deaton that the propriety of an accounting is not subject to the trial judge's discretion, citing the Restatement of Agency 2<sup>nd</sup>, s 382.**

**The Court also described the burdens of proof in this type of case: first, the movant must *establish the principal/attorney in fact relationship and introduce evidence that property of the principal was in the hands of the attorney in fact*; then, the burden switches to the attorney in fact to *explain the disposition of any and all property* (an accounting, for all intents and purposes).**

**Whether or not the attorney in fact had wrongfully administered the estate becomes a jury question at this point and the jury is instructed to decide whether the attorney in fact's conduct met the standard of "utmost good faith".**

## **2. Wabner v. Black, 7 S.W.3d 379 (Ky. 1999)<sup>13</sup>**

Elderly George Tapp, by will, devised his farm to his niece, Nancy Wabner, and made residuary bequests three other co-executors. The will also included the provision that any funds existing in jointly held bank accounts should pass to the surviving joint holder at the time of his death.

Shortly before his death, George, of sound mind, executed a durable power of attorney in favor of Nancy Wabner. George immediately requested that Nancy collect his out-of-state bank accounts and CDs and transfer them into a local bank account of which Nancy and George would be joint owners.

Pursuant to these instructions and by the powers created in her by the power of attorney, Nancy transferred assets of over \$200,000 (80% of George's assets other than his farm) into the joint bank account.

Three months after George died, the co-executors of his sued Nancy to have those transfers invalidated. The co-executors claimed that Nancy, knowing that George's will provided that jointly held assets would pass to the surviving holder, had essentially made gifts to herself by way of the durable power of attorney—gifts out of the funds George had set aside as residuary bequests to the co-executors of his will. The co-executors charged that Nancy lacked authority to do so under the durable power of attorney.

The trial court delegated the evaluation of the nature of Nancy's authority and propriety of her conduct to the jury, which found for Nancy.

The Court of Appeals reversed the jury's decision based on the determination that Nancy's authority to make gifts to herself was a matter of law for the court.

---

<sup>13</sup> For more key concepts, complete with citations, appearing in Wabner v. Black, see Appendix B.

Forgoing a simple remand, the Court of Appeals adopted a flat rule prohibiting attorneys in fact from making gifts of the principal's property to anyone in absence of clearly expressed written authorization. Applying this new rule, the court held that the durable power of attorney did not clearly grant Nancy the authority to make gifts to herself and ordered her to restore those assets to the state.

**The Supreme Court REVERSED the decision of the Court of Appeals, harmonizing its holding with that of Deaton v. Hale. The Court noted that it had previously refused to adopt any *per se* restoration rule in favor of providing the "utmost good faith" standard to juries. While affirming that established case law holds that the proper construction of a written power of attorney form is a matter for the court, *the Court reiterated that its duty ends at said construction and the question of whether the attorney in fact's conduct complied with the court's construction is one for the jury.***

**Thus, finding the language of the power of attorney form to unambiguously authorize Nancy to make the disputed transfers, the Court reinstated the trial jury's decision that those transfers had been made in the "utmost good faith".**

### **3. Priestley v. Priestley, 949 S.W.2d 594 (Ky. 1997)<sup>14</sup>**

Rodman Priestley suffered a crippling aneurysm and was submitted to the care of Cardinal Hill Hospital. While there, Rodman endured a debilitating fall that left him substantially disabled. As a result of this further disability, a court appointed guardian suggested that a durable power of attorney be executed in favor of Rodman's wife, Brenda Priestley.

As his attorney in fact, Brenda made several significant transactions involving Rodman's assets: among other things, she purchased a new car and sold their jointly held farm and truck. Also as attorney in fact, Brenda brought suit against Cardinal Hill Hospital, claiming medical negligence. She also sued on her own behalf, seeking damages for loss of consortium.

Brenda and the Hospital settled. To finalize the structured settlement, it was first necessary to have Brenda appointed as Rodman's guardian. After the appointment, the settlement was outlined to provide for equal division of the agreed amounts to cover Rodman's personal injuries and Brenda's loss of consortium. The agreement postponed the bulk of all payments until well beyond Rodman's life expectancy.

As Rodman's guardian, Brenda made continued transactions: she pre-paid on jointly held mortgages, purchased IRAs for herself, and purchased another car.

Rodman's heirs sued Brenda, charging that she had breached her fiduciary duties both as Rodman's attorney in fact and as guardian. The trial jury agreed with the Heirs, finding that Brenda had wrongfully administered Rodman's estate in

---

<sup>14</sup> For more key concepts, complete with citations, appearing in Priestley v. Priestley, see Appendix C.

matters not relating and relating to the settlement with the Hospital. With regard to that settlement, the jury found that Brenda had not settled in good faith, as 80% of the award should have gone to Rodman, rather than 50%. The trial court recalculated damages to reflect these findings.

The Court of Appeals reversed and dismissed the case, determining *sua sponte* that the decisive issue was whether or not Rodman's heirs had standing to bring suit—which it held they did not on account of their only having an “expectant” interest.

**The Supreme Court REVERSED the decision of the Court of Appeals, finding that the Heirs, who, since Rodman died intestate, were heirs at law with more than “expectant” interests in Rodman’s estate, did have standing to bring suit.**

**Brenda cross-appealed, seeking a directed verdict based on her argument that a subjective standard (“What would Rodman have done with his assets?”) should have been applied to her decisions respecting the estate. The Court disagreed and reiterated its intent to employ the objective “utmost good faith” standard, which, the Court explained, allows for only “limited discretion”. The Court also noted that Brenda’s duties were not lessened by virtue of her status as Rodman’s wife.**

**Side issues of whether “expectants” may be heard when it appears that an attorney in fact is wrongfully administering an estate and the constitutionality of KRS 404.040 were not decided.**

#### **4. Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989)<sup>15</sup>**

In a factually simple case, Mayme Floyd, sound of mind, executed a durable power of attorney in favor of an attorney. When Mayme became disabled and incapable of managing her affairs, she was hospitalized. Afterwards, her daughter, Peggy Rice, filed a series of petitions in efforts to have herself appointed as her mother’s guardian.

Mayme was eventually deemed legally incompetent, and the court recommended full guardianship for the remainder of her life. The district judge dismissed the guardianship proceedings, however, based on the notion that the existing power of attorney rendered a guardian unnecessary.

The essential issue in the case was whether or not Peggy’s appointment as her mother’s guardian would legally terminate the principal/attorney in fact relationship between Mayme and the attorney pursuant to the durable power of attorney.

The Court utilized the opportunity to, in its opinion, set out the general distinctions between guardians and attorneys in fact, and articulate what it recognized to be noteworthy shortcomings in this area of law.

---

<sup>15</sup> For more key concepts, complete with citations, appearing in Rice v. Floyd, see Appendix D.

In reaching what was apparently a fairly straightforward and statutorily mandated decision, the Court's opinion is most valuable for the plethora of rules regarding powers of attorney and the limitations on them.

## **\*FOUR PROBLEMS IN KENTUCKY POWER OF ATTORNEY LAW**

### **1. Fiduciary v. Attorney in fact**

#### **a. *Root of Problem***

- i. Any discussion of Kentucky law’s shortcomings with regard to powers of attorney might begin at *KRS §395.001*, which constitutes Kentucky’s definition of “fiduciary”. Conspicuously absent from the list of representative positions included in the provision is the attorney in fact. The statute lists executors, administrators, administrators with the will annexed, testamentary trustees, curators, guardians and conservators.

Beyond those same general positions, roughly 70% of states extend their statutory definition of “fiduciary” with phrases similar to “or any person performing substantially the same functions” or “any person acting in any fiduciary capacity” which have been construed broadly enough to include attorneys in fact.

#### **b. *Resulting Complications***

##### **i. Duties**

Of course, most state codes feature entire chapters outlining fiduciary duties. In the states that define “fiduciary” broadly enough to include attorneys in fact, these provisions, at least arguably, apply to the conduct of attorneys in fact. In Kentucky, those provisions do not apply—meaning that attorneys in fact are bound by fewer statutory guidelines.

One duty of concern is the preparation of an account of the attorney in fact’s transactions. See Part 3 of this section.

##### **ii. Personnel**

The representative positions listed in *KRS §395.001* can only be filled by people or banks meeting the requirements of *KRS §395.005*, which lists age and personal relation restrictions. Since attorneys in fact are not fiduciaries, these restrictions do not apply to them.

There appears, then, to be no clear statement similar to *KRS §395.005* or *KRS §304.9-105* (regarding “agents” in an

insurance setting) regarding who can or cannot be granted power of attorney.

## 2. Form

- a. As noted previously, only a handful of KRS provisions mention powers of attorney or attorneys in fact. The ones that do prescribe guidelines that are, at best, tenuous. Few rules governing execution or recordation have real impact upon the ways in which practicing attorneys or court officials supervise and/or participate in the creation of a principal/attorney in fact relationship.

To remedy what might once have been a similar void in its Code, the state of California's legislature passed a Uniform Statutory Form Power of Attorney Act devoted to making rules for power of attorney forms made available to the public. This Act begins at *Cal Prob Code §4400*.

10 states and Washington, D.C. have enacted this Act or a variation of it<sup>16</sup>.

- b. As also noted, no guidelines exist to govern the language of powers of attorney. Kentucky case law only slightly touches upon language requirements, mandating that the principle must make his desires clear. Other than that, presumably, any purportedly genuine document satisfies Kentucky's requirements.

By contrast, California's Act includes a statutory form. *Cal Prob Code §4401*<sup>17</sup>. This form must be substantially followed, and other provisions dictate the language that must appear to create various types of powers.

## 3. Accounting

Since Deaton v. Hale, Kentucky courts have imposed a qualified duty of accounting upon attorneys in fact. Then Justice Sternberg quoted directly from the *Restatements 2<sup>nd</sup> of Agency §382*:

“An attorney in fact, one acting under a power of attorney, must account for any and all property, real or personal, that is received by him from or for his principal.”<sup>18</sup>

Justice Sternberg then clarified the Restatement further:

---

<sup>16</sup> Alaska, Arkansas, California, Colorado, Connecticut, Montana, New Mexico, New York, Oklahoma, Washington, D.C., and Wisconsin.

<sup>17</sup> See Appendix E.

<sup>18</sup> Deaton v. Hale, 592 S.W.2d 127, 130 (Ky. 1979).

“What we are saying is that the agent does have the responsibility of explaining to the satisfaction of the court what disposition was made of the properties.”<sup>19</sup>

This apparently broad statement was qualified, however, in later Kentucky Supreme Court cases.

In Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989), Justice Wintersheimer, discussed the differences between guardians and attorneys in fact. Regarding the duty of accounting, Wintersheimer articulated the important qualification and hinted at Kentucky’s need for a revamping of power of attorney law:

“This Court notes that the guardian is answerable to a court and must file accountings at least annually. The attorney-in-fact is answerable and accountable only to the principal who may be mentally disabled. It is obvious that there must be adequate safeguards and control on the person who manages an incompetent's estate and that a great disparity exists between the durable power of attorney and a guardian.

A guardian must comply with KRS §389A.010 *et. seq.* whenever the sale of real property is involved. The attorney-in-fact may sell real estate as if it were his own. The guardian must also file biennial accounts with the district court. KRS §387.670 and KRS §387.710. An attorney-in-fact is not a fiduciary as defined in K.R.S. 395.001, nor is he a fiduciary subjected to the reporting requirements of KRS §387.500 *et. seq.* The attorney-in-fact is accountable only to his principal...”<sup>20</sup>

This statement apparently summarizes the current status of an attorney in fact’s duty of accounting in Kentucky: the attorney in fact is accountable before the court to his or her principal. As differentiated from guardians, however, it is questionable whether, after Rice, courts can require of an accounting by an attorney in fact without the principal having requested one.

Suffice it to say that there may be loopholes in this qualified duty. *First*, in dicta, Justice Wintersheimer may have, at least implicitly, sanctioned courts to require accountings in their efforts to decide whether a current attorney in fact would be a good candidate for appointment to fiduciary or guardian<sup>21</sup>. *Second*, and more clearly, Rice requires attorneys in fact to

---

<sup>19</sup> Id.

<sup>20</sup> Rice v. Floyd, 768 S.W.2d 57, 59 (Ky. 1989).

<sup>21</sup> Id. at 60.



prepare accountings for court-appointed fiduciaries, not just the principal.<sup>22</sup>

#### 4. Gifts

May the attorney in fact make gifts to himself or anyone else of the principal's property?

As included above, the issue of gifting was paramount in Wabner v. Black. In that case, and as it had in previous cases, the Kentucky Supreme Court stood firmly behind its "utmost good faith" standard for attorney in fact behavior.

In essence, the Kentucky Supreme Court's current stance on the attorney in fact's power to make gifts of the principal's property is no weaker than any other jurisdiction's when the power at issue contains language expressly granting the attorney in fact the power to make gifts.

When this is the case, most courts will construe the power literally—just as they would any common contract. Usually determining, by doing so, that the attorney in fact had the power to make whatever transactions at issue, the court will ask the jury whether or not those transactions were performed in "utmost good faith".

The problem with this approach to gifting rears its head when the language of the power *does not* expressly authorize gifting. Since there is no rule outrightly prohibiting unauthorized gifting, there is the chance that an unscrupulous attorney in fact could effectively deplete an entire estate and get away with it. In such a case, the court would interpret the language of the power, instruct the jury on what powers had been granted to the attorney in fact, then ask the jury whether the attorney in fact's behavior conformed to those powers to the "utmost good faith". Of course, there is always a chance that a jury could answer "Yes."

It should be noted that the Court of Appeals that heard Wabner attempted to set the flat rule that no attorney in fact shall make gifts unless expressly authorized to do so. The Supreme Court reversed that decision.

#### SOLUTIONS

Many states are light years ahead of Kentucky when it comes to the thoroughness with which they statutorily prescribe the duties, powers, and creation of attorneys in fact. Each of the four problem areas briefly discussed above is an obviously manageable discrepancy. Of course, whether or not legislation is absolutely crucial is a decision for the legislators. In terms of solving those four identified problems, the necessity for legislation varies from one to the next.

---

<sup>22</sup> Id.

## 1. *Regarding Definition-Based Problems*

This statutory deficiency wants a statutory solution, but other work could be done to achieve many of the same goals as a statutory rewrite.

Attorneys in fact are not fiduciaries in Kentucky. The definition of “fiduciary”, set out in *KRS §395.001*, includes no language broad or specific enough to include attorneys in fact—unlike similar statutes in 70% of other states. This is not to say that fiduciaries and attorneys in fact should be legal equivalents. They should not. Fiduciaries are generally court-appointees that come into legal existence upon the disability of the principal, whereas attorneys in fact are not usually appointed by courts, but are instead either chosen by the principal or volunteer for the position (subject to the principal’s approval). However, if Kentucky were to extend the definition of “fiduciary” with language similar to “any person performing substantially the same functions” or “any person acting in any fiduciary capacity”, then attorneys in fact would arguably be governed by more expansive fiduciary duties and prosecutors would have more statutory weapons available in cases of attorney in fact malfeasance.

For example, as Justice Wintersheimer noted, attorneys in fact may sell real estate as if it were their own<sup>23</sup>. This may or may not be according to the wishes of the principal. If the definition of “fiduciary” were broadened, attorneys in fact would have to satisfy *KRS §395.200*, which requires, among many other things, that the fiduciary obtain the “best price obtainable”.

Also, upon said change, prosecutors might have the entire Kentucky Principle and Income Act in their arsenal, which outlines fiduciary duties in *KRS §386.452*.

In fact, the definition of “fiduciary” for the purposes of that Act presents an inconsistency within the KRS, as *KRS §386.450* includes “personal representatives” (which may or may not include attorneys in fact), whereas *§395.001* does not.

Of course, this kind of statutory sleight of hand would be largely unneeded if the legislature instead authored a few more statutes specifically dealing with the rights and duties of, and identity restrictions upon attorneys in fact.

---

<sup>23</sup> Rice v. Floyd, 768 S.W.2d 57, 59 (Ky. 1989).

## 2. *Regarding Form*

More and more states are adopting statutory form powers of attorney. This might be a helpful step for Kentucky, but might be unnecessary, as similar forms are widely used and it is not often the language of the form that creates problems. On the other hand, Kentucky's form requirements are virtually nil, considering that a form is valid so long as the principal clearly expresses his desires, and a statute at least prescribing partial requirements and setting out the language needed to create the various types of powers might generate uniformity in the process.

Other aspects of form deficiency exist within the process of executing the power of attorney. Of course, a power of attorney failing to contain the signatures of both the principal and the attorney in fact will not do. In Kentucky, though, it appears that this may be the only formal requirement (that being said, even this requirement is not statutorily prescribed).

Since attorneys in fact are not court-appointed, the focus of our attention should be upon the principal. For, when it comes to executing the power, problems can arise for the principal in many different ways<sup>24</sup>:

*Forgery.* A man could obtain a power of attorney form, sign for himself, forge the signature of the principal, and go about transacting the principal's business. Requiring a third signature, of a witness testifying to the validity of both signatures, would be a step in deterring forgeries. A possibly unpopular alternative would be to hold drafting attorneys at law liable to duped principals based in negligence, thereby creating an affirmative duty of inquiry in attorneys at law regarding the validity of signatures.

*Uninformed Principal.* A man could obtain a power of attorney form, sign for himself, and obtain the signature of a principal who simply does not understand the ramifications of the agency relationship or does not know what he is signing. To combat this problem, California's legislature drafted a statute containing language meant to warn and inform the principal of the full legal consequences of creating the relationship<sup>25</sup>. Attaching a similar document to each power of attorney form would

---

<sup>24</sup> Two good statutes relevant to this discussion are from California's Code: *Cal Prob Code §4121* and *§4122*. Both are included verbatim in Appendix F.

<sup>25</sup> See Appendix E.

work the same way, as would requiring involved parties to attend an informational session before creating the relationship.

*Incompetent Principal.* A man could obtain a power of attorney form, sign for himself, and obtain the signature of a principal who is incapable of understanding what he is signing. Again, requiring the signature of a witness testifying to the validity of the principal's signature and extending liability to that witness upon the finding of the principal's incompetence might curb this problem.

Moreover, it cannot be overemphasized that the principal/attorney in fact relationship is not ideal for incompetent principals in Kentucky. Two firm reasons permit this assessment. First, according to *Rice v. Floyd*, the power of attorney terminates upon the finding of legal disability and appointment of a guardian or fiduciary. So, if a person is legally incompetent, creating a principal/attorney in fact relationship is of questionable meaningfulness. Second, according to Jack R. Cunningham<sup>26</sup>, Kentucky is in the minority of jurisdictions that grant less authority to attorneys in fact than to court-appointed guardians or fiduciaries. Thus, even if a power of attorney is created for the benefit of an incompetent, the attorney in fact's power would be absorbed by the court-appointed guardian or fiduciary.

**SIDE ISSUE:** Though this report focuses on Kentucky's law regarding attorneys in fact, similar weaknesses exist in the courts' system for appointing the aforementioned fiduciaries. One state in particular, Arizona, has enacted a statutory fiduciary certification provision. This provision alone, if modeled in Kentucky would help prevent the same abuse by fiduciaries as this report aims to curb in attorneys in fact<sup>27</sup>.

### **3. Regarding the Attorney in Fact's Duty of Accounting**

Fiduciaries have a statutorily mandated affirmative duty of accounting. Such is not the case in Kentucky, or in most other states, for attorneys in fact. Attorneys in fact are accountable only

---

<sup>26</sup> Cunningham, Jack R. "Durable Power of Attorney," Kentucky Estate Planning, First Ed., Sect. 15 (UK/CLE 1996.

<sup>27</sup> ARS §14-5651. See Appendix G.

to their principal and to any person appointed by the court as a personal representative of that principal<sup>28</sup>.

In cases involving incompetent principals, accountings might sometimes be difficult to obtain. By the same token, the appointment of guardians or fiduciaries for incompetents is appropriate. So, if unable to obtain either the accounting or the principal's request for one, a court could appoint a fiduciary to whom the attorney in fact would be legally accountable or appoint the current attorney in fact as fiduciary, thereby making him accountable to the court.

While no powerful impetus exists to create an affirmative duty of accounting in attorneys in fact, Minnesota's legislature has drafted a helpful statute detailing exactly what is expected of attorneys in fact regarding their keeping of records<sup>29</sup>. A provision or language similar to that of this provision could be considered if a push is made towards revamping the KRS's handling of powers of attorney.

#### ***4. Regarding Gifts***

When an attorney in fact is prosecuted and charged with wrongfully administering an estate by making unauthorized gifts, the first step in coming to a decision is the interpreting of the empowering document. Today, most powers of attorney are wholly unambiguous, either clearly granting or clearly not granting the attorney in fact the power to make gifts. If the document is ambiguous, the question of what authority it grants is a jury question.

When the power is unambiguous, the court will include in its instructions its rendering of the attorney in fact's legal capacities. Whether or not the court decides the attorney in fact had the authority to gift, the jury's main question is whether or not the attorney in fact's actions were of the "utmost good faith".

*KRS §386.093* states:

“Notwithstanding any provision of law to the contrary, a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal

---

<sup>28</sup> *Rice v. Floyd*, 768 S.W.2d 57 (Ky. 1989).

<sup>29</sup> *Minn. Stat. §523.21*. See Appendix H.

to do so is unambiguously stated on the face of the instrument.”

Likewise, the Kentucky Supreme Court continuously reiterates its intention to retain the “utmost good faith” standard for attorney in fact transactions rather than to prohibit unauthorized gifting altogether.

The Court of Appeals that entered a decision in Wabner v. Black before being overturned by the Supreme Court attempted to adopt a *per se* rule outlawing unauthorized gifts<sup>30</sup>.

Citing, primarily, non-Kentucky cases, that court articulated its rule in a variety of ways (the footnote citations are from the original cases):

“Absent intention to the contrary, an agent must further the principal's interests. He may not use his authority in a manner hostile to the principal for the benefit of himself or a third party. It is incumbent upon the agent to act with the utmost good faith and loyalty. Effectively, absent express intention, an agent may not utilize his position for his or a third party's personal benefit in a substantially gratuitous transfer.”<sup>31</sup>

“The power to make a gift must be expressly granted in the instrument itself. To avoid fraud and abuse, we have adopted a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing.”<sup>32</sup>

Citing a case from the Fourth Circuit, the Court of Appeals rationalized its decision to adopt the “flat rule” this way:

“Where the instrument is a formal one, with comprehensively enumerated powers, the traditional rule that its author's intent is to be sought entirely in the language of the instrument unless ambiguity makes that impossible, is complemented by the rule that courts may properly assume that such an instrument expresses the principal's entire intent. In interpreting such an instrument,

---

<sup>30</sup> Black v. Wabner, 1998 Ky. App. LEXIS 114.

<sup>31</sup> Fender v. Fender, 329 S.E.2d 430, 431 (S.C. 1985).

<sup>32</sup> Id.

the issue is the principal's actual intent at the time of its execution, not what it might or should have been.”<sup>33</sup>

The Court of Appeals posited that the “flat rule” was not only the correct rule, but a legal trend being actualized in many state and federal courts<sup>34</sup>

It is also noteworthy that any transactions amounting to gifts by the attorney in fact for his own benefit are voidable by the principal and may be repudiated by the principal, who is not required to show that he was injured by the transaction<sup>35</sup>.

Whether or not Kentucky should adopt this flat rule is for the legislature to decide. For the purpose of providing an example, California’s legislature has, by statute, adopted this flat rule<sup>36</sup>. This provision lists those transactions which must be expressly authorized in the power.

A survey designed to enumerate the states that have adopt this rule might be useful.

It should be noted that the IRS has attacked the practice of making and the legality of unauthorized gifts<sup>37</sup>.

Lastly, some legal scholars posit that *KRS §394.610*, a statute authorizing attorneys in fact to disclaim a right of succession in a testamentary gift, creates a gifting loophole. How this loophole works is complicated and is the subject of lengthy law review articles, a small section of the most concise of which appears in the Appendix<sup>38</sup>.

---

<sup>33</sup> Estate of Olive D. Casey v. Commissioner of Internal Revenue, 948 F.2d 895, 902 (4th Cir. 1991).

<sup>34</sup> Harrison v. Harrison, 105 S.E.2d 214 (Ga. 1958); Gagnon v. Coombs, 654 N.E.2d 54 (Mass. App. Ct. 1995); Vejraska v. Pumphrey, 488 N.W.2d 514, 518 (Neb. 1992); Fletcher v. Mathew, 448 N.W.2d 576, 582 (Neb. 1989); Townsend v. United States, 889 F. Supp. 369, 372 (D. Neb. 1995).

<sup>35</sup> Beasley v. Trontz, 677 S.W.2d 891, 894 (Ky. App. 1984), citing Ferguson v. Gooch, 26 S.E. 397 (Va. 1896), and Restatement (Second) of Agency § 313.

<sup>36</sup> *Cal Prob Code § 4264*. See Appendix I.

<sup>37</sup> *PLR 8635007*.

<sup>38</sup> See Appendix J.

# **APPENDICES**

## **To “Kentucky Attorneys in Fact”**

A.....	20
B.....	21
C.....	22
D.....	23
E.....	25
F.....	27
G.....	28
H.....	30
I.....	31
J.....	32



## APPENDIX A

### **\*\*KEY QUOTES FROM DEATON v. HALE**

“The duties and responsibilities of an agent to his principal are parallel to the nature of the particular office which the agent agrees to perform. Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166 (Ky. 1974). An agent is required to exercise utmost good faith toward his principal. 3 Am.Jur.2d, § 199, Agency; Georgia Casualty Co. v. Mann, 46 S.W.2d 777 (Ky. 1932). The right of a principal to require an accounting of his agent is elementary. Restatement of Agency 2d, § 382; Sell on Agency UTB, § 128. Unless otherwise agreed, there is no discretion as to whether an accounting may be required. Restatement of Agency 2d, § 382.”<sup>39</sup>

“An attorney-in-fact, one acting under a power of attorney, must account for any and all property, real or personal, that is received by him from or for his principal. Restatement of Agency 2d, § 382; Seavy, Agency HB § 144. The accounting must be for all property that is received by him while acting in his official capacity or otherwise. We do not mean to say, and we do not hold, that an agent operating in a fiduciary capacity, such as in the instant case, is liable for restoration or reimbursement for all properties received by him from the principal or from whatever source. What we are saying is that the agent does have the responsibility of explaining to the satisfaction of the court what disposition was made of the properties. The agent is required to go forward with an explanation when proof is introduced showing that the property was in the hands of the agent. The burden of going forward with the proof so as to explain the disposition of any and all properties received by the agent is then with him. The issue thereby presented is one of fact to be decided by the court or by a jury, as the case may be.”<sup>40</sup>

“Once the agency relationship [has] been established and the property shown to have been in the possession of the accused, he then [has] the burden of establishing the disposition that was made of the property.”<sup>41</sup>

### **\*\*OTHER KEY CONCEPTS**

By quoting from the Restatements of Agency 2<sup>nd</sup> regarding an attorney in fact’s duty of accounting, the Kentucky Supreme Court may have implied that it would adopt many of the affirmative duties outlined in the Restatements. Restatements Sections 377 – 386 enumerate various duties of service and obedience, including duties

1. Of care and skill
2. Of good conduct
3. To give information

---

<sup>39</sup> Deaton v. Hale, 592 S.W.2d 127, 130 (Ky. 1979).

<sup>40</sup> Id.

<sup>41</sup> Id. at 131.

4. To keep and render accounts
5. To act only as authorized
6. Not to attempt the impossible or impracticable
7. To obey
8. After termination of authority.

## APPENDIX B

### **\*\*KEY QUOTES FROM WABNER v. BLACK**

“The co-executors argue that the restoration rule announced by the Court of Appeals is the correct approach. They also contend that this rule is consistent with firmly established case law holding that the construction of a written power of attorney is exclusively a question for the court. We believe, however, that this case law does not compel the result achieved by the Court of Appeals and, moreover, that it is in harmony with Deaton. The power of attorney executed by Tapp was unambiguous. It expressly provided in writing that Wabner was to have the full power "to cash any certificates of deposits which I own or to change and redesignate the ownership thereof in his [her] sole discretion." When Wabner changed her uncle's accounts to joint accounts, she did what was expressly authorized by the power of attorney. The only question then was whether Wabner's exercise of the express authority granted by the power of attorney was attended by the utmost good faith. This was a question of fact for the jury.”<sup>42</sup>

“The co-executors also contend that Wabner's transfer of assets into the joint accounts constituted unauthorized gifts, and thus this case is distinguishable from Deaton. Deaton, they argue, did not concern whether the power of attorney authorized the holder to make gifts to herself, but instead whether an agent is required to make an accounting of all assets coming into the agent's possession. Although the co-executors are correct in noting that Deaton does not use the word "gift" to describe the pertinent transactions, the opinion does deal with property that has come into the hands of the attorney in fact. Thus, the co-executors argument that there is a significant factual distinction between this case and Deaton must fail.”<sup>43</sup>

“The "flat rule" announced by the Court of Appeals has the advantage that every *per se* rule has in that it allows certainty and predictability. We do not believe, however, that this rule of law should be adopted here in light of Deaton and the clear language of the power of attorney authorizing Wabner to make the disputed transactions. The better approach, consistent with firmly established law, is to allow the court or the jury, as it may be, to determine as a matter of fact the propriety of the transactions. Although this Court may not agree with the verdict reached by the jury here, it is not the place of an appellate tribunal to substitute its judgment for that of a fact-finding body. Thus, the jury's verdict must stand.”<sup>44</sup>

---

<sup>42</sup> Wabner v. Black, 7 S.W.3d 379, 381 (Ky. 1999).

<sup>43</sup> Id. at 381-82.

<sup>44</sup> Id. at 382.

## APPENDIX C

### **\*\*KEY QUOTES FROM PRIESTLEY v. PRIESTLEY**

“By necessary implication from the Court of Appeals' opinion, an attorney in fact acting pursuant to a durable power of attorney is not answerable to any person or entity except the grantor of the power of attorney, one who may well be incompetent.”<sup>45</sup>

“In the circumstances which prevailed here, appellee's interests were hopelessly in conflict. Morris v. Bryan, 712 S.W.2d 347 (Ky. App.1986); Howd v. Clay, 228 S.W.2d 437 (Ky. 1950); and Price's Adm'r v. Price, 163 S.W.2d 463 (Ky. 1942). While it was her duty as administratrix to marshal the assets of the estate and collect sums which might have been due the decedent for benefit of the estate (KRS 395.195), it was in her personal interest to ignore her own possible defalcation. In such circumstances we are not persuaded by appellee's technical argument that the final judgment is flawed for failure to expressly articulate her breach of duties as administratrix. In our view, this question was sufficiently answered when the jury returned a verdict and the court entered judgment requiring appellee to repay substantial sums to the decedent's estate and requiring reformation of the agreement by which the Cardinal Hill litigation was settled.”<sup>46</sup>

“On cross-appeal, appellee contends that she should have had a directed verdict and that her alleged breach of fiduciary duties should not have been submitted to the jury. No claim of error has been made concerning the instructions. She argues, without authority, that a subjective standard should have been applied to her decisions with respect to her husband's property: "What would the ward himself have done with his property?"

In our view, the proper standard of conduct is set forth in Deaton v. Hale, 592 S.W.2d 127 (Ky. 1979), which requires of an agent the utmost good faith. See also Dunn v. Kramer, 208 S.W.2d 41 (Ky. 1948). The guardianship statute, KRS 387.600, is highly particularized and requires detailed reporting and review by the court. Our decisions and the statutes are far more consistent with the concept of limited discretion in the fiduciary than with broader discretion as claimed by appellee.”<sup>47</sup>

---

<sup>45</sup> Priestley v. Priestley, 949 S.W.2d 594, 597 (Ky. 1997).

<sup>46</sup> Id. at 597-98.

<sup>47</sup> Id. at 598.

## APPENDIX D [2 pgs.]

### **\*\*KEY QUOTES FROM RICE v. FLOYD**

“In our view, the durable power of attorney provided by KRS §386.093 does not make the appointment of a guardian automatically unnecessary. It was not intended to supplant the provisions of KRS §387.500, the guardianship statute.

The Kentucky statute regarding durable power of attorney is derived from section 5-501 of the Uniform Probate Code (1969). The Kentucky law modified the common law principle that the acts of an attorney-in-fact taken after the principal's loss of power to contract were void. The general purpose of the Uniform Act is to change the common law rules that voided powers upon the principal's incompetency. Uniform Laws Annotated, *Uniform Durable Power of Attorney Act*, Prefatory Note p. 277 (1981). It is our interpretation that the Kentucky statute had the same purpose. KRS §386.093 and KRS §387.500 *et. seq.* can be harmonized if this purpose is given to KRS §386.093. The statutes in question provide a pattern for the systematic and rational resolution of the problems of incompetency and the time immediately prior thereto.

KRS §386.093 is designed to validate the acts of the attorney-in-fact during a period of actual disability prior to a finding of legal disability. This law provides an answer to the timeless problem which existed under common law of determining when a principal became disabled and at what time the power of attorney terminated and the acts thereafter were void. *See* 2A C.J.S., *Agency* §141.”<sup>48</sup>

“The durable power of attorney is not comprehensive enough to replace the provisions of Chapter 387 in regard to the administration of the estates of incompetents. The purpose of KRS §387.500 is to appoint a person to take care of the day-to-day personal business of an incompetent. The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability. The crucial phrase of KRS §386.093 is found in the last sentence which states that, "If a fiduciary is thereafter appointed by the court for the principal, the power of the attorney in fact shall thereupon terminate and he shall account to the court's appointed fiduciary."

It was not the purpose of KRS §386.093 to permit an attorney-in-fact to undertake all the obligations of a legally appointed guardian. A "durable power of attorney is not limitless." Matter of Wilhelm, 511 N.Y.S.2d 510, 511 (1987).”<sup>49</sup>

“This Court notes that the guardian is answerable to a court and must file accountings at least annually. The attorney-in-fact is answerable and accountable only to the principal who may be mentally disabled. It is obvious that there must be adequate safeguards and

---

<sup>48</sup> Rice v. Floyd, 768 S.W.2d 57, 58 (Ky. 1989).

<sup>49</sup> Id. at 59.

control on the person who manages an incompetent's estate and that a great disparity exists between the durable power of attorney and a guardian.”<sup>50</sup>

“A guardian must comply with KRS §389A.010 *et. seq.* whenever the sale of real property is involved. The attorney-in-fact may sell real estate as if it were his own. The guardian must also file biennial accounts with the district court. KRS §387.670 and KRS §387.710. An attorney-in-fact is not a fiduciary as defined in KRS §395.001, nor is he a fiduciary subjected to the reporting requirements of KRS §387.500 *et. seq.* The attorney-in-fact is accountable only to his principal, who in this case appears to be incompetent.”<sup>51</sup>

“The guardianship provides for broad powers and duties such as the power to select the place of living and the restrictions of personal freedom of the disabled. KRS §387.660. Such powers have never been encompassed in the traditional power of attorney even the durable power of attorney. The attorney-in-fact is not restricted. An incompetent cannot be sued and an attorney-in-fact cannot defend an action on behalf of an incompetent. Civil Rule 17.03. Defense must be completed by a legally appointed guardian or committee. The legal and personal requirements of a disabled person are not well satisfied by an attorney-in-fact as they might be by a guardian. We do not believe they accomplish the same goals as those expressed in the guardianship statutes.”<sup>52</sup>

“In Kentucky, the durable power of attorney statute states that if a fiduciary is thereafter appointed for the principal, the attorney-in-fact is terminated and he must account to the court-appointed fiduciary. The appointment of a guardian was contemplated by the legislature as part of the durable power of attorney.

Upon the jury determining the respondent disabled, the court *shall*, without the jury, determine the type of guardian or conservator to be appointed. KRS §387.580(3). The trial court is granted authority to determine the individual or entity to be appointed, and the court may appoint the attorney-in-fact if suitable to the task. An accounting at trial of his acts as attorney-in-fact would be relevant evidence as to his suitability. In appointing a guardian or conservator, the court must give preference to those individuals possessing qualifications enumerated in KRS §387.605. The four qualifications are not listed in order of priority, but all four qualifications must be considered together in order to determine the person or entity most qualified to serve.”<sup>53</sup>

“KRS §386.093 requires the termination for the power of attorney-in-fact upon the appointment of a fiduciary of the principal. If Floyd is determined by the jury to be disabled, the power of attorney will cease and a fiduciary as provided for in KRS §387.590 will be appointed by the trial judge. KRS §386.093; KRS §387.580(3)(a). Should Floyd be found disabled in managing both her personal affairs and financial resources, the court shall appoint a guardian, "unless the court considers it in the best interest of the ward to appoint both a limited guardian and a conservator." KRS

---

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id. at 59-60.

<sup>53</sup> Id. at 60.

§387.590(5).

It is the holding of this court that the durable power of attorney is not a substitute for the appointment of a guardian. The existence of a durable power of attorney cannot prevent the institution of guardianship proceedings. The disabled person is entitled to have the district court exercise control and supervision of her estate by the impaneling of a jury to determine whether she is disabled pursuant to Chapter 387 of the Kentucky Revised Statutes and if so to appoint a guardian in accordance with that chapter, and if a fiduciary is appointed then the power of attorney-in-fact shall terminate and an account must be given to the court-appointed fiduciary.”<sup>54</sup>

---

<sup>54</sup> Id. at 60-61.

**APPENDIX E [2 pgs.]**

**CALIFORNIA PROBATE CODE §4401 – STATUTORY FOR POWER OF ATTORNEY**

The following statutory form power of attorney is legally sufficient when the requirements of Section 4402 are satisfied:

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I [your name and address] appoint [name and address of the person appointed, or of each person appointed if you want to designate more than one] as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

- (A) Real property transactions.
- (B) Tangible personal property transactions.
- (C) Stock and bond transactions.
- (D) Commodity and option transactions.
- (E) Banking and other financial institution transactions.
- (F) Business operating transactions.
- (G) Insurance and annuity transactions.
- (H) Estate, trust, and other beneficiary transactions.
- (I) Claims and litigation.
- (J) Personal and family maintenance.
- (K) Benefits from social security, Medicare, Medicaid, or other governmental programs, or civil or military service.
- (L) Retirement plan transactions.
- (M) Tax matters.
- (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.



-----  
-----  
-----  
-----  
-----

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act -----  
-----

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this ----- day of -----, 19 -----

-----  
(your signature)

-----  
(your social security number)

State of ----- County of -----

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

[Include certificate of acknowledgment of notary public in compliance with Section 1189 of the Civil Code or other applicable law.]

**CALIFORNIA PROBATE CODE §4121 – REQUIREMENTS FOR LEGAL SUFFICIENCY OF POWER OF ATTORNEY**

A power of attorney is legally sufficient if all of the following requirements are satisfied:

- (a) The power of attorney contains the date of its execution.
- (b) The power of attorney is signed either (1) by the principal or (2) in the principal's name by another adult in the principal's presence and at the principal's direction.
- (c) The power of attorney is either (1) acknowledged before a notary public or (2) signed by at least two witnesses who satisfy the requirements of Section 4122.

**CALIFORNIA PROBATE CODE §4122 – WITNESS SIGNATURE REQUIREMENTS**

If the power of attorney is signed by witnesses, as provided in Section 4121, the following requirements shall be satisfied:

- (a) The witnesses shall be adults.
- (b) The attorney-in-fact may not act as a witness.
- (c) Each witness signing the power of attorney shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney.

**ARIZONA REVISED STATUTES §14-5651 – FIDUCIARIES; CERTIFICATION; QUALIFICATIONS; CONDUCT; REMOVAL; EXEMPTION; DEFINITIONS**

**A.** Except as provided by subsection G of this section, the superior court shall not appoint a fiduciary unless that person is certified by the supreme court. The Supreme Court shall administer the certification program and shall adopt rules and establish and collect fees necessary for its implementation. The Supreme Court shall deposit, pursuant to sections 35-146 and 35-147, the monies collected pursuant to this subsection in the confidential intermediary and fiduciary fund established by section 8-135. At a minimum the rules adopted pursuant to this subsection shall include the following:

1. A code of conduct.
2. A requirement that fiduciaries post a cash deposit or surety bond with the Supreme Court.
3. Minimum qualifications.
4. Biennial renewal of certification.

**B.** As a condition of appointment, the Supreme Court shall require each applicant for the position of fiduciary to submit a full set of fingerprints to the supreme court for the purpose of obtaining a state and federal criminal records check to determine the suitability of the applicant pursuant to section 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation.

**C.** An applicant for certification shall:

1. Be at least twenty-one years of age.
2. Be a citizen of this country.
3. Not have been convicted of a felony.
4. Attest that the applicant has not been found civilly liable in an action that involved fraud, misrepresentation, material omission, misappropriation, theft or conversion.
5. Attend an initial session and thereafter biennial training sessions prescribed by the Supreme Court on the duties of a fiduciary.
6. Consent in the application form to the jurisdiction of the courts of this state for all actions arising under this article or article 6 of this chapter and appoint the fiduciary program coordinator as the lawful agent for the purpose of accepting service of process in any action, suit or proceeding that relates to the duties of a fiduciary. The program coordinator shall transmit by registered mail to the person's last known address the lawful service of process accepted by the program coordinator. Notwithstanding the provisions of this paragraph, service of process on a public fiduciary or the department of veterans' services shall be made pursuant to the Arizona rules of civil procedure.

**D.** The superior court shall, and any person may, notify the Supreme Court if it appears that a fiduciary has violated a rule adopted under this section. The Supreme Court shall

then conduct an investigation and hearing pursuant to its rules. If the Supreme Court determines that the fiduciary committed the violation it may revoke the fiduciary's certification or impose other sanctions, including civil penalties, and shall notify the superior court in each county of this action. The supreme court may then also require the fiduciary to forfeit a cash deposit or surety bond to the extent necessary to compensate the court for the expenses it incurred to conduct the investigation and hearing.

**E.** A person who in good faith provides information or testimony regarding a fiduciary's misconduct or lack of professionalism is not subject to civil liability.

**F.** Persons appointed by the chief justice to serve in an advisory capacity to the fiduciary program, staff of the fiduciary program, hearing officers and employees of the administrative office of the courts who participate in the fiduciary program are immune from civil liability for conduct in good faith that relates to their official duties.

**G.** The requirements of this section do not apply to a financial institution. This exemption does not prevent the superior court from appointing a financial institution as a fiduciary. The Supreme Court may exempt a fiduciary from the requirements of this section for good cause.

**H.** This section does not grant any fiduciary or any applicant for a certificate as a fiduciary the right to a direct appeal to the Supreme Court.

**I.** The Supreme Court may receive and expend monies from the confidential intermediary and fiduciary fund established pursuant to section 8-135 for the purposes of performing the duties related to fiduciaries pursuant to this section.

**J.** For the purposes of this section:

**1.** "Fiduciary" means:

(a) A person who for a fee serves as a court appointed guardian or conservator for one or more persons who are unrelated to the fiduciary.

(b) A person who for a fee serves as a court appointed personal representative and who is not related to the decedent, is not nominated in a will or by a power conferred in a will and is not a devisee in the will.

(c) A public fiduciary appointed pursuant to section 14-5601.

(d) The department of veterans' services.

**2.** "Financial institution" means a bank that is insured by the federal deposit insurance corporation and chartered under the laws of the United States or any state, a trust company that is owned by a bank holding company that is regulated by the federal reserve board or a trust company that is chartered under the laws of the United States or this state.

## APPENDIX H

### **MINNESOTA STATUTES §523.21 – DUTIES OF AN ATTORNEY IN FACT**

The attorney-in-fact shall keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal. The attorney-in-fact has no duty to render an accounting of those transactions unless: (1) requested to do so at any time by the principal; (2) the instrument conferring the power of attorney requires that the attorney-in-fact render accountings and specifies to whom the accounting must be delivered; or (3) the attorney-in-fact has reimbursed the attorney-in-fact for any expenditure the attorney-in-fact has made on behalf of the principal. A written statement that gives reasonable notice of all transactions entered into by the attorney-in-fact on behalf of the principal is an adequate accounting. The persons entitled to examine and copy the records of the attorney-in-fact are the principal, a person designated by the principal in the document creating the power of attorney as the recipient of accountings required by this section, and the guardian or conservator of the estate of the principal while the principal is living and the personal representative of the estate of the principal after the death of the principal. The attorney-in-fact has no affirmative duty to exercise any power conferred upon the attorney-in-fact under the power of attorney. In exercising any power conferred by the power of attorney, the attorney-in-fact shall exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind. The attorney-in-fact is personally liable to any person, including the principal, who is injured by an action taken by the attorney-in-fact in bad faith under the power of attorney or by the attorney-in-fact's failure to account when the attorney-in-fact has a duty to account under this section.

**CALIFORNIA PROBATE CODE §4264 – ACTS REQUIRING EXPRESS AUTHORIZATION**

A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney:

- (a) Create, modify, or revoke a trust.
- (b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.
- (c) Make or revoke a gift of the principal's property in trust or otherwise.
- (d) Exercise the right to make a disclaimer on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.
- (e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.
- (f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.
- (g) Make a loan to the attorney-in-fact.

## APPENDIX J

**\*\*FROM BRATT, CAROLYN, "A PRIMER ON KENTUCKY INTESTACY LAWS". KENTUCKY LAW JOURNAL, 82 Ky. L.J. 29, (KENTUCKY COLLEGE OF LAW, 1994) pgs. 123-28. [Internal citations omitted]**

"Kentucky has adopted the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (the "Act"). The Act eliminated the common law rule that a testate share could be disclaimed by the intended beneficiary within a reasonable period of time after the testator's death, but that an intestate share could not be renounced by its recipient. Under the common law rule, title to intestate property passed to the intestate taker instantly upon the death of the decedent, whereas a will gift had to be accepted by the donee before title actually devolved. While a disclaimer by a will beneficiary prevented title from passing to the intended beneficiary, a disclaimer by an intestate taker divested the intestate taker of title to the property renounced. This conceptual distinction between disclaimers by will beneficiaries and disclaimers by intestate takers meant that the latter event was treated as a gratuitous transfer of title by the disclaimant to another. This, in turn, meant that the disclaimer had federal gift tax implications. The Act eliminates the conceptual distinction between these two acts of renunciation by permitting disclaimers by both intestate and testate takers. Neither type of disclaimer is now treated as a gratuitous transfer of the disclaimant's interest in the property.

By adopting the Act, the legislature has expanded the right to disclaim of many takers. Not only may both intestate and testate takers disclaim, but a will beneficiary who is given a future interest, rather than a present interest, in property of either a legal or equitable nature may also disclaim. Will beneficiaries of interests such as a power to consume, to appoint, or to apply property for any purpose also have the right to disclaim such interests. The Act extends the right to disclaim to representatives of incapacitated or protected persons and to appointees under a power of appointment exercised by a testamentary instrument. Successive disclaimers are permitted because persons succeeding to a disclaimed interest also have the power to disclaim. Since 1980, the right to disclaim survives the death of the person having the right to do so. The right may be exercised by the personal representative of such a person within the time periods stipulated in the Act.

A person who has the right to disclaim may disclaim in whole or in part. At the least complicated level, a partial disclaimer permits an intestate or testate taker to disclaim some fractional portion of her or his share. Thus, an intestate taker who is entitled to all of the decedent's estate could disclaim a third of her or his interest and retain title to a two-thirds interest in the estate. A will beneficiary who was given land and money could disclaim one gift and keep the other. Similarly, a sole intestate taker of a decedent who died owning Blackacre in fee simple should be able to disclaim her or his fee title to a physical portion of the land. For example, if Blackacre consists of ninety-nine acres, the intestate should be able to disclaim fee title to one-third of the land while retaining fee title to the remaining sixty-six acres. In addition, a will recipient of a \$ 1000 monetary bequest should be able to disclaim ownership of some part of the sum of money and keep the rest.

The more difficult question is whether the Act's provision on partial disclaimers authorizes a disclaimer that has the effect of changing the nature of the disclaimant's title interest in the

property. For example, suppose an intestate taker of a fee simple interest in Blackacre wants to disclaim all but a life estate interest in the land. Under Kentucky's intestacy statutes, the sole intestate taker succeeds to the decedent's whole title in the land that the decedent died owning. When there is more than one intestate taker, they are concurrent owners of a fractional interest in the same size estate that the decedent died owning. If the Act authorizes the disclaimer of part of the decedent's title as well as title to a physical part of the land, the intestate taker's remaining interest in the land is one incapable of creation by operation of the state's intestacy laws. A fee simple interest in either one hundred acres of land or in ten acres of land because of a disclaimer of title to ninety acres is still the same title interest the intestacy statutes contemplate descending to an intestate taker. However, a life estate in land that the decedent owned at death in fee simple is not an interest capable of being created in an intestate taker by operation of the intestacy statutes. At least one commentator has suggested that if the disclaiming instrument, rather than the intestacy statutes or the will, determines the nature of the taker's title, the disclaimer ought not to be permitted. Thus, under this interpretation of the Act, it would be permissible to disclaim title to a physical part of the object of the gift, but it would be impermissible to disclaim part of the title interest in the object of the gift.

A valid disclaimer must be done via a writing that declares the disclaimant's intention to disclaim, describes the property or interest disclaimed as well as the extent of the disclaimer, and is signed by the disclaimant. To remove the uncertainties of the common law rule that a disclaimer had to be made within a reasonable period of time, the Act fixes a definite time within which a disclaimer must be made. A disclaimer of a present interest must be made within nine months after the death of the property owner or donee of the power. A future interest must be disclaimed no later than nine months after the taker of the interest is definitely ascertained and the interest taken is indefeasibly vested.

For example, if a will leaves property to "A for life, remainder to B," the life tenant's interest must be disclaimed within nine months of the testator's death because A is given a present possessory life estate in the property. Although B is given a future interest in remainder, B must also disclaim within nine months of the testator's death. The identity of the taker (B) is fixed at the moment of the testator's death. As there is no requirement that B must survive the life tenant to take the remainder, B's remainder interest is indefeasibly vested at the death of the testator. If, on the other hand, the devise were to "A for life, then if B survives A, to B," A must again disclaim within nine months of the testator's death, but B must disclaim no later than nine months after the death of A. Only when A dies survived by B does B's interest indefeasibly vest in B.

The disclaimant must file the disclaimer in the district court of the county in which proceedings have been or could be commenced, if not yet commenced, for the administration of the deceased owner's estate. A copy of the disclaimer must also be delivered in person or mailed by registered or certified mail to the personal representative or other fiduciary of the decedent or donee of the power. If disclaiming real property or an interest in real property, the disclaimant may record a copy of the disclaimer in the office of the county clerk of the county in which the real property is situated.

Even if the relevant time period for disclaiming has not yet expired, the right to disclaim may be otherwise barred. Various acts of the disclaimant, inconsistent with renunciation, bar the right to renounce. Such acts include an assignment, conveyance, encumbrance, pledge, or



transfer of the interest or a contract therefor. Similarly, a written waiver of the right to disclaim will bar a later attempt to disclaim. Acceptance of the interest by the disclaimant or the judicial sale of the interest for the account of the disclaimant before the disclaimer is effected also bars the right to disclaim.

The disclaimant is not barred from disclaiming by outside events or limitations placed on his interest. For example, as a taking by eminent domain is unrelated to the satisfaction of the disclaimant's obligations, a timely disclaimer of the proceeds of a condemnation action is not barred by such a judicial proceeding. Also, the right to disclaim is not barred if the interest is subject to a spendthrift limitation, such as those imposed on trust beneficiaries, or similar restrictions. If a valid disclaimer or a written waiver of the right to disclaim is made, it binds the disclaimant and all persons claiming through or under the disclaimant.

In all cases of intestate disclaimers and in cases where a testator or donee of the power has not provided otherwise, the disclaimed interest, regardless of its character as a present or future interest, devolves as if the disclaimant had predeceased the property owner or the donee of the power. In intestacy, if the decedent were survived by two children, one of whom disclaimed and had three children of her or his own, the nondisclaiming child would take only half of the estate. The issue of the disclaimant would share the other half equally because the estate is distributed as if the decedent had been survived by only one child and the issue of a predeceased child.

Similarly, future interests that take effect at the termination of the disclaimed interest take effect as if the disclaimant had predeceased the property owner or the donee of the power. For example, if a testator left Blackacre to "my daughter for life, remainder to her children who survive her" and the daughter disclaimed with two children alive, the remainder is accelerated. That is, the two children of the daughter take a present fee interest in Blackacre at the death of the testator. Each is a tenant in common with an undivided one-half interest in the land even though these children might actually predecease their mother or more children might be born later to their mother.

Because the statute expressly provides that a disclaimer relates back "for all purposes" to the date of death of the property owner or the donee of the power, the Act affects the rights of taxing authorities, creditors of the disclaimant, and the disclaimant's surviving spouse. Regardless of the disclaimant's motive for the disclaimer, the disclaimed property is never part of the disclaimant's estate. Therefore, the disclaimer is not treated as a gift by the disclaimant. The dower rights of the disclaimant's spouse never attach to the disclaimed property, and the disclaimant's creditors have no claim to the property for satisfaction of the disclaimant's debts. In fact, the creditors are not even entitled to notice of the disclaimer.

The Act is the exclusive method of disclaimer for intestate takers, devisees, legatees, other beneficiaries under a testamentary instrument, appointees under an exercised testamentary power of appointment, and those succeeding to such disclaimed interests. Although the Act supplants the common law right of such persons to disclaim, the Act does not affect one's right to waive, release, disclaim, or renounce under other statutes. Specifically, the Act does not affect the surviving spouse's right to renounce under KRS §394.080 or the right of the donee of a power to renounce the power under KRS §386.095.

Finally, the Act does not govern disclaimers by a grantee of an inter vivos conveyance, a

donee of an inter vivos gift, a surviving joint tenant, a beneficiary under a nontestamentary instrument or contract, a person succeeding to any such interest, or an appointee under a power of appointment exercised by a nontestamentary instrument. Such nontestamentary disclaimers are governed by the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act.”

**KENTUCKY BAR ASSOCIATION  
RULES OF THE SUPREME COURT OF KENTUCKY**

**PRACTICE OF LAW**

**SCR 3.130(1.14) Client with diminished capacity**

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

HISTORY: Amended by Order 2009-05. eff. 7-15-09; adopted by Order 89-1, eff. 1-1-90

**SUPREME COURT COMMENTARY**

**2009:**

(1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

(2) The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

(3) The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

(4) If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the

guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

### **Taking Protective Action**

(5) If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

(6) In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

(7) If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

### **Disclosure of the Client's Condition**

(8) Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

### **Emergency Legal Assistance**

(9) In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or

another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

(10) A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

## **XIV. Common Medical Abbreviations, Definitions, Terms, Symbols, and Acronyms**

@	at
abd	abdomen
ABG	arterial blood gas
abrasion	wound caused by rubbing or scraping the skin
ac	before meals
ACE	angiotensin-converting enzyme
acute	having a rapid onset with a short, severe course; contrast “chronic”
AD	right ear
ADA	American Diabetes Association
ADL	activities of daily living
ad lib	freely
Adm.	admission
AFib	atrial fibrillation; heart arrhythmia
AKA	also known as; above the knee amputation
Alb	Albumin
a.m.	morning; before noon
AMA	against medical advice
amb	ambulate or walk

analgesic	a medication capable of reducing or eliminating pain
anterior	front or forward; contrast “posterior”
AP, A/P	anteroposterior (front to back)
apnea	temporary absence or cessation of breathing
appt.	appointment
aq	water; aqueous
ARNP	Advanced Registered Nurse Practitioner
AROM	active range of motion
arteriosclerosis	thickening or hardening of arterial wall
AS	left ear
ASA	acetylsalicylic acid (aspirin)
ASHD	arteriosclerotic heart disease
asthenia	weakness
ATNR	Asymmetrical Tonic Neck Reflex
asystole	absence of electrical/mechanical activity in the heart (“flatline”)
atherosclerosis	a form of arteriosclerosis characterized by build up of plaque on inner wall of artery
AU	each ear
AV	atrioventricular
AWOL	absent without official leave

ax	axillary; pertaining to axilla or armpit
Axis	in the multiaxial assessment used in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), each axis refers to a different “domain of information.” Axis I – clinical disorders; Axis II – personality disorders and mental retardation; Axis III – general medical disorders; Axis IV – psychosocial and environmental factors (stressors); Axis V – global assessment of functioning
BEE	basal energy expenditure; see BMR
bid	twice a day
bilat	bilateral
BKA	below the knee amputation
BLE	bilateral lower extremities
BM	bowel movement
BMI	Body Mass Index; formula to determine obesity (Wt. in lbs / (Ht. in inches) x (Ht. in inches)) x 703
BMP	Basic Metabolic Panel or Profile
BMT	Bilateral Myringotomy with Tubes
BMR	basal metabolic rate
BOM	Bilateral Otitis Media; bilateral infection or inflammation of the middle ear
B/P	blood pressure
BPH	benign prostatic hypertrophy
BPM	heart beats per minute





BR	bed rest
BRP	bath room privileges
BS	blood sugar or bowel sounds
BSP	behavior support plan
BUE	bilateral upper extremities
BUN	blood urea nitrogen
C	celsius (centigrade)
CA	cancer
Ca	Calcium
CABG	coronary artery bypass graft
CAD	coronary artery disease
cal(s)	calorie(s)
cap(s)	capsule(s)
cath	catheterization or catheterize
CBC	complete blood count
CC	chief complaint; critical care
cc	cubic centimeter (1 cc = 1 ml)
CCC	comprehensive care clinic
CCC-A	Certificate of Clinical Competency in Audiology/ Audiologist

CCC-SLP	Certificate of Clinical Competency for Speech-Language Pathologists/Speech Language Pathologist
C/O	complains of
CHF	congestive heart failure
CHO	carbohydrates
Chol	cholesterol
chronic	persisting over a long period of time; contrast “acute”
Circ	circulation
Cl	Chloride
cm	centimeter
CNS	central nervous system
CO <sub>2</sub>	carbon dioxide
Cont	continue
COPD	chronic obstructive pulmonary disease
COTA	Certified Occupational Therapy Assistant
CP	cerebral palsy; care plan
CPAP	continuous positive airway pressure
CPR	cardiopulmonary resuscitation
C&S	culture and sensitivity
C sect	cesarean section

CSF	cerebrospinal fluid
CTRS	Certified Therapeutic Recreation Specialist
CV	cardiovascular
CVA	cerebrovascular accident (stroke)
CVP	central venous pressure
cyanosis	bluish discoloration
dB	decibel
D&C	dilatation and curettage
DDS	Doctor of Dental Surgery
decubitus	lying down; hence, decubitus ulcer, bedsore, pressure sore, or pressure ulcer
dehydration	excessive water loss from the body
dementia	a label applied to a variety of chronic diseases characterized by severe memory impairment and other forms of cognitive dysfunction. The term describes the syndrome of progressive cognitive impairment, but does not specify the cause.
dept.	department
DIC	disseminated intravascular coagulation
DMD	Doctor of Dental Medicine
D/O	disorder
DOB	date of birth

dorsal	back (see posterior; ventral)
DPT	Diphtheria-Pertussis-Tetanus vaccine
dr	dram
Drsg.	dressing
DSM	Diagnostic & Statistical Manual of Mental Disorders
DT	Diphtheria Tetanus
Dx	diagnosis
dys-	difficult, painful, abnormal; contrast “eu-”
D5W	5% glucose in distilled water
ea	each
EAC	external auditory canal
ECG	electrocardiogram (EKG)
edema	swelling resulting from excess fluid in the tissue
EEG	electroencephalogram
EENT	ear, eye, nose, and throat
effusion	escape of fluid from the blood vessels or lymphatics into the tissues or a cavity
EKG	electrocardiogram
elix.	elixir
embol(us/ism)	blood clot/ the blocking of a vessel by a clot
endocrine	of or relating to endocrine glands or the hormones secreted by them

ENT	ears, nose, and throat
epi.	epinephrine (adrenaline)
ER	emergency room
erythema	redness
ETOH	ethanol or alcohol
eu-	well, easily, or good
eval.	evaluation
eve.	evening
exam	examination
EXT	extremity or extract
F	Fahrenheit
FB	foreign body
FBS	fasting blood sugar
Fe	iron
febrile	having a fever
fem-pop	femoral popliteal bypass surgery
FHT	fetal heart tones
flexion	bending a joint in a manner that decreases angle between the bones of the limb at the joint

fl. oz.	fluid ounce
fracture	a break, rupture, or crack, especially in a bone or cartilage
freq.	frequently or frequency
FSH	follicle stimulating hormone
F/U	follow up
FWB	full weight bearing
fx	fracture
g	gram
GA	general anesthesia
gal(s)	gallon(s)
GB	gall bladder
GERD	gastroesophageal reflux disease
GI	gastrointestinal
gr	grain (1 gr. = 0.002285 oz.)
GTT	glucose tolerance test
gtt(s)	drop(s)
GU	genitourinary
gyn	gynecology
h, hr	hour

HA, H/A	headache
HBsAB	hepatitis B surface antibody
HBsAG	hepatitis B surface antigen
Hct	hematocrit
hepat(o)	having to do with the liver
Hgb	hemoglobin
H&H	hemoglobin and hematocrit
HIV	human immunodeficiency virus (AIDS)
H/O	history of
H <sub>2</sub> O	water
H <sub>2</sub> O <sub>2</sub>	hydrogen peroxide
HOB	head of bed
H & P	history and physical
HR	heart rate
hr	hour
hs	bedtime
HTN	hypertension
hx	history
hyper-	more than normal
hypo-	below normal



I	independent
IBW	ideal body weight
ICF	intermediate care facility
ICF/MR/DD	Intermediate Care Facility for people with Mental Retardation and Developmental Disabilities
I & D	Incision and Drainage
IDDM	insulin-dependent diabetes mellitus
IM	intramuscular
infarct	death of tissue caused by lack of blood
INH	inhalation
inj	injection
I&O	intake and output
INR	international normalized ratio (clotting ratio)
INT	intermittent
IPPB	intermittent positive-pressure breathing
irr	irregular
ischemia	lack of blood caused by constriction or occlusion of blood vessel; can lead to infarct
ISP	individualized support plan
-itis	inflammation

IUD	intrauterine device
IV	intravenous
IVP	intravenous pyelogram
K	potassium
Kcal	kilocalorie
KUB	kidneys, ureters, bladder
kg	kilogram
L	liter
lac.	laceration
lat.	lateral
lateral	away from the midline of the body or structure
lb(s)	pound(s)
LBP	lower back pain
LD	licensed dietician
LE	lower extremities
LFT	liver function test
liq(s)	liquid(s)
LLE	left lower extremity/lower left extremity
LLL	left lower lobe

LLQ	lower left quadrant
LMP	last menstrual period
LOC	level of consciousness
LPN	licensed practical nurse
LR	lactated Ringer's solution
LRE	least restrictive environment
lumbar	having to do with the lower back
LUE	left upper extremity
LUL	left upper lobe (of lungs)
LUQ	left upper quadrant
m	meter
MAC	monitored anesthesia care
MAOI	monoamine oxidase inhibitor
MAR	medication administration record
MBS	modified barium swallow
mcg	microgram
MDD	major depressive disorder
MDS	minimum data set
medial	nearer to the midline of the body
-megaly	abnormal enlargement of a structure

mEq	milliequivalent
Mg	magnesium
mg	milligram
MI	myocardial infarction (heart attack)
min	minute; minimum
ml	milliliter
mm	millimeter
MN	midnight
mo	month
mod.	moderate
MOM	milk of magnesia
MR	mental retardation
MRI	magnetic resonance imaging
MSE	mental status examination
MSW	Master of Social Work
MT; med tech	medical technologist
myo-	having to do with muscle tissue
myel-	having to do with the spinal cord or nervous system
Na	sodium
N/A	not applicable

NaCL	sodium chloride
NEB	nebulizer
necrosis	death of cells or tissue through injury or disease
neg	negative
nephro-	having to do with the kidney
neuro-	pertaining to a nerve or nervous system
ng	nanogram
NIDDM	non-insulin dependent diabetes mellitus
NKA/NKDA	no known allergies/no known drug allergies
NOS	not otherwise specified
NPO	nothing by mouth
NR	non-reactive
NS	normal saline (0.9%)
NSAID	non-steroidal anti-inflammatory drug
Nsg.	nursing
N/V	nausea/vomiting
NWB	non weight bearing
O <sub>2</sub>	oxygen
OBS	organic brain syndrome

occl	occlusion
OD	once a day; overdose
od	right eye
oint.	ointment
O & P	ova and parasites
OP	outpatient
oph.	ophthalmology
OR	operating room
ORIF	open reduction/internal fixation; open reduction is a surgical procedure for reducing a fracture or dislocation after incision into the fracture site; internal fixation is the stabilization of fractured bony parts by direct fixation to one another with surgical wires, screws, pins, or plates
os	left eye
-osis	suffix indicating a disease
ostomy	surgical creation of an artificial opening
OT	occupational therapy
ot(o)	having to do with the ear
OTC	over the counter
-otomy, -tomy	cutting
OTR/L	Occupational Therapist Registered/Licensed
OU	each eye

oz	ounce
P	pulse
PA, P/A	Physician's Assistant; posteroanterior (the direction from back to front)
P & A	Protection and Advocacy
PA-C	Physician's Assistant-Certified
PaCO <sub>2</sub>	partial pressure of carbon dioxide in the arterial blood
palpation	feeling with the fingers or hand
PaO <sub>2</sub>	partial pressure of oxygen in the arterial blood
para-	next to, beside, near
paresis	partial paralysis or muscle weakness
PAT	paroxysmal atrial tachycardia
path	pathology
pc	after meals
PCWP	pulmonary capillary wedge pressure
PE	physical examination
ped(s)	pediatric(s)
PEEP	positive end-expiratory pressure
per	by, through
percussion	a method of medical diagnosis in which various areas of the body are tapped with the finger to determine by resonance the condition of internal organs

perf.	perforation
peri-	around; surrounding
PERRLA	pupils equal, round, react to light, and accommodation
pH	hydrogen ion concentration (acid/base measurement)
PKU	phenylketonuria (a genetic disorder in which the body lacks the enzyme necessary to metabolize phenylalanine, which can cause brain damage and progressive mental retardation if untreated. Kentucky requires testing of all newborns for this disorder)
-plegia	paralysis
pm	after noon
PMH	past medical history
PMS	Pulse, Motor, Sensory
PO	by mouth
popliteal	pertaining to the area behind the knee
pos	positive
post.	posterior (the back part of a structure)
postop	postoperative
PPD	Purified Protein Derivative (TB skin test)
PR	per rectum



preop	preoperative
prn	as required; as needed
PROM	passive range of motion
proximal	nearest to a point of reference , a point of attachment, or the midline of the body
PT	prothrombin time (clotting time); physical therapy
pt.	patient
PTA	physical therapy assistant; prior to admission
PTT	partial thromboplastin time
PUD	peptic ulcer disease
PVC	premature ventricular contraction
PWD	partial weight bearing
q or Q	every
QA	quality assurance
QI	quality indicators
q AM	every day before noon
qh	every hour
q2h	every 2 hours
q3h	every 3 hours
q4h	every 4 hours
q6h	every 6 hours

q12h	every 12 hours
qid	four times daily
q PM	every night
qt	quart
quad	quadrant
R	right; rectal (when following a temperature reading)
RAD	reactive airway disease
RBC	red blood cell count; red blood cell
R.D.	Registered Dietician
RDA	recommended dietary/daily allowance
RE:, re:	regarding
rec.	recommend
REC	recreation
renal	having to do with the kidney
RLE	right lower extremity
RLL	right lower lobe (of lungs)
RLQ	right lower quadrant
RML	right middle lobe (of lungs)
R/O	rule out

ROM	range of motion
RUE	right upper extremity
RUL	right upper lobe (of lungs)
RUQ	right upper quadrant
Rx	remedy; prescription; medication
s.i.	suicidal ideation
SIMV	synchronized intermittent mandatory ventilation
SL	sublingual (under the tongue)
SOA	shortness of air
SOB	shortness of breath
sol	solution
S/P	status post
ss	one half
SSRI	Selective Serotonin Reuptake Inhibitor; a class of anti-depressive medications
SUBCUT	subcutaneous
Sub Q	subcutaneous
supp	suppository
suppos	suppository
SUS REL	sustained release

Sx; sx	symptom
syncope	temporary loss of consciousness; fainting
syr	syrup
T & A	tonsillectomy and adenoidectomy
tab	tablet
tbsp	tablespoon
temp	temperature
TIA	Transient Ischemic Attack (“mini-stroke”)
tid	three times daily
tinct	tincture
top	topical
TPN	total parenteral nutrition
TPR	temperature, pulse, respiration
TSH	thyroid stimulating hormone
tsp	teaspoon
Tx	treatment
UA; U/A	urinalysis
UTI	urinary tract infection
UV	ultraviolet

vag	vaginal
vascular	pertaining to blood vessels
ventral	pertaining to the belly surface or front of the body
vital signs	pulse, temperature, and respiration
vol	volume
VS	vital signs
W/C	wheelchair
WBC	white blood cell; white blood cell count
wk	week
WNL	within normal limits
wt	weight
yr	year
>	greater than
<	less than
≥	greater than or equal to
≤	less then or equal to
=	equal
%	percent
ā	before
Δ	change

≠

not equal to

↑	INCREASE (D)
↓	DECREASE (D)
⌒	AFTER
⌒	WITH
⌒	WITHOUT
⌒	EVERY
⌒	ONE
⌒	TWO
⌒	THREE
⌒	FOUR
⌒	FIVE
⊙	ASSIST
⌘	PSYCHIATRIC

## **XV. Care Facility Types and Definitions**

### **Assisted Living Community**

KRS 194A.700 contains many definitions that apply to Assisted Living Communities.

Assisted living facilities are not to provide medical care:  
KRS 194A.700 Definitions for KRS 194A.700 to 194A.729.

As used in KRS 194A.700 to 194A.729:

- (1) "Activities of daily living" means normal daily activities, including bathing, dressing, grooming, transferring, toileting, and eating;
- (2) "Assistance with activities of daily living and instrumental activities of daily living" means any assistance provided by the assisted-living community staff with the client having at least minimal ability to verbally direct or physically participate in the activity with which assistance is being provided;
- (3) "Assistance with self-administration of medication," unless subject to more restrictive provisions in an assisted-living community's policies that are communicated in writing to clients and prospective clients, means:
  - (a) Assistance with medication that is prepared or directed by the client, the client's designated representative, or a licensed health care professional who is not the owner, manager, or employee of the assisted-living community.  
The medication shall:
    1. Except for ointments, be preset in a medication organizer or be in a single dose unit;
    2. Include the client's name on the medication organizer or container in which the single dose unit is stored; and
    3. Be stored in a manner requested in writing by the client or the client's designated representative and permitted by the assisted-living community's policies;
  - (b) Assistance by an assisted-living community staff person, which includes:
    1. Reminding a client when to take medications and observing to ensure that the client takes the medication as directed;
    2. Handing the client's medication to the client, or if it is difficult for the client or the client requests assistance,

opening the unit dose or medication organizer, removing the medication from a medication organizer or unit dose container, closing the medication organizer for the client, placing the dose in a container, and placing the medication or the container in the clients hand;

3. Steadying or guiding a client's hand while the client is self-administering medications; or

4. Applying over-the-counter topical ointments and lotions;

(c) Making available the means of communication by telephone, facsimile, or other electronic device with a licensed health care professional and pharmacy regarding a prescription for medication;

(d) At the request of the client or the client's designated representative, facilitating the filling of a preset medication container by a designated representative or licensed health care professional who is not the owner, manager, or employee of the assisted living community; and

(e) None of the following:

1. Instilling eye, ear, or nasal drops;

2. Mixing compounding, converting, or calculating medication doses;

3. Preparing syringes for injection or administering medications by any injection method;

4. Administering medications through intermittent positive pressure breathing machines or a nebulizer;

5. Administering medications by way of a tube inserted in a cavity of the body;

6. Administering parenteral preparations;

7. Administering irrigations or debriding agents used in the treatment of a skin condition; or

8. Administering rectal, urethral, or vaginal preparations

(4) "Assisted-living community" means a series of living units on the same site certified under KRS 194A.707 to provide services for five (5) or more adult persons not related within the third degree of consanguinity to the owner or manager;

(5) "Client," "resident," or "tenant" means an adult person who has entered into a lease agreement with an assisted-living community;

(6) "Danger" means physical harm or threat of physical harm to one's self or others;



(7) "Department" means the Department for Aging and Independent Living;

(8) "Health services" has the same meaning as in KRS 216B.015;

(9) "Instrumental activities of daily living" means activities to support independent living including but not limited to housekeeping, shopping, laundry, chores, transportation, and clerical assistance;

(10) "Living unit" means a portion of an assisted-living community occupied as the living quarters of a client under a lease agreement;

(11) "Mobile non-ambulatory" means unable to walk without assistance, but able to move from place to place with the use of a device including but not limited to a walker, crutches, or wheelchair;

(12) "Plan of correction" means a written response from the assisted-living community addressing an instance cited in the statement of noncompliance;

(13) "Statement of danger" means a written statement issued by the department detailing an instance where a client is a danger; and

(14) "Statement of noncompliance" means a written statement issued by the department detailing an instance when the department considers the assisted-living community to have been in violation of a statutory or regulatory requirement.

### **Boarding Home**

The following terms, defined in KRS 216B.300, explain the limitations of Boarding Homes:

(3) "Boarder" means a person who does not require supervision or assistance related to medication, activities of daily living, or a supervised plan of care; and

(4) "Boarding home" means any home, facility, institution, lodging, or other establishment, however named, which accommodates three (3) or more adults not related by blood or marriage to the owner, operator, or manager, and which

offers or holds itself out to offer room and board on a twenty-four (24) hour basis for hire or compensation. It shall not include any facility which is otherwise licensed and regulated by the cabinet or any hotel as defined in KRS 219.011(3).

### **Intermediate Care Facility for the Intellectually Disabled and Developmentally Disabled**

These facilities provide housing, medical care, training, therapies, and a host of other services to individuals with intellectual disabilities or developmental disabilities.

### **Hospice/Palliative Care Facility**

Hospice programs and facilities provide end-of-life care to people with terminal illnesses and coping/grieving guidance to their families. Some hospice programs also provide palliative care, the aim of which is to make the final months and days of the dying person as fulfilling and comfortable as possible.

### **Nursing Home**

"Nursing home" means a facility which provides routine medical care in which physicians regularly visit patients, which provides nursing services and procedures to care for the sick which require training, judgment, technical knowledge, and skills beyond that which the untrained person possesses, and which maintains complete records on patient care.

### **Nursing Facility**

This term used to describe what used to be called a "nursing home" (although see above for a specific definition of "nursing home.")

In KRS 216.510, the following definitions are used to describe:

(1) "Long-term-care facilities" means those health-care facilities in the Commonwealth which are defined by the Cabinet for Health and Family Services to be family-care homes, personal-care homes, intermediate-care facilities, nursing facilities, nursing homes, and intermediate care facilities for individuals with intellectual disabilities;

(2) "Resident" means any person who is admitted to a long-term-care facility as defined in KRS 216.515 to 216.530 for the purpose of receiving personal care and assistance; and

(3) "Cabinet" means the Cabinet for Health and Family Services.

**Personal Care Home**

Personal Care Home means a place devoted primarily to the maintenance and operation of facilities for the care of aged or invalid persons who do not require intensive care normally provided in a hospital or nursing home but who do require care in excess of room, board, and laundry.

**Skilled Nursing Facility**

Some nursing facilities have permission to provide the highest level of medical care that can be provided outside of hospitals; this care is usually provided in an entire skilled nursing facility (SNF) or in a "wing" of a nursing facility. Some hospitals actually have SNF wings as part of the services they provide.

## **XVI. Personnel in Care Facilities**

“Administrator” The administrator is responsible for all the functions of the facility. He/she must be licensed by the Board of Nursing Home Administrators. The administrator must maintain the license and attend approved continuing education classes. The administrator is usually answerable to the facility corporation or individual owner, although he/she may also be the owner.

“Director of Staff Development” The Director of Staff Development (DSD) is a nurse responsible for the training and continuing education of the facility’s health care staff. The DSD is usually also responsible for maintaining proof of the staff’s license status, be knowledgeable of elder abuse and its reporting requirements, and may also be involved in direct patient care and other duties involving patient care as needed. The DSD is frequently responsible for the scheduling of staff.

“Medical Director” The Medical Director is a physician contracted by the facility to provide appropriate care when the patient’s primary physician cannot be reached in a timely manner. The Medical Director sits on the facility’s various policy committees, and regularly scheduled patient care assessment meetings. The Medical Director position is required for skilled nursing facilities (SNFs).

“Director of Nursing” The Director of Nursing (DON) is responsible for all the nursing services and patient-related services of the facility. The DON is responsible for health care personnel and must oversee their qualifications, training, and the care they provide. He/she is also responsible for maintaining facility policies and procedures related to patient care, including making sure physicians are notified of changes in patients’ conditions, and following up with proper steps if the physician is not responding in an appropriate manner. The DON must be qualified as a nurse and be licensed by the Board of Nursing, and must maintain at a minimum the license and attend appropriate approved continuing education to maintain the license.

“Charge Nurse” The Charge Nurse is the LPN or RN who is responsible for the care of a group or station of patients. He/she reports directly to the patients’ physician and to the DON. He/she is responsible for the care and treatment received by the patients in his/her station during his/her shift. He/she makes the necessary calls to the physician, takes and carries out doctors’ orders, documents patients’ conditions, makes nursing assessments, and may provide direct patient care.

“Certified Nurse Aide” The Certified Nurse Aide (CNA) must receive approved training, pass both a written and skills test, and pass a criminal background check. The CNA must have no criminal record and can lose certification for committing certain offenses, even if they do not involve a patient. The CNA is responsible for providing the everyday care to the patient, such as bathing, feeding, ambulation, and the general activities of daily living. The CNA is under the direct supervision of the Charge Nurse. The CNA may not pass medications. Although nurse aides in Kentucky are often referred to as CNA, the correct title for a nurse aide listed on the Kentucky Nurse Aide Registry is State Registered Nurse Aide (SRNA).

“Nurse aide” means an individual, including a nursing student, medication aide, and a person employed through a nursing pool, who provides nursing or nursing related services to a resident in a nursing facility or home health agency, excluding:

- (a) An individual who is a licensed health professional;
- (b) A volunteer who provides the nursing or nursing-related services without monetary compensation; and
- (c) A person who is hired by the resident or family to sit with the resident and who does not perform nursing or nursing-related services.

“Home health agency” means a public agency or private organization, or a subdivision of such an agency or organization which is licensed as a home health agency by the Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board and is certified to participate as a home health agency under Title XVIII of the Social Security Act.

“Home health aide” means an individual who is hired to perform home health aide services.

“Home health care” means the care and treatment provided by a home health agency which is prescribed and supervised by a physician. The care and treatment shall include but not be limited to one (1) or more of the following:

- (a) Part-time or intermittent skilled nursing services provided by an advanced registered nurse practitioner, registered nurse, or licensed practical nurse;
- (b) Physical, respiratory, occupational, or speech therapy;
- (c) Home health aide services;
- (d) Medical appliances and equipment, drugs and medication, and laboratory services, to the extent that

such items and services would have been covered under the policy if the covered person had been in a hospital.

“Home health aide services” means those services provided by a home health aide and supervised by a registered nurse which are directed towards the personal care of the patient. Such services shall include but not be limited to the following:

- (a) Helping the patient with bath, care of mouth, skin, and hair;
- (b) Helping the patient to the bathroom or in using a bedpan;
- (c) Helping the patient in and out of bed and assisting with ambulation;
- (d) Helping the patient with prescribed exercises which the patient and home health aide has been taught by appropriate professional personnel;
- (e) Assisting with medication ordinarily self-administered that has been specifically ordered by a physician;
- (f) Performing incidental household services as are essential to the patient's health care at home provided that such services would have been performed if the patient was in a hospital or skilled nursing facility; and
- (g) Reporting to the professional nurse supervisor changes in the patient's condition or family situation.

KRS 314.011 defines many personnel positions. As used in chapter 314, unless the context thereof requires otherwise:

"Nurse" means a person who is licensed or holds the privilege to practice under the provisions of this chapter as a registered nurse or as a licensed practical nurse;

"Nursing process" means the investigative approach to nursing practice utilizing a method of problem-solving by means of:

- (a) Nursing diagnosis, a systematic investigation of a health concern, and an analysis of the data collected in order to arrive at an identifiable problem; and
- (b) Planning, implementation, and evaluation based on nationally accepted standards of nursing practice;

“Registered nurse” means one who is licensed under the provisions of KRS 314 to engage in registered nursing practice;

“Registered nursing practice” means the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill based upon the principles of psychological, biological, physical, and social sciences in the application of

the nursing process in:

(a) The care, counsel, and health teaching of the ill, injured, or infirm;

(b) The maintenance of health or prevention of illness of others;

(c) The administration of medication and treatment as prescribed by a physician, physician assistant, dentist, or advanced practice registered nurse and as further authorized or limited by the board, and which are consistent either with American Nurses' Association Standards of Practice or with Standards of Practice established by nationally accepted organizations of registered nurses. Components of medication administration include but are not limited to:

1. Preparing and giving medications in the prescribed dosage, route, and frequency, including dispensing medications only as defined in subsection (17)(b) of this section;

2. Observing, recording, and reporting desired effects, untoward reactions, and side effects of drug therapy;

3. Intervening when emergency care is required as a result of drug therapy;

4. Recognizing accepted prescribing limits and reporting deviations to the prescribing individual;

5. Recognizing drug incompatibilities and reporting interactions or potential interactions to the prescribing individual; and

6. Instructing an individual regarding medications;

(d) The supervision, teaching of, and delegation to other personnel in the performance of activities relating to nursing care; and

(e) The performance of other nursing acts which are authorized or limited by the board, and which are consistent either with American Nurses' Association Standards of Practice or with Standards of Practice established by nationally accepted organizations of registered nurses;

"Advanced practice registered nurse" or "APRN" means a certified nurse practitioner, certified registered nurse anesthetist, certified nurse midwife, or clinical nurse specialist, who is licensed to engage in advance practice registered nursing pursuant to KRS 314.042 and certified in at least one (1) population focus;

"Advanced practice registered nursing" means the performance of additional acts by registered nurses who have gained advanced clinical knowledge and skills through an accredited education

program that prepares the registered nurse for one (1) of the four (4) APRN roles; who are certified by the American Nurses' Association or other nationally established organizations or agencies recognized by the board to certify registered nurses for advanced practice registered nursing as a certified nurse practitioner, certified registered nurse anesthetist, certified nurse midwife, or clinical nurse specialist; and who certified in at least one (1) population focus. The additional acts shall, subject to approval of the board, include but not be limited to prescribing treatment, drugs, devices, and ordering diagnostic tests. Advanced practice registered nurses who engage in these additional acts shall be authorized to issue prescriptions for and dispense nonscheduled legend drugs as defined in KRS 217.905 and to issue prescriptions for but not to dispense Schedules II through V controlled substances described in or as classified pursuant to KRS 218A.020, 218A.060, 218A.080, 218A.100, and 218A.120 under the conditions set forth in KRS 314.042 and regulations promulgated by the Kentucky Board of Nursing on or before August 15, 2006.

**(a) 1.** Prescriptions issued by advanced practice registered nurses for Schedule II controlled substances classified under KRS 218A.060, except hydrocodone combination products as defined in KRS 218A.010, shall be limited to a seventy-two (72) hour supply without any refill.

**2.** Prescriptions issued by advanced practice registered nurses for hydrocodone combination products as defined in KRS 218A.010 shall be limited to a thirty (30) day supply without any refill.

**3.** Prescriptions issued under this subsection for psychostimulants may be written for a thirty (30) day supply only by an advanced practice registered nurse certified in psychiatric-mental health nursing who is providing services in a health facility as defined in KRS Chapter 216B or in a regional services program for mental health or individuals with an intellectual disability as defined in KRS Chapter 210.

**(b)** Prescriptions issued by advanced practice registered nurses for III controlled substances classified under KRS 218A.080 shall be limited to a thirty (30) day supply without any refill. Prescriptions issued by advanced practice registered nurses for Schedules IV and V controlled substances classified under KRS 218A.100 and 218A.120 shall be limited to the original prescription and refills not to exceed a six (6) month supply.

Nothing in this chapter shall be construed as requiring an advanced practice registered nurse designated by the board as a certified registered nurse anesthetist to obtain prescriptive authority pursuant to this chapter or any other provision of law in order to deliver anesthesia care. The performance of these



additional acts shall be consistent with the certifying organization or agencies' scopes and standards of practice recognized by the board by administrative regulation;

“Licensed practical nurse” means one who is licensed under the provisions of this chapter to engage in licensed practical nursing work;

“Licensed practical nursing practice” means the performance of acts requiring knowledge and skill such as are taught or acquired in approved schools for practical nursing in:

(a) The observing and caring for the ill, injured, or infirm under the direction of a registered nurse, a licensed physician, or dentist;

(b) The giving of counsel and applying procedures to safeguard life and health, as defined and authorized by the board;

(c) The administration of medication or treatment as authorized by a physician, physician assistant, dentist, or advanced registered nurse practitioner and as further authorized or limited by the board which is consistent with the National Federation of Licensed Practical Nurses or with Standards of Practice established by nationally accepted organizations of licensed practical nurses;

(d) Teaching, supervising, and delegating except as limited by the board; and

(e) The performance of other nursing acts which are authorized or limited by the board and which are consistent with the National Federation of Practical Nurses' Standards of Practice or with Standards of Practice established by nationally accepted organizations of licensed practical nurses;

"Nursing assistance" means the performance of delegated nursing acts by unlicensed nursing personnel for compensation under supervision of a nurse;

“Sexual assault nurse examiner” (SANE) means a registered nurse who has completed the required education and clinical experience and maintains a current credential from the board as provided under KRS 314.142 to conduct forensic examinations of victims of sexual offenses under the medical protocol issued by the Sexual Assault Response Team Advisory Committee pursuant to KRS 216B.400(4).

