

**PROTECTING THE GOLD IN THE
GOLDEN YEARS WHEN THE WOLF
IS AT THE DOOR (OR ALREADY INSIDE)**

**New Orleans Estate Planning Council
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PROTECTING THE GOLD IN THE GOLDEN YEARS WHEN THE WOLF IS AT THE DOOR (OR ALREADY INSIDE)

I. Financial Exploitation In General

A. The older population in the U.S. – persons 65 years and older – numbered 37.3 million in 2006, or 12% of our total population (21.6 million women and 15.7 million men). It is estimated that the older population will increase to about 55 million by 2020 and 86.7 million by 2050, or 21% of our population at that time. The older population controls 70% of the nation's wealth, which makes them tempting targets for the unscrupulous.

B. An estimated 5.2 million Americans have Alzheimer's disease. The number of new cases of Alzheimer's each year is expected to grow to 500,000 a year by 2010 and 1 million per year by 2050. Fourteen (14%) percent of all people age 71 and over suffer from some form of dementia.

C. Broadly, financial exploitation is the illegal or improper use of a vulnerable adult's funds or property for another person's profit or advantage.

D. Financial exploitation of the elderly is a serious problem and it continues to grow. Nationwide, financial exploitation is the third most frequent form of reported abuse after neglect and physical and emotional abuse.

E. Profile of Victims of Financial Exploitation

1. The most common characteristics of victims of fraud and financial exploitation are that they are gregarious (need interaction), compulsive (cannot pass up a good deal), have a sense of machismo (believe they cannot be fooled), vulnerable (have experienced a recent trauma or loss), and naïve (they want to believe everything they are told).
2. Generally, the victim of financial exploitation:
 - Is female
 - Lives alone or with a spouse or relative
 - May suffer some form of dementia or physical impairment and often suffers from multiple limitations that make him or her dependent on others for care
 - Tends to be isolated
 - May suffer from more than one type of abuse (emotional, physical, etc.)

II. Two Broad Categories of Financial Exploitation

A. Exploitation by a stranger, including unscrupulous salesmen or contractors, con artists, thieves or persons representing bogus charities. Examples include:

- Living Trust Mills
- Annuities
- Sweepstakes and foreign lotteries
- Predatory lending
- Nigerian money scam
- Bank examiner scam
- Pigeon drop
- Unsolicited household improvements or repairs
- Telemarketing and mail fraud for valueless or non-existent products, donations to bogus charities, investment in fictitious enterprise, hot stock tips
- Charitable donation scam
- Identity theft
- Stop foreclosure scam (property deeded to perpetrator with promises to deed it back at no cost when victim's credit has been repaired)
- Medicare advantage plans (which may not be needed)
- Reverse mortgages

B. Exploitation by a trusted person known to the victim, such as a family member, friend, neighbor, person acting under a power of attorney, curator, trustee, financial adviser, yardman, minister, university development officer, etc. Examples include:

1. Obtaining money or property by undue influence, misrepresentation, fraud or theft. The perpetrator coerces the elder into transferring title to accounts into joint names ("or" accounts, POD accounts) or in the perpetrator's name alone, executing donations and/or a Will transferring assets to the perpetrator, and changing beneficiary designation forms (life

insurance, annuities, IRAs) through the use of manipulation, intimidation or threats.

2. Improper or fraudulent use of a power of attorney or fiduciary authority (curator, Trustee) to steal or dispose of assets or alter the elder's estate plan.
3. Misappropriation of income or assets, such as the elder's social security checks, pension payments, checking or savings account, credit or ATM card or by withholding portions of checks cashed for an elder.
4. Charging excessive fees for services, such as for basic care, transportation, food, or medicine.

III. Selected Scams

A. Living Trust Mills

1. "Without a living trust you will not believe what probate will cost!" "Do not let nursing home bills devour your estate!" "Avoid costly probate or estate fees!" "Come to a free estate-planning seminar and learn how to obtain a living trust, save money and plan for long term care." These are some of the typical "come-ons" used to draw seniors in to so-called "estate planning seminars," where living trusts are hyped and sold. A living trust can be an appropriate estate-planning tool, especially when a qualified estate planner or elder law attorney examines an individual's assets and goals and determines the person's unique estate planning needs. The problem with living trusts is not the document itself, but the way living trusts are used, abused, and mass marketed by sales people, who often use scare tactics or other unscrupulous methods to sell a "one size fits all" living trust kit, which may be totally unsuitable for the particular individual purchaser.
2. The come-ons are in the form of postcards, e-mails, telephone calls, door-to-door solicitations, and advertising. Newspapers and radios have spots promoting living trust operators. Churches and senior centers often sponsor presentations to their members. People giving these seminars typically offer a free one-on-one consultation as a follow up. The follow up sessions are often excuses for ascertaining the extent of an individual's assets for the purpose of selling the person something else, usually an annuity, whereby the salesperson obtains a high commission and the annuitant gets a poor investment. See, e.g., Klein v. American Life & Cas. Co., et al., 2001 CA 2336 (1st Cir. 6/27/2003), 858 So.2d 527.

B. Annuities

1. Annuities are aggressively marketed to seniors, preying on their fears. In fact, the Wall Street Journal (July 2, 2002) reported that there is even an "Annuity University" where budding sales people are trained in a two day seminar on special sales techniques to promote annuity sales to the elderly.
 - a. "Treat them like they're blind twelve year olds." "You'll waste time if you think you can impress them with charts, graphs, printouts or use sophisticated words. They buy based upon emotions! Emotions of fear, anger and greed."
 - b. In explaining an annuity "there's the technical answer" and "there's the senior answer. Tell them it's like a CD – it's safe, it's guaranteed."
 - c. The first step to wooing seniors is to get them to attend introductory seminars and, the best way to attract them is a free meal. The seminar can be used to generate fear among the attendees – "You're there to solve their problems, but you have to create those problems first." No problem, no sale. So at the seminars, you're creating problems, and you tease them with solutions "to encourage a follow-up meeting with a salesman."
 - d. To determine if seniors are well off and worth concentrating on, put "spotters" in the parking lot to check out what kind of car each person drives.
2. Well-publicized abuses
3. The issue in most annuity sales is one of "suitability." The Louisiana Department of Insurance in Regulation 89 (LAC 37:XIII, Chapter 117) has implemented standards and procedures to be adhered to by insurance producers, or an insurer where no producer is involved, with regard to determining the financial suitability of annuity products prior to recommending such a product to consumers.

C. Sweepstakes

1. People over the age of 60 account for 25% of telemarketing fraud victims, but account for 60% of the victims in certain categories, such as prizes and sweepstakes.

2. Although there are state and federal laws designed to protect consumers from these types of scams and complaints can be filed with local district attorneys, the state attorney general, the U.S. attorney and postal authorities, in the practical world there is very little likelihood that your elderly client will obtain restitution.

D. Identity Theft

1. Identity theft is quickly becoming a common crime and seniors are among the most vulnerable to these hoaxes.
2. Older people may be appealing financial targets because they typically have better credit, higher home equity and more financial resources than younger people.
3. Jury duty scam – caller states elderly missed jury duty and will be arrested. Caller requests date of birth and social security number over phone to correct mistake and/or credit card number to pay fine for missing bogus jury date.

E. Predatory Lending

1. Predatory lenders engage in a range of abusive practices, from loan flipping, equity stripping, or failure to adequately disclose the terms of the loan, to loading the loan with additional charges and unwanted benefits (e.g., credit life insurance).
2. Elderly homeowners are easy prey to unscrupulous sub-prime lenders. The elderly may need funds for living expenses, medical expenses or to make some costly home improvements. Often lenders made major misrepresentations about the transaction, failed to make adequate disclosures, or charged unreasonably high interest rates and finance charges. They based the loan on the borrower's home equity rather than the borrower's income and ability to repay the loan. Once the loan goes into default, lenders would frequently raise the interest rate, refinance the loan at an even higher rate or foreclose.
3. In 2004, the Predatory Lending Prevention Act (R.S. 6:1101-1104) was introduced in the Louisiana legislature. Killed and in lieu thereof the legislature issued concurrent resolutions to create the Predatory Lending Prevention Task Force to "study" the problem and to make recommendations by January 1, 2006.

F. Reverse Mortgage

1. According to the Census Bureau, in 2006 81% of householders 65 and older owned their homes. Many seniors are rich in home equity but poor in cash.
2. Reverse mortgages have grown into a \$20 billion-a-year industry. According to a 2007 HUD report, the number of reverse mortgages grew from nearly 8,000 in 2001 to more than 107,400 last year. The average loan amount was about \$138,000.
3. Unlike a home equity loan, homeowners make no interest or principal payments during the life of the loan. Instead, interest is added to principal and the loan usually becomes due when the homeowner either sells the home, moves, leaves the home for more than 12 months (e.g., enters a nursing home) or dies. In these events, the loan, including compounded interest, is due in full, which means in most cases the home must be sold. If the sale proceeds are less than the outstanding loan balance, the homeowner (or his heirs) are not liable since reverse mortgages are non-recourse loans.
4. In some situations, reverse mortgages are very appropriate and actually improve seniors' lives by providing funds to meet retirement, medical and other needs when elders have few assets other than the equity in their family home. But in other situations, elders are being subjected to high-pressure or unethical sales tactics to take out loans with variable interest rates, to pay very high fees and costs (sometimes 4 – 8% of the total loan amount) and to put the loan proceeds into an unprofitable investment, such as deferred annuities with early withdrawal penalties, while the sales agent pockets substantial commissions. Years can pass before seniors realize the problems.
5. A survey released by AARP last year of more than 1,500 reverse mortgages borrowers found that almost 1 in 10 were urged to buy other financial products, like annuities.

G. See Appendix "A" – Warning Signals on Various Scams

IV. Financial Exploitation by Persons Known to the Victims.

A. Anyone may be an exploiter of the elderly when it comes to money. Statistically, the biggest threat is family (children, grandchildren, siblings, nieces and nephews), mainly because an elderly person is more likely to "trust" a family member, particularly one who is providing caregiving services. Since the exploitation may depend upon manipulating an elderly person's emotions, who better to do so than a family member close to the elderly victim.

B. Typically, the abuser attempts to obtain the victim's funds or assets by inter vivos donations or by Will, but financial exploitation also may occur by abusing a fiduciary relationship, such as Agent under a Power of Attorney or as Trustee of a trust.

C. Although the problem is nationwide, Louisiana case law is replete with controversies over financial exploitation claims, primarily execution of Wills and donations of property challenged on the basis of lack of capacity and undue influence.

1. Legal Capacity

- a. Capacity to make a donation, inter vivos or mortis causa requires that the person be able to comprehend generally the nature and consequences of the disposition that the person is making. (LSA-C.C. art. 1477). The donor who is capable of understanding has donative capacity even though he may not actually understand the exact instrument he executes. (Revision Comment (c) to La. Civil Code art. 1477).
- b. The capacity to make a Will is tested at the time the Will is made. (LSA-C.C. art. 1471). There is a presumption of the requisite capacity. The burden of proving lack of capacity is on the party challenging such capacity, who must prove by "clear and convincing" evidence that the person lacked capacity at the time he made the donation or executed his Will. (LSA-C.C. art. 1482).
- c. Revision Comment (f) to LSA-C.C. art 1477 states: "Cases involving challenges to capacity are fact intensive. The court will look both to objective and subjective indicia. Illness, old age, delusions, sedation, etc. may not establish lack of capacity, but may be important evidentiary factors. If illness has impaired the donor's mind and rendered him unable to understand, then that evidentiary fact will establish that he does not have donative capacity. Outrageous behavior by an individual may or may not be indicative of lack of ability to understand. Some outrageous behavior may be nothing more than a personality quirk, while other outrageous behavior may manifest serious mental disturbance. Each case is unique."

2. Undue Influence

- a. Prior to 1991, the Louisiana Civil Code prohibited challenges to donations and Wills based upon undue influence.

- b. LSA-C.C. art. 1479 now provides that a donation inter vivos or mortis causa is null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.
- c. Although claims to set aside donations often are brought upon both the grounds of lack of capacity and undue influence, undue influence presumes the donor has legal capacity. Undue influence is difficult to define. Everyone is more or less swayed by associations with other persons. Mere advice, or persuasion, or kindness and assistance, usually would not constitute influence that would destroy the free agency of a donor and substitute someone else's volition for his own. (Revision Comment (b) to LSA-C.C. art. 1479).
- d. A person who challenges a donation because of undue influence bears the high burden of proof by "clear and convincing" evidence. However, if, at the time the donation is made or the testament is executed, a relationship of confidence exists between the donor and wrongdoer, such as a doctor-patient, attorney-client or minister-parishioner relationship, the burden of proof is the lesser standard of "by a preponderance of the evidence." Although Revisions Comment(s) to LSA – C.C. art. 1483 refers to the relaxation of the burden of proof standard where the relationship is "more truly professional," Louisiana courts have extended it to all persons who have any relation of trust and confidence, including a neighbor [Kraus v. Wheat 856 So.2d 45 (La. App. 4th Cir. 2003)], a hairdresser [Kiney v. Bourgeois, 2006 LA 2384 (La. App. 1st Cir. 9/14/07)] and an unrelated, paid caregiver [Succ. of Fisher, 2006 LA 2493 (La. App. 1st Cir. 9/19/2007)]. Nevertheless, if the wrongdoer is related to the donor by marriage, blood or adoption, the party alleging undue influence is required to meet the more difficult and rigorous "clear and convincing" burden of proof standard. (LSA-C.C. art. 1483).
 - (i) Spouse of second marriage: Succ. of Reeves, 704 So.2d 252 (La. App. 3d Cir. 1997), rehearing denied (Children alleged spouse isolated their father from them and used sexual extortion by threatening to abandon him and deprive him of sexual intercourse if he did not name her as a legatee under his Will.

Court held that the granting or withholding of love, companionship, and intimacy by a spouse cannot, standing alone, serve to invalidate a Will on undue influencing grounds); Succ. of Cooper, 830 So.2d 1087 (La. App. 2d Cir. 2002) (Children alleged second spouse persuaded their father that they had stolen his money and wanted to put him in a nursing home, causing him to execute a Will leaving \$1 to each child and everything else to his second wife).

- (ii) Child: Succ. of Loundsberry, 01-1644 (La. App. 3 Cir. 5/8/02), 824 So.2d 409 (Son exercised undue influence by facilitating father's resentment against his other two sons so that father changed his Will to leave his estate only to the one son).

Neighbor: Kraus v. Wheat, 2003 CA 0393 (4th Cir. 9/3/2003), 856 So.2d 45: Vulnerable 75 year old who recently had lost his wife of 43 years was successful in having donation of his house to neighbor set aside. Court concluded that because neighbor was not related to Mr. Kraus, he only had to prove undue influence by a preponderance of the evidence, presumably on the theory that the neighbor has a "confidential" relationship with Mr. Kraus.

D. Employment Contract

1. An elderly person can enter into a personal care contract with a family member or an unrelated caregiver to provide personal care services. The contract could provide for a lifetime of care, with compensation being paid periodically or a lump sum payment (in cash, property or both) computed on the basis of the person's life expectancy, the frequency and number of hours of care to be provided and a reasonable per hour rate. The issue of financial exploitation arises if the payment is excessive or the contracted services are not rendered. Although lump sum personal care contracts were a planning tool by elder law attorneys to dispose of excess resources to qualify for Medicaid long term care vendor payments, LDHH recently issued a rule in its Medicaid Manual severely curtailing this planning technique and eliminating the opportunity for lump sum lifetime care contracts.
2. Succ. of Rhodes, 40,469 CA (La. App. 2d Cir. 12/30/2005), 918 So.2d 626.

E. See Appendix "B" – "How to Steal an Estate."

V. Detecting and Preventing Financial Exploitation

A. Role of Banks

1. In many cases, banks are the first line of defense in detecting and/or preventing financial exploitation at the outset. Bank tellers and account representatives may be in a position to observe changes in the customer's behavior and signs of exploitation, such as:
 - a. Elder's behavior:
 - Noticeable change in appearance and grooming
 - Disorientation; asks same question over and over
 - Change in mood
 - Change in eye contact with bank personnel
 - Cringing or withdrawing
 - Hesitancy to enter into conversation
 - Nervousness or fear of the person accompanying the elder
 - Customer is not allowed to speak for himself or make decisions on his own
 - b. Banking activity:
 - Numerous withdrawals from accounts that is inconsistent with previous spending habits
 - Frequent account changes from one branch/bank to another
 - Is accompanied by a stranger to whom the elder looks for guidance or help in conducting business or who pressures him or her to withdraw a large sum of cash
 - Is accompanied by a family member or other person who seems to coerce elder into making transaction
 - Appears to have signed a check or document but the signature looks forged, unusual or suspicious

- Has several "out-of-sync" check numbers
- Addition of names to the account signature card
- Acquaintance/family member too interested in elder's finances
- Is concerned or confused about missing funds from his or her account
- Applies for a credit card for the first time
- Fails to understand or remember recently completed transactions
- Implausible explanation about what customer is doing with the money
- Has bank statements and credit card statements that are sent to an address other than the elder's home
- Withdrawal of funds by a fiduciary or someone else handling the elder's affairs
- ATM withdrawals when elderly customer has never used ATM or is bedridden.

2. If confronted with a suspicious situation or transaction, consider performing the following interventions in a courteous manner:

- Learn the reason for large withdrawals.

This is especially important if the withdrawal is unusually large for your customer. If your customer is accompanied by a suspicious third party and makes an unusually large withdrawal, ask him or her, rather than the suspicious person, the reason for the withdrawal. If the suspicious person does not let your customer speak, or tries to put words in his or her mouth, this is a red flag.

- Carefully verify the authority of persons requesting to act for the customer.

Financial exploiters often lie. They may claim to be your customer's guardian or possess a Power of Attorney. They may say your customer is unable to come to the bank or credit union and they're just helping out. Check all documentation presented by a person claiming to act on behalf of a vulnerable customer. Have a designated bank supervisor or the bank's legal counsel review all Power of Attorney papers for authenticity. If a signature or transaction appears suspicious, call the customer for verification.

- Get photographic evidence of suspicious persons.

A surveillance photograph may be the only way to identify a suspicious family member, friend, or stranger who accompanies an elder to the bank or credit union. A surveillance photograph can also disprove a suspect's claim that he never went to the financial institution to cash the forged checks or make withdrawals.

- Write down a description of suspicious persons.

After your customer and a suspicious third party leave your institution, write down a description of the person. Include the type of car and the license number, if possible. Be as specific as possible.

- Try to separate a vulnerable customer from a suspicious third party.

If a vulnerable adult is accompanied by a suspicious third party and appears frightened, intimidated or coerced, ask to speak with the vulnerable adult away from the third party. Take the customer to a secure location on the pretense of discussing private account information. As you do this notify a colleague or security of the situation.

- If a customer or anyone accompanying him or her objects to your actions:

Ask the customer to speak with a manager or security to gain a better understanding of your actions. Repeat politely that the policies of the financial institution are intended to protect customers.

- Consult with managers or security.

Financial institutions should establish clear guidelines regarding when employees must notify management or security about suspicious circumstances. However, employees should feel free to consult with managers or security anytime they feel uneasy.

- Notify security or law enforcement at once.

Financial institution employees should notify security or law enforcement at once if they feel a vulnerable customer is in ANY immediate danger (i.e., before the customer leaves the area).

- A customer requests a large cash withdrawal to pay for a service or product.

Recommend a cashier's check instead as it's more secure than carrying a large amount of cash. Your customer can place a stop payment on a cashier's check if it's lost or stolen. A cashier's check can also be traced if it is used to pay a con artist for an undelivered product or service and offers a greater protection for your customer.

- A customer insists on a cash withdrawal.

Warn him or her of the dangers of carrying cash and inform him or her of alternatives.

- A vulnerable adult comes to the institution to add a relative's name to his or her account because he or she believes a joint account avoids probate.

Suggest a Payable on Death (POD) account. The beneficiary receives the money after the vulnerable adult dies but cannot access the account while the adult is alive. There is no need for probate. Further POD beneficiary designations are revocable at any time.

- An elderly customer requests a joint account so that a friend or relative can assist with making deposits and paying bills.

Suggest a direct deposit or an automatic bill-paying account instead. A direct-deposit account allows a customer's Social Security and retirement checks to be deposited directly. Financial institution employees, with the customer present, can call the local Social Security office and set up direct deposit for their customer's Social Security checks.

An automatic bill-paying account allows payments for public utilities, credit cards, and other bills to be withdrawn securely and automatically. However, this would not protect against unauthorized bills or credit card charges.

Both types of accounts prevent an unscrupulous friend or relative from withdrawing everything in a joint account.

- In some instances automatic bill paying may not be sufficient. Your customer may still need financial management help from a joint account holder.

Suggest that your customer open a new account with the joint account owner. Then help your customer set up an automatic monthly transfer to the new account to pay bills. This allows your customer to receive the help he or she needs with bill paying but still keeps the balance of the account protected.

- A customer has been exploited financially in the past and is an easy target for family or friends.

Suggest and set up a "protected account" for the customer with his or her consent. The account is flagged and any activity is closely watched. This is a good preventive intervention that can protect financial resources and can be adapted to fit individual needs.

3. Banks should embark upon programs to sensitize, educate and train their own personnel on financial abuse issues, to establish policies and protocols for reporting financial exploitation suspicions and to educate their elderly customers through written materials and seminars on financial exploitation.

B. Role of Attorneys

1. Lawyers should understand the risk factors for financial abuse recognize indicators that exploitation is occurring and the benefit and techniques of screening elderly clients about potential or actual financial abuse.
2. Before screening:
 - Determine who is your client, if it is not immediately obvious. The client is the one – the only one – to whom the lawyer has professional duties of competency, diligence, loyalty and confidentiality, regardless of who pays the bill.
 - Interview your client alone, especially if someone has brought in the client to execute documents, such as a Power of Attorney, donations, change of beneficiary forms or Will.
 - Try to determine if your client has legal capacity.
 - Assess your ethical and legal responsibilities of reporting suspected or actual financial exploitation to Louisiana's Elderly Protective Services (discussed below) and describe their implications to your client.

3. Screening questions should be direct, but not conclusive. Alerting a client if he or she has been a victim of financial abuse or exploitation is not useful if the client doesn't understand the meaning of those terms. Some screening questions might include:

- Who manages your money and property?
- How do you obtain cash when you need it?
- Does anyone else have authority to access your bank account? If so, has that person been withdrawing your money?
- Have you noticed any suspicious or unusual items on your bills (for utilities, credit cards, etc.)?
- Have you noticed that any funds are missing from your bank accounts?
- Have you noticed that any checks are missing from your checkbook?
- Have you noticed that any of your belongings are missing from your home?
- Has anyone encouraged or forced you to sign any documents that you didn't understand or didn't want to sign?
- If you have a Power of Attorney, does your agent do things that you don't want him or her to do?
- Does your paid caregiver demand that you pay him or her extra for things that are supposed to be provided anyway?
- Did you want to bring that person with you to this appointment? Did he or she insist on accompanying you? Did that person insist that you come see me?
- (If appropriate) Why do you carry all your documents around with you in a paper bag?
- Do you live with anyone? (If appropriate) When did he/she/they move in? Whose name is on the title or lease? Do they pay their share of the mortgage or rent and household expenses?

4. Some protective measures:
- a. Consider bringing in some back-up, such as geriatric case managers, social workers, etc.
 - b. Wills
 - (i.) Consider retaining the original Will to avoid disgruntled family member from destroying Will, thereby placing burden on the proponent of the Will that the testator did not revoke by destruction. See In the Matter of Succ. of Doucet, 42,692 CA (2d Cir. 2/6/2008).
 - (ii.) See La. Code of Civ. Proc. Art. 2904 (admissibility of videotape of execution of testament to prove testator's intention and mental state or capacity).
 - c. Power of Attorney
 - (i.) A "springing" Power, which only becomes effective upon certification of incapacity, may provide some protection against overreaching agents as compared to an "immediate" or "sprung" Power of Attorney.
 - (ii.) Consider whether a "special" Power is all that is needed to accomplish your client's goals rather than a "general" Power.
 - (iii.) The Power could contain a provision for periodic (and on demand) accounting of the agent's transactions pertaining to the principal's estate, to the principal and/or some other designated individual.
 - (iv.) The Power could provide for the designation of a curator if the principal becomes interdicted to prevent an "end run" around your client's choice of designated agent to make decisions.
 - (v.) The Power could designate more than one person as Agent requiring joint action by the Agents.

- (vi.) The Power of Attorney should specifically address whether the agent has the authority to make gifts of the principal's property and any limitations thereon, and authority or lack of authority to alter the principal's estate plan by changing beneficiary designation forms for assets such as life insurance, annuities and retirement benefits or amending or revoking revocable trusts.
- (vii.) Consider involving an unbiased third party in the Power of Attorney to whom financial records, such as monthly bank and brokerage account statements, must be sent.
- (viii.) Educate the agent in the agent's duties, responsibilities and limitations under the Power and applicable law.
- (ix.) Recognize that Powers of Attorney are potent documents and may be abused. See In re Roxanne Andrus, 04-B-0403 (La. 6/25/2004), 876 So.2d 745 (attorney disbarred for using Power of Attorney of 92 year old resident in assisted living facility to go on personal shopping spree at Saks Fifth Avenue, Gap Kids, the Disney Store, Ritz Carlton Hotel, Mr. B's Bistro and Pat O'Brien's); In re James B. Aime, 95-0284 (La. 4/21/95), 653 So.2d 1173 (attorney disbarred for using Power of Attorney of long-term client with bipolar disorder to convert \$90,607 of client's funds); In re Frank Letellier, II, 724 So.2d 544 (La. 1999) (attorney disbarred for improperly using Power of Attorney from long-term client for personal benefit).
- (x.) Recognize that Powers of Attorney are revocable by the principal (the so-called "ping pong" game among family members who seek to be the designated agent and keep changing the Power of Attorney).

d. Trusts

(i.) Types

- (a) Revocable (perhaps becoming irrevocable upon incapacity with special attention to how incapacity is to be determined and to principal's possible regaining capacity).
- (b) Irrevocable (particularly if estate is under the lifetime gift tax exemption account).
- (c) Revocable, but only with the consent of the Trustee or some other person (if gift taxes are a concern, consider the consent of a non-adverse Trustee or co-Trustee).

(ii.) Selection of appropriate Trustee(s) and successors and removal and replacement provisions. In re Black, 833 So.2d 956 (La. 2004); In re Reynolds, 737 So.2d 1272 (La. 1999) (attorney disbarred for creating trusts for elderly clients naming attorney as Trustee and using trust funds for personal use).

e. Interdiction (subject to ethical limitations of Professional Conduct Rule 1.14).

f. Personal Care Contract.

- (i.) If the client employs a caregiver, draft a contract that prohibits the caregiver's acceptance of gifts or loans. In Louisiana, could the contract include prohibition of receiving a testamentary bequest in light of LSA-C.C. art. 1976 which generally prohibits contracts dealing with the succession of a living person?
- (ii.) Consider a clause restricting the caregiver's access to or use of the elder's accounts and prevents the caregiver from filling out checks for the client.
- (iii.) If possible, consider the caregiver obtaining an adequate bond.

C. Role of Financial Planners and Life Underwriters

1. Like lawyers and banks, recognize financial exploitation indicators.

2. Be wary of changes in account designations and beneficiary designation forms.
3. Be wary of significant withdrawals from life insurance policies, annuities, banking accounts, etc.
4. Recognize mandatory reporting requirement to EPS.

D. Role of Accountants

1. As with other professional advisors and bankers, recognize financial exploitation indicators and be prepared to report suspicions to EPS.
2. If you are assisting in monthly bill-paying, review all account disbursements. If you are using account information to determine itemized deductions and income for annual tax returns, scrutinize for suspicious disbursements.

E. Role of Clergy

1. Clergy often make home visits to congregants. As a result, they are in a good position to observe indications of neglect and financial abuse that others don't see, such as the condition of the home, traffic in and out of the home, defensiveness or hostility of family members or caregivers and unwillingness to leave the elder alone for a private visit.
2. Clergy may be reticent to report suspicious abuse because they assume it might violate the clergy-penitent privilege. However, the privilege is limited to statements made to clergy under the sanctity of a religious confessional, not informal conversation and observed conditions and actions.

VI. Reporting Financial Exploitation

A. Elderly often are reluctant to report financial exploitation to appropriate authorities, for a variety of reasons, including:

1. They have a disability that renders them physically or mentally incapable of reporting the abuse.
2. They are unaware that they have been or are being exploited, as they do not recognize it for some time and think it is "too late" to do anything about it.
3. They fear they will not be believed.
4. They feel embarrassed, humiliated, afraid and may even defend the abuser.

5. They believe that there is a stigma to being labeled a "victim."
6. They have a close relationship with the perpetrator, whether relative or caregiver, and may be completely isolated and dependent on the perpetrator for something (care, love, shelter, etc.) and fear the loss of that relationship.
7. They don't want anyone to know they can't manage on their own for fear of being interdicted or placed in a sterile, unfamiliar nursing home.
8. They do not want to get the perpetrator (child, grandchild) "in trouble," only want the abuse stopped.
9. Some victims are actually able to convince themselves that they deserve the exploitation.

B. Reporting of most scams can be made to appropriate governmental agencies, such as the FTC, U.S. Postal Service, district attorney, etc.

C. Reporting to Louisiana's Elderly Protective Services ("EPS")

1. All fifty states have enacted legislation authorizing the provision of Adult Protective Services ("APS") in cases of elder abuse, including physical abuse as well as financial exploitation.
2. Louisiana requires mandatory reporting of suspected cases of financial exploitation of elderly persons age 60 and older) to EPS, a part of the Governor's Office of Elderly Affairs. The reporting is required by any person having reasonable cause to believe that such a case exists. La. R.S. 14:403.2.
 - a. Exploitation is defined as the illegal or improper use or management of the aged person's funds, assets or property or the use of an aged person's power of attorney or guardianship for one's own profit or advantage.
 - b. EPS also is concerned about all aspects of abuse and neglect of elderly adults, including physical and emotional abuse, which can be an element or facilitator of financial abuse. For example, acts of "isolation" covered by the EPS statute include intentional acts committed for the purpose of preventing and which do prevent, an adult from having contact with family, friends or concerned persons, intentional acts of physical or chemical restraint for the same purpose, and intentional acts committed to prevent an adult from receiving his mail or telephone calls.

- c. Any person who knowingly and willfully fails to report may be fined up to \$500 or imprisoned for up to six (6) months, or both.
- d. The identity of any person who in good faith makes a report of exploitation is confidential and cannot be revealed without the reporter's written authorization, except to law enforcement agencies pursuing enforcement of criminal statutes.
- e. No cause of action exists against any person who in good faith makes a report or cooperates in an investigation by EPS.
- f. The local EPS regional contact is located at 320 Old Hammond Highway, Suite 300, Metairie, Louisiana 70005. Phone (504) 835-3005. State hotline number: 1-800-259-4996.

3. Banks

- a. Banks have been reluctant to take an active role in reporting potential financial exploitation due to federal and state privacy statutes. However, these laws permit and/or offer protection to financial institutions and their employees who make good faith reports of suspected financial exploitation.
 - (i.) The Right to Financial Privacy Act ("RFPA") (12 U.S.C. § 3401, et seq.) applies only to the federal government and places no restrictions on the actions of state or local authorities in obtaining financial records, such as EPS.
 - (ii.) The Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley Act) applies to both the federal and state and local governments. This Act contains strong privacy protections and requires notification to customers before disclosure of their records and an opportunity to disapprove the proposed disclosure. However, Section 502(e) of the Act contains several relevant exceptions for state reporting programs:
 - (A) (e)(3)(B) personal disclosure "to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability."

(B) (e)(5) permits disclosure "to the extent specifically permitted or required under other provisions of law ... to law enforcement agencies ... or for an investigation on a matter related to public safety."

(C) (e)(8) permits disclosure "to comply with Federal, State or local laws, rules and other applicable legal requirements."

These exceptions also appear in the regulations promulgated under the Act. See 15 U.S.C. § 6802(e) and 12 C.F.R. § 332.14-15.

- b. La. R.S. 14:403.2K protects the mandatory reporter. However, does the "any person" language extend to the mandatory reporter's employer? La. R.S. 1:10 provides that the term "person" is defined to include a body of persons, whether incorporated or not, unless otherwise clearly indicated.

4. Attorneys.

- a. Since Louisiana has a mandatory reporting requirement to EPS by any person who has a reasonable suspicion of elder abuse, including financial exploitation, it would appear that this would include attorneys as mandatory reporters. However, it is unclear how this mandate interplays with the lawyer's ethical duty of confidentiality. The lawyer is forced to choose between a professional responsibility and an apparent legal obligation.

- b. Ethical Issues.

- (i.) Louisiana's mandatory reporting statute implicates the attorney's duty to maintain client confidences under Rule 1.6(a). Louisiana's Rules of Professional Conduct do not directly address the issue of mandatory reporting.

(ii.) However, Rule 1.6(a) does not apply to the divulger of confidential information if the client gives informed consent or, under Rule 1.6(b)(6) a lawyer MAY reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to comply with law."

(A) If the client gives his or her informed consent to report the alleged exploitation to EPS or to a family member to take other protective action, the ethical dilemma is resolved. Assuming the client is competent, and does not have "diminished capacity," the lawyer should strive to gain consent. An initial rejection of disclosure should not be the end of the lawyer's attempt to gain consent. The lawyer should attempt to elicit and understand the client's goals and concerns as to why the client may be refusing to consent to disclosure, such as fear of institutionalization, loss of personal autonomy, protection of the abuser to keep family harmony, fear of going to court, etc. Once the lawyer has determined the client's motivations, the lawyer should address the client's fears and recommend alternatives to avoid future exploitation, including reporting to the appropriate authorities.

(B) What if the client is competent and does not have "diminished capacity," but is so embarrassed that despite attempts to obtain informed consent, the client specifically tells the attorney not to report the information, Ethics Counsel of the LSBA Ethic Advisory Service (3/18/2008) has advised that "even if the client is unwilling to consent to a report - - if law mandates that the lawyer must report the abuse, Rule 1.6 permits the lawyer to reveal as much information as the lawyer believes reasonably necessary to comply with pertinent law." Even if the lawyer reports to EPS, the client has a right to refuse any help offered by EPS. Even if the lawyer reports to EPS, the client has a right to refuse any help offered by EPS.

- (C) What if the client specifically tells the attorney not to divulge information to family, such as children?
- (iii.) Rule 1.14(b) provides that when the lawyer reasonably believes that: (i) the client has diminished capacity; (ii) is at risk of substantial financial harm unless action is taken; and (iii) cannot adequately act in the client's own interest, then the lawyer may take reasonably protective action, including consulting with individuals or entities that have the ability to take action to protect the client.
 - (A) What constitutes "diminished capacity?" Rule 1.14 does not give much guidance and requires that even if the client has diminished capacity, the lawyer must, "as far as reasonably possible, maintain a normal client-lawyer relationship."
 - (B) Can the lawyer contact family members? If so, how much information is too much? ("I think you should review your parent's financial affairs.").
 - (C) The comments to Model Rule 1.14 would allow the lawyer to seek guidance from diagnosticians (without defining who is an "appropriate diagnostician) to help decide whether the client is competent or not. However, the diagnostician may have a duty to report to EPS. Thus, by seeking a consultation, the lawyer could essentially be reporting the exploitation against the client's wishes before a determination of capacity or incapacity is made.
- c. Most alleged incidents of exploitation involve the transfer of assets from one person to another. Under La. R.S.14:403.2B(6), exploitation is the misuse of an aged person's property or assets. This presents the attorney with a difficult situation. How can the attorney look into the client's mind to determine whether the transfer is being made with consent? Even when a client declares an intent to transfer assets, such as to one child, the attorney cannot simply conclude that the transfer is abusive, even though

the attorney may think it unwise. As long as the attorney believes the client is capable of making an informed decision and not subject to undue influence, the attorney should not intrude on the personal autonomy of the client to dispose of assets as the client desires. Clients have the right to reward caregivers, particularly family members. Furthermore, clients have testamentary freedom. On the other hand, a lawyer has a duty to provide competent representation to the client. An attorney who allows a known abusive transfer of assets to occur is not providing competent representation.

- d. A lawyer has the option to withdraw from the representation under Rule 1.16(b)(4) if "the client insists upon taking action the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

5. Criminal Sanctions.

- a. La. R.S. 14:93.4 defines the crime of exploitation of the infirmed as the intentional expenditure, diminution, or use by any person, including a caregiver, of the assets or property of an infirmed or aged person by means of fraudulent conduct, practices or representations. It also specifically includes the use of an aged or infirmed person's power of attorney or guardianship for one's own profit or advantage by means of fraudulent conduct, practices or representation.
 - (i.) Violation is a felony which can result in a fine of up to \$10,000 or imprisonment, with or without hard labor, for up to 10 years, or both. Upon conviction or guilty plea, the person is prohibited from having access to the victim's assets or property and from being appointed as agent under a power of attorney or as guardian for the victim, but still can inherit from the victim.
 - (ii.) State v. Ebarb, 772 So.2d 299 (La. App. 1st Cir. 2000); State v. Hicks, CA 07-726 (La. App. 3d Cir. 12/5/2007).
- b. La. R.S. 14:67 defines the crime of theft as the taking of anything of value which belongs to another without the person's consent or by means of fraudulent conduct, practices or representations.

- c. La. R.S. 14:67.21 defines the crime of theft from the aged (age 60 or older) as: (a) the intentional use, conversion, or management of the aged's funds, assets or property without his authorization or consent for the profit, advantage or benefit of another person; (b) the intentional misuse of an aged person's power of attorney to use, consume, convert, manage or appropriate the aged's person's funds, assets or property without his authorization or consent for the benefit of another person; or (c) the intentional use, consumption, conversion, management or appropriation of an aged person's funds, assets or property through the execution or attempted execution of a fraudulent or deceitful scheme designed to benefit another person. If the theft equals \$500 or more, the penalty may be a fine up to \$3,000, imprisonment, with or without hard labor, of up to ten (10) years, or both, as well as ordered restitution to the victim.
- d. The reality in many financial exploitation cases is that by the time the exploiter is caught, charged and found guilty, the exploiter has no funds with which to make restitution. Secondly, limited financial budgets of state district attorney offices means that resources have to be prioritized for non-economic crimes, such as murder, rape, drug possession, etc.

Internet Fraud

Make Sure You Don't:



Don't send a check or money order for something you bought at an internet auction.



Don't send money up front for anything.



Don't fall for false information about values in stocks.



Don't fall for an email from someone from another country asking for help in transferring money.



Don't give out your personal information to sellers or through emails, or through websites unless you're familiar with them.



Don't give out your personal information.



Don't respond to unsolicited special offers.

Make Sure You Do:

- ☐ Purchase auction insurance.
- ☐ Buy only from a reputable company.
- ☐ Examine feedback on sellers.

Investment Fraud

Watch For Red Flags:



Pyramid Schemes



Unlicensed sellers



Unregistered investments



Excessive Fees or Excessively High Commissions



High-Yield investments that claim little risk

Make Sure You:

- ☐ Use BrokerCheck to check out the broker.
- ☐ Check Bond information at NASD.
- ☐ Ask for written information and review it.
- ☐ Ask questions and get answers!

Sales Fraud

Watch For Red Flags



Sellers who contact you by mail, phone or door-to-door.



Sellers who use high pressure tactics.



Sellers who use scare tactics.



Sellers who threaten the price will increase tomorrow if you don't buy today.



Sellers who give you contracts with blank spaces



Sellers who make promises but won't put them in writing.



Sellers who ask for credit card or bank information

Make Sure You:

- ☐ Get promises in writing.
- ☐ Read the fine print.
- ☐ Research the company.
- ☐ Remember if it sounds too good to be true, it probably is.

Telemarketing Fraud

Watch For Red Flags:



Guaranteed loan in exchange for a processing fee.



Credit card loss protection.



Foreign lottery offers.



You have to pay shipping, registration and taxes to get your prize.



Vacation deals with fees, restrictions or up-front costs.



You must buy products to enter a sweepstakes or win a prize.



High pressure or time-sensitive tactics

Make Sure You:

- ☐ Sign up for the Do Not Call List.
- ☐ Screen your calls by using caller ID or an answering machine.
- ☐ Hang up on telemarketers.
- ☐ When you receive a call purportedly from your bank, hang up and call the bank at its published number.

- ☐ Safeguard your financial information and Social Security numbers.



Travel Fraud:

Make Sure You Don't:



Don't fall for a "free" vacation.



Don't fall for high-pressure tactics.



Don't fall for a time-sensitive offer.



Don't pay for your reservation before receiving a confirmation.

Make Sure You Do:



Deal with an established business.



Call your local consumer protection agency to check out the company.



Ask about the cancellation policy.



Ask for the total cost of the package.



Ask what is not included in the package.

How To Steal an Estate

June 15, 2007 by stealanestate

STEP ONE: Assess Opportunities & Establish Yourself

Identify Elderly Affluent People Who Are Alone - Target people who do not have strong family relationships, who are either estranged from their families and children or whose families live and work out of state.

Elderly Childless People Are Best - Children and grandchildren are hard but not impossible to displace. Childless people may not have obvious heirs making it much easier for you to establish your position.

Assess Their Estate Decisions - How large is their estate? Do they have a will? How strongly do they feel about the disposition of their assets? The greater their uncertainty, the better it is for you.

Avoid Worthwhile Causes - People who want to leave their estates to worthwhile causes must see you as being more deserving than their cause. Charities are skilled at maintaining close ties with their donors.

Aversion to Extended Care - Targets often exhibit a horror of nursing homes and extended care facilities and have a strong desire and determination to continue living in their home until they die. If they move, your years of hard work may be wasted.

Length of Life Span - Unless your target is terminally ill or very elderly, expect this to be a long term project. Once you are sole beneficiary you will still need to defend your position until they expire. Hastening their death is outside of the scope of this site.

Become a Close Neighbor - This is by far the best and easiest way to ensure access and influence. It allows you to monitor all their activities and all their other relationships.

Create Reasons to See Them Often, Daily is Best - Find legitimate reasons to see them often to gain their trust, build influence and eventual control of them.



Alcohol Helps - Alcohol lowers people's resistance, raises their susceptibility to suggestion, makes them relax, feel good and festive. It's easy to manipulate alcoholics and make them angry and emotional.

People Are Especially Susceptible To Suggestion When Sleepy - During those hazy, lazy moments when they are just drifting off to sleep or waking up. Visit or telephone when the impact of your communication will linger in their minds long after you finish.

Always be Smiling, Positive and Loving - They must see you as special, especially deserving and associate you with only the most positive, wonderful feelings.

Be Sincere and Genuine - Elderly people are much smarter than they seem and know when they are being worked. Develop a sincere interest in their welfare, it makes you more convincing. As they age they will eventually depend and rely on you to support them.

Approve of Everything They Do - Unconditional Love And Approval Are Absolute Requirements! Separate and differentiate yourself from their heirs and people who disapprove or disagree with them or try to tell them what to do.

Always Take Their Side And Fault Anyone Who Disagrees With Them - This is the **GOLDEN RULE!** You want them to eventually sever or discount all other relationships so they rely, trust and love only you.

Leave Them On A High Note, Feeling Very Good About You - Treat each interaction as a professional. Each performance must further your goal of showing them you are their **ONLY** deserving heir.

Talk To Them Like Family - Tell them they are the wonderful father / mother or aunt / uncle you always wish you had. Plant family associations and connections in their mind.

Disappear When Their Family or Children Appear - This is **VERY** important! If the rightful heirs see what you are doing before you have gained full control, they will stop your relationship. Tell your target you want to respect the time they have with their family and children, this will make you seem especially loving and considerate.

Love What They Love - Whatever they cherish, love it too. Be seen as much nicer than anyone else who might dislike or disapprove of what they love or do.

Get Into A Position Of Trust And Authority - Manage their checkbook, their investments, their grocery money. Whatever you do, be **VERY** Honest. Your purpose is to show how honorable and trustworthy you are. Don't steal early, wait for the big prize.

Cash Gifts - Make sure they know how much you really love them and not their money. Get gifts in cash which cannot be easily traced.

Act Like The Perfect Son Or Daughter - Be the perfect child they always wish they had. Appear far more deserving than any of their family members.

Create A Fun Secret Conspiracy, Build Secrecy Early - Tell them their daughter/son/rightful heir might get a little upset and jealous, so let's just keep it our little secret! Let's have fun and not tell them!

They don't have a right to know about everything you do any how!

Always Operate in Secret - Do NOT leave any proof or evidence of what you are doing or what you have done.

Keep the Rightful Heirs Ignorant of Your Relationship - If they sense you are becoming too close to their loved one before you have gained complete control, they will worry about your relationship and end it.

STEP TWO: Discredit and Displace The Heirs

It's A Military Campaign - You are investing time and energy to gain control of their estate. If victorious, you will never have to work again. It is a long term project that requires guts, drive, determination, hard work and dirty deeds. **Enjoy Doing Evil and Being Ruthless and Cruel.**

Your Goal: To Completely Discredit and Disinherit Existing Heirs

Hate The Heirs - You must absolutely hate and despise the heirs you are disinheriting. You need to transfer a vicious, angry hatred to your target so that neither of you feels badly about what you are doing. Show no mercy. Hate is an absolute prerequisite for success.

Truth and Righteousness - Show them the real truth about their heirs, illustrate and explain how their heirs have abused and misused them all their lives.

Collaborate If You Can - Is there an unhappy family member who can help you disinherit the others? Collaborate with them. Make sure you always have more on your collaborator than they have on you.

Turn All Innocent, Well-Intentioned Acts into Damning Condemnations of the Heir's Misbehavior - Everything they do is wrong. Make sure everyone adopts the same thinking. The heirs have NEVER done anything right.

Restate Reality Into Wrongs - Change innocuous comments into outrageous, inflammatory lies that are loudly and emphatically proclaimed by your collaborators. Lies become verified *truth* and *reality*.

SEVER ALL COMMUNICATIONS WITH THE HEIRS - This is **VERY IMPORTANT!** If your target refuses to communicate with their heirs, the heirs can't exert influence, change their minds or fight your plans.

Use Anger & Betrayal - Get your target very angry with their heirs and keep them angry so they will cease all communications with the heirs. Make them feel angry, betrayed, devalued, used and abused. Use every tool at your disposal, create conflict every way you can.

Creating Conflict - If reasons to be angry with the heirs don't exist, create them. The heirs are in the dark, they don't know what you are doing. Tell damaging lies, falsify letters and "proof" of the heirs horrible dishonesty and misdeeds.

Continue Your Campaign of Conflict with the Heirs - Be relentless. Start small and gradually build over time. Do everything you can to destroy their relationships and any positive memories of their heirs.

Avoid Isolation - Encourage your target to continue their normal activities except those involving the

heirs. You want them to appear normal to friends and associates who can validate their feelings. Isolating elderly people can be used to prove undue influence.

Involve An Attorney - The attorney who prepares the will be questioned if the will is challenged. Make sure their attorney supports you and will help you prove that they truly want you to enjoy their entire estate.

Rewrite Reality Repeatedly Over Time - A lie repeated over and over again over time eventually becomes truth. This is one of your most powerful tools. Repeatedly demonstrating what bad people their heirs are will eventually make your target believe it.

Discredit and Disparage - It is very hard to get people to go against long held, deep set beliefs and values. It's much easier to change their memories and perceptions of reality.

Repeatedly Ridicule and Revile The Heirs - Laugh, make ridicule fun and entertaining. Bond with mutual hatred of the heirs, their greed and all their misdeeds.

Develop a Fun, Secret Conspiracy - Involve your target in fun little dirty tricks that hurt and harm the heirs. Encourage them to enjoy playing tricks to punish their heirs for all their abuse and mistreatment.

Discredit and Destroy the Heirs - Hurt and weaken them any way you can. Can you harm their business? Their career? Spread damaging lies about them? Do it, your financial future is at stake. Destroy them if you can so they can't fight you.

Involve Organized Crime, Stalking and Hate Groups - Pay criminals to create havoc in the heir's life, but only do it through intermediaries so it cannot be traced to you. Major life disruptions can be caused by surprisingly minor dirty tricks disguised as life's bad breaks. Sick, psychotic people enjoy hurting people, getting paid for it is a plus.

STEP THREE: Savor Your Triumph

Enjoy Being Evil - Think about all the fun you will have and all the wonderful things you will do with the target's money and how much you enjoy hurting the stupid, unsuspecting heirs.

You are so much better, smarter and deserving than they are.
You deserve the money.

The human mind has no firewall. Elderly people are weak and vulnerable.

See *About Steal an Estate* on the upper right hand corner of this page.

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