

*CONTINUING LEGAL EDUCATION*

*FALL 2015*

*OCTOBER 15, 2015*

*ELDER ABUSE*

*HON. JUDY HARRIS KLUGER (RET.), ARLENE MARKARIAN, ESQ.,  
AND PROF. ANN GOLDWEBER*

*MODERATOR:  
HON. DEBORAH A. KAPLAN*



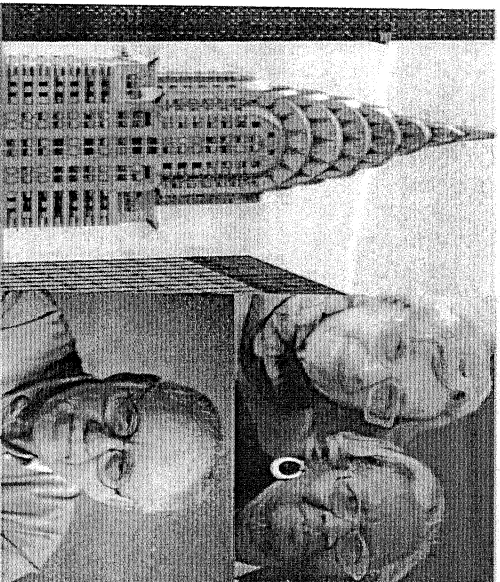
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APPELLATE DIVISION, FIRST DEPARTMENT  
AND  
THE ASSIGNED COUNSEL PLAN FOR THE FIRST DEPARTMENT

IN CONJUNCTION WITH THE  
NEW YORK WOMEN'S BAR ASSOCIATION

**Over 120,000 older  
New Yorkers  
experience elder  
abuse, neglect or  
financial exploitation  
each year.**

### **Mission Statement**

Through its partners and programs, NYCEAC seeks to prevent abuse, and assists people 60 and over who are abused or at risk of abuse – as well as their family members, friends, caregivers, and witnesses – by helping to improve how professionals, organizations and systems respond to their needs.



### **General Contact Information**

Phone: (212) 746-1674  
Fax: (212) 746-4888  
Email: [info@nyceac.com](mailto:info@nyceac.com)

### **Case Consultations and MDT Referrals**

Robin Roberts, MDT Coordinator  
Phone: (212) 746-7211  
Email: [rroberts@nyceac.com](mailto:rroberts@nyceac.com)

Search for NYC Elder Abuse Center on Facebook  
and LinkedIn.



525 East 68th Street, Box 39  
New York, NY 10065  
[www.nyceac.com](http://www.nyceac.com)

**The  
New York City  
Elder Abuse  
Center**



**Together we can  
stop elder abuse.**

[www.nyceac.com](http://www.nyceac.com)

## ASK:

Are you afraid of anyone in your family?

Are you afraid of anyone who comes to see you?

Has anyone close to you tried to harm you?

Has anyone close to you called you names or cursed at you or made you feel bad recently?

Does anyone make you stay in bed or tell you that you are sick when you're not?

Has anyone forced you to do things that you did not want to do?

Has anyone taken things that belong to you without your permission?

Does anyone take your money or have access to your bank accounts?

Excerpts from the National Center on Elder Abuse website [www.elderabusecenter.org](http://www.elderabusecenter.org)  
Risk Assessment Instruments, Rosalite Wolf, Ph.D.,  
Special Research Review Section,  
National Center on Elder Abuse  
Newsletter, September 2000

## WHO CAN HELP?

**Kings County District Attorney's Office  
Elder Abuse Unit/Domestic Violence Bureau**  
*Family and intimate partner violence,  
caregiver abuse, neglect*

718-250-3071

**DA's Action Center**

*Financial abuse*

718-250-2340

**NYC Department for the Aging  
Elderly Crime Victims Unit**

*Crisis intervention, counseling, help  
in accessing support services and entitlements*  
212-442-3103

**Adult Protective Services**

*To report abuse and neglect of physically  
and/or mentally impaired adults*  
212-630-1853

**JASA LEAP**

**Legal & Social Work Elder Abuse Program**  
*Legal services, crisis intervention, counseling, help  
in accessing support services*  
212-273-5272

**NYC Family Justice Center**

*Civil legal matters, advocacy and  
Family Court Orders of Protection*  
718-250-5113

DOMESTIC VIOLENCE BUREAU

KINGS COUNTY DISTRICT ATTORNEY'S OFFICE

## Elder Abuse Unit

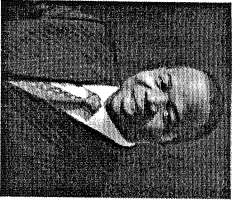


KENNETH P. THOMPSON  
DISTRICT ATTORNEY



**In an emergency dial 911!**





**KENNETH P. THOMPSON**  
DISTRICT ATTORNEY

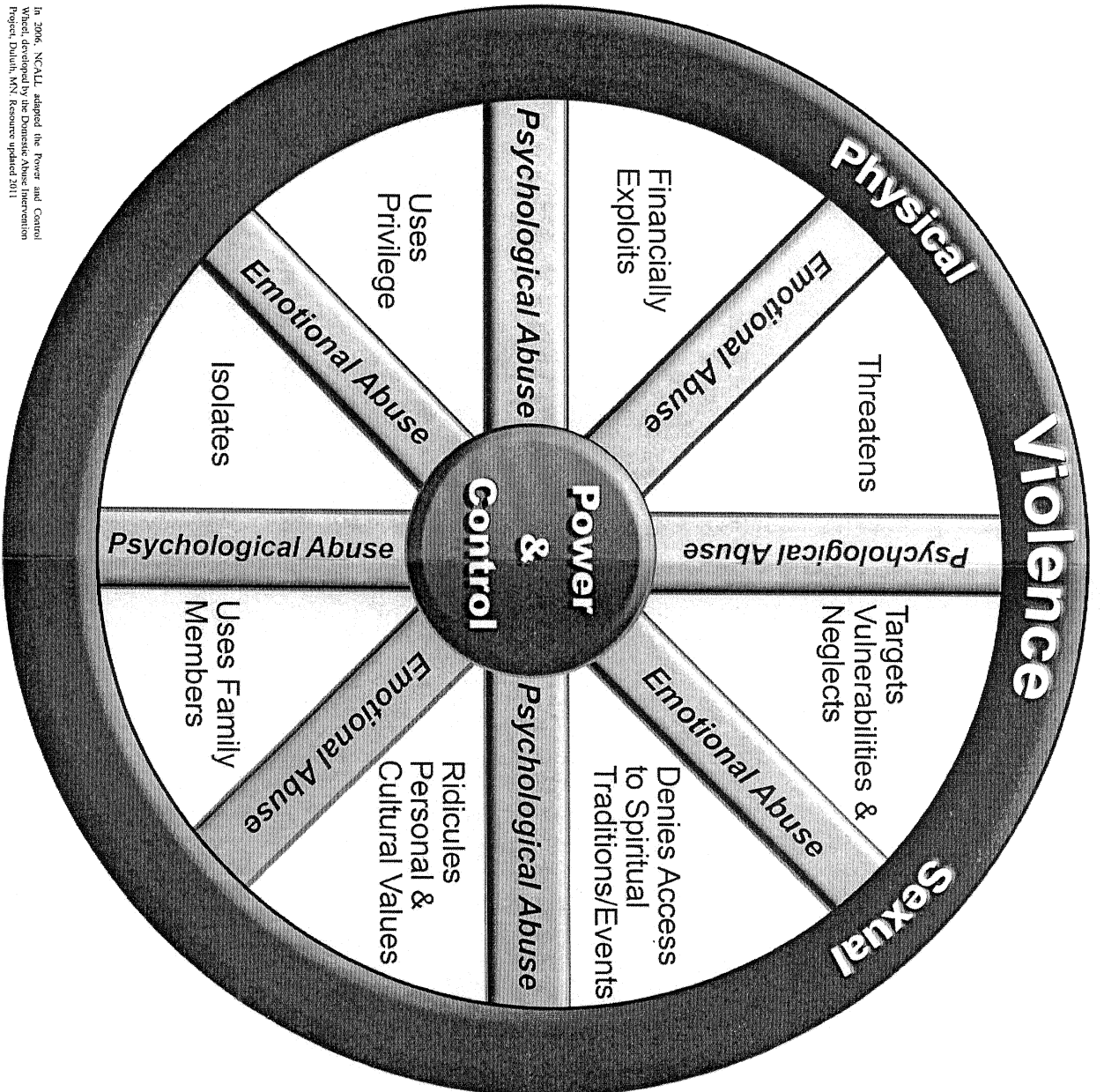
When an older person is abused or mistreated by someone they trusted, the result can be devastating. Painful and complicated for the victim, she or he might feel shame, guilt and the fear of retaliation, and may want to keep it a secret.

There is help.

In an effective collaboration among prosecutors, social workers, NYPD and community advocates, we hold offenders accountable and help victims retain what is rightfully theirs: safety and dignity.

We assist the victim, often the parent or grandparent, in many ways. Emotional support, safety planning, family meetings, access to civil attorneys, Criminal and Family Court Orders of Protection, and more. When offenders have drug, alcohol or mental illness problems, many receive outpatient or residential treatment under strict court supervision.

Consistent, dedicated assistance helps victims take steps toward a more peaceful older age.

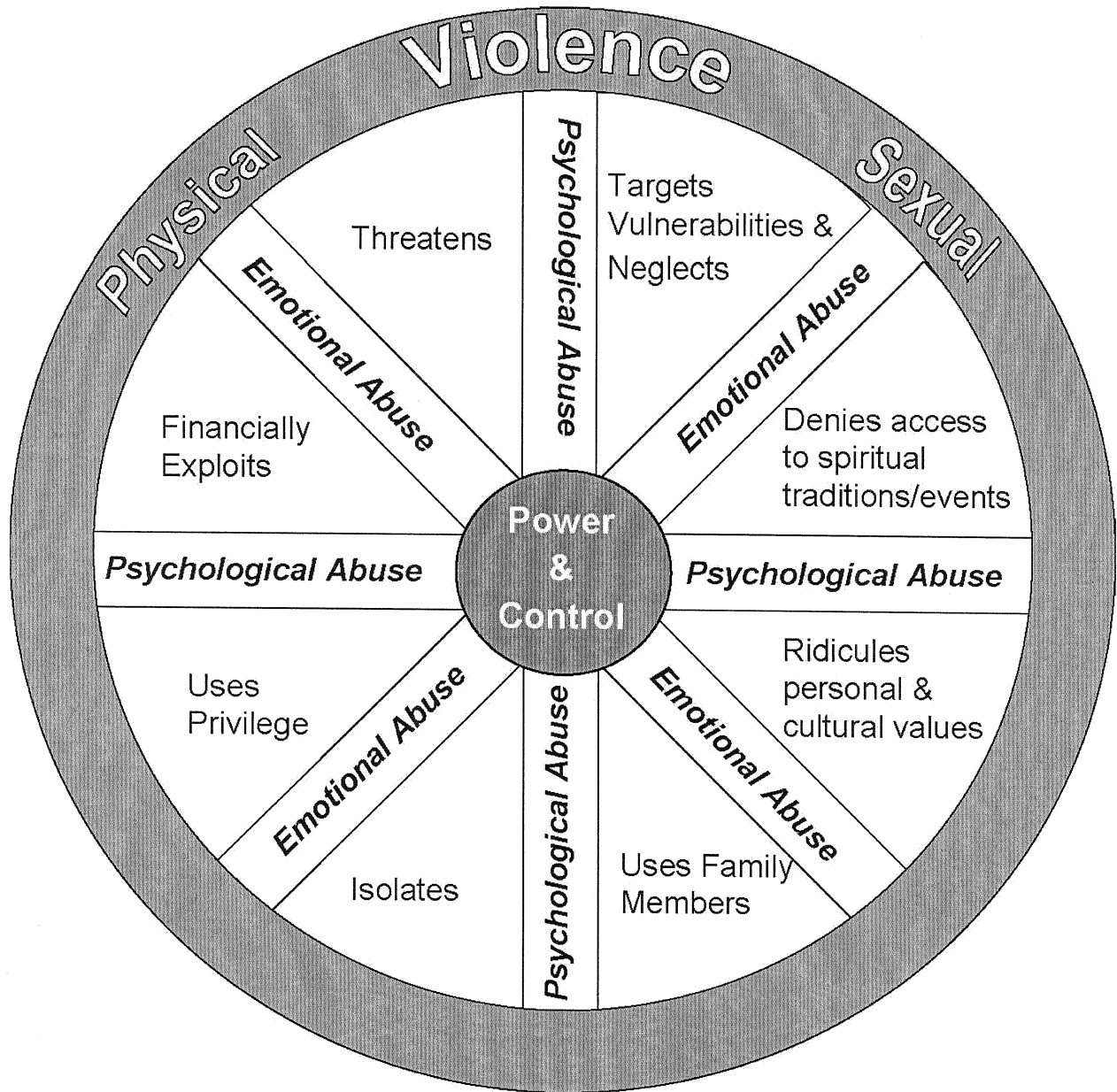


In 2006, NCAAL adapted the Power and Control Wheel, developed by the Domestic Abuse Intervention Project, Duluth, MN. Resource updated 2011.

# FAMILY VIOLENCE IN LATER LIFE



# Abuse in Later Life Wheel



Created by the National Clearinghouse on Abuse in Later Life (NCALL), a project of the Wisconsin Coalition Against Domestic Violence (WCADV)  
 307 S. Paterson St., Suite 1, Madison, WI 53703 608-255-0539  
[www.ncall.us/www.wcadv.org](http://www.ncall.us/www.wcadv.org)

This diagram adapted from the Power and Control/Equality wheels developed by the Domestic Abuse Intervention Project, Duluth, MN

## Abuse in Later Life Wheel Development

In early 1980, the Duluth Domestic Abuse Intervention Project asked women attending domestic violence educational groups to describe their experiences of being battered by their male partners. The Duluth Power and Control and Equity wheels were created using the most commonly repeated tactics. There are many additional abusive behaviors experienced by women that are not on the wheel due to the small space available.

In 1995, NCALL staff asked facilitators of older abused women's support groups to have participants review the Duluth wheel. These older women were asked if their experiences of abuse in later life were different or similar to younger victims/survivors. Participants from a handful of groups in Wisconsin, Minnesota and Illinois generously provided feedback. The older women's suggestions were used to create the Family Abuse in Later Life wheel by NCALL.

In 2005, NCALL took the Family Abuse in Later Life wheel back to older survivors, and asked them to review the wheel once again. Over 50 victims from eight states responded, many telling us that the wheel reflected the abuse in their lives, however, it did not adequately represent the ongoing psychological & emotional abuse they experienced throughout their relationships. The attached wheel illustrates this reality.

The outer rim of the wheel defines violence or the threat of violence that is evident in the relationship. The violence may be frequent or very limited, but fear and threats are present. The abuser uses threats to maintain power and control. Each of the pie pieces represent the different tactics abusers may use in a relationship. Abusers may not necessarily use all of the tactics or they may use one tactic more often. Any combination of tactics can be used to maintain power and control.

This wheel makes a distinction between emotional and psychological abuse. Emotional abuse is specific tactics, such as name-calling, put-downs, yelling and verbal attacks, used to demean the victim. Psychological abuse is the ongoing, manipulative, crazy making behavior that becomes an overriding factor/tactic in abusive relationships. Sometimes it can be very subtle, sometimes it is very intense and invasive.

The center represents the goal or the outcome of all of these behaviors...power and control.

# Tactics Used by Abusers

## PHYSICAL ABUSE

- Slaps, hits, punches
- Throws things
- Burns
- Chokes
- Breaks bones
- Creates Hazards
- Bumps and/or trips
- Forces unwanted physical activity
- Pinches, pulls hair & twists limbs
- Restrains

## SEXUAL ABUSE

- Makes demeaning remarks about intimate body parts
- Is rough with intimate body parts during care giving
- Takes advantage of physical or mental illness to engage in sex
- Forces sex acts that make victim feel uncomfortable and/or against victim's wishes
- Forces victim to watch pornography on television and/or computer

## PSYCHOLOGICAL ABUSE

- Withholds affection
- Engages in crazy-making behavior
- Publicly humiliates or behaves in a condescending manner

## EMOTIONAL ABUSE

- Humiliates, demeans, ridicules
- Yells, insults, calls names
- Degrades, blames
- Uses silence or profanity

## THREATENING

- Threatens to leave and never see elder again
- Threatens to divorce or not divorce
- Threatens to commit suicide
- Threatens to institutionalize
- Abuses or kills pet or prized livestock
- Destroys or takes property
- Displays or threatens with weapons

## TARGETING VULNERABILITIES

- Takes or moves walker, wheelchair, glasses, dentures
- Takes advantage of confusion
- Makes victim miss medical appointments

## NEGLECTING

- Denies or creates long waits for food, heat, care or medication
- Does not report medical problems
- Understands but fails to follow medical, therapy or safety recommendations
- Refuses to dress or dresses inappropriately

## DENIES ACCESS TO SPIRITUAL TRADITIONS/EVENTS

- Denies access to ceremonial traditions or church
- Ignores religious traditions
- Prevents from practicing traditional ceremonies/events

**NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE (NCALL)**





# Tactics Used by Abusers

## **USING FAMILY MEMBERS**

- Magnifies disagreements
- Misleads family members about extent and nature of illnesses/conditions
- Excludes or denies access to family
- Forces family to keep secrets
- Threatens and denies access to grandchildren
- Leaves grandchildren with grandparent without honoring grandparents needs and wishes

## **RIDICULES PERSONAL & CULTURAL VALUES**

- Ridicules personal/cultural values
- Makes fun of a person's racial background, sexual preference or ethnic background
- Entices or forces to lie, commit a crime or do other acts that go against the victim's value system

## **ISOLATION**

- Controls what victim does, whom they see, and where they go
- Limits time with friends and family
- Denies access to phone or mail
- Fails to visit or make contact

## **USING PRIVILEGE**

- Treats victim like a servant
- Makes all major decisions
- Ignores needs, wants, desires
- Undervalues victim's life experience
- Takes advantage of community status, i.e. racial, sexual orientation, gender, economic


## **FINANCIAL EXPLOITATION**

- Steals money, titles, or possessions
- Takes over accounts and bills and spending without permission
- Abuses a power of attorney
- Tells elder money is needed to repay drug dealer to stay safe

**NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE (NCALL)**



**KINGS COUNTY DISTRICT ATTORNEY'S OFFICE**  
 Kenneth B. Thompson  
 District Attorney  
 200 West Broadway, New York 11201



**ELDER ABUSE  
 &  
 THE BROOKLYN D.A.'S  
 ELDER ABUSE UNIT**

Arlene M. Markarian  
 Chief, Elder Abuse Unit  
 Domestic Violence Bureau  
 Kings County District Attorney's Office

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**SOME IMPORTANT STATS**

- 420,933 seniors live in Kings County
- 32.4% or 136,383 live with a disability
- Kings County has the largest population of senior citizens age 60 years or older in NYC
- Elder Abuse Unit currently handles over 450 cases per year
- 26 dv/elder homicides since 1999:  
 5 intimate partner; 21 "parental". No intervention in any of the households except one.

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**TYPES OF ELDER ABUSE**

- Physical Abuse
- Sexual Abuse
- Psychological/Emotional Abuse
- Neglect
- Financial Abuse

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### PROFILE OF AN ABUSER

- Adult child or grandchild [or other family member]
- Lives with senior
- Substance abuser [alcohol &/or drugs]
- Some degree of mental illness
- Unemployed
- Wants/gets/takes money from senior

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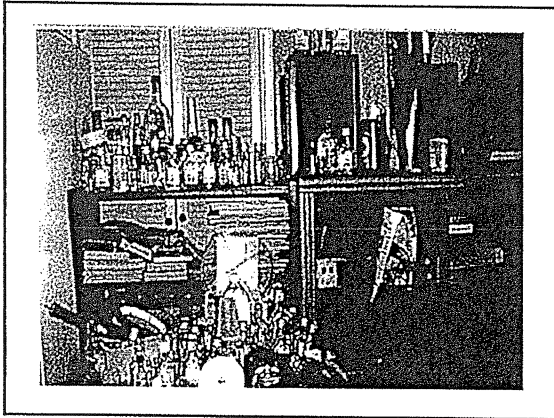
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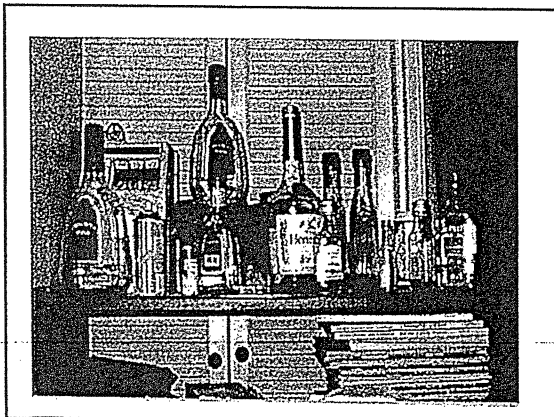
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**TYPICAL NON-FAMILY OFFENDERS**

- Home aids
- new "friend"
- neighbor
- landlord

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**SIGNS OF POSSIBLE ELDER ABUSE  
(Physical Abuse and Neglect)**

- Bruises [old and new / various stages]
- "Grab marks"
- Lacerations [old and new / various stages]
- Untreated pressure ulcers or other injuries
- Explanations for injuries don't make sense
- Over-medication / Withholding meds
- Poor hygiene
- Change in appearance or demeanor
- Missing assistive devices

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**IS THE SENIOR BEING ISOLATED?**

Does the "caregiver":

- Refuse to let anyone speak with the senior alone or prevent visitors?
- Prevent the senior from attending religious services, regular doctor visits or other activities outside the home, like the senior center??
- Answer for the senior?
- Take over after firing qualified agency home attendants?

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**IT TAKES LESS TO DO MORE  
DAMAGE**

- Yelling / screaming
- Damage property, sentimental items
- Threats to put in nursing home
- Threats to injure senior or another family member
- Threats to remove, injure or kill a pet
- Simple shove

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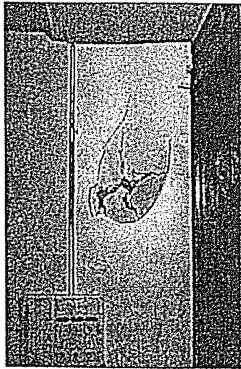
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**ANIMAL ABUSE**

- DID ABUSER INJURE OR KILL A FAMILY PET?
- DID ABUSER EVER THREATEN TO KILL OR INJURE A PET?

Animal abuse is an effective way to **TERRORIZE** a victim (if I could do this to an animal, imagine what I can do to you!)

- Is there a *missing* pet?

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**A FEW HELPFUL INTERVIEWING TIPS...**

- Interview senior in a private place
- Interview senior **ALONE!** & with minimal distractions
- Does the senior have his/her eyeglasses, hearing aid or other assistive devices?
- Take breaks...bathroom, food, water, meds?
- Interview earlier in the day when the victim is "fresh"
- Speak slowly, in short, simple sentences...be patient—always wait for a response.

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*Interviewing Tips con't...*

- Show respect: Address as Mr., Mrs. or Ms.
- BTW, how is the victim getting to your office?? Can the victim walk? Or should you be going to their home?
- Law enforcement should keep their weapon out of sight
- Keep in mind that the interview may take a little longer...

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**SENIORS IN COURT...**

- Can victim walk to courthouse from your office? Should you meet victim at courthouse?
- Does the victim need assistance getting up to the witness stand?
- Do they have their assistive devices?
- Should microphones be used in court?
- **PATIENCE!** Speak slowly, loudly and clearly. Face the senior. *Wait* for an answer.
- ..Please don't yell!
- Take breaks!

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**KINGS COUNTY DISTRICT  
ATTORNEY'S  
ELDER ABUSE UNIT**

*How we handle these  
cases...*

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**Elder Abuse Unit...what we do!**

- Immediate outreach to victim via telephone
- Car service provided if necessary
- Home / hospital visit if necessary
- DA social worker assigned
- 911 Cell Phone

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*Elder Abuse Unit continued...*

- Social service referrals: JASA, DFTA, APS or other social service agencies
- "Special Attention" by DVPOs
- Prosecute without victim's testimony when possible (and appropriate)

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**Types of cases handled by the Elder Abuse Unit...**

- **PHYSICAL ABUSE** by intimate partner, child, grandchild, etc...[Including threats of violence and damage of property]
- **NEGLECT/ABUSE by caregiver**— Whether paid or unpaid
- Victim is **60 years** of age or older

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**COMMON DISPOSITIONS**

*\*Always discussed with victim\**

- Mental Health Court or other psychiatric program
- Substance abuse rehabilitation program
- MICA programs
- Or other appropriate program
- **ORDERS OF PROTECTION** (be creative...parents still want to see their children— maybe a LOOP with special condition that defendant can't live there or stay overnight? Or that they can only see each other outside the home?)

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**COMMUNITY OUTREACH: TRAINING / WORKSHOPS**

- NYPD
- HOSPITAL E.R.s
- NYPTI
- **JUDICIARY / COURT PERSONNEL:** Family Court, Guardianship Court, Criminal Court & Supreme Court
- Attorneys: Government, private, elder law, etc.
- Various social service agencies
- **LOCALLY, STATEWIDE & NATIONALLY**

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**BEAM**

**BROOKLYN ELDER ABUSE  
MEETINGS**

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**FAMILY JUSTICE CENTER**

- On-site referrals to many agencies and services including DFTA and JASA;
- *Family Court Elder Abuse Order of Protection Project*
- Services available regardless of whether there is a criminal case
- Civil vs. Criminal

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**NYC ELDER ABUSE CENTER**

- **Brooklyn** has first Elder Abuse Center multi-disciplinary team New York State! Eastern Seaboard!
- Only other Elder Abuse Centers are in California
- Weekly meetings
- Elder abuse professionals including attorneys, doctors, social workers and other providers

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**Abuse Later in Life Grant...**

- Brooklyn was one of 9 jurisdictions in the country to win this federal grant in 2013
- The grant pays for elder abuse training for Brooklyn police, prosecutors, judges and social service providers, as well as direct services to seniors in the community

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***I HAVE  
POWER OF ATTORNEY***

***YOU CAN'T SPEAK WITH THE  
VICTIM—YOU CAN'T COME IN!***

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***GOOD LUCK!***

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***EVIDENCE-BASED PROSECUTION  
OF  
DOMESTIC VIOLENCE & ELDER ABUSE CASES***

**Arlene M. Markarian**  
Executive Assistant District Attorney  
Elder Abuse Unit / Domestic Violence Bureau  
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**WHY??**

The victim is unwilling to participate in the prosecution of a case. You may ask yourself, “Why bother?”—If the victim doesn’t want to help herself, let’s use our resources to investigate other cases.

Put yourself in the victim’s shoes—e.g., would a mugger call you after the mugging and beg your forgiveness or threaten you to drop the charges or try to make you feel guilty for having him/her arrested? NO!!! But this routinely happens in domestic violence and elder abuse cases.

Domestic violence offenders know where their victims live, worship and socialize. The offenders know the stores their victims frequent, where their family/friends live and their everyday routines. Imagine constantly looking over your shoulder in fear of being attacked. Possible retribution causes great fear in domestic violence victims. This is especially true in senior dating relationships. Senior citizens date too. They may date someone significantly younger than themselves. Under these circumstances, the victim is not only being stalked and fears physical injury—but may also be embarrassed by the age difference...too embarrassed to tell family, friends or law enforcement about the abuse.

Also, let’s not forget about *senior spousal abuse*—imagine being married or in an intimate relationship and your significant other either verbally or physically abuses you. What if you have been married to this person for three or more *decades*? —and he has abused you throughout the relationship! Do you think that a senior in this position would be able to leave the relationship or testify against their loved one? Think about it.

Does the abuser only abuse that one victim? Not necessarily. Domestic violence offenders many times abuse everyone with whom they have had an intimate relationship. Would you want this guy getting involved with your sister, daughter or mother??

As parents, can you imagine a situation where you must call the police on your child? What if you are a frail senior citizen and your adult child (or grandchild) is drug addicted or mentally ill? What if that child threatens you for money and becomes physical if you try to refuse? How do you feel as you watch the police handcuff your child and take him/her away? What do you do when that child then calls you from jail, crying and telling you that all sorts of horrible things are happening there? Do you think that you would voluntarily testify against your child? Even if s/he seriously injured you? THIS IS ONE OF THE MANY ISSUES IN ELDER ABUSE CASES.

What about seniors who suffer from *Alzheimer's Disease* or other diseases which prevent them from protecting themselves from neighbors, family or even their own home attendant? Many times the senior is physically unable to tell anyone what is happening to him/her or who is responsible for the abuse.

**NEGLECT** is another form of abuse. Neglect occurs when a caretaker [whether paid or not] does not properly care for the senior. This can include failing to provide appropriate nourishment and/or medical care for the senior, as well as not caring for their personal hygiene [i.e., allowing the senior to remain in feces-soiled clothes or bed].

However, keep in mind that not all neglect cases are criminal. Many times family members try to care for an aging relative, but are not able to do so properly. That is different from the case where the person is *not even trying* to properly care for the senior.

Senior Citizens can be frail and may have physical or mental ailments which they did not have as younger adults. It may only take a push or a shove to cause them to fall down and break a major bone, like the hip. As we know, the older we get, the tougher it is to bounce back from an injury. A broken hip will probably have a profound affect on the senior's quality of life—or may result in her death.

If we don't prosecute abusers as vigorously as possible, the abuser will not be stopped until it's too late, i.e., **MURDER**. DON'T THINK THAT IT CAN'T HAPPEN. We must intervene before it gets to the point of no return. There are programs and services available for both the victim as well as the abuser. The victims need to know that there is help for them as well as their significant others and children.

**\*\*NOTE:** Although the majority of victims may be women, there are many fathers and grandfathers who have been abused by their children, grandchildren and other family members. Additionally, when a man is abused by an intimate partner it may be more difficult for him to report the abuse because of the embarrassment or stigma of a man being abused by a woman. Naturally, this applies to same sex relationships as well. And remember, senior citizens date just like younger people!

**\*\*ANOTHER NOTE:** Although there are both female and male defendants and victims in and elder abuse cases, defendants will be referred to in the masculine and victims in the feminine for the purposes of this outline.

### **HOW??**

Many times in domestic violence and elder abuse cases, the trials become a “he said / she said”. This is because all of the available evidence is not collected or obtained which can prove and/or corroborate the allegations. If the victim testifies, we must have evidence to corroborate her so the jury will feel we met our high burden of “beyond a reasonable doubt”. If she does not testify for the prosecution, then we need independent evidence to prove each and every element of the crimes charged, as well as the identity of the perpetrator. If the victim suffers from advanced Alzheimer’s Disease or other dementia, she may not be *able* to testify. [I’ll say it again, if the victim does not testify for the prosecution, we will not only need evidence to prove the crimes charged, but we will also need evidence to prove that it was *the defendant* who committed the crimes.]

Since the victim may not testify at the trial, we must investigate a domestic elder abuse case as if it was a homicide case—we must try to prove the charges without the victim’s testimony. The BEST time to obtain the evidence is in the BEGINNING of the investigation—as close in time to the commission of the crime as possible.

***Important note!*** The examples of evidence listed below can be used, not only in criminal prosecutions, but in other proceedings as well. For example, Family Court, Landlord/Tenant Court, Guardianship Court, probation/parole hearings, divorce cases and any other legal proceeding involving the victim. If you want your client and his/her best interests to prevail, you need to provide the evidence to support your position!

### **WE NEED EVIDENCE!!**

#### **1. PHOTOGRAPHS [Do you have a camera? How about a *camera phone*?? Use it!]**

- **OF VICTIM**

To be able to identify her later if she moves and we need to find her.  
To show general physical condition and hygiene. [Neglect]

- **OF VICTIM’S INJURIES**

Including scratches, bruises, “grab marks”, lumps, lacerations or bed sores.

**\*Remember to take off bandages for photos! [If serious injury, with doctor’s permission and guidance, of course!]**

**\*Remember to take at least one photo of her injuries which shows her face [so we know she’s the one in the other photos!]**

**\*Document the victim’s name, date and your name as the photographer on the back of the photo.**

- **OF DEFENDANT’S INJURIES OR LACK OF INJURIES [Law Enforcement]**  
Especially important if abuser later claims self-defense.  
Include photos of:
  - \*Face, torso and hands (top & bottom)
  - \*Swollen, red hands if defendant beat victim
  - \*What defendant was wearing at time of crime—include footwear if he kicked her or the pet  
[seize footwear!]

**\*\*WARNING: IF YOU ARE NOT LAW ENFORCEMENT, DO NOT TRY TO TAKE PHOTOS OF THE ABUSER!! DON’T PUT YOURSELF IN JEOPARDY!!**

- **OF ALL BLOODY/BLOOD STAINED ITEMS**
- **OF PROPERTY DAMAGE**
  - \*To show struggle or use of intimidation.
  - \*Include telephones ripped out of wall to prevent 911 call.

Many times, abusers will break, smash or damage the victim’s personal property (usually items which have sentimental value) in order to intimidate and control the victim. This is common in elder abuse cases.

- **OF TEXT MESSAGES; NUMBERS ON BEEPERS AND CALLER I.D. BOX**
- **OF ENTIRE HOME/CRIME SCENE**
  - \*To show living conditions, including how much of the home was taken over by the abuser and where the victim sleeps.
  - \*Include photographs of the inside of the refrigerator and cabinets to show the lack of food in the home. [Neglect]
  - \*Photographs of broken property and overturned furniture to show signs of struggle...especially significant where defendant claims “we only had an argument” or “she just fell”.

***LAW ENFORCEMENT MUST TREAT THE VICTIM’S HOME AS A CRIME SCENE !***

- **OF ANY PROPERTY TAKEN INTO CUSTODY**  
All seized property should be photographed where it was found **before** removing it for vouchering. [See “seizing/vouchering property” below.]

## 2. SEIZING/VOUCHERING EVIDENCE

**\*\*WARNING: IF YOU ARE NOT LAW ENFORCEMENT, DO NOT TOUCH ANY CONTRABAND, INCLUDING: FIREARMS/GUNS, AMMUNITION, FLAMMABLE/TOXIC LIQUIDS OR ANY OTHER DANGEROUS INSTRUMENTS; DRUGS, DRUG PARAPHERNALIA; OR ANY BLOODY ITEMS. CALL THE POLICE/911 IMMEDIATELY.**

- **WEAPONS**

- \*Not just guns and knives, but also items used to injure or threaten the victim including scissors, spatulas or other utensils, shoes, boots, etc.

- \*Evidence that defendant owns or has access to weapons including holsters, cartridges, clips, firearm cleaning items, knife sheaths, etc.

Some weapons cannot be vouchered. For example, frozen turkeys (I'm not kidding!). Clearly, the property clerk will be quite upset if you voucher a frozen butterball. In these cases, photograph the item. A frozen turkey can be purchased for trial to be used as "demonstrative evidence". [Don't forget to document the weight so the prosecutor knows what size to get!]

- **CONTAINERS OF ASSAULTIVE &/OR FLAMMABLE LIQUIDS**

- \*E.g., lye, gasoline, etc. Voucher empty containers as well. Obviously, submit for testing.

- \*RE: Arson cases—don't forget to voucher defendant's clothes and matches/lighter found on him.

- \*If defendant threw chemical substance at victim, check closely for any injuries on him (photographing them), however slight. Seize his clothes and submit for testing.

- **DRUGS AND/OR DRUG PARAPHERNALIA**

- Evidence of drug use is especially relevant to prove the abuser's *motive* to commit the crimes, including theft, assault and neglect. Items should be photographed where found before seized as evidence. [For example, photograph empty crack vials on the floor before seizing them.]

- **ALCOHOLIC BEVERAGES/EMPTY BOTTLES, CANS OR OTHER CONTAINERS**

- If there are beer bottles/cans, vodka bottles, etc. all around the house, photograph them where they are found and then seize them. Again, evidence of excessive alcohol consumption/alcoholism is relevant in theft, assault and neglect cases.

- **DAMAGED PROPERTY**

- Including telephones ripped out of wall, damaged personal property as well as property damaged during a struggle or as a means of intimidation.

- **ITEMS USED TO RESTRAIN, GAG OR TORTURE VICTIM**  
Includes belts, rags, electrical cords, razors, etc.
- **LETTERS W/ ENVELOPES; E-MAILS; TEXT MESSAGES; FACE BOOK**  
Ask victim for everything she has. Many people save letters and notes. They may contain threats, apologies or evidence of defendant's motive, jealousy and /or stalking behavior. It can also be useful as a handwriting sample to compare with writings at issue in the trial. For those technically inclined, let's not forget about **e-mails** and **text messages!** Photograph text messages! Save messages on a c.d.
- **VICTIM'S AND/OR DEFENDANT'S DIARY/CALENDAR DOCUMENTING ABUSE**  
\*Affirmatively ask victim if she has documented the abuse.  
\*Law Enforcement: Do you need a search warrant to look through defendant's calendar/diary? Know the Search and Seizure laws of your state.
- **ANSWERING MACHINE/VOICE MAIL MESSAGES**  
Containing threats of violence, apologies and evidence of stalking. Also, threats of financial ruin or of being sent to a nursing home in elder abuse cases. Save messages left on voice mail/digital machines and duplicate onto c.d.. Can also be used to identify defendant's voice on other recordings at trial.
- **DID DEFENDANT HAVE THE ORDER OF PROTECTION [OOP] IN HIS POCKET? OR IN HIS CAR? IF SO, SEIZE IT!!** [and document where you found it!]  
[Law Enforcement]
- **CLOTHING, SHEETS, BLANKETS OR OTHER ITEMS WITH BLOOD STAINS**  
[PLACE IN PAPER BAG]
- **CLOTHING, SHEETS, BLANKETS OR OTHER ITEMS WITH FECES/URINE STAINS** [PLACE IN PAPER BAG] [Neglect] [Law Enforcement]
- **BLOODY/TORN CLOTHING** [Law Enforcement]  
Of both, victim and defendant
- **MARTIAL ARTS PARAPHERNALIA**  
Defendant's knowledge and proficiency in the martial arts, boxing or other type of combat training can be highly relevant in assault and murder cases.
- **FINANCIAL DOCUMENTS**  
Including bank statements, ATM receipts, bank withdrawal slips, "overdue" notices, unpaid bills, deeds, powers of attorney, health care proxies and wills. Seniors are many times both physically *and* financially abused by a family member, caretaker, landlord or "new friend". The financial abuse may be the *motive* for the physical



abuse or neglect. Often the abuser obtains control over the senior's finances on the pretense that they will take care of the bills but instead, take the money for themselves.

- **EVERYTHING!**

A jury needs to see everything. It brings them back to the time of the crime and corroborates your witnesses—police or civilian—and it makes you look good for getting it! Most importantly, it shows the jury how serious the crime was and the effect on the victim.

## **THINK ABOUT SEARCH WARRANTS!!** [Law Enforcement]

### **3. EYE WITNESSES, EAR WITNESSES & NOSE WITNESSES**

- **TO CRIME CHARGED**

- **TO PREVIOUS INCIDENTS OF ABUSE**

Document names, addresses and telephone numbers of neighbors, friends, family or anyone else who may have either *seen, heard, or smelled something*—either now or in the past. In elder abuse cases, neighbors may have *smelled* something that indicates neglect. [E.g., the strong odor of urine or feces.]

**\*Remember, walls are thin! WHO CALLED 911???**

### **4. DOCUMENT “EXCITED UTTERANCES” BY VICTIM**

Generally, when victim is *crying/shaking/injured/upset* and tells someone what happened to him/her or tells them about the abuse/neglect soon after it occurred or as soon as possible.

Document the victim's *demeanor* as well as the statement. For example, was victim crying, shaking or curled up in a fetal position?

Document the victim's demeanor when the suspected abuser enters the room—does the victim cringe, shake, cover her face or close her legs?

Check for excited utterances to:

- \*Friends/neighbors or other people at the scene
- \*EMS
- \*First police officers to arrive at scene
- \*Nurses/doctors
- \*To 911 [get recording asap!]
- \*To the 911 caller

## 5. DEFENDANT'S STATEMENTS

**DOCUMENT ALL STATEMENTS NO MATTER HOW INSIGNIFICANT AT THE TIME**  
For example, if suspect/abuser claims that injury was result of an accidental fall, but later, a doctor concludes that the injury is inconsistent with a fall, the abuser's claim can be used against him at trial.

Check for statements made to not only police, but to:

- \*Neighbors
- \*Landlord
- \*Friends/Family
- \*Employer
- \*EMS
- \*Hospital personnel
- \*Jail/Prison Officials [check corrections records]
- \*Parole/Probation Officer or at hearing

**\*\*Did the defendant call 911??** Get 911 recording as soon as possible!

**\*\*Get jail/prison phone call recordings as soon as possible!**

**LAW ENFORCEMENT—YOU MUST TRY TO GET A STATEMENT—READ DEFENDANT HIS MIRANDA RIGHTS AND GIVE IT A SHOT!!** Any statement is better than no statement. If he asks for a lawyer—so what? At least you tried! Note: If you are not law enforcement, don't worry about Miranda rights. Document everything the abuser says, when he said it and to whom.

**Law Enforcement: Don't forget to document anything a suspect says both pre and post Miranda!**

## 6. EXPERT MEDICAL OPINION

Try to obtain a "release" or HIPPA waiver from the victim so you can speak with her doctor(s) and obtain medical records. Otherwise, subpoena all medical records including x-rays and photos.

- **TO EXPLAIN FORCE REQUIRED TO INFLICT INJURY**
- **TO GIVE EXPERT OPINION** as to whether injury is consistent with the way defendant (or witness) claims it was sustained; to explain neglect and the risk of disease, injury or death to the victim; to determine stage, cause and age of pressure ulcers.

## 7. CHECK FOR PAST POLICE REPORTS AND OOPS

Check other jurisdictions/counties/precincts in which the defendant lived for previous history of abuse:

- \*With this victim
- \*With other victims

## 8. DOCUMENTARY EVIDENCE

Think about what is relevant to your case. Here are some examples:

- \*Defendant's prison records for present and past cases;
- \*Defendant's prison visitation and phone records
- \*Defendant's prison phone call recordings if available in your jurisdiction;
- \*Defendant's home and cell phone records;
- \*Defendant's parole/probation records
- \*Adult Protective Services file
- \*Court records—Family Court, local Criminal Court, and Superior Courts [criminal and matrimonial], etc.
- \*Previous 911 calls
- \*Police/court records from other jurisdictions
- \*Prior OOPs from this and other jurisdictions—involving anyone [relevant to defendant's knowledge and understanding of Orders of Protection, as well as his intent to violate them.]
- \*Does the defendant have Power of Attorney for the senior or is he a beneficiary in a will? Get the documents. Speak to the attorney who drafted the documents.

## 9. SEIZE ALL MEDICATIONS/DOCUMENT MEDICAL INFORMATION

If possible, obtain the names and contact info for all medical personnel who treated the victim both now and in the past including private doctors and hospitals. Specifically, you are looking for repeated injuries in past or for a *lack of medical attention* which may be evidence of neglect in elder abuse cases. Has there been **hospital or doctor "hopping"**, {i.e., bringing the victim to different hospitals or doctors to avoid detection??} \*\*Did victim have regular doctor visits until defendant entered picture??

If possible, obtain information regarding past and present medications taken by 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.

Seize all medications found in the home including prescribed medications, as well as homeopathic and over-the-counter remedies if the senior is being taken to the hospital.

If victim or caregiver claims that medications are needed, then a doctor should be consulted to determine if the medications or combination of medications are dangerous. If they are not seized, then photographs of and notes about the medications should be taken.

## 10. ANIMAL ABUSE

- **DID DEFENDANT EVER INJURE OR KILL A FAMILY PET?**
- **DID DEFENDANT EVER THREATEN TO KILL OR INJURE A PET?**
- **DOES THE PET APPEAR TO BE NEGLECTED?**  
Is the pet underfed, dehydrated or need of medical attention? Often, when an animal is neglected, so is the senior citizen.
- **IS THERE A *MISSING* PET??** Do you see evidence of a pet, i.e., food bowls, bird cages, kitty litter, but no pet in sight?? Ask the victim about it. Has the abuser taken the victim's pet? Brought to a shelter? Many times abusers will get rid of the pet without the owner's permission, including euthanizing it!

\*Animal abuse is an effective way to **TERRORIZE** a victim. If the defendant did injure or kill a pet, *contact your local ASPCA Police or the Humane Society*. Photograph the injuries. Have a veterinarian examine the pet, whether it's dead or injured. Charge the appropriate animal abuse charges.

\*Victims of abuse seek comfort from their beloved pets. Their abusers know this. Removing their pet further isolates the victim. Injuring or killing a pet is proof of the message the abuser is sending to the victim—if I could do this to an animal, imagine what I can do to you!

**\*\*KNOW YOUR STATE'S ANIMAL CRUELTY CHARGES!**

**\*\*IN NEW YORK, AGRICULTURE & MARKETS LAW SECTIONS 353, 353-a.**

## 11. DEFENDANT'S BACKGROUND

Document anything you discover about the defendant, including:

- **PSYCHIATRIC HISTORY/HOSPITALIZATION?**
- **DRUG/ALCOHOL ABUSE?**

- **SPECIAL MEDICATIONS?** Are there any special medications at the house? If so, what type? Seize defendant's medications to determine what they are and if defendant has been taking them as prescribed. [Important if there is a possible psychiatric defense.]

## 12. SECURITY CAMERAS / RECORDINGS

Check the area for security cameras! If the crime occurred inside the location, are there any cameras showing the door and hallway? If the crime occurred outside, any cameras in the area? You must physically go to the location and look around. Ask the owners/managers of businesses in the area if they have a camera; ask superintendents / landlords if there are any hidden cameras inside or outside their building. If there is a camera that records, you must arrange to get a copy of the recording a.s.a.p. because many times the recordings are deleted or destroyed within a short amount of time.

## SOME IMPORTANT TIPS / REMINDERS

- **DON'T FORGET TO INCLUDE DATES, TIMES, PLACES AND PEOPLE PRESENT WHEN DOCUMENTING THIS INFORMATION. MAKE SURE THE DATE AND VICTIM'S NAME ARE ON ALL PHOTOGRAPHS, AS WELL THE PHOTOGRAPHER'S NAME.**
- **REMEMBER—IF IT'S AN EMERGENCY, CALL 911 !!**
- **IF YOU ARE NOT SURE ABOUT A SITUATION, HAVE THE SENIOR BROUGHT TO A HOSPITAL FOR EVALUATION OR CALL ADULT PROTECTIVE SERVICES.**
- **BEWARE! DO NOT CALL 911 IN FRONT OF THE ABUSER OR TELL HIM THAT YOU ARE DOING SO. STEP OUTSIDE AND CALL. WAIT FOR POLICE AND TELL THEM WHAT HAPPENED. DO NOT TOUCH ANY CONTRABAND IN THE HOUSE, I.E., GUNS, DRUGS, ETC.. AGAIN, CALL 911. As stated before, the last thing you want to do is take the contraband to the police station—Murphy's law will take over...you will get pulled over for a traffic infraction and then get arrested for possession of the gun or drugs!**
- **IMPORTANT TO NOTE:** The evidence described above is not only necessary in a criminal prosecution but in other types of cases that are initiated to help the victim. For example, in Family Court when you are seeking an Order of Protection; in Supreme Court if you are seeking Guardianship or a divorce; and Housing Court if you are seeking to evict the abuser. It is very important to present this evidence so the Court has a full and accurate understanding of the circumstances and so the victim can be awarded the appropriate relief.

- **ANOTHER IMPORTANT NOTE:** This outline is intended for use by law enforcement and civilians who may come in contact with a domestic violence or elder abuse victim. Civilians should always contact law enforcement [District Attorney and/or police] for the safeguarding of evidence to a crime. Do not put yourself in jeopardy. This outline is intended to give you information so you will know what to look for and will recognize not-so-obvious evidence when you see it.
- When documenting anything, be as accurate as possible! Documenting observations, conversations, statements and other relevant information not only helps refresh your memory later in the investigation or at trial, but avoids cross-examination problems at trial.

### CONCLUSION

This checklist is only an example of the evidence which should be sought in a domestic violence or elder abuse investigation. It is important not only to be creative, but to use your common sense. Sometimes in elder abuse cases, the evidence of abuse/neglect may not be immediately obvious. You must ask yourself why a particular situation bothers you. Why do you suspect that a senior is being abused?

**\*\*See next page for some criminal charges to consider in domestic violence & elder abuse cases.**

**GOOD LUCK—AND BE SAFE!**

# ***NEW YORK STATE CRIMINAL CHARGES TO CONSIDER IN DOMESTIC VIOLENCE & ELDER ABUSE CASES***

## ***RELEVANT STATUTES***

1. **"BUMP-UPS"**: Where misdemeanor becomes felony based on prior conviction  
[Note: Penal Law is hereinafter referred to as "PL".]
  - Criminal Contempt in the First Degree [PL 215.51] to Aggravated Criminal Contempt [PL 215.52 (2) or (3)]
  - Criminal Contempt in the Second Degree [PL 215.50 (3)] to Criminal Contempt in the First Degree [PL 215.51]
  - Harassment in the First Degree [PL 240.26] to Aggravated Harassment in the Second Degree [PL 240.30 (4)]
  - Aggravated Harassment in the Second Degree [PL 240.30 (3)] to Aggravated Harassment in the First Degree [PL 240.31 (2)]
  - Menacing in the Second Degree [PL 120.14] to Menacing in the First Degree [PL 120.13]
  - Menacing in the Third Degree [PL 120.15] to Menacing in the Second Degree [PL 120.14 (3)]
  - Criminal Possession of a Weapon in the Fourth Degree [PL 265.01 (1), (2), (3) or (5)] to Criminal Possession of a Weapon in the Third Degree [PL 265.02 (1)] **\*\*Remember—the CPW 4 bump-up can be based on weapons other than guns where defendant has previous conviction for any crime.**
  - Stalking in the Fourth Degree [PL 120.45] to Stalking in the third Degree [PL 120.50 (4)]
  - Stalking in Fourth Degree [PL 120.25] to Stalking in the Second Degree [PL 120.55 (3)]
  - **\*\*New Statute!** Aggravated Family Offense [PL 240.75]: When defendant commits any misdemeanor designated as a "specified offense" and s/he has a prior conviction within past 5 years for a "specified offense", misdemeanor is now bumped up to class E felony. **(Effective 1/23/13)**



## 2. VIOLATION OF ORDERS OF PROTECTION

- Aggravated Criminal Contempt [*PL 215.52*]
- Criminal Contempt in the First Degree [*PL 215.51*]
- Criminal Contempt in the Second Degree [*PL 215.50 (3)*]

## 3. ELDER ABUSE STATUTES

- Assault in the Second Degree [*PL 120.05 (12)* ] where it is now a felony when a defendant causes physical injury to a person 65 years or older and the defendant is more than 10 years younger than the victim.
- Endangering the Welfare of a Vulnerable Elderly Person in the First & Second Degrees [*PL 260.34 & 260.32*]  
See definitions of “vulnerable elderly persons” under PL 260.30
- **\*\*New Statutes!** Endangering the Welfare of an Incompetent or Physically Disabled Person in the First & Second Degrees [*PL 260.24 & 25*] [Not only for elder abuse cases]. Changes previous statute for “knowingly engaging in conduct” from an A misdemeanor to an E felony and creates a new A misdemeanor for “recklessly engaging in conduct”. *Note: Statutes require that victims be unable to care for themselves due to the incompetence or disability. Effective 1/17/13.*  
Remember, a senior may be incompetent because of *Alzheimer’s Disease* or other dementia. However, *DON’T PRESUME* all seniors have these diseases or are incompetent—because they don’t and aren’t!!
- Consider **Reckless Endangerment** charges [*PL 120.25 & 120.20*] in neglect cases or where defendant pushes or shoves a senior—depending on their “fragility”, was there a real possibility of the victim breaking her hip or some other major bone?

## 4. ANIMAL CRUELTY STATUTES

- Overdriving, torturing and injuring animals; failure to provide proper sustenance [*Agriculture & Markets Law Sec. 353*] [Misdemeanor]
- Aggravated cruelty to animals [*Agriculture & Markets Law Sec. 353-a*] [Felony]
- See other animal cruelty charges under Article 26 of the Agriculture & Markets Law

5. **SEX OFFENSES: Penal Law Art. 130.00;** Where the victim was sexually assaulted and s/he is “mentally disabled”, “mentally incapacitated” and / or “physically helpless” at the time of the crime, as defined in PL 130.00 (5), (6) & (7), please charge the appropriate sexual assault charges under PL Art. 130. Also see PL 130.00: Sex Offenses Definitions; and PL 130.05: Sex Offenses, Lack of Consent (which includes victims in certain residential facilities and employees of those facilities engaging in sexual conduct.)

\*\*Don't forget that, unfortunately, seniors can be the victims of sexual assault at the hands of family, acquaintances, caregivers, strangers, etc., just like anyone else, whether or not they have any physical or mental disability.

6. **CONSIDER THE FOLLOWING CHARGES:**

- Intimidation of/Tampering with a Witness [PL Art. 215]
- Coercion [PL Art. 135]
- Grand Larceny by Extortion [PL Art. 155]  
See Penal Law definition of “Larceny”
- Hate Crimes [PL Art. 485] [when seniors are targeted b/c of their age]

## *INTERVIEWING TECHNIQUES FOR VICTIMS OF ELDER ABUSE*

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*Some of these suggestions may already be a part of your interviewing technique. Remember, interviewing a senior citizen [whether or not the senior has dementia] takes patience, sensitivity, a watchful eye and a keen ear. Also, don't PRESUME that an elderly victim suffers from Alzheimer's Disease or other dementia. Not all seniors do. However, you don't know what the issues are until you complete your initial interview. These tips will hopefully help you figure it out.*

### **I. THE INTERVIEW**

- A. **IMPORTANT:** Before you begin the interview process, ask all family, hired caregivers, or anyone else present to **leave the room**. You may call upon them later to observe the victim's response to certain individuals. When the interview occurs at your agency offices, find a **private place** to conduct it where other people can't overhear what is being said. Many victims are embarrassed and do not want others knowing of their abuse.
- B. **ALSO IMPORTANT:** Please remember to take breaks during the interview. Does the victim need to use the bathroom? Is s/he hungry or thirsty? Does s/he need to take any medications? Is s/he getting tired? Should you stop and pick it up again the next day? Remember that your interview will be much more fruitful if the victim is fresh and has energy. It is best to interview older individuals earlier in the day, rather than later.
- C. **Keep your weapon out of sight. Wear a jacket. [For police/peace officers.]**  
A confused person may not understand that you are there to help him/her. Some individuals suffer from delusional thinking and may incorporate your weapon into their reality. Example: The victim may have watched a police television show a few hours before and you then walk into his room. Reality and fantasy may become confused and the victim may become too agitated for you to talk with him.
- FYI #1:** Keep in mind that many immigrants have come from countries where they feared the police and/or the military. They do not see the police as source of safety. Immigrants may also fear the social consequences of bringing "shame" to family, as well as deportation if the police become involved in the situation.
- D. **Begin your conversation with orienting information and address the victim by his/her name.** \*Be respectful—address the senior as Mr., Mrs. or Ms. unless the senior invites you to use his/her first name. Be specific and indicate immediately that you are a

friend. Speak in a conversational tone to create a pleasant mood and begin developing a sense of trust.

Example: "Hello, Mrs. Smith, I am Janet Jones and I am here to help you."

- E. Face the person and look him/her in the eye. Ask permission to sit down near the individual in order to be at eye level. **Never conduct an interview towering over a victim. \*Remember, many abusers stand over their elderly victims and use their bodies to intimidate them.**

Try to give him/her enough space [about one foot] so the senior does not feel crowded or threatened. Maintain eye contact to help keep the individual focused.

**FYI #2:** However, please keep in mind that in some cultures it is considered disrespectful to make eye contact with an authority figure such as a police officer.

- F. **Be aware of environmental distractions.**

Example: Radio, television, an open window facing a busy street. Don't try to shout over these distractions, **simply eliminate them.** Shouting may be perceived as an assault on the victim and trigger an attack of anxiety or agitation. \*Remember, abusers shout at their victims in an effort to intimidate and instill fear in them. Being surrounded by multiple stimuli will make it almost impossible for a cognitively impaired person to concentrate on you and what you are asking them.

- G. **Assistive Devices**

Does the senior need his/her hearing aid, glasses or dentures? If so, ask the senior or companion/caregiver where they are. Remember, if the senior can't see you clearly, hear what you are saying or properly speak, then your interview may not be fruitful. Again, do not raise your voice. It is not effective and it may cause the individual to feel uncomfortable and/or fearful.

**FYI #3:** Abusers will often take away seniors' dentures, hearing aids, canes, etc. [and even withhold medication] in order to isolate, coerce and intimidate them. This also forces the victims to rely on their abusers.

- H. **Smile and relax.**

Smiling is often difficult to do when you are involved in serious business. However, Alzheimer's and dementia patients are VERY SENSITIVE to feelings. Often a smile may be just the leveler to maintain calm and avoid distress. But if you are smiling while gritting your teeth and arms folded across your chest, the message will be "displeasure." This stance will frighten the individual. Your physical posture (body language) and what you say should complement one another.

- I. **Speak slowly, in short and simple sentences. Be patient and always wait for a response.**

Example: Mrs. Smith, did you hurt your arm? Give her time to respond before you ask your next question. Do not assume she understands everything you are saying. See what she

does, not necessarily what she says, in response to your questions. Please keep in mind, however, that this doesn't mean that you should presume that all older people may have difficulty understanding you. Keeping it short and simple helps you evaluate the situation.

**J. Listen**

You are trained to listen to people, but it is often difficult when the individual is not communicating clearly. Ask for clarification when you need it. If the individual has trouble with “word finding”, use some examples. For instance: If you see bruises on the senior's arm, you might say “ Mrs. Smith, did someone do this to you?” Look at her eyes, reaction and body language. Do not interrupt. Allow the senior to finish her thought before you ask another question. *Be patient!*

**K. Acknowledge feelings**

Even if the language is unclear and the cues are confusing, try to recognize the individual's feelings, by their tone of voice. Let him know that you are aware of how he feels by simple responses: Example: “Mr. Smith, are you angry?” Don't dismiss his feelings. It gives the individual a sense that you care and that you are trying to understand.

**L. Touch**

A simple touch can convey approval, caring and security. If you are helping someone to a chair, ask his permission to assist him. Lightly hold onto his elbow.

**FYI #4:** Again, we must always try to be aware of cultural differences. While a gentle touch on the shoulder may be comforting to some elderly victims, in some cultures this is considered an intrusion and would be inappropriate by a stranger.

**M. Look – Observe - Smell**

Watch the individual's body language. If there are allegations of abuse by a hired or family caregiver, ask them to join you at some point. Observe the victim's reaction to the caregiver when the caregiver re-enters the room. Observe the victim's response and comfort level. Observe obvious bruises and signs of neglect, e.g., “grab marks” [finger marks or fingertip-sized bruises which result from the abuser grabbing the senior—usually on the arms], body odor and/or dirty clothing or body.

**FYI #5:** Grab marks alone do not necessarily constitute elder abuse. Sometimes marks can be left behind when trying to lift someone or help them in/out of the shower. However, grab marks should be considered with the rest of your observations—consider them a “red flag” and investigate further. At the very least, the caregiver may need some help in caring for the senior.

**N. Distraction**

If the victim becomes distracted by something else going on in the room or he becomes agitated, try to distract him by drawing his attention to something or someone else. For

example: “Do you have a picture of your grandchildren?” Once he seems involved in the new conversation, bring him back to what you were talking about and continue the interview.

## II. TYPES OF ELDER ABUSE

- A. **Physical Abuse:** Includes all assaultive behavior, e.g., punching, slapping, grabbing, cutting, burning, the use of weapons and/or forcibly restraining the senior.
- B. **Sexual Abuse:** Includes not only forcible or non-consensual touching, but touching where the victim is **unable** to give consent, e.g., victim suffering from advanced Alzheimer’s Disease.
- C. **Psychological/Emotional Abuse:** Includes intimidation tactics, threats to kill or hurt the senior, a family member or a beloved pet. Threats to damage personal property like sentimental items or to burn down the house. Threats to send senior to a nursing home. Also includes controlling and isolating the senior. [E.g., taking away “assistive devices” or medications as discussed above.]
- D. **Neglect:** The refusal, failure or inability to carry out a caretaking responsibility such as withholding food, medicine, aids [glasses, hearing aids, dentures, walker, etc.]; not providing proper hygienic care; not frequently moving a bed-ridden senior; or not providing needed medical care.

**FYI #6:** *Self-Neglect* is the refusal, failure or inability of a senior to properly care himself. While this is not a form of “elder abuse” because it is not being committed by a third party, intervention is necessary to prevent serious harm.

- E. **Financial Abuse:** Using threats to force the senior to give money, power of attorney, or any other access to assets. The unethical use of the senior’s money or assets by anyone including a “friend”, family member or caretaker.

## III. HELPFUL TIPS

- A. Be suspicious when you see: bed sores, bruises [old and new/various stages], lacerations [old and new/various stages/scarring], dehydration, malnutrition and/or over-medication [to keep the senior sedated so they won’t be “a bother” or “wander”]. **\*\*Affirmatively look for “grab marks” and other injuries.** If the senior is wearing a sweater, ask her if she would mind removing it. **\*\*Is the victim taking any medications or blood thinners that would cause easy bruising??** Important to know when assessing a situation.

- B. Beware of caregivers giving the senior homeopathic or over-the-counter remedies. Find out if the senior is taking these remedies voluntarily and whether the senior is being harmed by them. Should these remedies be taken when the senior is taking prescribed medications? Check with a doctor or pharmacist.
- C. When caregiver or companion re-enters the room, watch the senior's reaction. Does the senior curl up, cover his/her face or genital area? This may be a sign that the companion is an abuser. Also, watch the companion/caretaker. How does that person interact with the senior?
- D. Does the caregiver refuse to let you speak to the senior alone? Does the caregiver answer for the senior? This can be controlling behavior, as well as suspicious.

**FYI #7:** Having bed sores, bruises or poor hygiene isn't necessarily a condition of old age. [Not all seniors "bruise easily".] It can be a sign of elder abuse. Don't dismiss it. Look into it further. *The senior's life could depend on it.*

**FYI #8:** If you are not sure whether it's elder abuse, speak with the ER doctor or hospital social worker. Speak with a geriatrics specialist, if one is available at the hospital. You can also call your local District Attorney's Office, Adult Protective Services or Office for the Aging. If it is even *possible* elder abuse, you must investigate further!

**FYI #9: Not all cases of neglect are criminal.** Many times, family members are trying to care for the senior, but are just not able to properly do so. Other times, family members may be in denial. For example, a husband may not want to face the fact that his wife has Alzheimer's Disease. He may feel that she is able to care for herself, as she always has. However, she is suffering from malnutrition and dehydration. Clearly these families need help. Your local Office for the Aging will be able to assist them. Many times, the senior may be entitled to services which are free or covered by Medicaid. Speak with the hospital social worker regarding your investigation so the proper referrals can be made. Try to follow-up so the case does not "fall through the cracks".

#### IV. WHAT DO WE NEED TO PROSECUTE?

- Document your observations of the senior including the injuries and reaction to the caregiver.
- Document your observations of the caregiver [Does the caregiver refuse to leave the senior's side, refuse to let you speak with the senior alone, answer for the senior, etc? Document it.
- Document what the senior tells you—indicate the emotional state of the senior [e.g. crying, shaking and stated that her son beats her.] This is very important because these statements may be used at the trial of the abuser.

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- Document whatever the caregiver says to you [e.g. if the caregiver claims the senior fell down—especially if the injury is not consistent with the story.].
- Photograph the injuries and general physical condition of the senior.

**\*\*DON'T FORGET TO INCLUDE DATES, TIMES, PLACES AND PEOPLE PRESENT WHEN DOCUMENTING THIS INFORMATION. MAKE SURE THE DATE AND VICTIM'S NAME ARE ON PHOTOGRAPHS, AS WELL THE PHOTOGRAPHER'S NAME.**

**\*\*REMEMBER--IF IT'S AN EMERGENCY, CALL 911 !! IF YOU ARE LAW ENFORCEMENT AND YOU ARE NOT SURE ABOUT A SITUATION, HAVE THE SENIOR BROUGHT TO A HOSPITAL FOR EVALUATION OR CALL ADULT PROTECTIVE SERVICES.**

**\*\*BEWARE! DO NOT CALL 911 IN FRONT OF THE ABUSER OR TELL HIM THAT YOU ARE DOING SO. STEP OUTSIDE AND CALL. WAIT FOR POLICE AND TELL THEM WHAT HAPPENED. DO NOT TOUCH ANY CONTRABAND IN THE HOUSE, I.E., GUNS, DRUGS, ETC.. AGAIN, CALL 911. The last thing you want to do is take the contraband to the police station—Murphy's law will take over...you will get pulled over for a traffic infraction and then get arrested for possession of the gun!**

***GOOD LUCK!***

**Hypothetical – Deed Theft Case** (10 minutes)

Mr. M was an elderly man (91 years old) who lived at and owned a property in Jamaica, Queens. Mr. M was suffering from Alzheimer's Disease. During the last years of Mr. M's life, Ms. G, the daughter of a family friend, befriended him. Ms. G initially reached out to Mr. M for help with her financial problems. She also offered to help manage Mr. M's financial and personal affairs. As their relationship developed and their visits increased, Ms. G began to exercise pervasive influence and control over Mr. M. Ms. G used her influence over Mr. M to distance him from his family. Due to Ms. G's efforts, Mr. M became estranged from his family and entrusted Ms. G to handle his affairs. Mr. M's daughter told her father, out of concern, to stop spending time with Ms. G, but the relationship continued to grow. Aside from her influence over his family life, Ms. G began paying Mr. M's bills with blank checks from his checkbook. Ms. G also had full access to all of Mr. M's files and records.

After Ms. G had exercised control over Mr. M, she arranged for the sale of his home to her friend. Mr. M's house was sold to Ms. T and a large mortgage was taken out by Ms. T on the property. Mr. M. had no recollection of this transaction and received no proceeds of the mortgage. Ms. T stopped paying the mortgage and Mr. M's home ended up in foreclosure.

As part of Ms. G's scheme to defraud Mr. M, she also twice accompanied him to refinance a rental property he owned in Bayside, New York. Ms. G retained all of the proceeds from the mortgage and never made monthly mortgage payments. Mr. M has no knowledge of the transactions and this property also ended up in foreclosure.

## DEED THEFT CASES: CLAIMS AND DEFENSES (20 minutes)

May include, but are not limited to:

### 1. **Fraud, Conspiracy, Aiding and Abetting**

- a. **Fraud**: to recover damages for fraud, party must prove by clear and convincing evidence that (1) defendant made representations or omissions as to material fact; (2) which are false and known to be false by defendant; (3) that representation was made to induce reliance by plaintiff; (4) that plaintiff's reliance was reasonable; and (5) that plaintiff was injured.
- b. Fraud must be pled with particularity; but this requirement is not to be so strictly construed as to prevent otherwise valid cause of action where it may be impossible to state in detail the circumstances constituting fraud without further discovery. *Jered Contr. Corp. v. New York City Transit Authority*, 22 N.Y.2d 187, 194 (1968). Rather, sufficient facts must be pled so as to lead to a "reasonable inference" that fraud occurred. *Pluideman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486 (2008).
- c. A mortgage and note procured by fraud in the inducement is voidable and may be rescinded. *Lapis Enterprises Inc. v. International Blimpie Corp.*, 84 A.D. 286 (2nd Dept. 1981). Fraud in the factum, including by forgery renders a deed or mortgage null and void initio, and any subsequent deeds or encumbrances are likewise void. *Marden v. Dorothy*, 160 N.Y.39 (1899).
- d. "[A] deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid." *ABN AMRO Mortgage Group, Inc. v. Stephens*, 91 A.D.3d 801, 803 (2nd Dept. 2012); *Cruz v. Cruz*, 37 A.D.3d 754, 754, 832 (2nd Dept. 2007).
- e. False pretenses means "fraud in the factum." *Wells Fargo Bank, NA v. Edsall*, 22 Misc.3d 1113(A) (Sup. Ct. 2009) (citing *Betz v. N.Y.C. Premiere Prop., Inc.*, 38 A.D.3d 815 (2nd Dept. 2007)).
  - i. "Fraud in factum" means that one "was induced to sign something entirely different than what he thought he was signing." *First Nat. Bank of Odessa v. Fazzari*, 10 N.Y.2d 394, 397 (1961).
  - ii. It also "connotes an attack upon the very existence of a contract from its beginning, in effect alleging that there was no legal contract and that the instrument never had valid inception." *Norstar Bank of Upstate N.Y. v. Office Control Sys., Inc.*, 165 A.D.2d 265, 267 (3rd Dept. 1991).
  - iii. A claim for fraud in the factum requires an "allegation that the defendant was unable to read or understand the nature of the instrument he signed..." *Id.*

- f. **Connecting other actors to fraud:** other actors may include the real estate and/or mortgage broker, title company, settlement agent, appraiser, lawyer (recruited by broker or lender to “represent” the borrower/purchaser).
  - g. **Conspiracy to defraud:** (or commit some other tort) is not an independent cause of action under New York law. *See Alexander and Alexander of New York v. Fritzen*, 68 N.Y.2d 968 (1986). However, liability for fraud may be premised on knowing participation in a scheme to defraud even if that participation itself does not suffice to constitute the fraud. *Kao Fend Corporation v. Ma*, 669 N.Y.S.2d 575 (1st Dept. 1998). Allegations of conspiracy to commit the underlying wrong must connect actions of separate defendants with otherwise actionable tort.
  - h. **Aiding and abetting:** the elements for an aiding and abetting claim are (1) the existence of fraud; (2) actual (not constructive) knowledge of the fraud and (3) substantial assistance to the fraud on the part of the aider and abettor. *Phifer v. Homesavers*, 2007 WL 4295605 (EDNY).
2. **Claims and/or defenses against particular parties:** in addition to pleading fraud, conspiracy, aiding and abetting, or violation of GBL 349 where applicable.
- a. **Real Estate Broker:**
    - i. Possible violation of fiduciary duty
    - ii. UDAP claims – e.g. violations of licensing laws, failure to disclose whether broker acted as agent of seller or buyer
  - b. **Mortgage Broker:**
    - i. *See* Banking Law section 590(b)
  - c. **Seller:**
    - i. Caveat emptor doctrine strictly applied unless seller engages in fraud. *See Stamovsky v. Ackley*, 169 A.D.2d 254 (1st Dept., 1996).
    - ii. Breach of contract
  - d. **Attorney:**
    - i. Malpractice
    - ii. Breach of fiduciary duty
    - iii. Negligence
  - e. **Settlement or closing attorney/agent:**
    - i. Under agency law, settlement agent’s actions imputed to principal, e.g. lender, unless lender can show that agent acted adversely to principal’s interest and totally abandoned principal’s interest.
  - f. **Appraiser:**
    - i. May be liable for negligence to home purchaser if appraiser knew that third party (home purchaser) would rely on appraisal. *See White v. Guarente*, 43 N.Y.2d 356 (1977); *Chemical Bank v. National Union Fire Insurance Co.*, 74 A.D.2d 786 (1980).
  - g. **Servicers of the loan:**
    - i. May be liable for breach of duty of good faith and fair dealing for conduct with respect to collecting mortgage and escrow payments.

### 3. Quite Title

- a. In an action to quite title, the defendant bears the burden of proving valid title. Under Article 15 of the R.P.A.P.L., “[s]uch an action is essentially an action for a declaratory judgment to determine legal title wherein a defendant must establish his own good title to the property in order to prevail.” *Ossining v. Lakin*, 5 Misc.2d 1024, 1026 (Sup. Ct. Westchester County 1957).

### 4. Constructive Trusts

- a. “Courts can and will impose constructive trusts whenever necessary to satisfy the demands of justice.” *Cruz v. McAneny*, 816 N.Y.S.2d 486, 490 (2nd Dept. 2006).
- b. In order to establish a constructive trust, the party must show: i) a confidential or fiduciary relationship; ii) a promise, express or implied; iii) a transfer in reliance on that promise; and iv) unjust enrichment. *Bankers Sec. Life Ins. Soc. V. Shakerdge*, 49 N.Y.2d 939, 940 (1980); *See also, Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976).
  - i. These elements are flexible guidelines by which the court may determine whether to impose a constructive trust “and are not talismanic”, rigid, or narrowly drawn. *Reiner v. Reiner*, 474 N.Y.S.2d 538, 541 (2nd Dept. 1984); *See also Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978); *Lester v. Zimmer*, 542 N.Y.S.2d 855, 856 (3rd Dept. 1989). Moreover, the absence of one factor will not prevent the imposition of a constructive trust when it is required by equity. *Simonds*, 45 N.Y.2d at 241.
- c. Where a technical or formal fiduciary relationship is missing, an informal fiduciary relationship will still be found to exist under certain circumstances. *Penato v. George et al.*, 383 N.Y.S.2d 900, 905 (2nd Dept. 1976).
- d. In the absence of a formal fiduciary relationship, courts generally consider the following “factors in making [a] determination of whether a confidential relationship exists: the degree of kinship of the parties; the disparity in age; health and mental placed in the dominant party.” *In re Estate of Kaminski*, 200 Ill.App.3d 309, 312-313 (1990). Furthermore, the level of dependence of one party on the other as evidenced by any disparity of education, age, or experience is significant in establishing a fiduciary relationship for the purposes of a constructive trust. *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976).
- e. Finally, “a familial relationship... can provide the basis for finding the existence of a confidential relationship.” *Rahman v. Ahmed*, 37 Misc. 3d 1215(A) (N.Y. Sup. Ct. 2012). *See also Enzien v. Enzien*, 96 A.D.3d 1136(3rd Dept. 2012); *Matter of Almasy v. Ward*, 53 A.D.3d 946, 947 (3rd Dept. 2008).

### 5. Incompetency:

- a. Contracts by incompetent individuals are voidable. *Orterlere v. Teachers’ Ret. Bd. Of City of New York*, 25 N.Y.2d 196, 202 (1969).
- b. The contract is “voidable at the election of the incompetent person upon recovering his reason or at the election of his committee or personal

representative or heirs.” *Verstandig v. Schlaffer*, 296 N.Y. 62, 64 (1946). And the contract has force and effect “until the option to declare it void is exercised.” *Blinn v. Schwarz*, 177 N.Y. 252, 263 (1904).

- c. If a mentally incompetent individual elects to void the contract, and the other party can be restored to the *status quo*, rescission will be decreed upon a showing of “incompetence, without more...” *Faber v. Sweet Style Mfg. Corp.*, 40 Misc.2d 212, 214-5 (Sup. Ct. 1963). If the status quo cannot be restored and the other party did not know of the incompetence, and the contract was “fair and reasonable” rescission will be denied. *Id.* (citing *Mutual Life Ins. Co. v. Hunt*, 79 N.Y. 541 545 (1880)).
- d. The party alleging incompetency has the burden of proving it. *Id.* However, “once incompetence has been shown, the burden of proving lack of knowledge and fairness is upon the party asking that the transaction be enforced.” *Id.*