



ELDER ABUSE

PROSECUTION MANUAL

2024

KENTUCKY OFFICE OF THE ATTORNEY GENERAL

Office of Medicaid Fraud and Abuse Control

Office: (502) 696-5405

AG.KY.gov/MedicaidFraud



ATTORNEY GENERAL RUSSELL COLEMAN

July 31, 2024

Dear Colleagues,

Thank you for your tireless work on behalf of Kentuckians to protect our seniors. These Kentuckians deserve to be treated with dignity and respect, and your partnership is essential to protecting senior citizens from abuse, neglect, and exploitation.



As part of our Office's effort to support *your* work, we have enclosed the 2024 Elder Abuse Prosecution Manual. It includes resources and best practices for prosecuting cases related to personal, financial, and medical abuse, neglect, and exploitation. The Manual is the product of collaboration between the Attorney General's Office of Medicaid Fraud and Abuse Control and the Office of Victims Advocacy – a comprehensive partnership to keep seniors safe.

The abuse, neglect and exploitation of vulnerable adults is a serious issue in Kentucky. Through our Adult Abuse Hotline and other sources, the Office of Medicaid Fraud and Abuse Control received nearly 1,300 referrals in 2023. The sheer volume not only demonstrates Kentucky's profound challenges, but it also underscores our commitment to combating the abuse, neglect and exploitation of our vulnerable senior population.

Please do not hesitate to contact our Office of Medicaid Fraud and Abuse Control at (502) 696-5405 if we can ever be of assistance. If you have questions related to seniors experiencing fraud, scams, or financial exploitation, please contact our Office of Senior Protection at (502) 696-5300. Again, thank you for your continued partnership on behalf of Kentucky's elder citizens.

Gratefully,

A handwritten signature in blue ink that reads "Russ M. Coleman".

RUSSELL COLEMAN
ATTORNEY GENERAL

The original version of the Elder Abuse Manual was created by the staff of the Office of Medicaid Fraud and Abuse Control in 2006. The current version was edited and revised in 2024 by the following:

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ELDER ABUSE PROSECUTOR MANUAL

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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 the most for personal, financial, and medical care. The Attorney General's Office of Medicaid Fraud and Abuse Control is 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 Chapter 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, victim advocates, and prosecutors, offer a coordinated and efficient approach to combating elder abuse.

II. INTRODUCTION AND OVERVIEW OF INVESTIGATIVE AGENCIES

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 of tasks that others can perform for themselves.

The aging of the baby boomer generation is expected to hit Kentucky with particular force. The share of the population that consists of senior citizens is already above the average in Kentucky. That share is projected to increase over the coming years.

Kentucky's adult protective laws provide for the timely response to complaints of adult abuse, neglect, or exploitation based upon the apparent seriousness of the allegations and, most importantly, the risk to the life, health, and safety of the victim. The law requires that "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. KRS 209.030(2). **Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.** *Id.* Those seeking to make such a report can call 1-877-597-2331. Any person who makes such a complaint in good faith is immune from civil or criminal liability. (More information 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 both Medicaid funded facilities and non-Medicaid facilities. If a complaint does not fall within the jurisdiction of the MFCU, it will nevertheless be forwarded to the Department for Community Based Services and any other appropriate regulatory agency. Complaints can be made by calling 1-877-228-7384.

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.

Complaints involving abuse, neglect, or exploitation of adults receiving care in licensed facilities can be reported to the Cabinet for Health and Family Services, Office of the Inspector General (OIG). They can also be reported to the MFCU and the Department for Community Based Services. A timely report can quite literally be the difference between life and death for a vulnerable adult.

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

- 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. 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.

III. OVERVIEW OF KRS CHAPTER 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, and exploitation. Because both prosecutors and an array of other professionals must work closely to successfully prosecute these cases, significant segments of this manual are devoted to the roles of these varied groups. This is both for the benefit of the prosecutors and for the guidance of those other professionals who may not have experience working in a prosecutorial setting. These cases will become more prevalent as the population ages, both in Kentucky and nationwide. With the trend toward encouraging "aging in place" among seniors growing, law enforcement and prosecution must remain vigilant in seeking out cases where these vulnerable 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 far too often occurring without the kind of robust prosecutorial involvement that is needed to serve justice. Unfortunately, the crimes detailed in this manual are still often seen as "private matters" despite the law clearly designating these kinds of offenses as serious criminal matters. However, the increasing attention and emphasis on robust prosecution being present in these cases is a promising development in changing the public perception to properly understand elder abuse as criminal in nature.

It is worth noting that crimes related to matters such as domestic violence and child abuse were once seen as "private matters" before they received concentrated attention from law enforcement and prosecutors, which emphasized the criminal nature of those offenses. Even elder homicide is often successfully hidden by the caretakers responsible, since others perceive that the victim

was at the end of his or her life expectancy and mistakenly attribute the death to natural disease processes.

KRS Chapter 209 was enacted for the following purposes:

KRS 209.010 Purpose and application of chapter

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; 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.

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 Chapter 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.

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 ADTs. If Discovery is filed with the court, the prosecutor may want to file under seal any documents that would fall within the purview of KRS 209.140. 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

(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.

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 a validated substantiated finding of abuse, neglect, or exploitation by the Cabinet for Health and Family Services.

A key aspect of this development, relevant to the prosecution of elder abuse, is the requirement that a vulnerable adult services provider shall query the Cabinet to determine whether a validated substantiated finding exists as it concerns 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 information on whether or not there is a validated substantiated finding against him or her. With the individual's consent, the Cabinet can direct the result of the query to an alternative recipient so as to expedite the private individual's request.

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

Individuals are only placed on the registry after being afforded due process in the determination of this placement. Specifically, the individual must be afforded the opportunity to have an administrative hearing and the potential of a KRS Chapter 13B 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*****

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 any related right to an administrative appeal.

In addition, please forward the plea sheets and judgments of persons who qualify for inclusion on the DCBS Caregiver Registry to the Cabinet for Health and Family Services, Office of Legal Services at the conclusion of your case. Many administrative appeals related to registry placement are held in abeyance until the criminal case is resolved. Even if the defendant does not agree to be placed on the registry, the plea sheets and judgment will aid the Cabinet attorney for DCBS in ensuring that the defendant is placed 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 attributable to medical conditions or cognitive states of the victims. These responders should receive training to help them identify potential crime scenes. If such a scene is identified, they also need to know how 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. When necessary, they should be subpoenaed to court proceedings.

Patrol Officers

EMS will, oftentimes, not be called to scenes of crimes against the elderly. Instead, patrol officers will be the first responders. Patrol officers should always conduct a thorough investigation in these situations upon arrival and keep in the forefront of their mind the possibility of criminal conduct related to whatever incident brought them there. The scene and potential evidence should be fully secured and witnesses, including family members and caretakers, should be kept available for interview by investigators in accordance with law enforcement training. This will be covered further in "Chapter 6: Law Enforcement" in this Manual.

Investigators and Detectives

When investigators or detectives come into contact with a case of suspected abuse, neglect or exploitation, it is crucial that they should treat the situation as they would if they are at the scene

of any other crime. In addition to that and following training protocols, investigators and detectives should be familiar enough with the roles of other professional in order to effectively tap into the information, knowledge, and resources available to them to foster efficient and effective enforcement of law.

Victim Advocates

Victim advocates can be critical in assisting law enforcement and prosecutors with services such as victim protection as well as helping with interviews, court appearances, and many other aspects of the criminal process that requires working with the victims. Victim advocates play a crucial role helping prosecutors secure justice as well helping victims recover possible losses due to an offense.

Coroners

State law provides that coroners are to require that autopsies be performed in certain circumstances. The specifics are laid out in KRS 72.025. This statute should be carefully reviewed early on in any incident 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 factors such as medical conditions or cognitive states that may be impacting the victim. 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. This evaluation should clearly differentiate non abusive and abusive possible factors with regards to physical findings. When the case at hand involves a presumed victim of maltreatment, there should be appropriate imaging studies, standard laboratory analysis, review

of pertinent clinical findings, and histopathological examination, if appropriate for the forensic evaluation. As a branch of forensic pathology, Clinical Forensic Medicine is often used to evaluate the living elder victim of trauma and neglect for inflicted injuries. Practitioners of CFM are equipped to thoroughly examine the elder patient and review medical records to assess the possibility of physical abuse. These practitioners include both physicians and nurses. They are also fully qualified to provide expert medical opinions on injury mechanisms which are often relevant with regards to 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 any suspected occurrences. APS workers are trained to identify signs that help them identify possible cases that other professionals without that training would possibly not be trained to identify. Without question, the APS worker should be regarded as an extremely valuable asset during all phases of a case.

Office of the Inspector General

Survey staff from the Cabinet for Health and Family Services, 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 protect the very vulnerable people they are tasked with protecting from those aforementioned types of adverse situations, OIG staff can be of great help in establishing causation or a nexus between, for example, the actual services poorly provided or not provided and a decline in the victim's health.

This link is often a crucial part of any criminal prosecution on these matters. 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 members of families of residents who have concerns with any aspect of the care and services being delivered. Ombudsmen work on a regular basis with APS and OIG staff. They also often are involved in ongoing work with facility staff. Ombudsmen are generally well-aware of a facility's history of caregiving and compliance or lack thereof when looking at state and federal laws, in addition to regulations governing care. They can provide a wealth of information in facility-involved cases.

Behavioral and Mental Health Professionals

Behavioral and 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. They can provide psychological or psychosocial assessment of the behavioral health needs of victims or non-offending family members of the victim. They can also provide crisis intervention services to assist with the emotional crises of the victims or family along with ongoing therapeutic intervention to victims and families during and subsequent to the investigation and prosecution process. They can even provide specialized consultation to professionals involved in the provision of services. This is all done with a goal largely focused on providing insight into the impact of the victimization on the individual and family members. It also is of assistance when interpreting behaviors within the context of trauma response and conducting 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 these are specified under statute.

Office of the Attorney General, Office Medicaid Fraud & Abuse Control

The Office of Medicaid Fraud and Abuse Control (“MFCU”) in the Office of the Attorney General prosecutes fraud perpetrated by Medicaid providers against the Medicaid program, the state program that provides health care for people based largely upon financial eligibility. In addition to fraud, detectives with the MFCU investigate crimes of abuse, neglect, and exploitation against victims in health care facilities as well as room and board facilities. MFCU staff are always available to assist local prosecutors in any way to help 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 to prevent fraud, scams, and financial exploitation.

OSP administers 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 and 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 along with its role in assisting consumers with marketplace complaints. The Office also has a regulatory function, which requires registration of funeral homes, 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 complete with a 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 the Solicitor General

The Office of Solicitor General handles post-conviction proceedings. The Solicitor General and 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 502-696-5300.

Office of the Attorney General, Office of Victims Advocacy

Ensuring that victims of crime receive appropriate levels of service is the primary goal, but it is 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 to enforce victims' rights. This Office is an excellent source of guidance for the

prosecutor who is starting a multidisciplinary council or a local coordinating council in his or her judicial district. The Office can be reached by calling 502-696-5312.

VI. LAW ENFORCEMENT ROLE INTRODUCTION

Many adult victims are people who cannot care for themselves, rendering them completely dependent on others to meet even the most basic needs. Elder abuse includes the physical, sexual, emotional, financial abuse, neglect, abandonment, or exploitation of an older person. It may be committed by a family member, a friend, a fiduciary, a caregiver, or any other person. Each year, there are hundreds of thousands of vulnerable adults that are abused, neglected, and exploited and it is often by those closest to them.

Elder abuse can happen anywhere and can be committed by anyone. In the past, many have failed to recognize certain aspects of elder abuse as even being criminal in nature, even when they clearly are serious criminal matters by law. There has been an increased emphasis recently on the investigation and prosecution of the individuals responsible for the commission of these crimes against our senior population.

As the public becomes more aware of the fact that elder abuse is far more common than most people believe, those involved in investigation and prosecution of these offenses should expect to experience an increase in criminal cases in which seniors are the targets of these predatory crimes. Justice for victims of elder abuse requires specialized training for police officers and the same for other first responders in addition to well-trained 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 and 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.

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

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

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).

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. It should be noted that more than one form of abuse might be occurring at any given time. For example, emotional abuse often precedes or accompanies physical abuse as well as financial exploitation.

Incidents of 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. In order to effectively deter a crisis of this nature, it is worth considering the motivations that typically accompany the occurrences of these offenses, which are not clear but don't seem to be significantly different from motivations in connection to other types of violent crime.

The list below is by no means inclusive of every plausible factor associated with the commission of elder crimes, but they do seem to play a role and help explain why it is that 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 of caregivers; and
- Overworked and understaffed caregivers

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

Identifying Elder Abuse

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

Investigating and prosecuting offenses involving elder abuse can be difficult. It's possible, the victim may be unable or unwilling to report that abuse is occurring. It's also possible that witnesses may be hesitant to come forward for fear of similar acts being committed against them. There's also oftentimes a problem with physical evidence being all but non-existent or a time

lapse may exist. Factors such as these underscore the importance of vigilance at even the earliest stages of a potential investigation; looking for signs of elder abuse is crucial to a successful investigation and prosecution. Additionally, it can sometimes be difficult to distinguish between a natural disease process and an externally inflicted injury to 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 the aging process. Also, deaths may not be evaluated in detail. This is because it is routinely concluded that such deaths were 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:

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 appears 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 the injury and how it was obtained have been examined. It is worth keeping in mind that most accidental wounds tend to occur to arms and hands. That noted, consideration should be given to the possibility that hand and 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 very well be indicative of abuse. Before 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. Elderly persons 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 injuries 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 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 an 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 a victim to keep him or her quiet and manageable. Under-medication or withholding medication may also 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 disfunction, 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'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; and

- Conduct a sufficient preliminary investigation to verify or disprove the allegation.

Law enforcement officers should be 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. Law enforcement 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 overcome any potential assumption that their services can be better utilized elsewhere if the victim of elder abuse does not want their help. 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 or 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 weapons 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 the 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 even help an overwhelmed family care for their elderly relative. Community agencies to consider seeking assistance from include:

- 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 by 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.

Most people hopefully associate law enforcement with authority, safety, and security. This trust can be built upon to gain a victim's cooperation 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 cognitive 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 victims may be calling for your help and asking you to approach them to offer aid.

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 you 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 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.

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 any other history available 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 or 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 persons with hearing impairments see your lips, facial expressions, and hands when you interview them.
- Do not cover your mouth when you speak 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 person, 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

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 as currently understood by medical science. For this reason, it is important to obtain and examine 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 interacting with 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. The 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 windows 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 on your part 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 a 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 inadvertently continue under the investigator's 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

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 strength 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 or ethnic group is immune from elder abuse, it is possible 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, assuming the crimes are reported:

- Cultural norms of perseverance, silent suffering, and quiet endurance are valued in many communities. These qualities may also be 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. Some victims 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 to be “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 an authoritarian state or a corrupt legal system existed. They may not know they have rights in this country regardless of their immigration 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:

- Address the victim/witness using last names unless you are asked to use first names.
- 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 and 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.
- A country of origin may not indicate a preferred language; therefore, it is best to ask what language the complainant/witness prefers.

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

The information detailed below is not intended to be an all-inclusive list of possible evidentiary items; rather, it is 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.

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 can also 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 and/or 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, the absence or presence of required medical equipment and 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 or 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 Control (MFCU), and the 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.

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.

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

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.

The victim should be asked for any writings he or she has.

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 trashcans 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 he or 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, voice mails 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 help to identify motive or provide an explanation pertaining to a suspect’s actions.

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.

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.

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 the 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 Investigation 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 or her 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 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 the 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.”

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 generally does not involve weapons and oftentimes may not result 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, manifesting extreme indifference to the value of human life, which creates a grave risk of death to another and results in serious physical injury to another person. Violations under this statute are Class B felonies.

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 Class C felonies.

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 Class A misdemeanors.

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 Class C felonies, unless the victim is under twelve (12) years old, in which case it is a Class B 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 Class D felonies.

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 dysfunction, 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 KRS Chapter 209 can be found at the chapter of this manual devoted to this topic.

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

- KRS Chapter 508 requires, at a minimum, physical injury, while violations of KRS Chapter 209 can be established based on mental injury or physical pain.
- KRS Chapter 209 allows for prosecution of offenses based on one's failure to act, while KRS Chapter 508 requires some action on the part of the offender.

The penalties under KRS 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 KRS 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.

Sodomy in the third degree

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

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;

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 or 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 may become vulnerable to sexual assault through cognitive impairment and/or their physical inability to protect themselves. Abusers sometimes use sexual assault as a form of 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; and
- Rope burns can be 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; and
- Increased aggressive behavior.

Sexual assault may be more prevalent in cognitively impaired persons and those needing help with the 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 caregiver to provide an elderly person with basic necessities such 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); and
- 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; and
- An elder's own report of being abandoned.

KRS 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 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; and
- 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/or psychological abuse are the second most reported form of elder abuse.

Signs and symptoms of emotional or 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); and
- An elder's report of being verbally or emotionally mistreated.

KRS 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 also suffer from alcoholism, drug addiction, or physical or 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:

- Taking possession of financial assets through Power of Attorney or guardianship; and
- 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; and
- 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 a younger individual's income. 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 can often be 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 physical limitations

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 the taking of 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.

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 checkbook 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 or she 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 the Power of Attorney was signed, 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.

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; and

- 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; and
- 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 Chapter 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 the OIG investigation will typically be labeled as “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 Control.

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; and
- 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.

VII. PROSECUTOR’S ROLE IN PREVENTION AND PUBLIC AWARENESS

Community Education

Public awareness is a critical tool in our efforts to eliminate and effectively prosecute elder abuse. Prosecutors at the county and local level can play a critical role in educating your local community about this important issue. Information can be provided through a wide variety of methods ranging from things like brief presentations or the distribution of written materials, or organizational involvement with community groups including civic clubs, faith communities, nursing homes, and assisted living complexes.

Multi-Disciplinary Teams and Local Coordinating Councils

Commonwealth’s and County Attorneys are encouraged to actively participate in existing local multidisciplinary teams along with any local elder abuse coordinating councils. We offer additional encouragement to coordinate such efforts in those areas where none currently exist. These multidisciplinary groups provide important tools for community education and awareness. They also foster system improvements across the board, more effective investigation and prosecution of elder abuse cases, and even better coordination of victim assistance services.

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).

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 each appropriate authorized agency when an investigation begins, which should make it easier to become involved in these cases early in the investigation. "Authorized agency" is defined by KRS 209.020(17). Notification is often made by the DCBS Form 115 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

The Role of County Attorneys, Commonwealth's Attorneys and the Office of Medicaid Fraud and Abuse Control

- Commonwealth's Attorneys prosecute elder abuse and neglect cases when criminal activity being charged 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 Control, Office of the Attorney General prosecutes any fraud against the Medicaid program and the abuse, neglect, or exploitation of a patient in a facility or a similar setting. 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.

Requirements of KRS 209:

KRS 209.180 also provides that prosecutors shall:

- If adequate personnel are available, have an attorney trained in adult abuse, neglect, and exploitation. 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).
- If adequate personnel are available, 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. 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).
- 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 the 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 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 have, in habeas corpus proceedings, 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 or herself a witness to the victim's unavailability and offering argument in a summary manner. If at all possible, place 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 or she 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 elderly 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 or her 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 the 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 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 or she 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* (part of the consolidated opinion with *Davis*), 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 non-testimonial 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 the 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 (6th 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 (6th 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 (6th 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 (7th Cir. 2007) and *United States v. Hendricks*, 395 F.3d 173 (3rd 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 (6th 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 (6th 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 (6th Cir. 2004) (Statements made by a confidential informant to a police officer are “testimonial” under *Crawford*. The determination of whether something 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 (6th 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 (6th 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 (6th Cir. 2006); *United States v. Kappell*, 418 F.3d 550 (6th 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 (6th 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.*, 90 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 or her absolute immunity). This is not intended to replace the work of the trained, professional law enforcement officer, but to inform 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; and
- 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 recognizing 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 or her 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 or her 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 danger of serious impairment to the health or safety of the respondent or damage or dissipation to his or her 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 the need for the emergency appointment of a limited guardian or conservator. *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 a 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* KRE 504(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, husband-wife privilege shall not 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.

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 the victim.

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 the victim needs 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.

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 the use of 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

It may be useful for the prosecutor to request that the defendant demonstrate 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 based on *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**

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).
- The 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).

Place of Deposition

Whenever it is practicable to do so, the court shall direct that the deposition be taken in the county where the criminal case is pending, and the attendance of witnesses may be compelled by subpoena in the same manner as at trial. 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

The order authorizing the taking of a deposition shall 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.*

If the defendant is in custody, he or she shall be produced at the examination by the officer having the defendant in custody and kept in the presence of the witness during the examination. RCr 7.12(3)

Manner of Taking Depositions

Depositions shall be taken in the manner provided in the Civil Rules. RCr 7.18. The court at the request of the defendant may direct that a deposition be taken on written interrogatories in the manner provided in the Civil Rules. 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. 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 in accordance with Rule 30.02(4). 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.

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)(4); 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. Claire 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. 318, 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 (6th Cir. 1993) (additional 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

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 the afternoon, so plan your deposition accordingly. Allow the elder plenty of time in which to answer your questions, even if his or her

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).

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, or exploited.

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

Forensic Investigation of Abuse, Neglect and Death in the Elderly

Elder maltreatment is often accompanied by subtle physical findings as the primary or 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– will help optimize the investigation and help uncover subtleties of abuse and neglect in this population. A similar exhaustive investigatory approach should be standard with regards 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 five large categories: physical, psychological (emotional), financial, sexual, and neglect. There are also two other less clearly-defined categories, as well: self-abuse (self-neglect) and miscellaneous. The term “elder maltreatment” encompasses both elder abuse and neglect. It is not unusual to see both physical and non-physical markers in a victim. Physical abuse consists of violent acts intended to cause pain or injury. Markers indicating possible physical abuse often present as blunt force trauma, sharp force injuries, and cutaneous markings resulting from inappropriate or excessive employment of various kinds of restraints. Human bite marks and signs of malnourishment are often present in neglect cases. Evaluation of physical injuries necessitates a good deal of consideration of the particulars of a given case which means looking in depth at the particulars of the marker, while considering factors like type, amount, and extent, pattern, location, and potential pathophysiological consequences.

Sexual abuse is reported in less than 1% of all elder abuse cases. The relevant definition when evaluating conduct is that of sexual molestation. This includes contact with genitalia, mouth, or anus and can also include kissing, fondling, or otherwise improper handling of the elder.

Neglect results in the inability of the elder to properly thrive in his or her surroundings and includes intentional (active) and 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 a situation where the elder attempts to care for themselves despite their inability to care for themselves.

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

Subtle signs of elder maltreatment are often difficult to identify because of the coexistence of chronic or debilitating diseases. Ten percent of elders suffer from various types of degenerative or debilitating diseases and approximately 80% of all elderly persons 65 years of age or older in the United States have at least one chronic condition with about 50% having at least two. Sequelae of urinary or fecal incontinence, delirium and dementia-related behavioral disorders are at enhanced risk of being 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 offered for the injuries is a strong indicator of elder abuse. Hallmark presentations that should arouse suspicion for elder maltreatment include delays between injury and medical intervention. This is often 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 illustrate the type of things that should 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 can be sorted into separate categories based primarily on their relationship to the victim. 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 and Domestic Elder Abuse?

Domestic violence is a pattern of assaultive and coercive behavior in which an individual uses violence against an intimate partner to achieve power and control. It can take a number of forms including isolation, financial control, intimidation, 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.

There are some special patterns of domestic violence among the elderly that have been identified. For example, “*spouse abuse grown old*,” involves situations where victims have been abused for most of their lives; “*late onset*” abuse is defined when the abuse begins late in life by partners who had not previously been abusive; “*new relationship*” abuse is typical 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 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. Domestic violence is about power and control, which are the abuser’s primary means of imposing a system of motivation

and reward over the victim that they can use to exert control. 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 for fear of being subject to one or more of those types of behaviors if they do not. Abusers often believe they are entitled to use any means necessary to get what they want.

Barriers to Leaving

Victims of domestic violence often face numerous barriers to leaving their abusive relationship. 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 all the aforementioned barriers preventing them from removing themselves from an abusive situation and worse, yet they 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, and internalized generational values and health issues.

Legal Considerations and Applicable Law

KRS Chapter 209A

Purpose

The purpose of this chapter is to identify victims of domestic violence and abuse and dating violence and abuse, to link those victims to services, and to provide protective or therapeutic services for those who choose to accept them.

Definitions [KRS 209A.020]

“Dating violence and abuse” means (a) 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, or (b) Any conduct prohibited by KRS 525.125, 525.130, 525.135, or 525.137, or the infliction of fear of such imminent conduct, taken against a domestic animal when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the perpetrator is or has been in a dating relationship, when that person has a close bond of affection to the domestic animal. (As defined in KRS 456.010.)

“Domestic violence and abuse” means (a) 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; or (b) Any conduct prohibited by KRS 525.125, 525.130, 525.135, or 525.137, or the infliction of fear of such imminent conduct, taken against a domestic animal when used as a method of coercion, control, punishment, intimidation, or revenge directed against a family member or member of an unmarried couple who has a close bond of affection to the domestic animal. (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, and to bring said cases under the purview of the Circuit or District Court;

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; 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; 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;

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;

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 through an order pursuant to KRS 209.110 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. In ordering emergency protective services, the court shall authorize only that intervention which it finds to be the least restrictive of the individual's liberty and rights while consistent with his welfare and safety.

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 (this is a working definition and not a legal one)

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 unless the victim is under twelve (12) years old, in which case it is a Class B 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.

Female genital mutilation [KRS 508.125]

A person is guilty of female genital mutilation when:

The person knowingly performs female genital mutilation on another person under eighteen (18) years of age; The person is a parent, guardian, or has immediate custody or control of a person under eighteen (18) years of age and knowingly consents to or permits female genital mutilation of such person; or The person knowingly removes or causes or permits the removal of a person under eighteen (18) years of age from Kentucky for the purposes of performance of female genital mutilation of the person. It is not a defense to female genital mutilation that the conduct under subsection (2) of this section is: Required as a matter of religion, custom, ritual, or standard practice; or Consented to by the individual on whom it is performed or the individual's parent or guardian. A surgical procedure is not a violation of subsection (1) of this section if the procedure is: Necessary to the health of the person on whom it is performed and is performed by a person licensed in the place of its performance as a health care provider; or Performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place of its performance as a health care provider.

Female genital mutilation is a Class B felony.

Strangulation in the first degree [KRS 508.170]

A person is guilty of strangulation in the first degree when the person, without consent, intentionally impedes the normal breathing or circulation of the blood of another person by:

applying pressure on the throat or neck of the other person; or blocking the nose or mouth of the other person. Strangulation in the first degree is a Class C felony.

Strangulation in the second degree [KRS 508.175]

A person is guilty of strangulation in the second degree when the person, without consent, wantonly impedes the normal breathing or circulation of the blood of another person by:
Applying pressure on the throat or neck of the other person; or blocking the nose or mouth of the other person. Strangulation in the second degree is a Class D felony.

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: Strikes, shoves, kicks, or otherwise subjects him to physical contact; Attempts or threatens to strike, shove, kick, or otherwise subject the person to physical contact; In a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present; Follows a person in or about a public place or places; Engages in a course

of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. 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 (this is a working definition, not a legal one)

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; or
- 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. Resists examination by doctors. Shying away from being touched;
- Wearing multiple layers of clothing; or
- 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; or
- Inappropriate boundaries such as sharing a bed, leaving doors open when bathing/changing etc.

Legal Considerations and Applicable Law

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; or

(f) Being a peace officer, while serving in his or her official capacity, he or she subjects a person who the officer: 1. Arrested, held in custody, or investigated for commission of a traffic or criminal offense; or 2. Knew or should have known was under arrest, held in custody, or being investigated for commission of a traffic or criminal offense; 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; or (f) Being a peace officer, while serving in his or her official capacity, he or she subjects a person who the officer: 1. Arrested, held in custody, or investigated for commission of a traffic or criminal offense; or 2. Knew or should have known was under arrest, held in custody, or being investigated for commission of a traffic or criminal offense; 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 abuse in the second degree [KRS 510.120]

(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; (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; or (c) Being a peace officer, while serving in his or her official capacity, he or she subjects a person who the officer: 1. Arrested, held in custody, or investigated for commission of a traffic or criminal offense; or 2. Knew or should have known was under arrest, held in custody, or being investigated for commission of a traffic or criminal offense; 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.

Sexual abuse in the third degree [KRS 510.130]

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. In any prosecution under this section, it is a defense that: 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 the other person was at least fourteen (14) years old; and the actor was less than eighteen (18) years old. Sexual abuse in the third degree is a Class B misdemeanor.

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. App. 2006).

Emotional and Psychological Abuse

Definition (this is a working definition, not a legal one)

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; or
- 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; or
- Exhibits unusual behavior usually attributed to dementia (e.g., sucking, biting, rocking)

Perpetrator

- Usually a family member, caregiver or acquaintance; or
- Isolates the elder emotionally by not speaking to, touching, or comforting him or her.

Legal Considerations and 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.

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.

Neglect

Definition (this is a working definition, not a legal one)

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; or
- 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; or
- 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, and heat;
- Inadequate living environment evidenced by lack of utilities, sufficient space, and ventilation;
- Animal or insect infestations;
- Signs of medication mismanagement, including empty, 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; and
- 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 in some respect unique to elder homicide but also have some aspect that might make identification of possible elder homicide difficult, such that 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. These cases are often the most difficult to identify.

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; or
- Suicides are included in this category

Documenting Scene of Death

The following are questions to consider if called to the scene of an elder’s death.

- 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.

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?

- Consider the relationship of the victim and others in his or her life.
- Where did the victim spend the majority of his or her 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.
 - 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.

Do the victim's immediate needs appear to have been met on a daily basis? What seems "off" and why?

- 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, examine the phone to obtain last number called.
 - 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.*

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.

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

Control at (502) 696-5405 if the patient was a resident at a nursing home, assisted living facility, or similar facility, as the Office can demand immediate access to those records.

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 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 him or 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 potential biases against investigating such deaths as possible homicides.

- If such potential biases are not overcome, valuable evidence is lost forever.
- Collaboration with local first responders should begin far in advance.

Coroner

KRS Chapter 72 establishes and governs the office of the coroner under Kentucky law. There is no requirement that a coroner be a physician or have any medical education. The Commonwealth's Attorneys are advised 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 sometimes 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, local coroners may potentially be 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.

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.

- 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 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).

Maintaining a good ongoing relationship with the coroner is essential to the successful investigation and prosecution of the deaths of elders and persons with disabilities. 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 persons with disabilities, 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 the Prosecutor’s Authority to Demand When the 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 the 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 72.025 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;
- (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.

Legal Considerations and Applicable Law

This section deals primarily with the law relevant to the most common types of criminal homicide committed against the elderly and disabled, as well as non-intentional death through some form of abuse or neglect. These include Wanton Murder, Manslaughter First Degree and Second Degree, and Reckless Homicide statutes. 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*

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 the 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 the 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 the 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*, 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.

In *West v. Commonwealth*, 935 S.W.2d 315 (Ky. App. 1996), the Court of Appeals recognized that breach of a duty of care 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 the 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:

- Where a statute imposes a duty to care for another;
- Where one stands in a certain “status” relationship to another;
- Where one has assumed a contractual duty to care for another;
- 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 Numbers 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 the 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

The mere existence of even several serious medical conditions does not in itself negate criminal causation of death.

In a death resulting from the breach of duty, especially against a disabled person with various pre-existing medical conditions, the lack of causation is likely to be raised defensively. The mere existence of even several serious medical conditions does not in and of 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. These are 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).

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

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.

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. 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. 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. 1947).

Attachment

July 31, 2024

Via Facsimile:

(555)555-5555

_____ County Coroner

ATTN: Deputy Coroner

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 12/1/34, DOD on or about 12/31/21 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

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. This manifests through not only realizing the devastating impact on the lives of victims, but this may assist victims in feeling more confident that these cases can be successfully prosecuted.

Many seniors have warranted and perhaps 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 other 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 poor witnesses.

One must avoid stereotyping elder victims as forgetful, senile, long-winded, fragile, or disabled in other ways. Often, seniors can make credible witnesses. [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 elderly 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.

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.

The following is from an actual case investigated by the Kentucky Cabinet for Health and Family Services and law enforcement, which support the dispelling of 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 elders 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 a 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; and
- 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 that 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; and
- 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; and
- 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

borrower ones with high rates of interest with unreasonable fees and collection tactics that are 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 spousal 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 Health and Family Services 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, grand-children 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 one thousand 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. 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]

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 he or 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 Office of Consumer Protection, 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 Office of Consumer Protection 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. 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 Office of Consumer Protection. 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 prepaid funds for funeral services or money for pre-need merchandise (but not including cemetery lots or mausoleum space) are also regulated by the Office of Consumer Protection. 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 include 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).

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 directly and proximately harmed as a result of “[t]he commission of a crime classified as a felony; a misdemeanor involving threatened or actual physical injury, harassment, or restraint; a misdemeanor involving a child or incompetent person; or a misdemeanor involving a sexual offense or a trespass...” or “[c]onduct which, if committed by an adult, would be classified as a felony or a misdemeanor....” KRS 421.500.

Deceased Victims

Moreover, “[i]f the victim is a minor, incapacitated, or deceased, ‘victim’ also means one (1) or more of the victim's spouse, parents, siblings, children, or other lawful representatives which shall be designated by the court unless the person is the defendant or a person the court finds would not act in the best interests of the victim.” KRS 421.500.

Special Advocates

Prosecutors should consider requesting appointment of a special advocate for elderly victims with no support system.

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).

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.*

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

It is important to ensure that crime victims receive prompt notification of any schedule changes that affect court appearances.

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 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.

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

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.

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.

Victim Advocate's Role

Each victim advocate shall perform those duties necessary to ensure compliance with the Crime

Upon the request of the victim, the victim advocate shall be allowed to accompany the victim during any court proceedings.

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. 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

Consider videotaping the victim's impact statement if he is in the advanced stages of dementia or suffers from a terminal illness.

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).

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, the victim may submit a written impact statement which shall be considered when deciding 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 and accessing needed support such as medical, social and mental health services. Advocates can provide information about the individual case and the criminal justice system generally. Advocacy may also aid the prosecutor in improving conviction rates.

Prosecutors are increasingly turning to advocates to assist crime victims in staying safe and accessing needed support such as medical, social and mental health services. Advocates can also provide information about the individual case and the criminal justice system generally. Victim advocacy may also aid the prosecutor in improving conviction rates. Victim advocates may be employed

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 system-based victim advocate programs internal to the legal system (i.e. prosecutors' office, law enforcement agencies, courthouse) and community-based programs external to the legal system (i.e. domestic violence programs/shelters, rape crisis centers). Each may serve a different 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 system-based and community-based programs to provide the best and most comprehensive victim assistance services for each community.

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

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.

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 crime victim assistance services.

Victim Services

Crime Victims Compensation

Be aware that there are time limitations within which a crime victim must file his request for compensation from the Kentucky Office of Claims and Appeals.

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.

Making a Claim

The Crime Victims Compensation Program is administered by the Office of Claims and Appeals. 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.

The victim may not be charged for the examination.

Victim, Witness, and Family Protection Program

This program provides funding to law enforcement agencies for protective services provided to

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.

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.

VINE (Victim Information and Notification Everyday)

Victims, prosecutors, and the 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. 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://kspsor.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 federal 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 victim.

The Office for Victims of Crime offers several recommendations, listed here, for assisting elderly victims of crime.

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.

The Office for Victims of Crime also suggests techniques that promote more effective communication with elderly victims.

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.

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 the American Bar Association and the federal 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.

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 Control

(502) 696-5405

<https://ag.ky.gov/about/Office-Divisions/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/Office-Divisions/OCP/Pages/default.aspx>

Consumer Protection Hotline

(888) 432-9257

Office of Victims Advocacy

(502) 696-5312

<https://ag.ky.gov/about/Office-Divisions/OVA/Pages/default.aspx>

Kentucky Office of the Attorney General

Crime Victim Resource and Referral Line

(800) 372-2551

Cabinet for Health and Family Services:

Department for Aging and Independent Living (DAIL)

(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>

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-](https://corrections.ky.gov/Probation-and-Parole/Documents/Statewide%20PP%20Phone%20List%2012-13-19.pdf)

[Parole/Documents/Statewide%20PP%20Phone%20List%2012-13-19.pdf](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=INCARCERATED%20INMATES&pageNumber=598&returnResults=True>

Kentucky Office of Claims and Appeals

(502) 782-8255

<http://kycc.ky.gov/>

Crime Victims Compensation Form:

http://kycc.ky.gov/Documents/KCC_CrimeVictimsCompensationClaimForm.pdf

Kentucky Parole Board

(502) 564-3620

<https://justice.ky.gov/Boards-Commissions/paroleboard/Pages/default.aspx>

ElderServe (Louisville Metro Area)

Emergency Crisis Response Team:

(502) 587-8673

<https://www.elderserveinc.org/>

Kentucky Association of Sexual Assault Programs (KASAP)

(502) 226-2704

<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)

<https://www.ncoa.org/>

National Center for Victims of Crime

(202) 467-8700

<https://victimsofcrime.org/>

National Organization for Victim Assistance

<https://www.trynova.org/>

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](https://www.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/>

XII. OFFICE OF MEDICAID FRAUD AND ABUSE CONTROL

The Office of Medicaid Fraud and Abuse Control stands ready to assist local prosecutors in any way possible to assure the most effective prosecution of those who abuse the elderly. Please feel free to call 502-696-5405 at any time.

Medicaid is a joint federally and state funded program designed to serve the economically disadvantaged and persons with disabilities. The Office of Medicaid Fraud and Abuse Control (MFCU) is a division of the Kentucky Attorney General's Office. The MFCU 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 vulnerable adults in nursing facilities, assisted living facilities and similar facilities. Finally, the MFCU may investigate the abuse, neglect or exploitation of Medicaid recipients, regardless of their age, when that abuse, neglect or exploitation occurs in the context of receiving Medicaid services.

Since 1995, federal law has required that each state have a MFCU, unless the state can certify to the Secretary of the Department of Health and Human Services that a MFCU 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 it 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, as those crimes focus on the recipients 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;
- Boarding homes;
- Laboratories;
- Pharmacies;
- Home health care providers;
- Medical equipment suppliers; and
- Nursing homes.

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.

The 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 (“NAMFCU”). This highly specialized training is developed and coordinated by the Training Committee of the NAMFCU.

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 fraud prosecution to corporate abuse and neglect prosecutions. An annual week-long conference held by NAMFCU 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 and our statewide contacts with DCBS 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 pleased 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 federally funded 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 and/or Conservatorship are 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 or her personal or financial affairs. A conservator handles only financial affairs. KRS 387.510.

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 or her financial affairs while still maintaining personal rights. This may be done through a private attorney and does not require court involvement. KRS 457.020(7).

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. KRS 311.621(16).

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. KRS 205.935(2).

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. KRS 387.320.

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 or her health or safety, or that money is being stolen or excessively wasted. KRS 387.740(1).

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 an intellectual disability;
- Serious accidents that result in trauma to the brain impacting the person's ability to care for him or herself;
- 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. KRS 387.530(1).

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. KRS 387.600(1)

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 limits the exercise of 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 or her 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 or her 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 payees 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. The use of a representative payee is a less restrictive alternative that should be explored before guardianship is considered.

Representative payees 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 the adult.

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 the fiduciary duties owed. 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, it is possible that 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 the adult 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:

- A court-appointed guardian, if medical decisions are within the scope of the guardianship; if none then:
- 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 then:
- A spouse; if none:
- The majority of the adult children of the patient who can be reasonably contacted; if none then:
- 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 the exercise of their civil rights, guardianship should only be considered if no other 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 else has the legal authority and is otherwise willing to make those decisions. Guardianship is often 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 the adult 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 a 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 allegedly 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 allegedly disabled person.

District court has the jurisdiction to hear adult guardianship cases and the court in the county that the allegedly 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 (this is 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. 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 allegedly 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 allegedly 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 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 allegedly disabled person, information about the allegedly disabled person's condition, and an opinion regarding the need for guardianship KRS 387.540. This report is prepared using the standard ACO form, Report of Interdisciplinary Evaluation Team (AOC-765), which 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 allegedly 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 allegedly disabled person. The court appointed attorney owes all of his or her ethical duties to the allegedly 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).

Notice of the filing of a petition to determine disability must be sent to the allegedly 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 allegedly 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 allegedly disabled person retains all of their 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 allegedly disabled person or damage or dissipation of 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 these 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, as well as 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 belief 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

beneficiary 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 beneficiary 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 their 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. These acts constitute elder abuse when Medicaid applicants lack capacity and they are exploited, thereby 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/or Medicaid beneficiary 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. These cases are often identified in involuntary discharge actions from nursing homes.

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
CO2	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 ₂ O	water
H ₂ O ₂	hydrogen peroxide
HOB	head of bed
H & P	history and physical
HR	heart rate
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
O2	oxygen
OBS	organic brain syndrome

occl	occlusion
OD	once a day; overdose
od	right eye
oint.	ointment
O & P	ova and parasites
OP	outpatient
ophth.	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 ₂	partial pressure of carbon dioxide in the arterial blood
palpation	feeling with the fingers or hand
PaO ₂	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 phenylalaine, 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 than or equal to
=	equal
%	percent
ā	before
Δ	change

\neq not equal to

\uparrow increase

\downarrow decrease

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