ELDER FINANCIAL ABUSE: THE INVISIBLE EPIDEMIC
A NOTE CONCERNING THE PROGRAM MATERIALS

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I. ELDER FINANCIAL ABUSE: DEFINED; COMMON CHARGES

A. Definition: The National Center on Elder Abuse defines Elder Financial or Material Exploitation as "the illegal or improper use of an elder's funds, property, or assets. Examples include, but are not limited to, cashing an elderly person's checks without authorization or permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document (e.g., contracts or will); and the improper use of conservatorship, guardianship, or power of attorney."

Elder financial exploitation is the most common form of abuse. See: NYS under the Radar: New York State Elder Abuse Prevalence Study (2011). According to the study, only one in forty-four cases of elder financial abuse is reported to authorities. Id. The offenses often overlap with one or more of the following categories: domestic violence, identity/cyber theft, neglect, and others.

B. Criminal offenses commonly charged on elder financial abuse cases include felonies, misdemeanors and lower level offenses. Depending on the state, there may be a specific crime that applies to victims who have reached a certain advanced age, and/or impaired victims, or both. Financial Exploitation/Domestic Violence crimes that target elder and/or impaired victims may qualify as hate crimes in some states.

C. Common charges on elder financial abuse cases include:

1. Larceny.
2. Conspiracy.
3. Forgery.
4. Scheme to defraud.
5. Identity theft.
6. Offering or filing a false instrument.
7. Insurance fraud.
8. Criminal contempt.
9. Assault.
II. ANATOMY OF AN ELDER FINANCIAL ABUSE PROSECUTION

A. Who Are the Victims?

1. Elder abuse victims come from all socio-demographic groups. The National Center on Elder Abuse statistics indicate that female elders are abused at a higher rate than males, and that the older one is, the more likely one is to be abused. A study in New York City identified the majority of victims as Caucasian females living with another adult; in most cases it was their abuser. See Journal of Elder Abuse and Neglect, Vol. 11(4) 1999, p. 81.

2. The victim's mental status is crucial in determining whether and how to proceed on an elder financial abuse case. The victim may have a substance abuse dependency (drugs or alcohol), or have mental illness and/or cognitive issues, such as dementia.

B. Who Are the Abusers?

In the only national study that attempted to define the scope of elder abuse, the vast majority of abusers were family members (approximately 90 percent), most often adult children, spouses, partners, and others. See National Center on Elder Abuse, www.ncea.aoa.gov/Resources/Data; National Elder Abuse Incidence Study: Final Report (1998) Washington DC.

New York County D.A.’s Office statistics indicate that exploiters of the elderly include their family members, home attendants, healthcare professionals, fiduciaries (including accountants, brokers, attorneys, agents, guardians) and strangers (street crime, con and scam artists).

The abuser may have mental health issues, but this would be less likely to determine how the prosecution proceeds, unless it is determined that the impairment affected the defendant's intent when he/she committed the crime. If this is the case, the theory of the case may be affected (i.e. reckless as opposed to intentional charge).

C. Proving an Exploitation Case when the Elderly Victim Is Reluctant to Cooperate or Is Otherwise Unavailable

1. Domestic violence cases involving older couples are notoriously difficult to prosecute. Crimes involving parents and grandparents who are financially exploited by their children and other relatives often present with the most reluctant witnesses of all.

2. Law enforcement attempts, whenever possible, to "build a case" without relying on the older, reluctant and/or impaired victim to testify.

   a. The prosecution may attempt to prove its case at trial without requesting or subpoenaing the elderly victim to
testify. There are certain offenses, like Criminal Contempt (the violation of an order of protection), that the prosecution may be able to prove beyond a reasonable doubt through the introduction of evidence other than the victim's statement (i.e.: the order of protection and a police officer's testimony that he witnessed the defendant at the victim's residence in violation of the order).

b. "Hearsay" evidence: Courts are reluctant to allow the admission of hearsay statements at trial, as they are inherently unreliable and the declarant cannot be challenged by the defense during cross-examination. The primary challenge for a prosecutor in his or her efforts to introduce hearsay statements of an elderly witness who is "unavailable" (death, incapacity) at the time of trial is to establish that the statement constitutes one of the exceptions to the hearsay rule. The case of Crawford v. Washington, 541 U.S. 36 (2004), makes this more difficult. In Crawford, the Supreme Court has articulated (or re-defined) what will be considered to be "testimonial" hearsay evidence, and therefore deemed to be inadmissible despite the prosecutor's potential argument that the declarant who made the statement is unavailable and the statement is reliable. Id. In that a "conditional examination" (examination in advance of trial in anticipation of the witness' unavailability at trial) based upon the victim's advanced age may not be an available option in every case and in every state, every effort should be made to build the case without depending solely on the victim's testimony.

c. Evidence that may be crucial in preparing for a case in which law enforcement will not call the victim to testify includes:

i. The defendant's admissions to civilian witnesses (bank, family member, neighbor, A.P.S. worker, victim's doctor) or to the police at the time of crime/arrest. If permitted in your state, consider tape recording conversations (pre-arrest) between the defendant and a cooperative witness (controlled calls, state law permitting), in which the defendant is confronted with the abuse and exploitation; obtain tapes from elder's message machine;

ii. Medical evidence pertaining to the nature of the victim's injuries and status, including cognitive testing such as Mini Mental State Examination (MMSE) exams, prescriptions and prescription history;
iii. Photographs or drawings of the home, crime scene (if different) and/or the victim's injuries – remember photos of refrigerator, cabinets, medications, bedding;

iv. Witnesses' observations of the victim and/or defendant's or exploitive conduct;

v. Financial records which establish the unauthorized transfer of the victim's funds including signature cards, canceled checks, monthly statements, mortgage applications, balance books, deposit and withdrawal slips, tax returns – especially gift tax returns, deeds, trusts, power of attorney documents, applications, contracts, receipts, bills and ATM film, when it exists;

vi. Legal documents such as wills, health care proxies, contracts, deeds;

vii. Forensic evidence, such as laboratory examinations, handwriting analysis and voice analysis; and

viii. Physical evidence obtained from the crime scene or from the defendant.

d. If the prosecution cannot prove the elements of the crimes charged "beyond a reasonable doubt" without calling the reluctant victim to testify, a subpoena to compel the witness' attendance should be considered in certain cases.

D. Proving the Financial Case when the Victim Is Mentally Impaired

1. A witness must have testimonial capacity (competence) in order to testify at trial.

2. An elderly witness may have testimonial capacity but otherwise lack capacity in that they have little or no memory of the matter in question due to dementia, such as Alzheimer's disease, or some other age-related illness.

3. Law enforcement will need to assess whether the victim could have consented to the transfer of funds or property at issue. Was the authority to transfer funds given by an "owner" of property – at a time that he/she had capacity? Were "false pretenses" or "false promises" used to induce the victim to transfer property? Cases that are instructive on the issue of an owner's capacity to consent are helpful.
a. In People v. Camiola, 225 A.D.2d 380 (N.Y.A.D. 1996), lv denied 5/14/96, is a case in which an accountant for an elderly, senile woman maintained a pattern of thefts from her over a two year period. The victim passed away by the time of the trial. The defense contended that the victim had consented to the transfers of funds in question, and that they were gifts she had knowingly given to the defendant. The Court held that the jury, in evaluating the definition of larceny, was properly instructed that it should consider the victim's capacity to form consent in order to determine whether there had been a trespassory taking of her property, a form of larceny actionable pursuant to section 155 of the Penal Law. Id. at 380.

b. In People v. Marshall, 106 A.D.3d 1 (N.Y. 2013), the Court held that the trial record amply supported the jury’s determination that defendants were guilty of larcenous conduct and a scheme to defraud Brooke Astor, defendant Marshall's mother, by fraudulently changing her will at a time when they knew her mental condition precluded her from having the capacity to agree to any such changes. Marshall was his mother's agent pursuant to a Power of Attorney during the period when he induced her to change her estate plan and stole from her.

c. Larceny actions involving joint bank accounts may prove to be unprovable, as the account holders are usually joint owners of the property.

E. Financial Exploitation and the Power of Attorney ("POA")

1. A power of attorney is a legal document that allows another individual to act on the senior's behalf. Powers of attorney can be helpful to older people and others who wish to select a trusted agent or attorney in fact to conduct business for them. There is relatively easy access to power of attorney forms. They are sold online, at local stationery stores, and many banks routinely distribute their institutional POA documents to individuals who plan to become agents for account holders. Virtually anyone has access to these forms. The POA must be executed when the principal (senior) has capacity and is able to understand the document.

2. Durable powers of attorney are a significant vehicle for exploitation of elderly victims. A durable power of attorney differs from a traditional power of attorney in that it continues the agency relationship beyond the incapacity of the principal. If there is reason to believe that an elder's agent/attorney-in-fact is suspected of exploiting the principal, the POA should be reviewed to determine whether the agent is authorized to be paid, and/or whether authorities such as "gift-giving" are permitted.
Note: An agent's authority under a power of attorney is void upon the death of the senior principal.

III. THOSE IN LAW ENFORCEMENT MUST BE MINDFUL OF BRADY V. MARYLAND, 373 U.S. 83 (1963), ON ELDER FINANCIAL ABUSE CASES

Records that contain information favorable to the defendant (i.e. if there is a reasonable possibility that the information would affect the outcome of the trial), this evidence must be turned over to the defense. This includes statements of witnesses that conflict with the prosecution witnesses on material issues, and evidence that could allow the defense to impeach prosecution witnesses. Examples may include statements of witnesses relating to the older victim's capacity at the time of the transfer at issue, whether or not the victims signed a check, will, or contract, as well as results of handwriting analysis that are inconclusive.
This checklist for law enforcement provides suggestions for evidence that may be useful in investigating and prosecuting elder financial exploitation cases. The list is not meant to be fully exhaustive, and particular items may not be relevant in your investigation or applicable in your jurisdiction. Obtaining this evidence may require a grand jury subpoena, search warrant or other court order.

_____ Power of Attorney (POA) document(s) and accompanying rider(s) (current and past)

_____ Health Care Proxies or Medical Power of Attorney document(s) (current and past)

_____ Will(s) and Codicil(s) (current and past)

_____ Trust(s)

_____ Financial account information for victim, suspect, and relevant payees/payors, if applicable (closed and current accounts), including:

- bank statements for savings, checking, investment accounts

- any checkbook balance books (victim or suspect) or other miscellaneous balance sheets

- account opening records

- ATM records (often kept in a separate division)

- ATM film and bank film, if not recycled

- internal fraud documents, including Suspicious Activity Reports (SAR) and Currency Transaction Reports (CTR) – do not disclose to any party per federal law

- copies of checks written on victim/suspect(s)’ and others’ accounts (front and back)

- copies of deposits into victim’s account

- signature cards, and any other documents with victim’s signature

- wire transfer records

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1 Written by Tara Patet, Senior Prosecutor, City of St. Paul, MN; Jennifer J. Hasbargen, Assistant Anoka County Attorney, MN; and Page Ulrey, Senior Deputy Prosecuting Attorney, King County, WA; modified by Elizabeth Loewy, Esq.
- customer correspondence file
- bank form POAs on file
- applications for online/internet banking
- witnessed handwriting samples from victim and suspect (from time at issue and time of referral to law enforcement)

Credit information and credit card activity relating to victim and suspect
- Credit reports relating to victim and suspect (Experian, Transunion, Equifax), including requests to freeze
- receipts from any/all transactions at issue

All real estate and/or personal property transfer documents and open/closed bank loan or mortgage documents, including:
- Contract of sale
- Appraisal
- Loan application
- loan ledger sheet
- copy of loan disbursement document
- copy of loan repayment document
- any correspondence regarding loan
- collateral agreement(s)
- notes or other instruments reflecting obligation to pay and payment schedule
- copies of real estate mortgage(s), chattel mortgage(s), or other security for bank loans
- appraisals related to real estate or personal property
- annual interest paid statement(s)
- loan amortization statement(s)
- deed (house/condo)
- stock certificate (co-op)
☐ proprietary lease (co-op)
☐ title document(s)
☐ rental agreement(s)

_____ Medical Assistance
☐ Medicaid/Medicare application and correspondence
☐ Application/records for other medical provider
☐ correspondence or notes between financial worker and applicant

_____ Residential Health Care Facility (Assisted Living, Nursing Home, Hospital) records (current and past), including:
☐ account history
☐ any documents with victim/suspect signature
☐ correspondence with suspect
☐ admission agreement (is suspect listed as financially responsible party?)
☐ brochures, pamphlets advertising facility
☐ HR file, training/educational materials for institutional suspects (if an issue)

_____ Documentation relating to other assets/investments/real estate of the victim, including:
☐ annuities, mutual funds, bonds, stocks, securities, certificates of deposit
  ☐ account statements, annual interest statements
  ☐ documents reflecting purchase of investment
  ☐ documents reflecting redemption of investment
  ☐ any records relating to commission made by broker/dealer
☐ relevant automobile titles and/or loan documents
☐ deed and title documents (see real estate and personal property transfer above)
☐ property appraisals

☐ HR file, training/educational materials related to institutional suspects (if an issue)

Documentation for any income that does not automatically deposit into the victim's bank account (who is endorsing checks and where they are being deposited/cashed), including:

☐ Social Security

☐ tax refunds

☐ pension

Capacity evaluation of victim by geriatric expert(s), if capacity is an issue (past and current)

Medical records of victim, including psychological evaluations, from primary care provider and other specialists who may have seen or provided care to the victim dating back at least one year prior to incident

All past and current APS records pertaining to victim and suspect, including follow-up investigations

Conservatorship and/or guardianship documents, including court evaluator's report and annual accountings

Probate Court records

Judgments, liens, bankruptcies, lawsuits against suspect

State and Federal tax filings of victim and suspect (i.e. Gift Tax is paid by donor, often not paid when defense is that funds were "gifted")

Suspect's computer, which may contain any of the above information and/or emails pertaining to same

Telephone records (cell phone and landline) for victim and suspect

Telephone answering machine at victim's residence (suspect's/scammers messages)

Controlled call recording, if permitted in your state

Insurance policies on victim

Property insurance – look to see if missing/"gifted" valuables are still insured by victim
## Table of Reporting Requirements for Elderly and/or Vulnerable Persons

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<th>STATE</th>
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<tbody>
<tr>
<td>Indiana</td>
<td>Ind. Code Ann. §12-10-3-9(a) (West 2013)</td>
<td>Yes</td>
<td>An individual who believes or has reason to believe that another individual is an endangered adult</td>
<td>Endangered adult: an individual who is: (1) at least eighteen years of age; (2) incapable by reason of mental illness, mental retardation, dementia, habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of the individual’s property or providing or directing the provision of self-care; and (3) harmed or threatened with harm as a result of: (A) neglect; (B) battery; or (C) exploitation of the individual’s personal services or property.</td>
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<tr>
<td>Indiana</td>
<td>Ind. Code Ann. §12-10-3-2(a) (West 2013)</td>
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<td>Ind. Code Ann. §12-10-3-9(a) (West 2013).</td>
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<tr>
<td>Kentucky</td>
<td>Ky. Rev. Stat. Ann. §209.030(2) (West 2013)</td>
<td>Yes</td>
<td>Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or care taker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation. Ky. Rev. Stat. Ann. §209.030(2) (West 2013).</td>
<td>Adult: a person eighteen years of age or older who, because of mental or physical dysfunctioning, is unable to manage his or her own resources, carry out the activity of daily living, or protect himself or herself from neglect, exploitation, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services.</td>
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<td>Missouri</td>
<td>Rev. Stat. Mo. §208.912(1) (West 2013)</td>
<td>No</td>
<td>Any adult day care worker, chiropractor, Christian Science practitioner, coroner, dentist, embalmer, employee of the departments of social services, mental health, or health and senior services, employee of a local area agency on aging, funeral director, home health agency or home health agency employee, hospital and clinic personnel engaged in examination, care, or treatment of persons, in-home services owner, provider, operator or employee, law enforcement officer, long-term care facility administrator or employee, medical examiner, medical resident or intern, mental health professional, minister, peace officer, pharmacist, podiatrist, probation or parole officer, psychologist, vendor - any organization having a written agreement with the department to provide services including monitoring and oversight of the personal care assistant services to consumer, personal care attendant, or social worker.</td>
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nurse practitioner; optometrist; other health practitioner; peace officer; pharmacist; physical therapist; physician; physician’s assistant; podiatrist; probation or parole officer; psychologist; social worker; or other person with the care of a person sixty years of age or older or an eligible adult. Mo. Ann. Stat. §198.070(1) (West 2013). (see "eligible adult")

Any adult day care worker; chiropractor; Christian Science practitioner; coroner; dentist; embalmer; employee of the departments of social services, mental health, or health and senior services; employee of a local area agency on aging or an organized area agency on aging program; funeral director; home health agency or home health agency employee; hospital and clinic personnel engaged in examination, care, or treatment of persons; in-home services owner, provider, operator, or employee; law enforcement officer; long-term care facility administrator or employee; medical examiner; medical resident or intern; mental health professional; minister; nurse; nurse practitioner; optometrist; other health practitioner; peace officer; pharmacist; physical therapist; physician; physician’s assistant; podiatrist; probation or parole officer; psychologist; social worker; or other person with responsibility for the care of a person sixty years of age or older. Mo. Ann. Stat. §565.188(1) (West 2013).

Any physician, physician assistant, dentist, chiropractor, optometrist, podiatrist, intern, resident, nurse, nurse practitioner, medical examiner, social worker, licensed professional counselor, certified substance abuse counselor, psychologist, physical therapist, pharmacist, other health practitioner, minister, Christian Science practitioner, facility administrator, nurse’s aide or orderly in a residential facility, day program or specialized service operated, funded or licensed by the department or in a mental health facility or mental health program in which people may be admitted on a voluntary basis or are civilly detained pursuant to chapter 632.

Disability: a mental or physical impairment that substantially limits one or more major life activities, whether the impairment is congenital or acquired by accident, injury or disease, where such impairment is verified by medical findings. Mo. Ann. Stat. §660.053(6) (West 2013).

Consumer: a person: (a) who qualifies to receive department services; or (b) who is a parent, child, or sibling of a person who receives department services; or (c) who has a personal interest in services provided by the department. A person who provides services to persons affected by intellectual disabilities, developmental disabilities, mental disorders, mental illness, or alcohol or drug abuse shall not be considered a consumer. Mo. Ann. Stat. §630.005(6) (West 2013).


Vulnerable person: any person in the custody, care, or control of the department that is receiving services from an operated, funded, licensed, or certified program. Mo. Ann. Stat. §630.005(34) (West 2013).

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or employee of the departments of social services, mental health, or health and senior services; or home health agency employee; hospital and clinic personnel engaged in examination, care, or treatment of persons; in-home services owner, provider, operator, or employee; law enforcement officer; long-term care facility administrator or employee; mental health professional; peace officer; probation or parole officer; or other non-familial person with responsibility for the care of a vulnerable person, as defined by section 630.006. Mo. Ann. Stat. §565.218(1) (West 2013). (see "vulnerable person")

Any person having reasonable cause to suspect that an eligible adult presents a likelihood of suffering serious physical harm and is in need of protective services shall report such information to the Department of Social Services. Mo. Ann. Stat. §660.255(1) (West 2013). (see "eligible adult")

Any adult day care worker; chiropractor; Christian Science practitioner; coroner; dentist; embalmer; employee of the departments of social services, mental health, or health and senior services; employee of a local area agency on aging or an organized area agency on aging program; funeral director; home health agency or home health agency employee; hospital and clinic personnel engaged in examination, care, or treatment of persons; in-home services owner, provider, operator, or employee; law enforcement officer; long-term care facility administrator or employee; medical examiner; medical resident or intern; mental health professional; minister; nurse; nurse practitioner; optometrist; other health practitioner; peace officer; pharmacist; physical therapist; physician; physician's assistant; podiatrist; probation or parole officer; psychologist; or social worker. Mo. Ann. Stat. §660.300(1) (West 2013). (see "in-home services client")
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<td>Ohio</td>
<td>Ohio Rev. Code §5101.61(A)(6)(g)(ii) (West 2013)</td>
<td>No</td>
<td>Any attorney, physician, osteopath, podiatrist, chiropractor, dentist, psychologist, any employee of a hospital as defined in section 3701.01 of the Revised Code, any nurse licensed under Chapter 4723 of the Revised Code, any employee of an ambulatory health facility, any employee of a home health agency, any employee of a residential facility licensed under section 5119.22 of the Revised Code that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults, any employee of a nursing home, residential care facility, or home for the aging, as defined in section 3721.01 of the Revised Code, and any person engaged in social work or counseling. This section does not apply to employees of any hospital or public hospital as defined in section 5122.01 of the Revised Code.</td>
<td>Adult: any person sixty years of age or older within this state who is handicapped by the infirmities of aging or who has a physical or mental impairment which prevents the person from providing for the person’s own care or protection, and who resides in an independent living arrangement. Ohio Rev. Code §5101.60(B) (West 2013).</td>
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<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. §71-6-103(b)(1) (West 2013)</td>
<td>Yes</td>
<td>Any person, including, but not limited to, a physician, nurse, social worker, department personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation. Tenn. Code Ann. §71-6-103(b)(1) (West 2013).</td>
<td>Adult: a person eighteen (18) years of age or older who because of mental or physical dysfunctioning or advanced age is unable to manage such person’s own resources, carry out the activities of daily living, or protect such person from neglect, hazardous or abusive situations without assistance from others and who has no available, willing, and responsibly able person for assistance and who may be in need of protective services; provided, however, that a person eighteen (18) years of age or older who is mentally impaired but still competent shall be deemed to be a person with mental dysfunction for the purposes of this chapter.</td>
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<td>Virginia</td>
<td>Va. Code Ann. §63.2-1606(A) (West 2013)</td>
<td>Permissive reporting</td>
<td>Any person licensed, certified, or registered by health regulatory boards listed in §54.1-2503, with the exception of persons licensed by the Board of Veterinary Medicine; any mental health services provider as defined in §54.1-2400.1; any emergency medical services personnel certified by the Board of Health pursuant to §32.1-111.5; unless such provider immediately reports the suspected abuse, neglect or exploitation directly to the attending physician at the hospital to which the adult is transported, who shall make such report forthwith; any guardian or conservator of an adult; any person employed by or contracted with a public or private agency or facility and working with adults in an administrative, supportive or direct care capacity; any person providing full, intermittent or occasional care to an adult for compensation, including, but not limited to, companion, chore, homemaker, and personal care workers; and any law-enforcement officer. Va. Code Ann. §63.2-1606(A) (West 2013).</td>
<td>Adult: any person sixty years of age or older, or any person eighteen years of age or older who is incapacitated and who resides in the Commonwealth; provided, however, &quot;adult&quot; may include qualifying nonresidents who are temporarily in the Commonwealth and who are in need of temporary or emergency protective services.</td>
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<td>West Virginia</td>
<td>W. Va. Code Ann. §9-6-9(a) (West 2013)</td>
<td>No</td>
<td>Any medical, dental or mental health professional, Christian Science practitioner, religious healer, social service worker, law enforcement officer, humane officer, state or regional ombudsman or any employee of any nursing home or other residential facility. W. Va. Code Ann. §9-6-9(a) (West 2013).</td>
<td>Incapacitated adult: any person who by reason of physical, mental or other infirmity is unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health. W. Va. Code Ann. §9-6-1(4) (West 2013). Facility resident: an individual living in a nursing home or other facility, as that term is defined in subdivision (7) of this section. W. Va. Code Ann. §9-6-1(9) (West 2013).</td>
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