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# Forgotten Victims of Financial Crime and Abuse: Facing the Challenge

Lisa Nerenberg, MSW, MPH

**ABSTRACT.** This article summarizes the proceedings of four roundtable discussions, which were sponsored by the National Center on Elder Abuse, and held in conjunction with a conference on financial crime and abuse. The discussions focused on four components of the legal system: local law enforcement, federal investigative and regulatory agencies, the civil justice system, and victim witness assistance programs. Participants were asked to describe their role in preventing financial crime and the challenges they face in doing so. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-342-9678. E-mail address: <getinfo@haworthpressinc.com> Website: <<http://www.haworthpressinc.com>>]*

**KEYWORDS.** Criminal justice system, civil justice system, victim witness assistance, restitution, investigative agency, elder abuse, undue influence, mental capacity

Cases of elder financial abuse, which range from telemarketing scams to illegal transfers of property, pose myriad challenges to professionals. Many of these cases challenge society's basic understanding of such complex matters as cognitive functioning, mental capacity, and undue influence as workers attempt to interpret victims' ability to understand complex financial transactions and withstand increasingly sophisticated forms of persuasion. Further complicating matters is the fact that financial abuse exceeds the boundaries of any single disci-

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pline or jurisdiction. The lines between criminal conduct and “civil matters” are often unclear, which sometimes results in law enforcement personnel referring to the civil system cases involving the misuse of civil instruments (e.g., powers of attorney) even though the conduct may also be criminal. Because the roles and relationships between the two systems are not well understood, coordination between them is often poor. Even in cases that are clearly criminal, a lack of clarity may exist with respect to where jurisdiction lies as financial crimes may cross county, state, and federal boundaries. Depending on the nature of the offense, financial crimes may be handled by police, Medicaid fraud and control units, the Federal Bureau of Investigation, the Federal Trade Commission, the Secret Service, or others.

In addition to this lack of clarity with respect to the appropriate systems or jurisdictions for handling abuse cases, a variety of additional obstacles prevent many victims from getting the help they need and perpetrators from being brought to justice. Physical or cognitive disability prevents some victims from participating in the justice system. Particularly frail individuals are likely to decline, become incapacitated, or even die during the course of protracted proceedings; and it is not uncommon for cases to continue for many years, particularly when defendants must be extradited. Victims with diminished mental capacity who are unable to recall details of a crime or explain the impact it had on them may be poor witnesses. Although victim advocates could have a significant role in addressing these barriers to the legal system, many advocates lack familiarity with financial crime and abuse and their potential role has not yet been fully recognized or realized.

Finally, public and professional perceptions and attitudes about financial crime and abuse also impede efforts to prevent it. Many victims fail to perceive financial crimes as crimes. A study on telemarketing fraud conducted by AARP showed that although victims felt that what had been done to them was wrong, the majority did not understand it also was criminal. Some victims fail to report because they distrust the system, fear retaliation, or believe offenders might sue them while others lack confidence in the system’s ability to help them. Many victims simply want to recover what they have lost and do not believe that reporting to the police will accomplish this.

To achieve a clearer understanding of the roles and interrelationships between all of the systems involved in stopping and preventing

financial crime, the remedies and resources they offer, and the challenges that those working within them face, a series of roundtable discussions was conducted in San Francisco on October 29, 1998. The discussions were sponsored by the National Center on Elder Abuse (NCEA) and convened in conjunction with the "Forgotten Victims of Financial Crimes" conference. The conference, which drew an audience of well over two hundred professionals from a wide range of disciplines, was co-sponsored by the Northern California Office of the U.S. Attorney's Office, the San Francisco Consortium for Elder Abuse Prevention at the Goldman Institute on Aging, the San Francisco District Attorney's Office, and San Francisco SAFE.

Each roundtable discussion focused on one of four systems: the criminal justice system, the civil justice system, the victim witness assistance network, and federal investigative and regulatory agencies. Participants included local, state, and national experts. The sessions followed similar formats: Participants were asked to introduce themselves and the organizations they represented and briefly describe the challenges they face in handling financial crime and abuse cases. Following introductions and opening comments, the groups engaged in lively discussions about common areas of concern and promising approaches to addressing problems. The groups were also asked to offer recommendations for new services and public policy reform that would improve systemic responses to the problem. This article summarizes the issues and challenges defined by the participants. The content, therefore, reflects the views and opinions of the participants.

#### ***CHALLENGES FACED BY LOCAL LAW ENFORCEMENT IN STOPPING ELDER FINANCIAL CRIME***

Members of the local law enforcement roundtable included police officers, sheriffs, prosecutors, and social service providers. Foremost among the challenges the group members cited was the critical lack of available training for all levels of law enforcement personnel in handling financial abuse cases. Proving financial crimes frequently requires familiarity with such diverse topics as contract law, real estate, guardianship, and mental capacity. Investigators and prosecutors may need to decipher civil contracts and financial documents, prove what victims did and did not understand (often at earlier points in time), and determine what defendants knew or reasonably should have known

about victims' levels of understanding. Because these topics are not covered in traditional law enforcement training curricula or programs, few police officers within local precincts, even command staff, possess this expertise. Similarly, prosecutors are unlikely to have received training in these areas. Those officers and prosecutors with this type of expertise are likely to be so inundated with cases that they are forced to prioritize those that involve a large number of victims and large losses. Without training, law enforcement personnel who come into contact with financial crimes are forced to pick up needed skills "on the run." Exacerbating the problem further is the fact that law enforcement agencies typically rotate staff through their various units. By the time fraud investigation personnel have acquired the expertise that is needed, they are likely to be transferred back to other divisions, or may be ready for retirement.

Lacking adequate training, law enforcement personnel may fail to recognize financial crimes or respond to them in a timely manner. In particular, crimes involving the misuse of civil instruments (e.g., the forging of wills or powers of attorney or inducing mentally incapacitated persons to transfer titles of their homes), are likely to be viewed as civil matters and referred to attorneys. Even when law enforcement personnel do get involved, they are apt to miss the "broader picture" or the direction in which cases are likely to proceed. For example, lacking knowledge about common patterns, investigators may be well into cases before it occurs to them to find out if victims are being over-medicated or under-medicated (homicide cases involving victims who are poisoned or deprived of nourishment for financial gain are becoming increasingly common). Unless these patterns are recognized, victims may be dead and cremated before the investigator makes the connection.

Further frustrating law enforcement personnel is the fact that financial crimes are often repetitive in nature. Victims are likely to be repeatedly targeted and re-victimized, while perpetrators are likely to re-offend many times. This recycling of cases, which creates a significant drain on already limited resources, has been attributed to characteristics of both victims and perpetrators.

In the case of impaired victims, many never realize that they are being victimized. As a result, protective mechanisms or supervision are not put into place and the abuse continues unchecked. The recycling of cases can also be attributed to the lack of systems in place for

tracking suspects or convicted offenders. Offenders can (and do) relocate to avoid arrest and those who are caught and prosecuted often simply relocate and start operating again after they have completed their sentences. It has been frequently observed that many ex-convicts become paid caregivers for vulnerable individuals. This practice continues because most states still do not require criminal background checks and do not prohibit persons who have been convicted of certain crimes from working with the elderly. The relatively light sentences that are typically imposed on perpetrators also fail to deter perpetrators from re-offending.

Investigating financial crimes is extremely complex and labor intensive. Pertinent documents are frequently in the hands of offenders or they have been destroyed. When perpetrators and/or victims are members of immigrant groups and do not speak English, it can further complicate investigations. Proving cases may also involve proving that perpetrators had special relationships with their victims (e.g., relationships of trust); establishing the existence or nature of these relationships can be extremely difficult. In addition, many victims do not make good witnesses owing to the same attributes or conditions (e.g., dementias) that render them susceptible to this type of abuse in the first place.

Problems with jurisdiction further complicate matters. In many cases, victims reside in different jurisdictions from perpetrators and evidence may exist in still other jurisdictions. For example, bank records that are needed to prove a case may be stored in a different state from that in which the crime occurred, requiring law enforcement officers to work through another jurisdiction to obtain a search warrant. Even within a single law enforcement agency, it may not be clear which unit is the most appropriate for handling financial crimes that occur in concert with other types of crime including assault, neglect, false imprisonment, or homicide.

Another common frustration voiced by members of the group is the likelihood that assets will be depleted or dissipated by the time cases are prosecuted. While investigations are in progress, suspects often continue to exercise legal control over victims' assets and influence and control over victims themselves. Many states have inadequate laws to freeze victims' assets or keep suspects away from their victims while investigations are in progress.

The fact that costly and complex criminal investigations could have

been avoided is also a source of frustration to law enforcement personnel. Many financial crimes or abuse could have been prevented or circumvented if adequate “front end” protections had been in place. For example, perpetrators often commit crimes using documents such as powers of attorney. Despite the fact that these instruments can be used to take over someone’s life savings, transfer the title of their home, or cash out their stocks or CDs, there is very little tracking or accountability for fiduciaries.

Investigating financial abuse cases are particularly time-consuming and may exceed the statutes of limitation typically applied to them. Many crimes are discovered long after they have been committed and securing needed evidence can be extremely time consuming. Banks are typically reluctant to release records to law enforcement for fear of breaching confidentiality or exposing themselves to lawsuits. The turn-around time for getting search warrants and serving financial institutions can be significant, particularly since banks’ records are likely to be stored in other states. Cases involving highly technical issues of disclosure and fraudulent misrepresentation require extensive fact-finding and background work that may take months to complete.

Most police and prosecutors’ offices lack adequate resources for handling these complex cases. Some police and prosecutors divide their time between elder abuse, domestic violence, general fraud and theft, and child abuse cases. In addition to insufficient in-house staff, prosecutors’ offices often lack funds to hire expert witnesses, including experts in gero-psychiatry (to evaluate mental capacity and undue influence), whose testimony is often critical. Some units lack resources to even pay for simple services like researching bank files or duplicating bank records. When a law enforcement agency cannot pay these costs, they may simply give up an investigation.

Members of the law enforcement roundtable attributed the lack of sufficient resources that have traditionally been devoted to this type of crime as stemming from the low priority placed on them by most police agencies and prosecutors’ offices. Often “property crimes” are seen as less serious than violent crimes. Because law enforcement agencies are “statistic-driven,” it is not surprising that, when faced with having to choose between financial crimes and those that can be resolved more quickly, law enforcement personnel are likely to assign a lower priority to financial crimes. Without “buy-in” from chiefs,

sheriffs, city managers, mayors, Boards of Supervisors, and City Councils, agencies are unlikely to provide sufficient resources.

### ***THE ROLE OF THE CIVIL SYSTEM IN ELDER FINANCIAL CRIME AND ABUSE PREVENTION***

Participants in the civil system roundtable included private attorneys, private professional guardians, probate court personnel, an expert in undue influence, and social service providers.

Civil courts and attorneys become involved in elder abuse cases under a variety of circumstances. Guardianships (called conservatorships or committeeships in some states), which is the court appointment of an individual to supervise and make decisions for an impaired individual), are often sought as a vehicle for preventing exploitation. Civil attorneys may become involved in initiating lawsuits to recover stolen or misappropriated money or assets, challenging bogus marriages, contesting guardianships, and petitioning courts for accountings of expenditures by attorneys in fact. More importantly, civil attorneys can help prevent abuse by designing protective legal mechanisms like trusts and durable powers of attorney. Civil actions can also be an effective means for recovering victims' losses.

#### ***Mental Capacity and Undue Influence***

In developing protective interventions and assessing whether abuse has occurred, those working within the civil system are often called upon to assess older persons' ability to understand transactions and withstand undue influence. For that reason, members of the civil roundtable focused considerable attention on the complexities of these determinations. They called for clearer definitions, better instruments to measure these functions, and greater guidance for court personnel in making determinations based on these factors.

Mental capacity is the collection of mental skills required to perform everyday tasks, including memory, reason, the ability to calculate, the ability to modulate emotions, etc. Different tasks require different mental skills. Paying bills, for example, requires that the bill payer remember when the bills need to be paid and be able to perform simple calculations. Financial abuse frequently involves the transfer of

assets through instruments like wills and powers of attorney. Although these documents are improper or illegal if the older person lacks the mental capacity to understand what they are signing, the nature or standards of capacity that are needed for certain transactions are better understood than it is for others. For example, there is general agreement about testamentary capacity, or the degree of capacity necessary to make a will, but less agreement about the level of capacity needed for other common contractual agreements, such as giving gifts or getting married.

Undue influence, which is the concerted, deliberate effort to assume control over another person's decision making, is another concept that is fundamental to understanding and responding to financial abuse against vulnerable persons. Just as transactions made by persons who lack mental capacity are not legal, transactions by persons who are victims of undue influence are also illegal. Several legal standards exist for defining undue influence, and, not surprisingly, there is disagreement over which standard should be used in specific instances. The broad definition, which has its roots back to the time of Sir Francis Bacon, defines undue influence as one person taking unfair advantage of another.<sup>1</sup> A much narrower interpretation, and one which has been used by appellate courts in California, characterizes undue influence as "substituting the will" of the victim for that of the perpetrator, a standard that is extremely vague and difficult to prove.

Although persons with diminished mental capacity are vulnerable to undue influence, mentally competent persons can also be unduly influenced. Commonly used mental status exams, even those administered by capable neuropsychologists, fail to assess susceptibility to undue influence. Part of the difficulty in identifying and defining undue influence stems from the fact that it is a process as opposed to a discrete action, event, or condition. It involves what is often a series of interactions by powerful influencers who use their power and authority to play upon the vulnerable person's fears, loneliness, and disability. In order to prove that undue influence has been exercised, courts and advocates need to understand these processes. Courts are increasingly relying upon expert witnesses to trace these patterns and help attorneys and judges understand what has happened.

***Probate Guardianship: Balancing Protection and Civil Liberties***

The benefits and limitations of guardianship figured prominently in the civil roundtable participants' discussion. As described earlier, guardianship is a mechanism by which courts appoint persons to handle the financial and/or personal affairs of individuals who are unable to protect themselves as the result of disability. Guardianships are typically granted to stop abuse when severely impaired victims are unable to grasp the severity of their situations and refuse needed services. It can be an effective remedy when family members are quarreling over the custody or assets of impaired elders or when adult children want to claim inheritances prematurely or influence their elder family members to make new wills. Guardianship may also be appropriate when less restrictive legal devices, such as durable powers of attorney or trusts, have been misused.

Controversy has historically surrounded guardianship owing to the profound implications of stripping individuals of their most basic civil liberties. Although guardianship can be a powerful vehicle for stopping or preventing financial abuse, it can further become a license to steal if granted to untrustworthy individuals. In the mid 1970s, the Associated Press published a national exposé on guardianships which revealed rampant abuse, including situations in which court appointed guardians stole money from those they were charged to protect. The study also revealed widespread disregard for the civil liberties of seniors citing, for example, instances in which guardianships were granted solely on the basis of a single physician's judgment that a person was mentally incapacitated (regardless of whether the physician had expertise in making this type of assessment). These revelations led to Congressional hearings<sup>2</sup> and major reforms in some states, including California. Despite the progress that has been made, the system is still vastly inadequate nationwide. Most courts throughout the country lack the resources to provide adequate investigation and ongoing monitoring of guardianships. In addition, most states do not have public guardians.

The civil roundtable participants' discussion highlighted many of the repercussions of California's guardianship reform initiatives. Although the state's system is among the most progressive in the nation, it has come at a high price, which is often borne by those it is charged

to serve. For example, in California, the costs of investigating proposed conservatorships are charged to the incapacitated person's estate whenever possible. Because the process is already costly and complex, the recently added requirement that proposed guardians try less restrictive alternatives prior to filing has led to some criticism. Critics believe that these added responsibilities might potentially discourage trustworthy family members from becoming guardians or that they create an additional burden for public guardians who already lack sufficient resources.

Courts are also increasingly appointing separate counsel for alleged incapacitated persons, and there is discussion as to whether courts should routinely do so in all cases. Much of this debate stems from the fact that fees for court appointed lawyers come from the incapacitated person's estate, which may create hardships for persons with limited estates. Some jurisdictions are able to pay court appointed attorneys from public funds although it is usually at a lower hourly rate than attorneys typically charge.

Members of the civil roundtable further cited the shortage of affordable guardians as a critical problem. Although the overwhelming majority of guardians are family members, many vulnerable seniors do not have trusted family members or friends available to serve in this capacity. Public guardianship programs were created to serve these individuals, but most communities do not have public guardians. In communities in which they exist, the demand often far exceeds the supply.

This shortage of guardians has fostered the emergence of the relatively new field of private professional guardians and fiduciaries. Several private non-profit agencies across the country have also started guardianship programs. Ironically, this development has had a negative impact on public guardians' ability to serve low income and indigent clients. Although public guardians are publicly funded, they have historically lacked adequate resources to accept all clients in need. Like private guardians, public guardians are authorized to charge fees to the estates of clients who can afford to pay and have depended upon these fees to supplement public funds. With increased numbers of private professional guardians, public guardians find themselves in competition with private professionals and agencies for clients who have assets, thereby reducing public guardians' resources for serving the poor.

Ensuring accountability by private, professional guardians and fiduciaries is also problematic. At present, this rapidly growing new profession is unregulated; the sole requirement for becoming a private professional guardian in most states is to be over the age of 18. (In California, private professional conservators must register with the court in the jurisdiction in which they practice. They are fingerprinted and a criminal background check is done.) This is in spite of the fact that fiduciaries control a huge amount of wealth (a survey conducted by the Southern Region of the California Association of Private Professional Fiduciaries revealed that its members alone handled over \$5 billion dollars in assets).

This lack of regulation and oversight is troubling to responsible members of the profession as well as to outsiders. In California, private professionals have repeatedly initiated efforts to regulate their profession by creating oversight mechanisms and certification requirements but these efforts have been unsuccessful. One motivation behind the initiatives has been to reduce some of the risks that have prevented private professional fiduciaries from securing malpractice insurance. It was only after a long struggle that private fiduciaries in California were finally able to purchase malpractice coverage, but the price is still prohibitively high.

Finally, the negative stigma attached to guardianship has historically made it the alternative of last resort for most families. To some seniors, the threat of being placed under guardianship is as terrifying as the threat of nursing home placement.

### ***Shortage of Attorneys to Handle Elder Abuse Cases***

Civil attorneys play a significant role in elder abuse cases by helping victims recover misappropriated assets, challenging bogus marriages, filing for accountings by attorneys in fact, contesting guardianships, etc. There is, however, at present, a critical shortage of attorneys to handle these cases in most communities.

Private attorneys have few incentives to take abuse cases, which are risky from a financial perspective. Many cases are extremely time consuming and if the victim dies before the case is resolved, lawyers may not get paid. California's Elder and Dependent Adult Protection Act (EADACPA)<sup>3</sup> was created to address these problems by providing for treble damages, post mortem recoveries, and enhanced penalties. Many observers believe, however that the law has failed to achieve the

desired effect. Attorneys' fees are often difficult if not impossible to collect and courts have failed to offer much support in requiring perpetrators to pay. Perpetrators are often "judgment proof," that is, they have no assets from which victims can be reimbursed and attorney fees paid. It has also been observed that civil judges who handle abuse cases, unlike judges who routinely handle personal injury litigation, are reluctant to award attorneys' fees, especially in cases in which the damage is small and the fees are high by comparison. When defense attorneys offer to settle, the first thing that often gets struck from the settlement is attorneys' fees.

Although publicly funded legal assistance programs are increasingly receiving referrals for abuse cases, these programs have experienced severe retrenchments in recent years and lack the resources to meet the existing demand, particularly since abuse cases tend to be extremely complex and labor intensive. Some communities have started programs, many of which are sponsored by Bar Associations, to enlist private attorneys to provide pro bono service.

Members of the civil roundtable observed that effectively handling complex financial abuse (e.g., contesting guardianships or wills) requires skills that are unlikely to be found in the same person. Personal injury and medical malpractice attorneys who are skilled in litigation are rarely versed in estate planning. Conversely, estate planners are not typically skilled in litigation.

Finally, the standard of proof typically applied to abuse cases in the civil system was cited as a cause of concern to some members of the group. Some believe that the "clear and convincing" standard of proof is too high to meet in many cases, preferring instead the "preponderance of evidence" standard.

### ***Lack of Accountability with Powers of Attorney***

Members of the civil roundtable also discussed the benefits and risks of powers of attorney. A general power of attorney is a legal document through which one individual (called the "principal") appoints another individual (called the "agent" or "attorney in fact") to act in place of, or on behalf of, the principal. Older persons who cannot get to the bank because of physical disability, for example, may grant a power of attorney to someone they trust to perform the task for them. A durable power of attorney (DPA) is a type of power of attor-

ney that “endures” after the onset of incapacity. A DPA must contain certain words indicating that it is intended to be durable (e.g., “this power of attorney shall not be affected by the subsequent incapacity of the principal”). Without this provision, the power of attorney is non-durable and terminates once the principal becomes incapacitated. Executing a DPA allows a competent elder to choose a trustworthy person to handle his or her affairs and continue to do so even in the event that the principal becomes incapacitated. The power may become effective at the time it is signed or, in the case of a “springing power of attorney,” at a specified future time, or on the occurrence of a specified future event or contingency (e.g., the subsequent incapacity of the principal). DPAs provide a simple, inexpensive tool for financial management and planning for the future.

Like other devices that were created to provide protection, powers of attorney can also become “licenses to steal” if the authority is given to or taken by untrustworthy individuals. Common abuses include inducing persons with cognitive impairments to sign powers of attorney (this is illegal, regardless of the type of power), using the power after it has terminated (e.g., the principal becomes incapacitated and the power is not a durable one), or using the power for purposes other than those for which it was intended.

At present, there is little oversight to protect against abuses by attorneys in fact. Few states require any type of registration and most do not require lawyers’ involvement in drafting the documents or witnesses to ensure that the agent has mental capacity and is not being coerced into signing. Although notary publics are typically required to witness the signing of powers of attorneys, it is not the role of notaries to assess mental capacity (see the following section). Without guidance, many elders do not realize the extent of the authority they are assigning to their chosen agents. Because few states have formal procedures for revoking the powers, attorneys in fact can, and often do, continue to use them even after they have been revoked. Because there is no requirement that the principal be notified when a power of attorney is used, competent principals are unable to monitor the actions of attorneys in fact.

When abuses occur, they are difficult to prove or rectify. For example, courts frequently encounter situations in which it appears that a principal lacked capacity at the time (s)he signed a document. These situations, however, raise ethical dilemmas for court personnel; al-

though the appropriate course of action would seem to be to revoke the power, the principal must possess mental capacity to do so. A temporary guardianship could be established to suspend the power, but initiation of a guardianship is relatively expensive and burdensome if the sole intent is to accomplish a single action.

Although some states have explored ways to bring more accountability into the system, these efforts have met with mixed success. For example, California passed legislation allowing for court monitoring of powers of attorney but some court personnel are dissatisfied with the new law, which places them in the position of being asked to monitor attorneys in fact with insufficient information or resources. Because the law does not provide for courts to receive inventories and appraisals when the powers are first enacted, accountings at a later point in time have little meaning.

***Lack of Clarity Regarding “Key Players”  
in the Civil Process***

Members of the civil roundtable further discussed the lack of clarity by the public and professionals regarding key players in the civil process. This includes a lack of understanding regarding the role of notary publics who witness the signing of certain documents such as powers of attorney. It was observed that the witnessing of document-signing may create a false sense of security by creating the illusion that there is greater oversight and accountability than actually exists. The witnessing by notaries is, in fact, simply to ensure that the signer is the person s(he) claims to be. Notaries are not trained in assessing mental impairment nor are they typically required to report problems.

The roles and functions of attorneys in certain civil proceedings is also poorly understood by the public and even some professionals. Until recently, family lawyers sometimes represented both the alleged incapacitated person and the proposed guardian in guardianship proceedings, posing an apparent conflict of interest. The public and many professionals still need to be alerted to these potential conflicts.

The precise role of court appointed counsel is also unclear. Although in most civil proceedings, the role of attorneys is to represent their clients' wishes (as well as advising them in legal matters), this may not be possible when a client has a mental impairment. Consequently, there is disagreement as to whether the role of court appointed attorneys is to defend their clients' wishes to the extent possible,

advocate for what they believe clients would have wanted if they did not have a mental impairment (substituted judgment), or advocate for what they believe is in the “best interest” of their clients.

***THE ROLE OF FEDERAL AGENCIES IN STOPPING  
FINANCIAL CRIME AGAINST THE ELDERLY***

Participants in the law enforcement roundtable included representatives from the Federal Trade Commission (FTC), the Federal Bureau of Investigation, the United States Attorney’s Office, the Secret Service, and other interested service providers.

Among the primary challenges cited by federal agencies in handling financial crimes were the number of agencies involved and the lack of clarity regarding the specific roles and jurisdictions of each. Financial crimes are federal if they involve the use of the mail, interstate transfers, the use of the telephone, or the misappropriation of federal benefits. Federal financial crimes that are commonly committed against the elderly include telemarketing fraud, the theft of Social Security or Supplemental Security Income checks, pension fraud, and crimes involving the use of credit cards or the Internet. The responsibility for investigating and prosecuting federal crimes may fall under the jurisdiction of the Federal Trade Commission (FTC), the U.S. Immigration Service, the Secret Service, the Federal Bureau of Investigation (FBI), the Department of Justice (through the U.S. Attorneys Offices and its other divisions), the Social Security Administration, and many others.

Further complicating matters is the fact that some financial crimes fall under more than one jurisdiction. An example is the sale of fraudulent “Medicaid qualifying trusts,” a multi-million dollar business in which victims are told that anything contained within the trust is not counted as an asset by Medicaid in determining eligibility. These false claims could be prosecuted by district attorneys, Medicaid fraud control units, or federal agencies (because perpetrators typically mail “instruction kits” to salespersons showing them how to sell the products). Because there is often disagreement or a lack of clarity regarding the appropriate jurisdiction in a particular case or type of crime, many cases “fall between the cracks.”

With so many agencies handling financial crime cases, victims are unlikely to know to whom they should report. Service providers and advocates are also unlikely to know which agencies handle specific

crimes. Even personnel from federal agencies may be unclear about jurisdiction in particular cases. For example, a crime involving a credit card could constitute both mail fraud and credit card fraud and could, therefore, fall under the jurisdiction of the Postal Service or the Secret Service.

Another primary cause of frustration cited by members of the group was the sheer number of victims affected. Cases of telemarketing or credit card fraud, for example, may involve hundreds or even thousands of victims. In addition, offenders seek out the same victims repeatedly or sell their names to others. The tendency for victims of financial crime to be re-victimized is so common in the fraudulent telemarketing business, for example, that “sucker” or “mooch” lists (lists of individuals who have been victimized in the past) are valuable commodities in and of themselves.

Further contributing to the problem is the fact that new crime trends emerge more quickly than federal response systems can be designed. Because new crimes are identified on an almost monthly basis and developing response systems may involve enacting new laws or changing policies, there is often a lag between the time a new crime is discovered and the point at which systems are set into place to address it. Examples include identity theft and Internet fraud, which recently became federal crimes years after the first cases were identified.

Further contributing to the magnitude of the problem is the high rate of offender recidivism. Because federal agencies lack the resources or mechanisms needed to track offenders, even those who have been prosecuted or restrained often resume business in other communities. Owing to inconsistent enforcement across the country (federal regulatory agencies have regional branches that set their own priorities), the same federal crime may be handled differently in one part of the country than in another. There is also significant variation across the country in how local district attorneys prioritize and handle cases. Owing to these inconsistencies in enforcement, certain geographic areas have become “safe havens” for perpetrators.

Members of the roundtable cited the dearth of information about the extent of the problem as an obstacle to securing adequate resources for prosecuting federal financial crimes and ensuring the rights of victims. At present, there is a lack of reliable and compelling statistics to demonstrate the incidence of the problem, patterns of victimization, and losses. Financial crime, for example, has never been included in

the United States Department of Justice's National Crime Victimization Survey, the major survey of its kind.

Problems in documenting the actual incidence of financial crime go beyond the limitations of existing reporting mechanisms. Victims are often reluctant to report financial crime out of shame or fear. Others are incapable of reporting as the result of disability. As described earlier, many victims do not know to whom they should make reports. Some do not know the extent of their losses. Many older people fail to report because they do not perceive certain types of fraud as crime.

### ***The Limited Impact of Prevention Efforts***

Members of the group expressed frustration with traditional approaches to preventing financial crime, which have tended to focus on alerting potential victims to common scams and fraudulent practices. The results of these efforts have often been disappointing because this type of outreach is virtually ineffective with many of the most vulnerable individuals, including those with mental impairments, those who are isolated, and individuals who are desperately in need of cash. Persons who are subjected to intense pressure or undue influence are also often impervious to warnings. Even knowing that the schemes are likely to be fraudulent, many victims continue to participate in hopes of recouping their losses.

### ***White Collar Crime Is Seen as Less Serious than Other Types of Crime***

Members of the federal crime roundtable shared with their local law enforcement counterparts the perception that financial crime is viewed as less serious than violent crime. They noted that although many advocates believe that current sentencing guidelines for financial crimes are not stringent enough, public opinion polls have revealed that most responders were satisfied with the existing guidelines. Competing demands on law enforcement personnel's time and resources, as well as the difficulties inherent in these cases, further contribute to the low priority that these cases are typically assigned.

## ***THE VICTIM SERVICE NETWORK'S ROLE IN ELDER FINANCIAL CRIME AND ABUSE CASES***

Members of the victim services roundtable included victim advocates from the local, state, and national levels; an expert in restitution reform; and other interested service providers.

In the last three decades, the role of victims within the criminal justice system has expanded significantly. Traditionally, the system viewed criminal acts as offenses against society and little attention was paid toward understanding or responding to the impact that crime had on victims or toward their psychological or service needs. Those who suffered financial losses were not compensated for their losses or assisted in recovering them.

In recent years, criminal justice personnel and victims' advocates have fought aggressively to acknowledge victims' right to participate in the criminal justice process. The Victims of Crimes Act (VOCA) of 1984<sup>4</sup> provided for new services and compensation to victims. Most states have enacted victims' rights amendments and statutes which give victims the right to be informed when offenders are released from custody, to tell courts how they were affected by the crime, and to have a voice in sentencing decisions. A national victims' rights amendment has been introduced in Congress which would set national standards for ensuring victims' rights.

Although these trends have significantly raised the status of victims, they have focused on victims of violent crimes, largely ignoring the needs of victims of financial crimes. Until very recently, VOCA victim assistance grants could not be used to fund services for victims of financial crime. Recent changes in VOCA regulations provide for assistance to financial crime victims but many advocates and victims are unaware of these changes. Victims of financial crimes are still not eligible to receive VOCA funded compensation.

### ***Problems with Restitution***

Members of the Victim Assistance Roundtable identified problems with the restitution recovery system as being among the most pressing challenges they face. Restitution, which is the monetary compensation that courts can require offenders to pay victims, is perhaps the right which is most valued by financial crime victims. All states offer some form of restitution and the federal government requires perpetrators of federal crimes to pay restitution in most cases. Many judges, however, fail to order restitution and prosecutors seldom ask for it. Other judges order restitution but fail to list victims' names on judgments, which makes it virtually impossible for victims to enforce the orders, use them to declare losses on their taxes, or seek recovery funds.

Members of the group observed that the failure to order restitution may be attributed to the fact that many judges and prosecutors believe that victims can seek civil remedies for recovering their assets or that offenders are unlikely to have assets with which to repay victims. Hiring civil attorneys to help them recover their losses, however, is beyond the financial reach of many victims.

Even at its best, the current system of restitution only serves some victims. Many offenders are never apprehended and an estimated 90 percent of all criminal defendants are indigent. Victims who suffer losses at the hands of these perpetrators have no recourse for recovering their losses. The current system also fails to consider the full value of victims' financial losses, which may continue to accrue long after sentencing has taken place. When perpetrators are charged with multiple counts, many counts are discharged in the course of plea negotiations and victims whose cases are dropped are often not considered eligible for restitution. In cases involving multiple victims, there is often no system in place or consideration given to determining who gets restitution or the order of priority. Owing to the difficulties involved in collecting restitution, those most likely to collect are victims who have the financial resources to hire attorneys. As a result, those in greatest need seldom receive restitution.

Victims may not receive restitution because they do not know they are entitled to it. Those who are not kept apprised of the continuing status of their cases are unlikely to be told that they are entitled to restitution. Some victims are not told to keep the criminal justice system notified of address changes; as a result, the U.S. Clerk of Court, or other agencies that distribute restitution, are not able to find them. In the federal system, restitution orders are enforceable for twenty years, which may exceed victims' life spans. Many victims and their families, however, are unaware that payments can be applied to victims' estates.

The failures of the restitution system can, in part, be attributed to the absence of a designated agency to oversee enforcement. There is currently disagreement over what agency is, or should be, responsible for the collection and enforcement of restitution. Some advocates feel that the responsibility should rest with probation departments, while law enforcement tends to view the collection of restitution as the responsibility of victims. With limited staffing, most probation per-

sonnel believe that their primary role is to supervise offenders and ensure the safety of the community.

Fragmentation within the recovery system makes it impossible to track the disbursement of restitution or ensure that the system is working properly. Restitution payments are collected by clerks' offices, financial litigation offices, or the U.S. Attorney's Office. Victim/Witness Assistance programs, which have ongoing contact with victims, may not have access to information about who is getting paid.

When restitution is ordered, victims are often unable to collect it. As a result of physical or cognitive impairment, severe depression, or stress, many victims are unable to do what is necessary to collect restitution. Some feel that recovering restitution should not be their responsibility. Others mistakenly believe that once restitution is ordered, it will be immediately available or collected for them.

Even victims who want to collect restitution, and have the mental and physical ability to do so, face formidable obstacles. Once restitution is ordered, information about the process, and even about their own cases, is often not readily available. Copies of judgments are often not provided to victims and securing information about their offenders may be difficult. Some victims do not know who their offenders are, where they live, or their status within the criminal justice system. The remedies available to victims differ depending on whether the perpetrator was prosecuted in the federal or local system and on the agencies involved. Even victim advocates, whose job it is to assist victims, are often ill informed about these processes.

A primary obstacle to restitution is the lack of effective mechanisms for preserving assets. Because financial crime investigations often take months or years, perpetrators' assets are often dissipated or hidden during the process, leaving little or nothing left for victims to collect. Time lags in collecting restitution also reduce the amount that is available.

Members of the victim services roundtable echoed many of the same concerns and frustrations voiced by members of the two law enforcement groups. These include the difficulties inherent in serving multiple victims, the pervasive belief that economic crime is less serious than violent crime (and with it, the corresponding lack of resources and low priority placed on these cases), and the limited effectiveness of traditional approaches to outreach.

As described earlier, some cases of elder financial abuse involve

dozens, hundreds, or even thousands of victims. For that reason, the existing system for ensuring victims' rights cannot begin to meet the need. Even notifying victims about the status of their cases is often impossible. With inadequate technology, some victim advocates still manually stuff thousands of letters to send out notices about hearings. Although most victims' services offices have toll free numbers, responding to individual requests or questions in a timely fashion is virtually impossible for advocates, particularly in light of variations in time zones and the complexity of the information that needs to be conveyed.

Beyond their need for information, victims also need services to help them recover from emotional, financial, and physical trauma. Mental health services are often needed to address the emotional impact of financial crime, which may include depression, thoughts of suicide, and hopelessness. Other needed services include legal assistance to recover assets, help in finding new housing as a result of crime-related home foreclosure or eviction, assistance in finding attendants to replace abusive individuals, financial assistance for necessities that the victim cannot afford as a result of the crime, and assistance in securing benefits. Victims are also likely to need help tracking down resources like "recovery funds" (e.g., California's Department of Real Estate's fund for victims who have been defrauded by licensed realtors acting within the scope of their licenses).

Even when services exist, victims may lack information or access to them. Physical, cognitive, and attitudinal impediments limit financial crime victims' access to services and avenues for exercising their rights. Most victims' services are only available to victims who agree to participate in the criminal justice system and, as described earlier, many victims are unable or unwilling to do so as a result of fear, shame, disability, and cognitive impairment. Some believe that their efforts will prove futile. Others are unaware that they have been victimized or refuse to see themselves as victims. Although service providers who work with the elderly and are likely to encounter financial crimes and abuse could play an important role in providing liaison to the criminal justice system and victim assistance programs, many are unfamiliar with these systems. Even many adult protective service (APS)<sup>5</sup> workers, who are often the first people to discover financial crimes, are unfamiliar with these networks. In addition, with large caseloads, APS workers may not have sufficient time to establish the

level of trust and confidence that is frequently needed to encourage victims to accept help.

Members of the roundtable attributed the lack of resources for financial crime victims, in part, to the lack of information available on which to design services and programs. As noted earlier, little is known about the extent or nature of financial crime. Apart from a few studies on telemarketing fraud, very little is known about other types of financial crime, including fraud by family members. Even less is known about the impact of financial crime on its victims, victims' services needs, and promising approaches to meeting those needs. Commonly accepted perceptions or stereotypes assume the worst. For example, although it is commonly believed that efforts to collect restitution are futile, little has actually been done to explore promising approaches to improving restitution recovery. Even less is known about victims' mental health or social service needs and effective approaches to addressing them. Without this information about best practices and promising approaches to service delivery, it is unlikely that new resources will be forthcoming.

The pervasive belief that financial crime is less serious than other crimes has clearly affected the treatment of victims of financial crimes, who have not historically been afforded the same rights as other victims. For example, in some districts, victims of federal financial crimes are not permitted to speak about the impact the crime had on them at sentencing hearings. The proposed federal victims rights constitutional amendment does not include provisions for protecting the rights of financial crime victims. Although national and state organizations have emerged to advocate on behalf of victims of violent crime, including victims of domestic violence and sexual assault, there are no comparable organizations advocating for victims of financial crimes. As a result, the interests of elderly victims of financial crimes are not effectively being voiced or defended.

The challenges of providing outreach to financial crime victims were also discussed. It was noted that victims of financial crime and abuse are unlikely to self-report and service providers who are likely to encounter these situations are also unlikely to contact law enforcement or victim service programs. As a result, if victims are to receive services, victims' rights programs need to find ways to reach them. Effective outreach to victims and vulnerable seniors is particularly challenging owing to the enormous size of the vulnerable population

and the complexity of the information that needs to be conveyed. In addition, many of the most vulnerable seniors are particularly hard to reach as a result of cognitive impairment, physical disability, isolation, and language barriers.

Language and cultural barriers further impede access to information and services. Owing to the fact that many financial scams target elderly members of specific cultural groups, language barriers, negative experiences with the criminal justice system, and immigrants' fears about being deported further discourage many victims from seeking out or accepting help. Others are simply uninformed about the system and do not know about available services or how to access them. Additionally, research has shown wide variations in how members of different cultural communities perceive financial crime and abuse, creating additional challenges to victim advocates.

Members of the group suggested that traditional approaches to outreach, which have focused on alerting vulnerable seniors to potential risks, have inadvertently conveyed the message that victims of financial crimes are at least in part to blame for their victimization. They cite examples of outreach materials that ostensibly promote prevention while, in fact, subtly suggesting that victimization results from greed or gullibility, and that this type of crime can be avoided through prudence. These materials de-emphasize perpetrators' culpability, fail to communicate the fact that perpetrators are highly skilled and predatory manipulators, and further fail to acknowledge that the problem can be attributed in part to the shortcomings of the current systems of enforcement. Although it is clear that circumventing abuse before it occurs is preferable to intervening after a crime has been committed, there is no research to show that preventative techniques, such as outreach brochures that caution victims against falling for scams, are effective with crimes like telemarketing scams or investment fraud. Further research into effective intervention and prevention techniques is clearly indicated.

Finally, lack of coordination and cooperation among agencies serving victims has further impeded victims from getting help. Although victim witness assistance programs are receiving increasing numbers of referrals from other entities within the criminal justice system, most of these referrals involve victims of violent crimes. Police and prosecutors still frequently fail to recognize that victims of financial crimes may also benefit from these programs.

Promoting collaboration and coordination between victim assistance programs and other agencies in the community has also been difficult. Victim advocates have not traditionally worked closely with social service providers and the two groups lack familiarity with each other's approaches, resources, policies, or procedures. "Territoriality" may further discourage some agencies from cross-referring cases.

### ***SUMMARY AND CONCLUSION***

The four roundtable discussions provided extremely valuable insight into the challenges and obstacles inherent in combating financial crimes and abuse against the elderly. These range from public attitudes about culpability, to the lack of training available to those charged to respond, to the sheer volume of persons affected.

Although there was widespread variation between the groups, several common themes emerged. Members of the two law enforcement and victim advocates' groups shared the perception that financial crime is viewed as less devastating than other types of crime. They further agreed that this pervasive attitude accounts for the low priority and insufficient resources that have historically been devoted toward apprehending perpetrators, recovering losses, ensuring victims' rights, and providing services to victims.

The extent and complexity of the problem has clearly frustrated efforts to control it. The fact that a single crime can involve hundreds or thousands of victims makes these cases particularly overwhelming in terms of the time and resources they demand. The lack of clarity with respect to jurisdiction, overlapping jurisdictions, and poor coordination between jurisdictions further impede efforts to contain the problem. The need for greater clarity and consensus about how to define and measure mental capacity and undue influence was also repeatedly addressed.

The roundtable participants offered dozens of recommendations for improving the criminal justice and civil legal systems' responses to financial crimes and abuse. These ranged from approaches to removing obstacles and creating incentives for victims to participate in the criminal justice process, reforming restitution, offering training to persons at all levels within the systems, to appointing a federal "czar" to direct attention to the problem and serve as a focal point for coordinating a national response to the problem. The recommendations have

been published by the National Center on Elder Abuse, in a report *The Forgotten Victims of Financial Crime and Abuse; A Report and Recommendations*, which is being disseminated to policy makers, advocates, and service providers at the local, state, and national levels.

## NOTES

1. Singer, M.T. (1992). Undue influence and written documents: Psychological aspects. *Journal of Questioned Document Examination*, 1(1), 4-13.

2. U.S. House Select Committee on Aging (1987). Abuses in guardianship of the elderly and infirmed: A national disgrace. Publication No. 100-639. Washington DC: U.S. Government Printing Office.

3. nexus (1996). Interview with elder rights champion Marc Hankin. *nexus: A Publication of the National Committee for the Prevention of Elder Abuse*, 2(2), 1,4-6. San Francisco: Goldman Institute on Aging.

4. The victims of Crime Act (VOCA) of 1984 provided for services and compensation to victims. Until recently VOCA grants for victim assistance services could not be used for services for victims of financial crime. Although recent changes to VOCA regulations provide for services for financial crime victims, victims of financial crime are still not eligible to receive VOCA funded compensation.

5. APS is a federal program that was created to protect individuals who are endangered because of unsafe or hazardous living conditions, neglect, or exploitation. APS has been designated to accept reports of abuse and neglect under most states' older and dependent adult abuse reporting laws.