

**PROTOCOL FOR PROSECUTORS:**  
**Responding to Victims with Disabilities and Older Adults Who**  
**Experience Sexual Assault, Domestic Violence, Abuse, Neglect or**  
**Exploitation**

Produced by:  
Illinois Family Violence Coordinating Council  
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# **PROTOCOL FOR PROSECUTORS:**

## **Responding to Victims with Disabilities and Older Adults Who Experience Sexual Assault, Domestic Violence, Abuse, Neglect or Exploitation**

### **Background**

Family Violence Coordinating Councils, at both the state and local/circuit levels, provide a forum to improve the institutional, professional, and community response to family violence, which includes child abuse, intimate partner abuse, teen dating violence, and abuse against people with disabilities and older adults. Councils provide professional education and prevention, coordinate interventions and services for victims and perpetrators, and contribute to both the improvement of the legal system and the administration of justice.

In February 2006, in partnership with the Illinois Department on Aging (IDoA), the Illinois Family Violence Coordinating Councils (IFVCC) convened a statewide Responding to Elder Abuse Committee. Protocols for law enforcement, prosecutors, and judges were among the resources developed by this committee.

Thousands of cases of abuse, neglect, and financial exploitation of older adults (60 and older), and people with disabilities were reported to IDoA in 2017, according to the department's 2017 Annual Report. Reported cases included:

- Financial Exploitation: 8,604
- Emotional Abuse: 6,476;
- Passive Neglect: 6,679
- Physical Abuse: 3,782
- Willful Deprivation: 2,268
- Confinement: 1,381
- Sexual Abuse: 765

The Responding to Elder Abuse Committee was charged with identifying and developing resources to assist the courts, criminal justice systems, and communities in responding to the needs of abused people with disabilities and older adults.

The Illinois Family Violence Coordinating Council (IFVCC) formed a committee in 2010 to address violence in the lives of people with disabilities which, according to the Americans with Disabilities Act, is defined as; a physical or mental impairment

that substantially limits one or more major life activities. According to the U. S. Bureau of Justice Statistics, people with disabilities experience violence two times more often than people without disabilities.

Other studies indicate that people with disabilities are three to 10 times more likely to experience violence than people without disabilities. Despite the prevalence of violence in the lives of people with disabilities, there is a glaring lack of reports and a general lack of services for the victim. For these reasons, the Responding to Victims with Disabilities Committee determined the need for protocols for law enforcement and for prosecutors.

In 2011, the Illinois Family Violence Coordinating Council received a Department of Justice, Office on Violence Against Women Arrest grant. The focus of the grant was development of an Integrated Protocol Initiative (IPI). The scope of the initiative included updating the domestic violence and elder abuse protocols for law enforcement and prosecutors and to create protocols to address violence against people with disabilities. Upon completion of the protocols, in 2013, IFVCC and its partners conducted training of trainers across the state to facilitate local implementation. As a part of the statewide roll-out, the protocols for responding to violence against people with disabilities and older adults were jointly trained. During the rollout, it was determined that though there are differences between people with disabilities and older adults, there are enough similarities in victimology and support requirements between the two populations that merging the protocols will allow a more cohesive response and provide ease of use for law enforcement and prosecutors.

In 2016, in preparation for the merger of the protocols, Illinois prosecutors were interviewed to gather information both on their best practices and their challenges in prosecuting crimes against people with disabilities and older adults. Additionally, people with disabilities and older adults were interviewed to learn from their experiences.

**People with disabilities and older adults have provided valuable feedback to inform the development of this protocol.**

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## **PROTOCOL FOR PROSECUTORS:**

### **Responding to Victims with Disabilities and Older Adults Who Experience Sexual Assault, Domestic Violence, Abuse, Neglect or Exploitation**

**"I would talk to someone who would not judge me or treat me different because I have a disability. We are all people." - Illinois citizen**

#### **An important note about words and respect**

Respectful language is an integral part of connecting with people with disabilities and older adults, because many times they have experienced negative judgement by others due to their disability or age. Ableism is defined as discrimination or prejudice against people with disabilities. The definition of ageism is almost identical as discrimination of a person of a certain age group. This protocol is written with those experiences in mind. *People First Language* is used to denote that the person is more important than the diagnosis or label. For example, "a person who uses a wheelchair" or "a woman with cerebral palsy" is preferred over "a wheelchair user" or "the cerebral palsied woman." It is also important to use words that indicate a person has a disability, rather than the person is a disability. For example, "She has an intellectual disability" is preferred over "She is intellectually disabled." Wherever possible in this protocol, the term "older adult" is used. Older adult mirrors the term "younger adult." Both terms refer to the lifespan of a person rather than a label.

Labels and words not considered respectful include: handicapped, mentally retarded, nuts, wacko, crippled, palsied, 'the disabled', geezer, biddy, pops, gramps, or any other slang terms. These are important considerations to keep in mind when establishing a rapport with victims who have disabilities or are older adults. Furthermore, this approach supports informed response and investigation, which yields better information. See page 75 for more information, see the handout on People First Language. Handouts can be used for educational and training purposes. Ideas for use include posting it in the breakroom or using it during roll call.

**"I would want to talk with someone who is comfortable with my disability and sees me as strong. I won't talk to someone who just focuses on my disability or someone who thinks I'm not intelligent because I use a wheelchair."  
- Illinois citizen**

Note: Preferred language will be used throughout the protocols except when citing criminal code or Illinois statutes where other language is dictated.

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## **Responding to Victims with Disabilities and Older Adults Who Experience Sexual Assault, Domestic Violence, Abuse, Neglect or Exploitation**

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# INTRODUCTION

**“My lawyer (State’s Attorney) believed me and helped me in court. He helped me when I got nervous. The guy that hurt me got sent away.”  
- Survivor Testimonial**

## Needs Statement

According to the Centers for Disease Control and Prevention one in five persons in the United States identifies as having a disability. For adults 60 and older the prevalence increases to one in four.<sup>1</sup> Some people are born with disabilities, some acquire disabilities during their childhood years, and others experience disabilities related to accidents, disease, or aging. For many people, having a disability is a natural part of life.

There are many kinds of disabilities. Some disabilities are easy to see, and some disabilities are not visible. Some disabilities affect the body, some affect the ability to learn and reason, and some affect emotions and thoughts. As people live longer, they also face more problems with chronic illness and disabilities. Research indicates people with disabilities experience domestic and sexual violence more often than people without disabilities.<sup>2</sup> It is also known that victims with disabilities rarely access victim services and most of the time, their offenders are not held accountable in the criminal justice system.<sup>3</sup>

Similarly, statistics gathered by the National Center on Elder Abuse, show that, each year, between 1 and 2 million Americans aged 65 and older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection. One in four older adults live alone and are among the most at risk and impoverished groups in Illinois. According to the National Association of States United for Elder Abuse and Disability, it is estimated that for each case of elder abuse, neglect, and exploitation, between five and 14 more go unreported.

**“In my continuing work with the senior population I have become keenly aware of just how often these citizens become victims to crime. Most of these crimes go unreported to authorities, allowing the perpetrators to remain free in the community to continue taking advantage of others.”  
- Senior Case Manager**

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<sup>1</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/media/releases/2015/p0730-US-disability.html>

<sup>2</sup> Breiding, M.J., Armour, B.S. (2015). The association between disability and intimate partner violence in the United States. *Annals of Epidemiology*; 25(6): 455-457. doi: 10.1016/j.annepidem.2015.03.017.

<sup>3</sup> End Abuse of People with Disabilities. <https://www.endabusepwd.org/problem/outofreach/exploring-the-barriers-in-victim-services/>

People with disabilities and older adults want a compassionate response to their experience like any other victim. People with disabilities and older adults who experience sexual and/or domestic violence, abuse neglect or exploitation deserve justice as much as other victims. Sometimes incorrect assumptions and attitudes are a barrier to equal justice and sometimes lack of information and skills is the barrier. When these barriers are addressed, people with disabilities and older adults can have equal access to the criminal justice system and offenders can be held accountable.

### **References and Resources**

See the National, State and Local Resources section on page 128 for available resources.

**“Please explain things in plain language, I did not understand what the word ‘continuance’ meant.” – Woman with a disability in Illinois**

At times, these victims will need accommodations to participate fully in the criminal justice system. An accommodation can be as simple as using plain language or giving someone extra time to answer a question. Accommodations are individualized for the specific person and allow the person the same access to a facility, service, or activity others receive. There are community resources that can assist first responders, investigators, and prosecutors in obtaining needed accommodations.

Abuse, neglect, and exploitation are serious issues that demand an effective and swift criminal justice response. Personal relationships between victims and offenders may raise special problems in the prosecution process. Handling of these cases requires high levels of expertise, experience, and sensitivity on the part of the prosecutor’s office to best achieve the interests of justice. The primary goal is to treat complaints of abuse neglect and exploitation as criminal acts. Successful intervention by the criminal justice system, with or without the victim’s participation, is the best way to stop abuse neglect, and exploitation, hold offenders accountable, protect victims, and deter others.

Many victims endure acts of abuse, neglect, or exploitation in order to stay in their own homes, avoid nursing homes, group home placement, or other forms of institutionalization. An empathetic, proactive criminal justice response can protect victims from further acts of abuse, neglect or exploitation and interrupt the cycle of victimization with criminal justice system resources to monitor and control the offender’s behavior.

## Purpose of Protocol

The purpose of this protocol is to effectively guide prosecutors in responding to people with disabilities and older adults who experience sexual assault, domestic violence, abuse, neglect, or exploitation through model guidelines, pretrial examples, and legal considerations. Implementation of the protocol will allow for successful partnering with law enforcement, advocates, and others in the criminal justice system in the response to victims who are people with disabilities or older adults and ensure that the response follows legal mandates as well as current best practices.

**Prosecutor response is critical** to assuring that victims with disabilities and those who are older have equal access to the criminal justice system in a compassionate, proactive, individualized manner. Use of this protocol will promote a more coordinated community response with law enforcement by bringing together health care, social services, and adult protective services in serving people with disabilities and older adults who are victims of sexual assault, domestic violence, abuse, neglect, and financial exploitation.

This protocol is not the final word on working with people with disabilities and older adults. This protocol is meant to serve as a starting point; information to guide you as you incorporate the language, ideas, and knowledge into everyday conversation. This protocol is meant to be used and adapted by prosecutors, using local resources to respond to the needs of people with disabilities and older adults. These cases may be tough, but they are winnable. See “How Prosecutors Changed the Odds to Start Winning Some of the Toughest Rape Cases” on page 76.

## Language and Messaging

Words matter. The way we describe something influences our perceptions of it. We internalize the messages that we receive and it subconsciously influences how we communicate and interact with others. Word selection throughout the protocol is designed to create messages that underscore the value of individuals who experience violence and to clearly communicate that violence in any form (emotional, physical, sexual, financial) is a serious matter (and often criminal) with long lasting impact.

- **Domestic violence and domestic abuse** are terms that often are used interchangeably. Leaving behind the complex legal definitions, it may be helpful to view domestic violence as a term that covers all family- and caretaker-related abuses. It is often considered a ‘blanket definition’ that includes acts of violence in addition to other types of abuse that take place within a family, caretaking, or close relationship setting. Wherever possible, the word violence is used in the protocol to emphasize the impact and intentionality of a perpetrator’s actions. Some professionals prefer to avoid the term abuse as it may be interpreted as a more minor behavior.
- **The criminal justice system** refers to a person who has experienced violence as a “victim”. Many groups that work to advocate for people who have experienced violence prefer the term *survivor*. Some people identify as a victim, while others prefer the term survivor. The best way to be respectful is to ask for their preference.
- **People First Language** is used to denote that the person is more important than the diagnosis or label. For example, “a person who uses a wheelchair” or “a woman with cerebral palsy” is preferred over “a wheelchair user” or “the cerebral palsied woman.” Wherever possible in this protocol, the term “older adult” is used. This refers to the lifespan of a person rather than being considered a label.
- **Rape, sexual assault, sexual abuse, and sexual violence** are terms that are often used interchangeably. Often, the use of these terms depends on whether a particular criminal act is described or speaking generally about the issue. When referring to a particular criminal act, using the specific legal description that best fits is preferred. When speaking about these crimes generally, this protocol uses *sexual violence* as an all-encompassing, non-legal term that refers to crimes like sexual assault, rape, and sexual abuse.
- **Perpetrator and abuser** are terms that are often used interchangeably. An abuser must have a victim on which to perpetrate. An abuser is predatory, just like a sexual predator, murderer, and other predatory individuals. They intentionally plot and plan their abuses up to and including how they are going to end an event of abuse/perpetration.

## Definitions

### Disability

A good starting point for addressing the response to violence against people with disabilities and older adults is to examine definitions related to the issue. The World Health Organization defines disabilities this way: “Disabilities are an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus, disability is a complex phenomenon, reflecting an interaction between features of a person’s body and features of the society in which he or she lives.” According to this definition, the environment is a key feature and of critical importance.

Some people are born with a disability while others acquire disabilities in later life. The life experiences of someone with a life-long disability may vary greatly from an individual who gets a disability as an older adult. People with disabilities are a diverse group.

The American Disabilities act (ADA) covers over 900 different disabilities and defines a person with a disability as:

Any person with a physical or mental impairment that substantially limits one or more of an individual’s major life activities, including people with a record of impairment or who are regarded as having an impairment.

Disabilities covered by the ADA include, but are not limited to:

1. Developmental disabilities (including intellectual disabilities, autism, cerebral palsy, epilepsy).
2. Traumatic brain injury.
3. Severe physical disabilities (spinal cord injury, polio, spina bifida, etc.).
4. Psychiatric disabilities.
5. Degenerative Brain Disorders.
6. Deaf or hard of hearing.
7. Blind or low vision.

## **Older Adults**

The Center for Disease Control and the U.S. Census Bureau define an older adult/elderly person as someone aged 65 and older.

In Illinois, the definition of an older adult is anyone age 60 and older. Although older adult is the preferred term for someone aged 60 and older in Illinois, statutory definitions use the term elderly person.

**The following definitions are taken from Illinois Criminal Code of 2012 (720 ILCS 5/):**

### **Caregiver**

Caregiver means a person who has a duty to provide for a person with a disability or an older adult, including, but not limited to, food and nutrition, shelter, hygiene, prescribed medication and medical care and treatment.

### **Confinement**

Confinement means restraining or isolating, without legal authority, an individual for other than medical reasons, as ordered by a physician.

### **Consent**

In Illinois “Consent” means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent. A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct. 720 ILCS 5/11-1.70.

#### **References and Resources**

See the handout from End Violence Against Women International Evaluating Capacity to Consent to Sexual Acts on page 83.

### **Domestic Violence**

Attempting to cause or causing abuse of a family or household member or high-risk adult with disabilities, or attempting to cause or causing neglect or exploitation of a high-risk adult with disabilities which threatens the adult's health and safety, as defined in Section 103 of the Illinois Domestic Violence Act (IDVA) of 1986, as amended. (750 ILCS 60/103) (from Ch. 40, par. 2311-3)

**Elderly person (Older Adult)**

A person, 60 years of age or older.

**Emotional Abuse**

Emotional abuse means verbal assaults, threats of maltreatment, harassment, or intimidation intended to compel the person to engage in conduct from which she or he wishes and has a right to abstain, or to refrain from conduct in which the person wishes and has a right to engage.

**Family or Household Members**

Family or household members means spouses, former spouses, parents, children, stepchildren, and other persons related by blood or by present or prior marriage; persons who share or formerly shared a common dwelling; persons who have or allegedly have a child in common; persons who share or allegedly share a blood relationship through a child; persons who have or have had a dating or engagement relationship; and, persons with disabilities and their personal assistants. For purposes of this paragraph, neither a casual acquaintanceship nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute a dating relationship.

**Financial Exploitation**

Financial Exploitation means the misuse or withholding of a person with a disability's or older adult's resources by another, to the disadvantage of the person and/or the profit or advantage of someone else.

**Financial Fraud/Scams/Cons**

Financial Fraud/scams/cons means the intentional deception of a person with a disability or older adult for the profit or advantage of someone else.

**Interference with Personal Liberty**

Interference with personal liberty means committing or threatening physical abuse, harassment, intimidation, or willful deprivation of the person with a disability or older person to compel him/her to engage in conduct from which he/she has a right to abstain or to refrain from conduct in which he/she has a right to engage.

**Intimidation of a Dependent**

Intimidation of a dependent means subjecting a dependent person with a disability or older person to participation in, or the witnessing of physical force against another or

physical confinement or restraint of another which constitutes physical abuse regardless of whether the abused person is a family member or household member.

### **Passive Neglect**

Passive neglect means another individual's failure to provide a person with or willful withholding from an eligible adult the necessities of life including, but not limited to, food, clothing, shelter, or medical care. Nothing in this directive shall be construed to mean that a person is a victim of neglect because of health care services provided or not provided by licensed health care professionals.

### **Perpetrator (Abuser)**

Someone who has committed a crime or a violent or harmful act.

### **Physical Abuse**

Physical abuse means causing the infliction of physical pain or injury, reckless use of physical force, confinement, or restraint, repeated and unnecessary sleep deprivation and/or reckless conduct which creates an immediate risk of physical harm.

### **Sexual Abuse**

Sexual Abuse means touching, fondling, sexual threats, sexually inappropriate remarks, or any other sexual activity with a person when the person is unable to understand, unwilling to consent, or is threatened or physically forced to engage in sexual behavior.

### **Vulnerable Adult**

Vulnerable adult means a person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person, funds, property or resources.

### **Willful Deprivation**

Willful deprivation means willfully denying a person medication, medical care, shelter, food, a therapeutic device, or other physical assistance, and thereby exposing that person to the risk of physical, mental, or emotional harm – except when the person has expressed an intent to forego such care.



# **Model Response Procedures**

# MODEL RESPONSE PROCEDURES

## Understanding Dynamics

**Research indicates people with disabilities know their abusers 97 percent of the time and older adults know their abusers 60 percent of the time. People with disabilities most often suffer at the hands of a trusted individual, family member or professional hired to serve them. Older adults most often suffer at the hands of family members, most commonly spouses or adult children.**

Persons with disabilities and older adults are particularly at risk of abuse and victimization due to their physical, intellectual, and emotional challenges and, in some cases, their dependence on others for basic needs. They may experience abuse from intimate partners, family members, caregivers or other trusted individuals. Note that the type of relationship and the age and/or disability presents expanded options for charging and prosecution. *Reference the Charging Crimes section on page 38 for specific charging options.*

When thinking about domestic violence, sexual assault, abuse, neglect and exploitation, one must be mindful of the power dynamics between the perpetrator and the victim. In cases of violence against people with disabilities or older adults, this relationship dynamic may be even more impactful as the perpetrator often uses the individual's age and/or disability to exercise power and control over the victim. For example, a perpetrator may over or under medicate the victim or destroy or withhold adaptive equipment (hearing aids, walkers, canes, etc.) to promote compliance and keep the person dependent upon them. *For a more comprehensive list of tactics and power dynamics see pages 87 & 90.*

The defendants who perpetrate crimes against people with disabilities or older adults do so in large part because of the victim's age or disability; therefore, consider if the act or actions meet the criteria for a hate crime. Remember the tactics are intentional, strategic, methodical, and goal-oriented. A defendant may have been grooming the victim over a period of time and playing upon the person's trust, loyalty, and dependence to remain under the radar of law enforcement and the criminal justice system. *Learn more about grooming behaviors on page 91.*

It is not uncommon for perpetrators to attribute indicators of abuse, neglect and exploitation to the victim's age or disability,

### References & Resources

#### Disability & Hate Crimes Laws

"Federally, disability is recognized under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which also allows voluntary data collection via state and local level reporting to the FBI's National Crime Information Center, although disability hate crimes — and many others — are probably severely underreported."

<https://autistichoya.net/resources/disability-hate-crimes-laws/>

claiming the victim bruises easily due to medication or health condition, forgets things because of their cognitive disability or dementia, or “makes up things” as a result of mental illness. Defendants will use their repertoire of tactics to convince others, including prosecutors, that they are just caring for the person with a disability or older adult and they are the true victim. *See Defendant Tactics, page 92.*

**Getting away from abuse is often harder for people with disabilities and older adults because access to help and support may be controlled by the abuser.**  
**- Advocate**

The more dependent the victim is on the defendant, the more difficult it is for them to participate in the judicial process. Victims with disabilities and older adults may fear loss of their independence if the perpetrator is taken away. By the time a prosecutor meets with the victim, they may have already experienced negative consequences, such as running out of medication or food, missed medical appointments, and unpaid bills. The fear of institutionalization is a powerful deterrent to participation in the legal process. *See Barriers for Older Adults and People with Disabilities handout on page 93 for additional information.*

It is not uncommon for people with disabilities to be accustomed to always do what they are told and not make their own decisions or assert their own wishes or opinions. Compliant behavior may be repeatedly reinforced and rewarded and becomes an expectation. Of course, this culture of compliance is one of the reasons older adults and people with disabilities experience domestic and sexual violence at a greater rate than others. Older adults may also defer to people in authority, such as doctors and lawyers, believing that they have more knowledge or education. Older adults and victims with disabilities may ask prosecutors, “What do you think I should do?” If not directly asked, they may look for indicators of what you think is best through non-verbal cues. In short, the victim may make a decision based upon what they think you want them to do.

#### **Promote Survivor-Driven Decision-Making**

- Check for understanding
  - Ask the victim to say what they understand (more than a head nod or yes is needed).
- Assess whether someone else is influencing their decisions (abuser, family, friends and you)
  - Ask the victim to talk about how they came up with their decision, i.e. explore pros and cons, who they talked to about choices.
- Provide enough time for decision-making during and after the meeting.

All aforementioned dynamics impact the experience of the person with a disability or older adult and their interactions with prosecutors.

## Other Considerations

Prosecutor response is critical to ensuring that victims with disabilities or older adults have equal access to the criminal justice system and are treated in a compassionate, proactive, individualized manner. To be successful, prosecutors must be aware of factors that create barriers to working with survivors with disabilities. Consider the following factors:

Other Considerations			
Culture of Compliance or "people pleasing"			
1. Does the victim appear to want to give the right answer and please others? (This is a common pattern in people with disabilities)		2. What strategies can be used to lessen this tendency, i.e. re-asking question, asking general or 3rd person question?	
Guardianship/Power of Attorney			
1. Does the victim have a guardian? If yes, in what areas does the guardian have decision-making authority? (financial, medical, etc.)		2. Does the guardian appear to support or honor the victim's choices in regard to prosecution?	
3. Does the guardian appear to influence the victim's statements or try to talk for her/him?		4. How can the guardian best be utilized during the investigation and prosecution process?	
Health & Wellness			
1. Does the victim have any medical conditions that may impact her/his ability to participate in the judicial process? Think through potential challenges, i.e. prolonged sitting, intense cross examinations, early morning appearances, etc.		2. What supports can be put in place? For example, more frequent breaks for nutrition, movement, restroom facilities.	
Language			
1. Does the victim understand their choices in the prosecution process? Can she/he articulate or indicate comprehension of the process?	2. Are materials provided to the victim written in simple, plain language?	3. Are explanations provided in such a manner that is easily understood?	4. Has the victim been asked how she/he best communicates?
Living Situation			
1. What is the victim's current living situation, i.e. living alone, group home, living with relatives? Is safety an ongoing concern due to the victim's current living situation?	2. Does the offender have access to the victim or the victim's family or friends?	3. If a change in living situation is needed to promote safety, what resources can be leveraged to make this happen?	
Transportation			
1. How will the victim get to required court appearances	2. Are they dependent upon others to get places? If yes, is there a required notice period for arranging or revising transportation times?	3. How does transportation impact scheduling meetings or court appearances, i.e. time of day, frequency?	
Victim Support			
1. Is the courtroom accessible and welcoming for a victim with a disabilities or an older adults?		2. Does the victim have access to needed supports during the court proceedings, i.e. comfort items, supportive people?	

## Policy Statement

State's attorneys' offices shall treat violent crimes against people with disabilities and older adults as a high priority and respond both professionally and compassionately to victims with disabilities. In addition, prosecution offices shall ensure that:

- A. Reports of abuse, neglect, financial exploitation, domestic violence and sexual assault of people with disabilities and older adults are fully investigated regardless of the type of disability the victim has or may have and regardless of the relationship between the victim and the suspect(s).
- B. Prosecutors shall treat all persons with disabilities and older adults with dignity and respect including the person's right to self-determination. Self-determination is a person's right to tell their own account and say what they need to say without influence by another person who may want to speak for them.
- C. Immediate, effective assistance and protection to victims who are older adults or have a disability be provided and appropriate action against offenders is taken. Further, the implementation of these solutions should not result in increased risk to the victim and should not exacerbate the situation, regardless of where the victim resides.
- D. Prosecutors shall seek to determine needed accommodations/resources for victims with disabilities or those that are older adults to ensure the victim has equal access to the criminal justice system.
- E. Prosecutors participate in coordinated efforts with other appropriate agencies, including criminal justice, victim services, disability, or senior service organizations, and abuse/neglect investigative entities in an effort to improve their responses to victims with disabilities and older adults.
- F. In situations when the victim is unavailable to testify in court, pursue an evidence-based prosecution.
- G. If the initial investigation lacks enough collective evidence to file charges, initiate further investigation; i.e., re-interviews and collection of corroborative evidence.

### **Tips & Tools**

**Most, if not all, accommodations or supports provided to people with disabilities or older adults actually benefit all victims.**

- H. Pursue a vertical prosecution when possible (i.e., same prosecutor working with the victim throughout the process). This allows the prosecutor to develop a relationship with the victim which increases comfort, as well as understanding of communication and needed accommodations.
- I. Determine if the facts support an aggravated or enhanced charge because of the person's age or disability.
- J. Consider if the facts support filing charges of a hate crime (720 IL CS 5/12-7.1; 730 IL CS 5/4-5-3.2; 20 IL CS 2605/55a (31)).
- K. Prosecutors are trained to work with people with disabilities and older adults.

### **Look Closer**

Was disability or age a factor in facilitating the offense? Is the offender in a position of authority? Does the perpetrator suspect that the victim may be unable to give consent or understand the nature of the crime? Do the facts capture premeditation/grooming behavior by the perpetrator, coercion, threats and/or force? Is the victim capable of resistance?

## **Policy Components**

To achieve an effective response to older adult violent crime victims or victims with disabilities, prosecutors will use the model response procedures and promote the following goals and responsibilities:

### **Interagency Cooperation**

Interagency cooperation is a goal that requires a team approach. Coordination of effort from law enforcement, prosecutors, investigative entities, Adult Protective Services, Department of Human Services, Office of Inspector General, Illinois Department of Public Health, disability organizations, banks, medical personnel, judicial entities, and victim advocacy groups is necessary for a thorough response to a person with a disability or an older adult who experiences a violent crime. Where appropriate, interagency efforts are solidified through a written agreement, such as a Memorandum of Understanding (MOU). The MOU will address cross-agency investigation, referral process, cross-training and any other system agreements which enhance perpetrator accountability and victim empowerment and safety.

### **Training**

Training is needed to ensure criminal justice personnel have the knowledge, skills, and tools to successfully respond to persons with disabilities or are older adults who are victims of sexual assault, domestic violence, abuse, neglect, or exploitation. Training will include:

- Laws impacting the response to victims with disabilities and older adults.
- Myths and facts about people with disabilities and older adults.
- Attitudes about people with disabilities and older adults.
- Language and sensitivity.
- The Americans with Disabilities Act.
- Indicators of violence in the lives of people with disabilities and older adults.
- Offender characteristics.
- Risk factors.
- Interviewing techniques; i.e., victim interviewing vs. offender interviewing.
- Investigative strategies including trauma informed investigation.

- Evidence collection.
- Joint investigation procedures with state investigative entities (i.e., adult protective services, Illinois Department of Human Services, Office of the Illinois Inspector General and Illinois Department of Public Health)
- Impact of trauma.

Like any profession, continuing education is critical for the development of expertise. Prosecutors will participate in ongoing education opportunities.

### **Victim Advocacy**

There are many reasons that prosecutors would want to include victim's advocates in the prosecution process when working with victims who have disabilities and/or are older adults. A victim's advocate can assist at a pace that is most appropriate for the victim and assist with rephrasing or reframing questions so that the person is better able to understand. A victim advocate also can assist with crime victim's compensation, fulfilling crime victim's rights requirements, understanding the criminal justice process, as well as meeting various needs that may arise within the criminal justice process. Victim advocates may include individuals from non-profit, non-governmental victim services organizations, governmental victim assistants, legal advocates and representatives from community-based organizations.

### **Communicating with the Victim**

Communicating with the victim is a critical component of the criminal justice process. Meeting the victim should occur as soon as possible. It is important for the prosecutor to establish rapport with the victim and allow the victim to tell the story of what happened to them. The first meeting is also a time to discuss any accommodations that the victim may need to fully participate in the criminal justice process. The victim should be notified each step along the way so that they know what is happening, (e.g., charges filed, pre-trial, trial, sentencing). The prosecutor should also make sure the victim is aware of their rights under the Victim's Compensation Act. These rights shall be given in language that is easy for the victim to understand. *See Interviewing Tips on pages 94 for more guidance on interacting with older adults and people with disabilities.*



## Response Procedures

For a successful interview, the prosecutor must establish rapport and respectful communication with the victim. A key element of this is approaching the individual within the framework of presumed competence. Presumed competence means the prosecutor presumes the victim can participate in an interview and the criminal justice process. The prosecutor will want to gather some initial information before interviewing the person:

1. Determine if the victim has any kind of disability and/or receives any sort of support services.
  - a. Did the person attend special education classes in school?
  - b. Does the person participate in services with a disability organization?
  - c. If the victim is an older adult, does the older adult receive in-home services or nursing services?
2. Find out how age or disability may affect the interview process; each person is unique so further information will be gathered when you meet the person.
3. Determine if the victim uses any adaptive equipment, such as a hearing aid, crutches, communication device (which may be an IPAD), or a wheelchair?
4. Determine if the victim has any attention difficulties.
5. Determine how the victim best communicates their wants and needs.
6. Determine what makes it easiest for the victim to understand what others communicate.
7. Assure the setting for the interview is accessible to the victim.
8. When possible, arrange for a victim advocate to be present to support the victim outside of the interviewing space to protect confidentiality.

### Tips & Tools

“Instead of assuming that the victim will not make a viable witness, ask yourself, what do I need that I don’t have?” This kind of thinking provides concrete direction for dialogue with the victim and evidence collection.” The best approach is to believe that with the right supports, victims with disabilities and older adults can successfully participate in the criminal justice process.

<https://www.disabilityisnatural.com/presume-competence-1.html>

While reviewing information from the report may assist in preparing or making arrangements for the investigative interview, asking the victim with a disability or older adult victim about how you can best work together is essential. The person is the expert on their situation. *See page 97 for more guidance on interacting with people with disabilities and deaf people.*

## Prosecutor Responsibilities

The prosecutor shall:

1. Ensure necessary accommodations needed by the individual to participate in the legal process (preliminary interviews through court proceedings).
2. Ensure the ongoing safety of the victim; if assistance is needed, notify the appropriate medical, law enforcement, or social service personnel.
3. Create a safe and non-judgmental environment that encourages honesty and sharing. Allow the victim to share what happened to them before asking for a lot of details.
4. Comprehensively explain to victims and witnesses their rights under the Rights of Crime Victims and Witnesses Act and the Crime Victims Compensation Act. It is helpful to have copies of a Victims' Rights Card in large print and braille for victims who have low vision or blindness or with pictures for those who may not read.
5. Comprehensively explain to victims the legal process including remedies, court process and potential timeframes. Often, a victim's only knowledge of court processes is from what they see on television. Explain that television is not an accurate account of what really happens in court. Be upfront about court proceedings, possible outcomes and timeframes.
6. Reduce the number of people that have contact with the victim. It may take a while to establish trust and open communication. Follow the victim's lead. Some people do not like having to tell their story multiple times to multiple people, other victims may experience a healing effect from having an opportunity to share their trauma.
7. Respect and protect the confidentiality of the victim regarding the notification and participation of others throughout the investigation.
8. It is recommended that prosecutors utilize the Communication Guide offered by the Illinois Coalition Against Sexual Assault, Illinois Imagines project to aid in communication with people who would benefit from using pictures in communication.
9. Screen for and charge any co-occurring crimes. The initial report may indicate financial exploitation, but there may also be physical or sexual abuse. Ask

### Tips & Tools

The Who, What, Where, When communication picture guide developed for response to sexual assault and domestic violence is available at:

<http://www.icasa.org/index.aspx?PageID=1045>

specific questions as victims with disabilities and older adults are more likely to understand and respond to direct inquiries.

10. Be mindful of the potential for witness intimidation. Cases involving abuse by intimate partners and other family and household members based upon power and control dynamics are likely to involve intimidation and emotional manipulation both before and after the crime. Intimidation is a significant factor in the failure of victims to report the crimes, their reluctance to participate in the criminal justice process, and recantation.<sup>4</sup>

### **References and Resources**

Field Guide to Witness Intimidations: A Reference for Identification, January 2018.  
[http://www.aequitasresource.org/Field\\_Guide\\_to\\_Witness\\_Intimidation\\_3.19.18.pdf](http://www.aequitasresource.org/Field_Guide_to_Witness_Intimidation_3.19.18.pdf)

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<sup>4</sup> AEquitas. (2017). Adapted from The prosecutor's resource: Elder abuse. Washington, DC: Author. Retrieved from [www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf](http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf)

## Trauma Informed Response

### Be Aware of the Signs of Trauma

Prosecutors working with survivors of violence should be aware of signs of trauma, such as:

- The victim does not talk about their experience(s) in a linear manner. They may go off on tangents or their speech may not seem coherent.
- What would seem to be highly emotional facets of their experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of their voice (sometimes referred to as “flat affect”). They may be intellectually present but emotionally detached.
- The victim develops a deep, blank stare or an absent look during meetings; this could be a sign that they are dissociating.
- The victim is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive as you work together on their case. While a prosecutor cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help victims be psychologically present for their own advocacy.

Adapted from: A Handbook for Attorney's

<http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookMay282012.pdf>

According to Substance Abuse Mental Health Services Administration (SAMHSA.gov), trauma results from an event, series of events, or set of circumstances experienced by an individual as physically or emotionally harmful or threatening and that has lasting adverse effects on the individual's functioning and physical, social, emotional, or spiritual well-being. When a person with a disability or older adult experiences a violent or abusive act, trauma may occur. Trauma is very personal and everyone who experiences the same situation may have a different response. Trauma not only affects the person's observable response but can also overload the brain's stress response. Additionally, individuals may have experienced other trauma which impacts their responses to the current victimization and influences your interaction with them.

For prosecutors to establish rapport with victims, it is important to be trauma responsive. Russell Strand is an expert in this area and his article, “The Forensic Experiential Trauma Interview,” is included in the protocol starting on page 99. Some of his suggestions include focusing on the person's experiences rather than a sequential

reporting of events; referencing senses during the interview i.e. what did you hear, see, smell, taste, feel, and understanding the biochemistry and brain response to trauma.

In general, when victims feel understood, listened to, and empowered, investigators tend to get better and more accurate reports of what happened. *See page 109 to learn more about communication after trauma.*

## Initial Considerations

### General Considerations

Prosecutors are ethically responsible, in addition to all requirements of attorneys practicing in Illinois, for “doing justice.” Therefore, it is important at the outset to thoroughly examine the additional components necessary to charge, prepare, and prosecute sexual assault, domestic violence and abuse, neglect or exploitation cases involving victims with disabilities or older adults. Clearly, if the victim is a person with a disability the nature of the disability can pose significant challenges that must be addressed, but none of these presents an insurmountable difficulty. However, in order to “do justice,” the prosecutor should always consider the potential harm to the victim that any charging or prosecution decision may have.

A successful prosecutor must understand the extent and nature of the victim’s disability. Doing so will enable you to more accurately assess the strengths and weaknesses of your case, file any appropriate pre-trial motions, and secure any necessary accommodations for court proceedings. To this end, it is advisable to meet with the victim as early as possible in the process, preferably with the presence of a victim advocate.

An early meeting with the victim allows you to base your decisions regarding the prosecution on your actual knowledge of the victim’s desires and capabilities, instead of merely on assumptions. It will also serve to reduce the victim’s anxiety about his or her participation in the prosecution. Remember, many of the offenders who commit violent crimes select victims with disabilities or older adults because such victims are perceived to be less likely to tell or be believe. However, if you as a prosecutor are sufficiently well-informed regarding the needs of the victim, many of the obstacles to successful prosecution can be overcome through the effective use of preparation, courtroom and other accommodations, and pre-trial motions.

#### Best Practice

Some people who have experienced trauma need to know what to expect when proceeding with a totally new experience. It helps reduce anxiety and it builds trust. It is a very important step in preparing a survivor for court.

When working with victims with disabilities and older adults it is helpful to consider some core issues:

# Early Considerations

## Practice Note

Because of aging demographics, the special needs of many victims, and complex defenses, prosecutors will necessarily need to ask and answer many questions early on in the case and simultaneously employ strategies to help proactively address issues related to victim interactions, case decisions, and trial tactics. Below are some examples.

- 1** Can the victim be interviewed at all? If so, what time of day is best?
- 2** Is the victim capable of giving legal consent? Who can make this determination?
- 3** Can the victim get to court to give testimony?
- 4** Is the victim legally competent to testify?
- 5** Is there a need to preserve the victim's testimony early in the process?
- 6** Can the case be proven without the victim giving testimony?
- 7** What accommodations will the victim need in order to participate in the criminal justice process?
- 8** What protections, orders, and support should be in place to assist the victim during and after the investigation and prosecution?
- 9** Did the victim's physical or cognitive limitation make her/him a "target" for the perpetrator?  
e.g., was it easier to convince, confuse, or deceive the victim or allow the perpetrator to continue her/his pattern of abusive tactics and evade detection

Prosecutors should consider the benefits of interviewing the older adult/person with a disability separately to ensure that his/her answers are not skewed as a result of fear or manipulation of the perpetrator, or other persons.

## **Was the victim capable of giving consent? How is this determination made?**

In Illinois, “consent” means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent. A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct (720 ILCS 5/11-1.70).

Illinois uses two tests to determine consent. The “Morality Test” necessitates that a person has a moral understanding of sexual activity, in addition to understanding its nature and consequences for consent to be valid. Additionally, Illinois uses a test called “Totality of Circumstances.” This test requires the factfinder to examine all relevant circumstances to determine whether the victim was capable of consenting to the sexual acts in question.

In Illinois, a person commits a sex crime if that person knows that the victim is unable to understand the nature of the act or is unable to give knowing consent ( 720 ILCS 5/11-1.20; 720 ILCS 5/11-1.50). A person commits aggravated criminal sexual abuse if a person commits an act of sexual conduct with a victim who is a person with a severe or profound intellectual disability (720 ILCS 5/11-1.60). Additionally, a person commits a sex crime if the victim is a “vulnerable adult.” See *“Capacity, Consent and Undue Influence” on page 110.*

## **If a person has a guardian or Power of Attorney, can they give consent?**

Most adults with disabilities do not have legal guardians. They may receive support from a caregiver(s) with shelter, education, medical care, employment, and food, but a court may not have appointed legal guardianship. Even in cases where some level of guardianship is granted by the court, the person retains rights. Similarly, older adults do not have others acting as Power of Attorney and can and do make choices for themselves.

Well-meaning family members and/or guardians may try to influence the court process. They may try to speak on behalf of the victim and indicate that their loved one does not understand. They may believe that it is up to them to decide for the victim. It is important that prosecutor’s take the time needed to discern the wishes of the victim.

## **Is there anything I should know to help us work better together?**

Knowing someone’s diagnosis may be helpful in determining whether enhanced penalties are appropriate, but a diagnosis does not tell you very much about a person. Getting to know the victim as an individual will promote rapport and most likely provide valuable information for preparing a case and working together throughout the court process. Ask first about things that are not related to the crime or a disability. For example:



“Tell me about yourself.”

“What are your favorite things to do?”

“Who are the most important people in your life?”

“Describe a typical day. What do you do? Where do you go?”

“What do you do when you get worried? Scared? Angry?”

The information gained from this type of conversation sets the stage for learning about what the victim may need from you.

To achieve a successful prosecution, be aware of any special preparations or accommodations that will need to be made as soon as possible. Depending on the needs of the victim, the necessary accommodations may range from making sure the courtroom in which the victim will testify is wheelchair-accessible to securing the assistance of an American Sign Language Interpreter, to filing a pre-trial motion permitting the victim to testify with the assistance of a comfort animal. *See Animals in Court article on page 116 for more information.*

You will also want to keep in mind during this interview the possibility of filing other pre-trial motions that may assist or protect the victim, which will be discussed in detail in subsequent sections of this protocol.

This initial interview is your best opportunity to find out exactly what is needed to facilitate the victim’s participation in the prosecution of the offender. Again, you and your victim’s advocate will want to familiarize yourselves with the services available in your community to ensure that the necessary accommodations can be made. Additionally, the sheriff’s office is an invaluable resource for making sure witnesses, including the victim, can safely access the courts. Contact your sheriff or other representative of the sheriff’s office in advance of court proceedings if their assistance may be helpful to your victim. Finally, each judicial circuit in the State of Illinois has a Court Disability Coordinator (CDC). You can contact the Illinois Attorney General’s Office in Springfield at (217) 524-2660 or in Chicago at (312) 814-5684 for information on the CDC in your area.

#### **Best Practice**

The assistant state’s attorneys will meet the victim wherever the victim will be most comfortable, including their home.

Of course, each case is different. People with the same diagnosis do not have the same life experiences, nor do they need the same supports or accommodations.

Check in with the older adult or person with a disability to make sure that the accommodations are working. If the court process takes a long time, different supports may be needed as health may change over time.

### **Best Practice**

Making an assumption about accommodations is not necessary when you are working with the expert. Asking the victim, “Is there anything I should know about you to help us work better together?” is a great way to open up dialogue about needed supports.

## **Interview Questions**

The foregoing inquiries may not address every concern that you may want to address in your initial contact with the victim. This list is not meant to be comprehensive and is merely intended to serve as a guide and to illustrate that the purpose of the initial interview with the victim is to prepare both yourself and the victim for effective prosecution of the offender.

*How has the offense impacted the victim?*

Of course, domestic violence, sexual assault, abuse, neglect, and exploitation are traumatic experiences with both short and long-term impacts. In cases in which the victim has a disability and/or is an older adult, it is an unfortunate fact that the offense is often perpetrated by an individual who is, at least in part, responsible for the care of the victim. You should be able to obtain an order prohibiting the offender from having contact with the victim if the offender is released on bond. While this can address the victim’s fears of further abuse and/or retaliation for reporting the offense, the victim may still be left in a situation where he or she needs assistance with day-to-day care and activities. You and your victim’s advocate should be familiar with disability services and community resources for older adults.

*What are the victim’s expectations of the criminal justice system?*

First, ensure the victim understands their rights. You may need to spend more time explaining rights to some victims with disabilities. You should allow sufficient time in this initial interview to explain the nature of the criminal proceedings to the victim with an emphasis on their role during the proceedings. You may benefit from the assistance of a family member or caregiver if the nature of the victim’s disability is such that they have difficulty understanding your explanation.

Next, take the opportunity to find out what goals the victim may have for the case, or what they expect will happen to the offender as a result of criminal prosecution. It should be your goal at this initial interview to ensure the victim emerges with a realistic understanding of what will be expected from them during the process, as well as what will happen to the offender. As with any other victim, a person with a disability or older adult is entitled to accurate information in this respect and you should refrain from “sugar-coating” this information or promising the desired result.

*In what context did the violence take place?*

Understanding the context of the offense as viewed through the lens of the victim is crucial for success before judges and juries. Context should be developed during the investigation of a case and proven at trial.

In domestic and sexual violence investigations, it is essential to establish/explore course of conduct which includes pre-assault behavior, violent incident and post assault behavior.

- Documentation of pre-assault behavior might include the isolation of the victim, manipulation, threatening, or grooming behavior or forced compliance.
- Documentation surrounding the violent incident that describes how the victim said, “no.” This includes description of behaviors and/or statements which indicate no consent, i.e. victim cried, closed eyes, tightly held legs together, laid still throughout the assault.
- Post-assault behavior includes indicators which may present immediately following the assault as well as those occurring days, weeks, or months later. Reports from the victim, family members, and friends demonstrating changes in the victim’s behavior, such as sleeplessness, weight gain/loss, not attending work or school, putting locks on the door, afraid to answer telephone or door, or moving is critical evidence that prosecutors can use in establishing lack of consent. Think about these changes in behavior. Do they speak to consensual sex or a non-abusive relationship?

To help establish context, prosecutors should develop a list of experts in the field who can assist throughout the process. An expert witness might be useful when it comes to trial, especially when the contextual assessment is a critical part of the strategy. The expert witness might be someone with a degree and many years of experience working with people with disabilities or older adults. In addition, medical professionals, family and friends, facilities directors, and program coordinators also may provide valuable information and will often be a part of the victim’s support structure.

In all cases where crimes are perpetrated against a person with a disability or older adult, the prosecutor should approach the case from an evidence-based perspective.

## Why would victims with disabilities or older adults be reluctant?

Any crime of domestic or sexual violence has the possibility of a reluctant victim and few if any other witnesses. The prosecutor must determine if the case is provable and must then attempt to optimize possibility of a successful prosecution. The fact that the victim has a disability may exacerbate the already difficult road that the victim must travel. An individual who has a disability or an older adult may have more risk factors in terms of being targeted for harm and may also depend on the abuser for caregiving purposes, monetary support, childcare, transportation, or other resources.

### Look Closer

What you see may not just be an “uncooperative” or “unwilling” victim. The abuser’s response is quick and certain; whereas, the wheels of justice may turn slowly. Victims may have to choose safety and independence over justice.

The prosecutor needs to understand the relationship from the perspective of the victim and how this dynamic affects a victim’s ability and willingness to testify. To the victim, the prosecutor is someone in a suit in an office whom the victim meets a couple times at best. The prosecutor cannot do anything to harm the victim if the victim chooses not to testify. The abuser, however, certainly could do something to harm the victim should they choose to testify. The abuser is usually someone close to the victim, someone who has caused harm to the victim in the past, who could certainly do it again, who may be currently threatening harm or death to the victim or the victim’s family members, and who may perform other useful functions in the victim’s life. It is a completely different dynamic for a victim than for someone who was perhaps the victim of a random break-in.

Negative consequences to the victim for supporting the charging and prosecution are often immediate, i.e. withdrawal of care, retaliation from the abuser, loss of independence; whereas, the benefits of participating in the court process are tentative and in the future.

With this consideration, the prosecutor should attempt to make conditions as favorable as possible for the victim to come forward and share their experience. Keeping the defendant from influencing the victim’s testimony is paramount. Making the victim as comfortable as possible with the court process is also important.

To keep the defendant from influencing the victim, no contact orders must be in place and enforced. If necessary, the defendant should be kept in custody. Monitor jail calls to ensure he/she is not influencing the victim. Keep in touch with the victim. Meet with the victim to develop rapport and discuss safety planning with the victim. Link the victim with local agencies which could be supportive – domestic violence shelter, etc. Seek family members/friends of the victim who can help support the e. Provide a safe and

comfortable atmosphere when information gathering. If the victim has not given a written statement, consider whether it would be helpful to obtain one.

It is also important present a positive impression on the victim. Sometimes it takes several attempts at prosecution before an abuser is held accountable. If a victim has a terrible experience with the judicial system/prosecutor's office, will they be likely to be cooperative the next time?

## **Charging Crimes**

Note: There are various domestic-related sentencing enhancements for offenses when the victim has a disability and/or is an older adult. Review the Power and Control Charging Wheel on page 120.

<b><u>Physical Abuse</u></b>	<b><u>Sexual Abuse</u></b>
<p>First Degree Murder (720 ILCS 5/9-1)</p> <p>Aggravated Assault (720 ILCS 5/12-2)</p> <p>Aggravated Battery (720 ILCS 5/12-3.05)</p> <p>Domestic Battery (720 ILCS 5/12-3.2)</p> <p>Aggravated Domestic Battery (720 ILCS 5/12-3.3)</p> <p>Abuse or Criminal Neglect of a Long-Term Care Facility Resident; Criminal Abuse or Neglect of an Elderly Person or Person with a Disability (720 ILCS 5/12-3.05)</p> <p>Child Abandonment (720 ILCS 5/12-21.5)</p>	<p>Criminal Sexual Assault (720 ILCS 5/11-1.20)</p> <p>Aggravated Criminal Sexual Assault (720 ILCS 5/11-1.30)</p> <p>Criminal Sexual Abuse (720 ILCS 5/11-1.50)</p> <p>Aggravated Criminal Sexual Abuse (720 ILCS 5/11-1.60)</p> <p>Sexual Misconduct with a Person with a Disability (720 ILCS 5/11-9.5)</p> <p>Promoting Juvenile Prostitution (720 ILCS 5/11-14.4)</p> <p>Patronizing a Minor Engaged in Juvenile Prostitution (720 ILCS 5/11-18.1)</p> <p>Child Pornography (720 ILCS 5/11-20.1)</p>
<b><u>Emotional Abuse</u></b>	<b><u>Financial Abuse</u></b>
<p>Criminal Abuse or Neglect of an Elderly Person or Person with a Disability (720 ILCS 5/12-4.4a)</p> <p>Abuse or Criminal Neglect of a Long Term Care Facility Resident; (720 ILCS 5/12-3.05)</p>	<p>Financial Exploitation of an Elderly Person or a Person with a Disability (720 ILCS 5/17-56)</p> <p>Identity Theft (720 ILCS 5/16-30)</p> <p>Robbery (720 ILCS 5/18-1)</p> <p>Aggravated Vehicular Hijacking (720 ILCS 5/18-4)</p>

<p style="text-align: center;"><b><u>Willful Deprivation</u></b></p> <p>Criminal Abuse or Neglect of an Elderly Person or Person with a Disability (720 ILCS 5/12-4.4a)</p> <p>Abuse and Criminal Neglect of a Long Term Care Facility Resident (720 ILCS 5/12-4.4a)</p>	<p style="text-align: center;"><b><u>Confinement</u></b></p> <p>Kidnapping (720 ILCS 5/10-1)</p> <p>Aggravated Kidnapping (720 ILCS 5/10-2)</p>
<p style="text-align: center;"><b><u>Passive Neglect</u></b></p> <p>Criminal Abuse or Neglect of an Elderly Person or Person with a Disability (720 ILCS 5/12-4.4a)</p>	<p style="text-align: center;"><b><u>Self-Neglect</u></b></p> <p>Self-Neglect is NOT a criminal offense unless a caregiver is involved.</p>
<p style="text-align: center;"><b><u>Other</u></b></p> <p>Disorderly Conduct (720 ILCS 5/26-1) (Must prove breach of the peace)</p> <p>Communication with a Witness (720 ILCS 5/32-4(b))</p> <p>Intimidation 720 ILCS 5/12-6</p> <p>Violation of Bail Bond (720 ILCS 5/32-10)</p> <p>Violation of Order of Protection (720 ILCS 5/12-3.4)</p> <p>Interfering with the Reporting of Domestic Violence (720 ILCS 5/12-3.5)</p> <p>Stalking (720 ILCS 5/12-7.3)</p> <p>Aggravated Stalking (720 ILCS 5/12-7.4)</p> <p>Cyberstalking (720 ILCS 5/12-7.5) (9 includes contacting or soliciting someone else to contact a person through electronic communication, like a defendant trying to get someone to contact the victim through social media sites Class 4 Felony)</p> <p>Phone Harassment (720 ILCS 135/1-1) (Can be felony enhanceable depending on what is said)</p> <p>Harassment by Electronic Communication (720 ILCS 135/1-2) (Can be felony enhanceable)</p> <p>Harassment of a Witness (or juror, or a representative for a child) (720 ILCS 5/32-4a)</p> <p>Hate Crime (720 ILCS 5/12-7.1) (Applicable to people with a mental or physical disability)</p>	

## **Analysis of the Evidence**

Evidence-based prosecution should be a familiar term to those prosecutors who have worked on domestic violence, elder abuse, or homicide cases. The same principles should be used in these cases involving victims with disabilities. In homicides, victims cannot speak for themselves, so the evidence must speak for them. The same holds true of cases with victims who for a variety of reasons are unable or choose not to speak fully for themselves. Therefore, the other evidence must be gathered to fill in the gaps where testimony would be.

Any analysis of the evidence must include both looking at what evidence has already been collected and determining if additional evidence may be available.



## Prosecutorial Investigation

When evidence on these cases is being collected, law enforcement is not necessarily thinking in terms of “homicide” or “victim unable to speak for self.” They are trying to do their jobs the best they can, which involves investigating all kinds of offenses and circumstances. It is the prosecutor’s job to ensure that all available evidence is preserved in particular kinds of cases where it is likely to be needed.

This could include:

- 911 recordings.
- Ambulance and hospital records.
- Interviews with outcry and other witnesses.
- Photographs.
- Physical items which may or may not be amenable to forensic testing.

**Many seniors are reluctant to report to the authorities for fear of being seen as incapable, gullible, or “stupid” by their adult children, families, law enforcement, and peers in the community. The individuals I have worked with in many situations have chosen not to prosecute, even after reporting a crime, for fear of retaliation by the perpetrator or their associates.” - Senior Case Manager**

- Written statements from victims and witnesses.

These items could be and are available after the initial contact with law enforcement. The earlier a prosecutor gets involved in a case, the more likely it is that additional evidence can be gathered.

Another rich resource for information is court documents regarding the perpetrator and the victim.

This may include:

- Allegations in prior orders of protection against the defendant. These are helpful resources to develop knowledge of a pattern of behavior.
- Prior orders of protection.
- Contents of divorce files.
- Learning who the victim’s friends/cohorts are.
- Evidence gathered via staff member interviews and documentation during social service visits.

There are many reasons why a victim of domestic violence may choose not to participate fully with law enforcement and prosecutors. When a victim has a disability

and/or is an older adult, there may be even more reasons. There may be fear of losing services, children, access to grandchildren, their home, personal care assistance, and/or benefits. If a victim is reluctant to participate, do what you can to establish trust and rapport with the victim, and proceed with an evidence-based prosecution.

In reviewing evidence for prosecution of a domestic violence case involving a victim with a disability or older adult, the prosecutor should focus on putting together the best case possible. In this way, it is no different than the prosecution of any domestic violence case.

#### **Best Practice**

- Charge the highest offense possible.
- Try to get a conviction on at least a misdemeanor domestic battery or violation of order of protection so you can enhance to a felony next time.

## Preparing Cases

### Pre-trial Motions

#### Motion in Limine

In any prosecution, making sure that you are prepared for trial can mean the difference between obtaining a conviction and watching the defendant walk out the door with an acquittal. The fact that the victim may have a disability and/or be an older adult affects your trial preparation in two major ways. First, there are several pre-trial motions that specifically apply to sex offense cases, domestic violence cases and to cases in which the victim has a disability or is an older adult. Second, if the victim has a disability you will need to become familiar with the person's disability during your preparation, so that you can address any influencing factors on the victim's ability to present his or her testimony by finding other evidence to fill gaps in the story or by arranging in advance for suitable accommodations to permit the victim to accurately present his or her account of the events.

It is often desirable or even necessary to obtain a ruling from the court in advance on the admissibility of evidence or on the procedure to be followed in a given situation. Such pre-trial motions, or *motions in limine*, are filed as a matter of course in many criminal prosecutions. This section will focus on several pre-trial motions specific to the trial of sexual offenses, domestic violence, and to cases in which a victim and/or witness has a disability or is an older adult.

It is wise to have a library of *motions in limine* which may be useful in sexual violence and domestic violence cases. There is no reason to reinvent the wheel. If your office does not have these types of motions, consult with other state's attorney's offices or with state/national organizations for help. You can also refer to a sample motion in limine on page 121. Common issues include:

#### **Decisions regarding informing the court about the victim's disability**

In some cases, prosecutors may opt not to share an individual's disability with the court. This is not to say that there is anything wrong with having a disability or that information on the disability should be kept hidden. However, juries do not get a lot of time to receive evidence in a case and deliberate. They are only going to receive a limited amount of information. They won't know about the victim's daily life days or weeks before the offense. They often make snap judgments based on preconceived ideas. Is it relevant to the case that the victim has a disability? If not, then perhaps we don't want to allow information about the disability to cloud the issues for the jurors.

One example of this occurs with mental health issues. Defense attorneys have historically tried to paint a terrible and distorted picture of someone who may have a mental health diagnosis. Just because someone has a certain condition, does that

mean they might just make things up? Or that just because they were the victim of a crime, that they want their condition discussed in open court?

There is a temptation for prosecutors to just allow information into the proceeding because it is the truth. Yes, if the information is going to be allowed in, then the prosecutor must be prepared to deal with this information in an honest and open way. Prosecutors who volunteer information must be prepared to counteract incorrect biases and assumptions that come with it. As a practical matter, the judge is going to be reluctant to allow “bolstering” of the victim’s credibility in the form of positive or even neutral attributes of a person with this diagnosis, because of course the onus is on the prosecution to prove their case. The judge will be less likely to curb a defense attorney from raising the specter of possible negative ramifications of a mental health condition. So, the prosecutor should think carefully about what information the jury is allowed to hear, without making sure that the jury will be allowed to access the correct tools to analyze the information.

### **Testimony by Closed-Circuit Television (CCTV)**

725 ILCS 5/106B-5 provides that when the victim of a criminal sexual assault, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual abuse, aggravated criminal sexual abuse aggravated battery, or aggravated domestic battery is under the age of 18, or is a “moderately, severely, or profoundly intellectually disabled person” or a person affected by a developmental disability, the court can permit the victim to testify by CCTV outside the presence of the defendant.

When you have a case in which the victim has expressed reluctance to testify because he or she is reluctant to confront his or her abuser, CCTV allows a reasonable accommodation for the victim. To allow the victim testimony via CCTV:

- Such testimony would have to take place during the trial or other proceeding.
- The victim must be a child, a moderately, severely, or profoundly intellectually disabled person, or a person affected by a developmental disability.
- The court must find that making the victim testify in court would result in the victim suffering serious emotional distress such that the victim cannot reasonably communicate, **or** that it would cause the victim to suffer severe emotional distress that is likely to cause the victim to suffer severe adverse effects.

If such a motion is allowed, then the victim may testify in a separate room via CCTV, without the presence of the defendant. In addition to the victim, other people in the room can include:

- Prosecutor.
- Defendant’s attorney.

- Judge.
- Equipment operators.
- Court security personnel.
- Person whose presence contributes to the well-being of the victim, such as:
  - Parent or guardian.
  - Social worker.
  - Person who has supported with the victim in a therapeutic setting concerning the abuse.

Only the prosecutor, defendant's attorney, and the judge may ask the victim questions. While the defendant may not be present in the room from which such a victim is testifying, he or she is to be permitted to communicate with the persons in the room "by any appropriate electronic method." This section does not apply if the defendant is appearing pro se.

### **Prior Sexual Activity of Victim ("Rape Shield")**

725 ILCS 5/115-7, also known as the "Rape Shield" law, prevents the defendant from offering evidence of the victim's reputation or prior sexual activity. One can well imagine that prior to the enactment of this statute, many victims of sexual assault and sexual abuse would have been reluctant to report the offenders for fear of having to have their private lives exposed and scrutinized in court. This statute prevents the defendant from turning the tables and essentially putting the victim on trial.

Under this statute, the only time that the defendant could introduce any evidence of the reputation or prior sexual activity of the victim is upon the issue of whether the victim consented to prior sexual activity with defendant, if evidence of prior sexual offenses against the victim by the defendant are offered pursuant to Section 115-7.3 of the Code of Criminal Procedure, or if such evidence is constitutionally required to be admitted.

If you are prosecuting a sexual assault or sexual abuse case in which you intend to offer, pursuant to Section 115-7.3, evidence of prior sex offenses perpetrated by the defendant against the victim and the defendant attempts to offer evidence of prior sexual activity offered to impeach the victim's testimony on the issue of consent to prior sexual activity or denial of prior sexual activity with the defendant, an offer of proof as to any such evidence must be heard in camera. In reviewing such proposed evidence, the court must find that it is "reasonably specific" as to date, time, and place of past sexual activity, or the court shall order defense counsel to refrain from inquiring about prior sexual activity between the victim and defendant.

The provisions of this statute apply equally to other corroborating witnesses called to present testimony regarding prior sexual offenses committed by the defendant pursuant to Section 115-7.3 as they do to the victim in the present case. While the wording of the statute does not expressly require the State to file a *motion in limine* to prevent the defendant from introducing evidence of the victim's reputation or prior sexual activity, it would certainly be prudent to file such a motion pursuant to this statute to avoid surprise or ambiguity.

### **No Mental Examination of Sex Victim**

725 ILCS 5/115-7.1 provides that the court may not order the victim of a sexual offense to submit to a psychiatric or psychological examination. One might assume, then, that the defendant would not be permitted to introduce evidence of the victim's mental health at all. However, that is not necessarily the case. While the court may not order a psychiatric or psychological examination on the victim of a sex offense, and the victim's mental health records would ordinarily be subject to privilege under the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/10 et seq.), courts have held that such privilege is overcome by the Defendant's 6<sup>th</sup> and 14<sup>th</sup> Amendment rights where such information is relevant and impeaches the victim. See, e.g., People v. Bean, 137 Ill.2d 65, 147 Ill. Dec. 891, 560 N.E.2d 258 (2<sup>nd</sup> Dist. 1990).

Pursuant to Bean and the cases that have followed it where the defendant seeks to obtain the victim's mental health records, the court first reviews any such records received pursuant to subpoena in camera before determining which, if any, portions thereof are relevant. The burden is then on the defendant to establish that the evidence is relevant and impeaches the victim.

This is not something that prosecutors would generally initiate, but they do need to be prepared to respond when the victim's mental health treatment records are subpoenaed by the defendant. The mere fact that the victim of an offense may have sought treatment for a mental illness is not relevant to his or her credibility as a witness; see, for example, People v. Printy, 598 N.E.2d 346, 174 Ill.Dec. 149 (2<sup>nd</sup> Dist. 1992). Prosecutors must make sure defendants are held to their burden of proving any issue they seek to raise regarding the victim's mental health is relevant to the victim's credibility, such as memory loss, hallucinations, etc., and must avoid allowing the defendant to use presence of mental illness as a factor in impeachment.

With that said, the following section, 115-7.2, provides that expert testimony relating to "any recognized and accepted form of post-traumatic stress syndrome" suffered by the victim is admissible in the prosecution of sex offenses. Such evidence could be quite helpful in establishing that the victim suffered from a traumatic experience and may help explain any erratic behavior or other symptoms of post-traumatic stress to the judge or jury in the proper context. Again, although Section 115-7.2 does not expressly require that a pre-trial motion is filed in order to present such evidence, it may be prudent to file

a *motion in limine* regarding post-traumatic stress syndrome evidence in order to avoid surprise at trial.

## Evidence of Prior Violent Offenses

Anyone who has prosecuted for an appreciable period can tell you that the rates of recidivism for defendants who commit sex offenses are alarming. The Illinois legislature has recognized that certain individuals are prone to commit sex offenses, and in enacting 725 ILCS 5/115-7.3, gave prosecutors a powerful tool to present evidence of an offender's prior sexual offenses to the judge or jury. While ordinarily, evidence of a defendant's prior "bad acts" could only be admitted for a limited purpose, such as showing knowledge, intent,

absence of mistake, and modus operandi, this statute permits introduction of evidence of the defendant's commission of prior sex offenses "for its bearing on any matter to which it is relevant," which includes propensity to commit sex offenses.

### Facts & Stats

People v. Torres, 2012 IL 111302 has framed the way discovery is followed when prior testimony is possibly going to be admitted, because the case was overturned on appeal due to prior testimony not being included in discovery.

**To introduce evidence of prior sex offenses at trial, you must first file a pre-trial motion.** This section applies to cases in which the defendant is charged with one or more sex offenses set forth in Section 115-7.3(a)(1), or other offenses which, while not "sex offenses," per se, involved the commission of an act of sexual penetration or sexual conduct, pursuant to Subsection (a)(2). Finally, Subsection (a)(3) applies this statute to the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.

Prior to the trial of such cases, prosecutors may file a motion asking the court to admit evidence of the previous commission by the defendant of any offense set forth in Subsections (a)(1), (a)(2), or (a)(3), for its bearing on any manner to which it is relevant. Prosecutors also must disclose any evidence that you seek to admit under this section to the defense "at a reasonable time in advance of trial," although the court may excuse pre-trial notice "on good cause shown" (Subsection (d)).

At hearing on the pre-trial motion, the court may consider (1) the proximity in time to the charged or predicate offense, (2) the degree of factual similarity to the charged or predicate offense, and (3) other relevant facts and circumstances. Obviously, the more recent the prior sexual offense committed by the defendant and the greater the degree of factual similarity, the more likely evidence of the prior offense will be allowed in court. This is where earlier investigative efforts will pay off; if you can introduce detailed evidence of the prior sex offenses committed by the defendant, it will be easier for you to show that the degree of factual similarity between the prior offense and the charged offense weighs in favor of admitting the evidence of the prior offense.

Be advised that introducing evidence of prior sexual offenses committed by the

defendant against the same victim opens the door to rebuttal evidence that would ordinarily be prohibited by the “rape shield” law. The defendant may introduce evidence that the victim previously consented to sexual activity with the defendant, and may even introduce reputation evidence. Therefore, when seeking to introduce evidence of prior acts of sexual abuse or sexual assault committed against the same victim, it is critical to conduct a thorough investigation and pre-trial interview with the victim, anticipate the defendant’s rebuttal evidence, and ensure that the victim is prepared to withstand cross examination.

### **Excited Utterance**

A new published opinion on this topic is People v. James Brown, 2013 IL App (2d) 110327. This case relates to Crawford and how excited utterances are allowed under certain circumstances.

### **Hearsay Exception for “Outcry” Statements by Victim**

725 ILCS 5/115-10 permits the introduction into evidence at trial of evidence of out-of-court statements made by the victim regarding sexual or physical abuse or assault, which would ordinarily be inadmissible hearsay. In order for this hearsay exception to apply, the victim must be (1) a child under 13 years of age, **or** (2) a “moderately, severely, or profoundly intellectually disabled person.” This section applies to prosecutions for any “physical or sexual act” perpetrated upon a qualifying victim, and lists a number of specified offenses, including all sex offenses, as examples of applicable offenses, although the list is not exhaustive.

Out-of-court statements that are admissible under this section are set forth in Section 115-10(a) as:

- “(1) testimony by the victim of an out of court statement made by the victim that he or she complained of such act to another; and
- (2) testimony of an out of court statement made by the victim describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act against that victim.”

The first category of statements is useful to counter a defense tactic of suggesting a delay in reporting an offense to law enforcement detracts from the victim’s credibility. As we know, there are a number of reasons a victim may hesitate to report an offense, including fear of retaliation, fear that his or her complaint will not be believed, or being unable to effectively communicate what happened to him or her. Often, a defendant will assert if the offense really happened, the victim would have come forward sooner. If you can point to an occasion where the victim did tell someone what happened to him or her, it can help to counter that tactic.



When the victim has a disability that may cause him or her to experience anxiety during his or her testimony to the extent that it will be difficult for the witness to articulate what happened. Often, the victim of an offense will be able to explain what happened to him or her more clearly to a listener outside the courtroom, without the looming threat of cross-examination. In fact, subsection (e) of this statute expressly includes statements about the offenses made in interviews conducted according to protocols adopted by a Child Advocacy Advisory Board, or interviews to which an agent of the state's attorney's office is a party or a witness. Allowing the state's attorney's office to participate in this interview ensures that any accommodations necessary to assist a witness with a disability can be made. The defendant has no corresponding right to participate in this interview.

For admission under this statute, the court must find, pursuant to Section 115-10(b)(1), that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." This finding must be made at a hearing conducted by the court outside the presence of the jury, and although the statute does not expressly state that the hearing must be held prior to trial, **it is highly advisable to file a *motion in limine* regarding statements sought to be admitted under this section in advance of trial.** Subsection (d) requires that the party offering the statement shall give the adverse party "reasonable notice" of the particulars of the statement.

The statute also states for these statements to be admissible at trial, the victim who made the out-of-court statement must either testify at trial or, if the victims unavailable, there must be evidence to corroborate the statement. However, the Illinois Supreme Court ruled that introducing hearsay statements in cases in which the victim does not testify violated the defendant's right to confront and cross examine witnesses under the 6<sup>th</sup> Amendment. See In re Rolandis G., 232 Ill.2d 13, 902 N.E.2d 600 (2008).

In addition to the requirement that there be "sufficient safeguards of reliability" regarding statements admitted pursuant to this section, in cases with a child victim, the statute requires that the out-of-court statement be made either before the victim attains 13 years of age **or** within three months of the commission of the offense, whichever occurs later. This time limit does not pertain to adults with disabilities. In any case in which out-of-court statements are admitted pursuant to Section 115-10, the jury must be instructed pursuant to Section 115-10(c), which provides:

"If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the moderately, severely, or profoundly intellectually disabled person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor."

This 115-10 instruction to the jury has been addressed by the Jury Instructions Committee and the pattern instruction that follows this section is set forth in IPI Criminal # 11.66.

## **Other Pre-Trial Motions**

As a general rule, prosecutors should consider any and all possible pre-trial motions that may be advantageous to the case. Filing a pre-trial motion to obtain a ruling even when a motion is not required also can be a smart strategy. For example, Section 115-11 permits the court to exclude persons not having a direct interest in the case (except for the media) from the courtroom when a child under 18 is the victim of a sex offense and is testifying. The statute contains no requirement that the State file a motion in advance of trial, but if the victim expresses anxiety about testifying, obtaining an order in advance of trial may set their mind at ease and allow them to focus on trial preparation. In addition, any accommodations needed for a victim to fully participate in the court process can be made in a pre-trial motion. This is especially true when the courtroom needs to be changed or modified or when the request may be objectionable to the defense.

## **Evidentiary Matters**

When using 911 calls, prosecutors should be familiar with foundation requirements and issues, as well as witnesses needed. Too lay the foundation for the call. Witnesses may include the 911 operator who took the call, the technician who duplicated the 911 tape, and the officer who collected the recording. Be familiar with the “silent witness” chain of custody rules, and whether they apply to 911 recordings or other types of recordings that could be useful.

Prosecutors also must lay the foundation for the recording’s contents. A witness to identify the victim’s voice on the recording will be needed if the victim is not going to testify. Prepare a *motion in limine* to get the contents of the recording into the record.

Also be aware of the evidentiary foundation for introducing photographs.

## **Witness Preparation**

### **Preparing the Victim to Testify**

Prosecutors have grown accustomed to spending time in courtrooms and it is easy to forget what an overwhelming and even unpleasant experience it can be for someone who is not used to it. Court appearances can be an especially trying ordeal for the

**“When I have a victim who is an older adult or person with a disability, I take the person to the courtroom when it is empty and show them where they will sit when they testify and where everyone else will be in the courtroom.”**

**– Illinois Assistant States Attorney**

victims of domestic violence, sexual violence, neglect and exploitation, as they must cope with confronting a perpetrator in addition to the unfamiliarity of the court setting. The challenge of appearing in court and giving testimony can seem even more daunting to victims with a disability and/or is an older adult.

By investing time in preparing the victim for what he or she will face in the courtroom, prosecutors can show them the challenges inherent in testifying are not insurmountable.

- Schedule a time to meet with the victim.
- Allow plenty of time to answer any questions that he or she may have.
- Instruct staff not to interrupt the meeting.
- Talk to the victim about more general topics, and inform them in general about the court process and the time frame for their case.
- Learn from the victim about their disability and how it affects them.
- Allow the victim to review their statement to the police.
- Check for understanding.
- If the victim needs assistance to review and understand the report, provide needed support.
- Emphasize if they remember anything differently from the way the statement is written, it should be discussed with the prosecutor.
- Prepare the victim for what will be said about them in court. Be sure to address how their disability may be discussed, including their diagnoses and treatment services.

Prosecutors should encourage victims to become familiar with a courtroom by taking them into a courtroom while court is not in session and allowing him or her to move around and sit on the witness stand. Show the victim where you will be when he or she is testifying, and where the judge, jury, and other courtroom personnel will be located.

### Best Practice

If feasible, meet at the court where the case will be held. With each step, be sure to explain the things that could happen. There is a balance here of giving them enough information so that they know what to expect and giving them so much information they become overwhelmed.

“Representing Domestic Violence Survivors who are Experiencing Trauma and other mental health Challenges: A Handbook for Attorneys”

<http://www.nationalcenterdvtraumamh.org/publications-products/attorneys-handbook/>

Victims will need to know where the offender will be, as well as where security personnel will be stationed. This would be especially beneficial to avoid stress that would interfere with court proceedings.

It is advisable to spend some time explaining the procedure for direct and cross examination to the victim. Ensure the victim knows to wait for a ruling on an objection before trying to answer a question to which an objection has been interposed. Instruct the victim to listen carefully to the question and to answer the question that was asked, without trying to explain or offer additional information. The victim should understand that “I don’t know” and “I don’t remember” are acceptable answers when they are true, and that he or she should not try to guess at answers to please the questioner. Explain to the victim that it is acceptable to pause for a moment before giving an answer and that he or she can control the flow of the questioning by doing so. Above all, make sure that the victim understands that he or she is not responsible for the outcome of the case, which is in the hands of the judge or jury, and that his or her only responsibility is to tell the truth.

Try to iron out all practical considerations ahead of time, such as:

- Transportation.
- Physical location in the courtroom.
- Safety issues such as being comfortable with courtroom personnel.
- The setup of the courtroom.
- Who might be in the courtroom?
- Matching testimony time of day with victim’s health and peak level.
- The victim having a support person present in court.

### Tips & Tools

See the What Happens at Court Handout on page 123 for victims who are older adults or people with disabilities mapping out the court experience.

### **Best Practice**

Unique ways prosecutors have used the ADA to give victims a voice:

- Illinois: Victim communicated by blinking yes or no.
- California: Victim tapped a pencil for yes or no.
- Washington: Victim testified in presence of a support animal.

Work closely with the victim witness coordinator, if there is one, to discuss these issues with the victim as well as other surrounding issues such as bathroom locations, etc.

Make sure to ask the victim if he or she has any questions about what will happen in court. In domestic violence, sexual violence, neglect, and exploitation cases, it is likely that the victim will have some apprehension about having to face the offender. If this is a concern for your victim, consider whether one of the previously discussed pre-trial motions can address this problem. If not, y assure the victim that the defendant will not be able to get to him or her during the trial because of court security personnel, and that he or she does not have to look at the defendant except when making the in-court identification. Direct the witness to keep

his or her eyes on you (or, better still, the jury) if that will help to reassure him or her. Often victims simply need some reassurance and support. Most victims are more than up to the task of testifying in court.

Of course, when the victim has a disability, that disability can impact the victim's experience in court, and interpose barriers between the witness and the judge or jury. Ascertain how the victim's disability might affect their testimony. In Illinois, all witnesses are presumed competent to testify, and the burden of establishing incompetence is on the party raising the challenge. As long as the witness understands the importance of the oath to tell the truth and is able to communicate, that witness should be found competent to testify. This is true even if the witness is not capable of speech, provided he or she can communicate by other means. See *People v. Spencer*, 119 Ill.App.3d 971, 75 Ill.Dec.479, 457 N.E.2d 473 (1st Dist. 1983).

This raises the question of what other means of communication are acceptable. It is difficult to formulate a straightforward legal rule in light of the varying nature and extent of the myriad of disabilities that may need to be accommodated. The trial court has great discretion in determining what procedure will be followed. In the case of a witness who is not able to speak, accommodations might include:

- Written questions and answers.
- Written statements.
- Hand signals or sign language with the aid of an interpreter.
- Gestures in place of actual speech.

- Communication devices can also be used.

If the victim is unable to speak and must communicate non-verbally through gestures, the court may even permit the witness to testify with the aid of a facilitator. The Supreme Court of Kansas, in *State v. Warden*, 257 Kan. 94, 891 P.2d 1074 (1995), ruled that before allowing a witness to testify with such a facilitator, the court must be satisfied that the testimony transmitted to the court by the facilitator is actually the testimony of the witness and not influenced by the facilitator.

### **Tips & Tools**

#### **Illinois Assistive Technology Program**

The Illinois Assistive Technology Program (IATP) is the non-profit organization designated as the Statewide AT Program funded under the Assistive Technology Act of 1998, as amended. IATP's lead agency is the Illinois Department of Human Services, Division of Rehabilitation Services.

IATP's mission is to increase access to and the acquisition of Assistive Technology (AT) devices and services for individuals of all ages with disabilities. IATP provides AT information and services in the areas of education, employment, community living, and IT/telecommunications. Our goal is to improve the quality of life of all Illinoisans with disabilities and enable them through greater access to assistive technology devices to fully participate in all aspects of life. We believe disability is a natural part of the human experience and in no way diminishes a person's right to:

- enjoy full inclusion and integration in mainstream society;
- benefit from an education;
- pursue meaningful careers and;
- enjoy self-determination and make choices.

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

It is difficult to find precedent in the cases regarding accommodations that can be made for victims with a disability, but one thing is certain: accommodations will not be provided without a request. Once it has been ascertained what the witness will need on the stand, accommodation motions should be filed. Accommodations should not be such that it could influence the substance of the witness's testimony or provide undue advantage to the party seeking the accommodation. In addition, they must not violate the defendant's 6th Amendment right to confront and cross-examine witnesses.

With such guidelines in mind, a wide variety of possibilities are available. For example, a witness who cannot see could be permitted to have a service animal assist him or her to the stand. A witness who suffers from extreme anxiety and is soothed by the presence of a familiar person or caregiver may be permitted to have that person present

during his or her testimony. Witnesses may be given frequent breaks to rest, use restroom facilities, or to take medication as needed. Contact the local court circuit's Court Disability Coordinator for assistance.

The possible accommodations are essentially too many to list here, but the basic principle is the same in each case: Prosecutors must advocate for the victim and request the accommodation that allows him or her to testify in his or her own words and it is the prosecutors' duty to convince the courts that the public policy of facilitating access to the courts and seeking justice for the victims of crime is important enough to justify some creative and unorthodox solutions to the problems presented. Provided that the accommodation does not change the substance of the witness's testimony, the court should permit reasonable accommodations to assist a witness with a disability with having his or her day in court.

### **Law enforcement witnesses**

Manage police bias, if any is detected, about domestic violence cases/victims and disabilities. Discuss with police any opinions in their reports that may reflect negatively on your case. Acknowledge that law enforcement typically is frustrated with cases of domestic violence. They are called out repeatedly, when they arrive on a scene the parties are in a highly emotional state, and it seems like nothing ever changes. Remind the witnesses they are there to testify about their observations and not to make judgments.

### **Experts**

What is the purpose of an expert? To assist the trier of fact with information that might be beyond their common understanding. Victims are the best experts and experts can be used in two ways: to educate yourself before trial and to educate the jury (and judge) during trial. Talk to the victim. Be curious. Ask them questions to garner understanding of the situation. Ask them about their relationship with the perpetrator, good and bad, and also ask them about their disability.

### **Others**

As the prosecutor, it is best to leave your judgments at the door. Prosecutors should refrain from victim blaming. Many prosecutors and law enforcement express frustration at victims for being in a bad situation or continuing to be in a bad situation. Keep the focus on the defendant's behavior. It is difficult for many to follow through with this. Many ask, Why did she stay? Not call for help earlier? Pick this guy? This kind of thinking will only lead to frustration for the prosecutor and it is not productive to the prosecution of a case. Instead, consider that the victim's behavior is simply what that person has done to get by and their attempt to conduct a cost-benefit analysis. Then let it go. Focus only on the defendant. Address the criminality of the defendant rather than waste energy feeling angry at the victim. Modeling these thought patterns in the courtroom might even rub off on the jury.

#### **Tips & Tools**

The Expert Testimony Chart found in Appendix A on page 63 of the Prosecutor's Resource provides information on use of experts.

<http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf>

## Trial

Preparing for trial when the victim has a disability is much like preparing for any other case, however there are additional factors to keep in mind as indicated throughout this section.

### Continuances

- The prosecution should proceed to trial as quickly as the court docket allows. Continuances should be requested only for proper statutory reasons.
- Defense continuances should be opposed when unsupported by motion and affidavit and/or lack a statutory basis.
- If a continuance is granted to either party, the prosecution should ask the court to admonish subpoenaed witnesses that their subpoenas remain under full force and effect.

### Jury Selection

Unfortunately, age and disability carry a stigma in our society. As human beings, potential jurors are susceptible to the same prejudices and biases that permeate society. Prosecutors should carefully question prospective jurors to determine whether the victim's age or disability will affect the jurors' assessment of his or her credibility. When possible, questions should be phrased in an open-ended manner that invites a broader, more informative response than merely "yes" or "no." This will allow you to form a more complete opinion of a prospective juror's suitability, while allowing the jury to hear ideas and concepts from one another, instead of hearing you repeat the same phrases over and over again.

The voir dire process also offers an opportunity to educate prospective jurors about the victim's disability. By choosing words and follow-up questions to reflect positive associations and emphasizing the things that the victim has in common with the venire, jurors may begin to look past the victim's disability and see the entire person.

It might be tempting to ask potential jurors outright if they or anyone they know has a disability and/or is an older adult, but prosecutors should avoid that method of inquiry. As agents of a "public entity," as contemplated by Title II of the Americans with Disabilities Act, with that line of questioning, prosecutors could subject themselves and their offices to a claim of discriminatory practices.

Prospective juror perceptions of people with disabilities and older adults and how they

#### **Tips & Tools**

Refer to Appendix B on page 68 of the Prosecutors Resource to review sample Voir Dire questions:

<http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf>



may affect the weight given to the victim's testimony can be measured with a less direct method of inquiry. Ask prospective jurors, "What do you think of when you hear the words 'disability', 'disabled,' or 'dementia'?" and follow up on his or her response with appropriate questions. This line of questions will offer insight on whether the prospective juror is capable of fairly evaluating the testimony of your witness, without risking the alienation that could result from offending the venire through overly blunt inquiries.

### **Offensive Strategy**

#### **Case in Chief**

The manner in which prosecutors conduct their case in chief obviously depends on the elements of the charged offenses and the available evidence. The approach to trial advocacy will generally determine the manner in which the case is tried. Described here are some issues that may arise when the victim of a sexual assault or sexual abuse offense has a disability.

#### **Context**

##### **The defendant:**

Prosecutors are typically precluded from introducing prior criminal histories without a motion in limine. It is good practice to file such a motion under 725 ILCS 5/115-7.4 if history indicates prior acts of domestic violence. It is helpful for the jury to understand that this particular act of domestic violence did not occur in a vacuum. You may or may not end up being able to bring in evidence of past abuse history, depending on the judge's ruling, but it is good practice to start acclimating the judge to the fact that this evidence is allowed under the law. The reason that the law allows this is because domestic violence isn't just one push or shove or slap, it is a whole culture of control and the law is attempting to allow a prosecutor to show that there is more going on here than one act. It is the prosecutor's responsibility to seek out evidence of other acts. The police may not do that. They are investigating one offense. However, this is a valuable tool prosecutors have been given to illustrate a bigger picture of abuse. Victims may not be able to describe a gradual decline into violence, but prosecutors should take advantage of what they are allowed to show: other acts of violence.

##### **The victim:**

When the victim has a disability, the context of their experiences of living with a disability is important for the jury to know. When questioning the victim on direct

#### **Tips & Tools**

- Use open-ended questions.
- Question at a comfortable pace.
- Do not ask questions in a rapid-fire succession.
- Do not use legalese.
- Do not rush.
- Do not pretend to understand if you do not.

examination, ask them to explain as much as they can about their daily life. In this way the jury will be able to put their testimony into the context of their abilities. It will also help the jury to understand why a victim may not report an incident immediately, their relationship to the perpetrator, and how that impacts their reporting of the incident.

When a person with a disability has been abused by their caregiver, it is important to know to what extent they rely on that person to care for them. Think about the continuum: if someone randomly runs up to a person on the street and attacks them, there is no downside to reporting this and following through with prosecuting the attacker. However, if the attacker is someone who cares for the victim, supports them financially, drives them where they need to go, and is important to their daily functioning, there is a huge downside to reporting and following through. If the jury doesn't know there is a downside, they will not understand a victim's reluctance to comply with the societal expectations for reporting violence.

## **Opening Statement**

The opening statement is the first opportunity to acquaint the jury with the facts of the case. While the fact that the victim is a person with a disability and/or older adult may be significant to the trial, remember that **the case is not about age or the disability**; it is about the crime that the defendant committed. Depending on the nature of the victim's disability, it may bit even be noted in the opening statement, as you will want to focus on the evidence that supports a conviction. When referring to a victim's disability, "people first" language reminds the jurors that the victim is a person with a disability instead of focusing on the disability itself.

## **Direct Examination of Victim**

As previously discussed, it is vital to prepare the victim to testify. By the time they get up on the witness stand, prosecutors should know exactly what is needed for the victim to tell his or her account. Prosecutors should be positioned so that when the victim looks at them, they will be looking in the general direction of the jury.

If the victim requires an accommodation to give his or her testimony, such as testifying via closed circuit television, the prosecutor may ask a couple of brief questions of the witness to explain the accommodation to the jury. Explanation won't be necessary for a less obtrusive accommodation, such as a child holding a stuffed animal for comfort during his or her testimony. However, if an adult is holding a stuffed animal, asking brief questions of the witness is advisable. Jurors are as curious as anyone else and will probably be distracted by something unfamiliar to them unless they understand what it is. In any case, keep any explanation brief, and quickly move on to the facts of the case.

Unless the nature of the victim's disability makes it impracticable to do so, try to ask your questions in an open-ended manner. This will allow the victim the opportunity to give their account to the jury in their own words. When working with a victim with a disability and/or who is an older adult limited to affirmative or negative responses, the

ability to elicit information on direct examination will be limited and evidence-based prosecution tactics will be needed to fill in the balance of the narrative. Prosecutors should ask questions in a manner and at a pace with which the victim is comfortable. From pre-trial interview(s), prosecutors should have a basic familiarity with your witness's vocabulary and patterns of speech. Asking questions in quick, rapid-fire succession is not advisable as it rushes the victim's only chance to speak to the jury. Prosecutors should avoid resorting to legalese, but also be careful not to speak to an adult victim as though he or she were a child. Adults who have developmental or intellectual disabilities are often spoken to as if they are children, which they consider patronizing and hurtful and may negatively influence the jury's perception of the victim.

If your victim has a disability that affects his or her speech, it may be difficult for jurors to understand his or her answers to your questions. Listeners often pretend to understand the speaker when they do not, but the speaker can usually tell, and may become angry or frustrated, as it is considered impolite and condescending to pretend that you understand what someone has said when you in fact do not. When the prosecutor does not understand the answer given by a witness, there is a good chance that the jury also does not understand. Keep a close eye on your jury, and try to read their body language and facial expressions to see if they seem to be having difficulty understanding your witness. If so, do not be afraid to ask the victim to repeat his or her answer. Prosecutors also may be able to repeat portions of his or her answer when asking the next question. For example:

Q: What happened that evening?

A: A man came in through my bedroom window.

Q: After he came in through the window, what did he do?

A: He came toward my bed.

Q: When he was coming toward your bed, what were you doing?

A: I was lying down and I was afraid.

### **Evidence-Based Prosecution**

**“A 91-year-old woman was raped and beaten and died before the trial, her interviews were read into the record for the trial. When discussing the case, even the other state’s attorneys could not understand why someone would “be interested” in raping someone that old. This is indicative of the challenge in dispelling myths when prosecuting these crimes.”**

**– Illinois Assistant State’s Attorney**

Sometimes when a person with a disability and/or an older adult has been the victim of a crime, they are unable recall, understand, or articulate sufficient facts to support the

conviction of the offender. While corroborating evidence is, of course, important in any prosecution, in cases where the victim may have a disability that precludes him or her from being able to provide a coherent narrative of the offense, it is even more important to let the other witnesses, physical evidence, and circumstantial evidence “speak” for the victim. In effect, evidence-based protection requires law enforcement officials and prosecutors to treat the offense as a homicide case, where there is no victim.

Many forms of evidence can be used to prosecute a case when the victim is unavailable to testify, such as 911 call recordings and transcripts, child witness statements, neighbor witness statements, medical records, paramedic log sheets, prior police reports, protection orders, booking records, audio recordings of jail telephone calls, letters from the suspect, videotaped/audio taped interviews with the victim, and defendant's statements. Additionally, an expert witness can testify to explain reasons a victim may be absent, as well as explaining the dynamics of domestic violence, victimization, and abuse against people with disabilities and/or older adults.

## **Argument**

The closing argument is your opportunity to advocate for the victim. When prosecuting any criminal case, jurors must understand how the facts of the case fit together to establish that the defendant committed a crime. The only difference in a case in which the victim has a disability or is an older adult is that a greater reliance on other evidence is needed to corroborate and supplement the victim's testimony. In some cases, there may be evidence that supports the inference that the offender selected the victim because of his or her age or disability, whether because he or she perceived the victim as more vulnerable due to his or her age or disability or even as a “hate crime” where the victim's age or disability itself is the motive for the offense. In such cases, of course, these inferences should be appropriately argued to the jury. Otherwise, there is no reason to make your closing argument in a different manner than you would if the victim of the offense did not have a disability and was not an older adult because after all, the case is not about the victim's disability, but the crime committed by the defendant.

### **Facts & Stats**

Denying access to supportive devices is a common strategy used by perpetrators to have power over older adults and people with disabilities. Depending upon the abilities of the individual and their needs, the perpetrator will focus in on tactics which effectively control the victim. Crime scene photos that can show that supportive devices are inaccessible to the victim are valuable.

## **Defensive Strategy**

### **Cross-Examination**

When preparing cross examination for a case when the victim is an older adult or person with a disability, additional considerations may include:

- The ability to use leading questions.
- When the defendant is known to the victim, cross examination is a vehicle to get the defendant and witnesses to agree about aspects of the defendant's relationship with the victim.

### **Rebuttal**

Be watchful during the defense case for opportunities to present rebuttal testimony. Think about not only witnesses that can rebut the credibility of defense witnesses, but also for witnesses who could rebut their factual allegations about the capacity or credibility of the victim or their disability. Perhaps you might want to call the victim in rebuttal to talk about a specific aspect of their disability and explain it further.

## **Case Outcomes**

### **Plea Negotiations, Reductions, and Dismissals**

- Where practical the State's Attorney's Office shall consult with the victim prior to making an offer of a plea bargain or entering into plea negotiations with the defendant. (Rights of Crime Victims and Witnesses Act – section 725 ILCS 120/4.5c(4))
- No case will be dismissed upon the request of the victim, unless the state's attorney determines that the case cannot proceed to trial without the victim and a reasonable effort has been made to determine the victim's request to dismiss is not based on threats or intimidation.
- The State's Attorney should understand the victim's reluctance to prosecute due to fears including: future violence/isolation/exploitation, violence perpetrated against other family members, nursing home placement, dying alone, or mental/physical impairments.
- The state's attorney shall attempt to build rapport with the victim to gain their support and participation.

**“The man who molested us took a plea bargain. We did not know. We were trying to figure out what happened by reading the paper.”  
– Woman with a disability in Illinois**

- The victim shall be referred to the local adult protective services agency or other community advocates as appropriate.
- If the victim fails to appear or is unable, and his/her testimony is not essential for a successful prosecution, the matter should proceed to trial.
- In cases where the state cannot proceed to trial without the victim, a record of nolle prosequi shall be made to the court in writing.

## **Sentencing**

The state's attorney's recommendation for sentencing should be based on the facts of the case and should be commensurate with sentences for other crimes.

Factors in Aggravation (730 ILCS 5/5-5-3.2). If age or disability is not an element of the crime you are sentencing, the following applicable factors should be argued:

- (a)(8): Victim is 60 years of age or older.
- (a)(9): Victim is physically handicapped.
- (a)(18): Offense committed in a nursing home.
- (a)(23): Crime was committed against a person who was elderly, disabled, or infirm by taking advantage of family or fiduciary relationship.

Additionally, the statute allows for the court to consider imposing an extended term sentence on any felony where the victim was 60 years of age or older (730 ILCS 5/5-5-3.2(b)(3)(ii)) or where the victim was physically handicapped at the time of the offense (730 ILCS 5/5-5-3.2(b)(3)(iii)).

# References And Resources

# Criminal Statutes

## RELATED CRIMINAL OFFENSES (720 ILCS)

Just like anyone else, a person who has a disability or older adult can be the victim of any crime known to the law. However, certain types of offenses are more likely to target people who have disabilities or older adults. If a person is targeted for domestic violence and/or sexual assault or another crime because of their disability, the possibility of a hate crime exists.

Set forth below are a number of offenses involving bodily harm, sexual abuse/assault, property damage or theft, and other offenses which may unfortunately be committed more frequently against people with disabilities or older adults, or for which the law provides different or enhanced penalties if committed against a person with a disability. Please note that while the quoted statutory sections may not use “People First” language, such language is the preferred manner of communicating with and about people who have disabilities.

## ACT 5. CRIMINAL CODE OF 1961

### ARTICLE 9. HOMICIDE

#### 5/9-1 First Degree Murder

Section 5/9-1(b)(17) sets forth that it is an aggravating factor if “the murdered individual was a disabled person and the defendant knew or should have known that the murdered individual was disabled.” Prior to the repeal of the death penalty in Illinois, this factor in aggravation could result in the imposition of a sentence of death.

### ARTICLE 10. KIDNAPPING AND RELATED OFFENSES

#### 5/10-1 Kidnapping

Section 10-1(b) provides that “a severely or profoundly intellectually disabled person” is confined against his or her will for purposes of this statute if such confinement is without the consent of such person’s parent or guardian.

#### 5/10-2 Aggravated Kidnapping

Section 10-2(a)(2) elevates a kidnapping offense from a Class 2 Felony under Section 10-1 to a Class X Felony if a person commits the offense of kidnapping and “takes as his or her victim ... a severely or profoundly intellectually disabled person.”

### ARTICLE 11. SEX OFFENSES

#### 5/11-1.20 Criminal Sexual Assault

Section 11-1.20(a)(2) provides that a person commits the offense of Criminal Sexual Assault if that person “commits an act of sexual penetration and ... knows that the victim is unable to understand the nature of the act or is unable to give knowing consent.”



- 5/11-1.30      **Aggravated Criminal Sexual Assault**  
The offense of Criminal Sexual Assault is elevated from a Class 1 Felony under Section 11-1.20 to a Class X Felony if, under Section 11-1.30(a)(6) “the victim is a physically handicapped person” **or** under Section 11-1.30(c) “a person commits an act of sexual penetration with a victim who is a severely or profoundly intellectually disabled retarded person.”
- 5/11-1.50      **Criminal Sexual Abuse**  
Section 11-1.50(a)(2) provides that a person commits the offense of Criminal Sexual Abuse if that person “commits an act of sexual conduct and knows that the victim is unable to understand the nature of the act or is unable to give knowing consent.”
- 5/11-1.60      **Aggravated Criminal Sexual Abuse**  
The offense of Criminal Sexual Abuse is elevated from a Class A Misdemeanor or Class 4 Felony under Section 11-1.50 to a Class 2 Felony if, under Section 11-1.60(a)(4) “the victim is a physically handicapped person” **or** under Section 11-1.60(e) “a person commits an act of sexual conduct with a victim who is a severely or profoundly intellectually disabled retarded person.”
- 5/11-9.5      **Sexual Misconduct with a Person with a Disability**  
Provides that it is a Class 3 Felony Offense for an employee or contractual agent of the Department of Human Services or a community agency funded by DHS to engage in an act of sexual conduct or sexual penetration with “a person with a disability who is under the care and custody of the Department of Human Services at a State-operated facility; or ...who is in a residential program operated or supervised by a community agency.”
- 5/11-14.4      **Promoting Juvenile Prostitution**  
Provides that it is a Class 1 Felony where a person “advances prostitution as defined in Section 11-0.1, where the minor engaged in prostitution, or any person engaged in prostitution in the place, is under 18 years of age or is severely or profoundly mentally retarded at the time of the offense” (Subsection (a)(1)) or “profits from prostitution by any means where the prostituted person is under 18 years of age or is severely or profoundly mentally retarded at the time of the offense” (Subsection (a)(2)). If the child or “profoundly mentally retarded” person is confined against his/her will by force or by threat of force, Subsection (a)(4) elevates this offense to a Class X Felony with an extended sentencing range of 6-60 years in the Department of Corrections.

- 5/11-18.1 Patronizing a Minor Engaged in Juvenile Prostitution  
Despite the name of this offense, the provisions of this statute apply equally if the person commits the acts described with a “severely or profoundly mentally retarded person” as if the acts had been committed with a person under the age of 18.
- 5/11-20.1 Child Pornography  
Despite the name of this offense, the provisions of this statute apply equally if the person commits the acts described with a “severely or profoundly mentally retarded person” as if the acts had been committed with a person under the age of 18. Please note that the language regarding “severely or profoundly mentally retarded” persons is **not** included in Section 11-20.1B, pertaining to the offense of Aggravated Child Pornography.

## ARTICLE 12. BODILY HARM

- 5/12-2 Aggravated Assault  
The offense of Assault is elevated from a Class C Misdemeanor under Section 12-1 to a Class A Misdemeanor under Section 12-2(b)(1) if the victim is a physically handicapped person.
- 5/12-3.05 Aggravated Battery  
The offense of Battery is elevated from a Class A Misdemeanor under Section 12-3 to a Class 3 Felony under Section 12-3.05(b)(2) if the defendant causes “bodily harm or disability or disfigurement” to any “severely or profoundly mentally retarded person.” In cases of “great bodily harm or permanent disability or disfigurement” to such victims, the offense is further elevated by Section 12-3.05(b)(1) to a Class X Felony, with yet further sentencing enhancements if a firearm is used in the commission of the offense.
- The offense of Battery is elevated from a Class A Misdemeanor under Section 12-3 to a Class 3 Felony under Section 12-3.05(d)(2) if the victim is pregnant or physically handicapped.
- Section 5.05(a)(4) is a person who, in committing battery, intentionally or knowingly causes great bodily harm or permanent disability or disfigurement to an individual of 60 years of age or older.
- 5/12-4.4a Abuse or Criminal Neglect of a Long Term Care Facility Resident; Criminal Abuse or Neglect of an Elderly Person or Person With a Disability  
Provides that it is a Class 3 Felony for certain specified types of caregivers (see statute for definitions) to endanger the life or health

of a resident of a long-term care facility, elderly person, or person with a disability, or to perform acts causing such person's pre-existing mental or physical condition to deteriorate, or to fail to perform acts necessary to maintain or preserve the life or health of such person, or abandons such person.

With regard specifically to elderly persons or persons with disabilities, one who "physically abuses, harasses, intimidates, or interferes with the personal liberty of the person" (Subsection (b)(1)(D)) or "exposes the person to willful deprivation" (Subsection (b)(1)(e)) also commits this offense.

If commission of this offense results in the death of the victim, the offense is elevated to a Class 2 Felony, for which a prison sentence of not less than three years nor more than 14 years must be imposed (Subsections (d)(1) and (d)(2)).

5/12-7.1      Hate Crime

This statute elevates a number of specified misdemeanor offenses to Class 4 Felony offenses (or Class 2 Felony for second and subsequent offenses) if the offense is committed "by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual..." (emphasis added).

5/12-21.5     Child Abandonment

Section 12-21.5(b)(3) provides that, for purposes of determining "whether the child was left without regard for the mental or physical health, safety, or welfare of that child," one factor to be considered is the "special needs of the child, including whether the child is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications."

ARTICLE 16. THEFT AND RELATED OFFENSES

5/16-30       Identity Theft

Subsection 16-30(b)(1) provides that a person who commits the offense of Identity Theft against a person with a disability commits Aggravated Identity Theft. The precise classification of this offense varies based on the amount of financial loss to the victim and the prior record of the offender, but Aggravated Identity Theft is generally one class of offense higher than an Identity Theft with otherwise similar factual circumstances.

ARTICLE 17. DECEPTION AND FRAUD

5/17-56       Financial Exploitation of an Elderly Person or a Person with a Disability  
Provides that a person who "stands in a position of trust or

confidence” with an elderly person or person with a disability and by deception or intimidation obtains control over his or her property commits a felony offense. The precise classification of the offense varies based on the amount of financial loss to the victim, and, in the case of an elderly person, on the actual age of the victim.

#### ARTICLE 18. ROBBERY

##### 5/18-1 Robbery

Robbery is elevated from a Class 2 Felony offense under this Section to a Class 1 Felony offense if the victim is a physically handicapped person.

##### 5/18-4 Aggravated Vehicular Hijacking

The offense of Vehicular Hijacking is elevated from a Class 1 Felony under Section 18-3 to a Class X Felony under Section 18-4(a)(1) if the person from whose physical presence the motor vehicle is taken is a physically handicapped person.

#### ARTICLE 26. DISORDERLY CONDUCT

##### 5/26-1 Disorderly Conduct

Section 26-1(a)(8) provides that a person who transmits or causes to be transmitted a false report to the Department of Public Health under the Nursing Home Care Act, the Specialized Mental Health Rehabilitation Act, or the ID/DD Community Care Act commits a Class B Misdemeanor.

## Case Law

**CRIMINAL CODE OF 2012 – CRIMINAL SEXUAL ASSAULT** Holding a position of trust, supervision, or authority in relation to a criminal sexual assault victim does not depend on the duration of that trust, supervision, or authority. In *People v. Feller*, 2012 IL App (3d) 110164, the Illinois Appellate Court was asked to determine whether the Circuit Court of Putnam County erred when it found the defendant guilty of criminal sexual assault and aggravated criminal sexual assault, due to the defendant's position of trust and authority over the victim, pursuant to Section 11-1.20(a)(4) of the Criminal Code of 2012\* (720 ILCS 5/11-1.20(a)(4) (West 2010)). Section 11-1.20(a)(4) states, in relevant part, that the accused commits criminal sexual assault if he or she commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed, and the accused was 17 years of age or older and held a position of trust, authority, or supervision in relation to the victim. At the time of the offense, the victim was 14 years of age and the accused was 31 years of age. While assisting the victim (who was blind) in swimming in a lake, the defendant sexually assaulted the victim. On appeal, the defendant argued that his conviction should be reversed because the evidence was insufficient to prove that he was in a position of trust, authority, or supervision in relation to the victim. The defendant also argued that the General Assembly did not contemplate that short-term offers of assistance, where the defendant was in a position of trust, authority, or supervision for only a short duration, could result in enhanced criminal liability. The Illinois Appellate Court disagreed and affirmed the defendant's conviction. The court determined that for the purposes of the statute, whether a defendant was in a position of trust, supervision, or authority in relation to the victim does not depend on the duration of that trust, supervision, or authority. A dissenting opinion argued that the statutory reference to "a position of trust, authority or supervision in relation to the victim" did not apply to actions based on momentary assistance such as that which the defendant offered in this case.

**CRIMINAL CODE OF 2012\* – STATUTE OF LIMITATIONS** The extended limitations period for financial exploitation of an elderly person commences when the aggrieved party has knowledge, rather than suspicion, that a crime has occurred. In *People v. Chenoweth*, 2015 IL 116898, the Illinois Supreme Court was asked to decide whether the appellate court erred when it vacated the defendant's conviction of financial exploitation of an elderly person, holding that the extended period of limitations under paragraph (2) of subsection (a) of Section 3-6 of the Criminal Code of 2012 (720 ILCS 5/3-6(a)(2) (West 2004)) had expired. Subsection (a) of Section 3-6 extends the general statute of limitations for theft involving a breach of fiduciary obligation, and paragraph (2) of that subsection provides that the prosecution may be commenced "within one

year after the discovery of the offense by an aggrieved person . . . or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." The State argued that the prosecution was timely because it was commenced within one year after the State's Attorney was informed of the offense. The defendant argued that subsection (a) was triggered when the victim learned from a detective that the defendant had written unauthorized checks, and that because the charges were brought more than a year after that date, the prosecution was outside of the extended limitations period. The court agreed with the State, holding that the limitations period commenced "when the . . . State's Attorney became aware of the offense." The court reasoned that paragraph (2) of subsection (a) requires more than mere suspicion of a crime, but rather "awareness or knowledge that there has been a violation of a penal statute." Under the court's interpretation of paragraph (2) of subsection (a), the victim learning that the defendant had written unauthorized checks amounted to suspicion of a crime, but not to absolute knowledge that the crime occurred. The court further noted in its reasoning that "the legislature enacted Section 3-6(a) specifically to deal with the offender who has successfully avoided detection of his or her breach of fiduciary obligation for the term of the general time limitation.

**CODE OF CRIMINAL PROCEDURE OF 1963 – MARITAL PRIVILEGE** Testimony by a defendant's wife about the defendant's threat to kill her and the victim is not protected by the marital testimonial privilege. In *People v. Trzeciak*, 2013 IL 114491, the Illinois Supreme Court was asked to decide whether the appellate court erred when it held that Section 115-16 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-16 (West 2010)) barred testimony by the defendant's spouse that the defendant tied her up, beat her, threw her in his pickup truck, had a gun, drove her to the victim's trailer, pointed at the trailer and said he would kill her and the victim. Section 115-16 provides that neither spouse "may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage, except in cases in which either is charged with an offense against the person or property of the other. . . ." The defendant argued and the appellate court held that the communications between the defendant and his wife were protected by the marital privilege because they were made during their marriage and were made privately. The Illinois Supreme Court reversed the appellate court, holding that not every communication between husband and wife made in private is confidential. The court, adopting interpretations of other states of what a confidential marital communication encompasses, reasoned that the privilege covers only those private exchanges which would not have been made but for the absolute confidence in, and induced by, the marital relationship and prompted by the affection, confidence, and loyalty engendered by such a relationship. The court further reasoned that whether a communication falls under the marital privilege depends

on the nature and form of the communication and the circumstances immediately surrounding its making. The court noted that such a determination is a preliminary question of fact to be decided by the trial court, and concluded that the trial court was well within its discretion to allow the wife's testimony.

**SEXUALLY VIOLENT PERSONS COMMITMENT ACT – SEXUAL ABUSE OF COMMITTED PERSONS** People civilly confined in facilities operated by the Department of Human Services under the Act are not protected by the same safeguards against sexual assault that are available to prison inmates. In *Smego v. Meza*, 2015 WL 5636459 (C.D. Ill.), the District Court for the Central District of Illinois was asked to decide whether the plaintiff's complaint sufficiently stated a claim for relief when alleging, among other things, that the facility operated by the Illinois Department of Human Services ("IDHS") in which the plaintiff was civilly committed under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 et seq.) violated the plaintiff's equal protection rights under the Fourteenth Amendment to the United States Constitution (U.S. CONST. amend. XIV). The plaintiff argued that the facility failed to have a reliable procedure for reporting and investigating sexual assaults allegedly occurring at the facility, and that his equal protection rights were violated because prisons operated by the Illinois Department of Corrections ("IDOC") have more thorough sexual assault reporting and investigation procedures than the facility operated by IDHS. The court dismissed the plaintiff's complaint for failing to state a claim, reasoning that because the plaintiff is in an IDHS facility, he is not similarly situated to an inmate in an IDOC prison. The court also opined that the difference between the reporting and investigation procedures for IDHS facilities and IDOC prisons might be because IDHS facilities are not subject to the federal Prison Rape Elimination Act of 2003 (42 U.S.C. § 15601 et seq.).

**ILLINOIS DOMESTIC VIOLENCE ACT OF 1986 – SUBSTITUTION OF JUDGE AS OF RIGHT** When an order of protection petition is brought in conjunction with another civil proceeding, there is no substitution of judge as of right even if the other civil proceeding is not pending. In *Petalino v. Williams*, 2016 IL App (1st) 151861, the Illinois Appellate Court was asked to decide whether the circuit court erred in denying a motion for substitution of judge as of right when an order of protection petition was brought in conjunction with a child custody case that was not pending. Paragraph (2) of Subsection (a) of Section 2 1001 of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2014)) provides that each party shall be entitled to one substitution of judge without cause as a matter of right, if it is presented before trial or hearings begin and before the judge to whom it is presented has ruled on any substantial issue in the case. Paragraph (2) of subsection (a) of Section 202 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/202(a)(2) (West 2014)) provides that an action for an order of protection may

be commenced “[i]n conjunction with another civil proceeding. . . .” The petitioner argued that because the petition for an order of protection was filed in conjunction with another proceeding upon which substantive issues had been decided, the respondent was not entitled to a substitution of judge. The respondent argued that when a petition for an order of protection is filed in conjunction with another civil proceeding, Section 202(a)(2) of the Act requires the other civil matter to be pending at the time the order of protection petition was filed. The respondent further argued that because no substantive ruling had been made regarding the order of protection petition, 38 the respondent's motion for substitution of judge as of right should have been granted. The court agreed with the petitioner, holding that the circuit court did not err in dismissing the motion for substitution of judge as of right. The court reasoned that when Section 202(a)(2) is read in conjunction with other portions of the Act, it is apparent that it was the legislature's intent to make a distinction between “pending civil cases” and “another civil proceeding.” The court further reasoned that matters pertaining to child custody are ongoing proceedings that are best presided over by the same judge who is familiar with the parties and the facts of the case.

#### **ILLINOIS DOMESTIC VIOLENCE ACT OF 1986 – PRIVILEGED COMMUNICATIONS**

The advocate-victim privilege is not limited to communications related to domestic violence. In *People v. Sevedo*, 2017 IL App (1st) 152541, the Illinois Appellate Court was asked to decide whether the trial court erred in denying a domestic violence advocacy center's motion to quash a subpoena for documents generated in connection with report of threatening statements made by a defendant indicted with threatening a public official. Paragraph (3) of subsection (a) of Section 227 of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/227(a)(3) (West 2014)) defines "confidential communication" as "any communication between an alleged victim of domestic violence and a domestic violence advocate or counselor in the course of providing information, counseling, or advocacy." "Confidential communication" includes "all records kept by the advocate or counselor or by the domestic violence program in the course of providing services to an alleged victim concerning the alleged victim and services provided." Subsection (b) of that Section provides that "[n]o domestic violence advocate or counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal case or proceeding or in any legislative or administrative proceeding without the written consent of the domestic violence victim except . . . in cases where failure to disclose is likely to result in an imminent risk of serious bodily harm or death of the victim or another person." The State argued that the advocacy center should be compelled to turn over the documents because they pertain to a statement made in public and not in a privileged context. The State further argued that the statement did not pertain to domestic violence, but rather to a detective's testimony at the defendant's



armed burglary trial. The advocacy center argued that the trial 58 court erred in denying its motion to quash the subpoena because the documents sought concerned a statement the victim made "to her domestic violence advocate while the advocate was attending [victim's] armed robbery trial in accordance with the advocate's job to provide information, counseling, or advocacy." The court agreed with the advocacy center, holding that the "documents were protected by domestic violence advocate-victim privilege." The court reasoned that, based on the plain language of the statute, the General Assembly intended the privilege to extend to "any communication beyond the topic of domestic violence, even statements unrelated to the information, counseling, or advocacy being provided to the victim." The General Assembly could have limited the scope of the privilege from "any communication . . . in the course of providing information, counseling, or advocacy" to "communications related to domestic violence and the services provided to the victim" but did not.

# PEOPLE FIRST

'People First' is a mindset. It is a way of looking at other people, not by their disability, race, gender or any other characteristic, but rather as PEOPLE FIRST.

As people we are all more alike than we are different.  
In general, we are all people first. The same is true of people with disabilities – we are more like people without disabilities than we are different.

## People with Disabilities Are Not:

- freaks
- cripples
- incapable
- weak or disabled
- contagious
- heroes or extraordinary

**We are people, just like you, living our lives  
the best we know how.**

Disabilities, and perhaps more importantly peoples' reactions to disabilities, create barriers for people with disabilities through stereotypes, myths, prejudices, fears and ignorance.

We all have the same  
rights and responsibilities,  
and we should all be able  
to enjoy them as what we  
all are... **PEOPLE FIRST**

**We are people, just like you and everyone else.**

# How Prosecutors Changed the Odds To Start Winning Some Of The Toughest Rape Cases

January 16, 2018 5:00 AM ET

Heard on All Things Considered  
**Joseph Shapiro**

There's a trial scheduled in March at the marble courthouse in Newark, N.J., of a man charged with kidnapping and raping a young woman with an intellectual disability.

That trial is likely to be a quiet one, with little attention, nothing like the feverish national press coverage 25 years ago of the trial — in that same courthouse — in another case of sexual assault of another young woman with an intellectual disability.

That case, known as the Glen Ridge rape case, was the first time a sexual assault of a woman with an intellectual disability captured widespread national attention. In 1989, in Glen Ridge, N.J., an affluent suburban town of broad front yards and stone mansions, a group of popular high school athletes persuaded a young woman from the special education classes to come into a basement. They promised that if she did, she would get to go on a date with the football player she had a crush on. Then she was forced to perform oral sex and was assaulted with a baseball bat and a broomstick.

Of the 13 young men in the basement that day, six left when the assault began. But no one stopped it. And not one reported it.

The trial started in 1992. Four of the young men were [convicted in 1993](#) — three of aggravated sexual assault, the fourth of conspiring with the others.

A young prosecutor back then, Robert Laurino, championed the case. Today, Laurino is the chief prosecutor in Essex County. And he continues to make prosecution of sex crimes against people with intellectual disabilities a priority.

"There's probably no more satisfying victory that you can get than to be able to convict a person who is of a predatory nature that would actually prey on the person with a disability" he says.

The Glen Ridge rape case became a national lesson in how people with intellectual disabilities — back then, the term was "mental retardation" — are victims of sexual abuse.

## How to better pursue cases

The rape of someone with an intellectual disability remains one of the hardest crimes for police to investigate and one of the hardest for prosecutors to win in court. A victim with an intellectual disability may have trouble speaking, or may not have words at all. And

when victims can speak, they may have trouble telling precise details, which makes them easy to confuse in a courtroom.

That makes the rape of someone with an intellectual disability one of the easiest crimes to get away with. A perpetrator is free to rape again. And that's one reason people with intellectual disabilities are sexually assaulted at more than seven times the rate of people without disabilities. NPR obtained that number from unpublished data provided by the Justice Department.

In the years since Glen Ridge, Laurino and his prosecutors have learned — as have prosecutors around the country — how to better pursue these tricky cases. And those lessons are being applied to the trial of Khrishad Clark, the man charged with kidnapping and raping a 29-year-old woman with an intellectual disability. That's the trial set to begin in March in Newark.

The case started in May 2016, when the woman wandered away from the house where she lived. She explained later that she had wanted to go find her father. She walked to a phone store — without any money — thinking she could buy a phone and call him. Then she disappeared.

Police searched for the woman on the streets late into the night. And one detective, who kept looking, happened to be near the woman's house when a van pulled up at 4 a.m. This tiny woman — shaking with fear, he said — got out. That's how police caught Clark, the driver of the van.

### **"Keep it child friendly"**

After Glen Ridge, prosecutors, lawmakers and state officials in New Jersey looked for better ways to prosecute cases where people with intellectual disabilities were abused. One thing they did: They applied some of the best practices for prosecuting crimes against children.

Fifteen years ago, the state built Wynona's House, a "child advocacy center" in Newark. That's where police took the woman that night.

Wynona's House, a two-story brick building in Newark, is designed to be a place for children who have been physically or sexually abused. It houses a team of health care professionals, including therapists, who can respond in a crisis and then offer ongoing support. Also on site: There's a nurse who can do a rape exam.

Police and prosecutors, who handle these cases, are based here, too. They're able to collaborate more effectively because they have offices next to each other. But that law enforcement side is kept out of sight on the second floor. That protects confidentiality and makes Wynona's House less scary for victims. "We don't want guns and badges in front of them," explains Kathleen Lyons-Boswick, an assistant prosecutor in the county's Special Victims Unit. "That's really important to keep it child friendly."

On the first floor, the walls are painted with colorful balloons, rainbows and birds. There are special interview rooms where child victims can tell their stories to one or two counselors. To avoid the need for the child to tell a story again or to multiple people — which can be traumatic — police investigators and others can watch from a room next door.

And although the center is designed specifically for children, it is also a place where adults with intellectual disabilities are taken when they are victims of sexual violence.

### **Looking for the different building blocks**

On that night in May 2016, the woman was taken upstairs to a separate interview room, not one of the ones set up for children. But this one, too, was set up for forensic interviews. She sat at a small table with a detective and a police sergeant. There's a camera, discreetly in a corner of the room. An assistant prosecutor watched the interview on a computer from a room across the hall and could relay questions.

Adults with disabilities are not children. The investigators know they can't treat them the same way. But there's one thing that helps with both: Every police officer and prosecutor gets training in interview technique — in how to ask concrete questions. That makes it easier for children and people with intellectual disabilities to answer more completely.

Many people with intellectual disabilities think in concrete and literal ways. Abstract concepts, such as time, or the use of euphemisms, metaphors and analogies — and some humor — may be difficult to understand. That can lead to misunderstandings, and making things trickier: They often won't let someone know they don't understand, often because they want to please the person they're talking to, or they're embarrassed and try to hide their level of confusion.

So better questions help build the facts necessary to making a case. Many people with intellectual disabilities, for example, have difficulty putting things in proper time sequence. That matters in court.

The woman who was allegedly kidnapped and raped impressed investigators that night.

"She was able to describe what happened to her," says Lyons-Boswick, the prosecutor who is trying the case. "A sexual assault that happens in private, in secret — these things don't happen out in the open — you look for all the different building blocks that corroborate the case."

### **"These are individuals who tend not to come forward"**

At the time of the Glen Ridge trial, prosecutors rarely took to trial sexual assault cases against people with intellectual disabilities. Even when an offender was identified, only 24 percent were charged with an offense, according to research in 1994 by Dick Sobsey of the University of Alberta — a pioneering researcher of crime and intellectual disability. And of those who were charged, only 8 percent were convicted.

There are no good numbers today for how often someone is charged in the sexual assault of a person with an intellectual disability, or how often someone is convicted. Sobsey and others say the numbers have grown sharply since 1994. Still, only a minority of these rape cases end in a conviction.

NPR's own numbers suggest that. NPR asked states for data on how often they got reports of sexual abuse of someone with an intellectual disability. Under federal requirements, states are required to follow up on suspected abuse when it is reported or observed by a provider of services, like a group home or a work program that gets state and federal funding.

The state data show that allegations of sexual assault rarely result in prosecution. In Texas, less than 1 percent of allegations were confirmed. In Florida, about 5 percent were verified. In Ohio, 23 percent were substantiated between 2012 and 2015. In Pennsylvania, 34 percent of allegations were confirmed. But only 40 percent of those were referred to law enforcement. Pennsylvania was the only state that provided referral data to NPR.

And NPR's numbers, obtained from the Justice Department's use of a household survey, show that most cases don't get reported. When asked, the people with intellectual disabilities — or a family member or someone else speaking on their behalf — explained that they didn't think police would or could help (40 percent) or they handled the assault "with another way" (37 percent).

"These are individuals who tend not to come forward," Laurino explains today. "Sometimes they don't even understand that they've been abused."

By contrast, women without intellectual disabilities gave different reasons for not reporting sexual violence to police, according to the Justice Department: 20 percent feared retaliation, 13 percent believed police would not do anything to help and 13 percent believed it was a personal matter.

After Laurino won milestone convictions in the Glen Ridge case, he traveled around the country to conferences, where he would tell other prosecutors how to pursue these cases. "To show that these cases are, in fact, winnable," he says. "They take a lot of work. But if you invest in them, they are winnable and it's a great feeling when you can help somebody who really can't help themselves."

As law enforcement officials saw other prosecutors winning these cases — and as more prosecutors understood that these crimes were going unprosecuted — more began to pursue sexual abuse against people with intellectual disabilities.

### **Putting things in context**

People with intellectual disabilities and their families demanded prosecution, too. Nancy Thaler, the Pennsylvania official in charge of developmental disability programs there, says the integration of people with intellectual disabilities made a difference. "As they've

become more integrated in society, people have come to know them," says Thaler, a deputy secretary of Pennsylvania's Department of Human Services. "Thirty years ago, it was impossible to find a prosecutor to prosecute. In the 1990s and the 2000s, we started to see changes."

Now, she says, prosecutors are more likely to be willing to file charges and judges are more likely to understand how to handle these cases. "Today, you might actually find a prosecutor who went to public school, in an inclusive school, with classmates that were disabled," says Thaler. "So they're familiar with people [with intellectual disabilities] and how they think and how they talk."

Laurino, for example, came to the Glen Ridge case with a lifetime of that understanding. His older brother has an intellectual disability.

But at trial in 1992 and 1993, Laurino had to explain to the court and to jurors how someone with an intellectual disability was easily manipulated. Defense attorneys tried to depict the young woman as a sexually experienced temptress who aggressively sought out sex with the young men charged with assaulting her. The judge allowed the young woman's sexual history to be noted in court. She'd had other sexual experiences. And, because her parents were worried that she was vulnerable, she'd started taking birth control pills when she was 16.

Laurino put that into context. She was first sexually assaulted when she was 12. All her life, she'd been the victim of cruel pranks by classmates trying to see what they could get her to do. It started when she was 5 and some boys persuaded her to lick dog feces. By the time she was a teen, boys were trying to talk her into sex acts.

Laurino countered the defense attorneys' depiction of her — as the sexual aggressor — by noting the limitations that came with her disability. She had no friends, but desperately wanted them. She had difficulty understanding the difference between sex and love and that she could say no to her classmates who asked for sex.

"Why didn't you ask the boys to leave you alone?" Laurino asked the woman when she testified at the trial.

"I didn't want to hurt their feelings," she replied.

The Glen Ridge case divided the wealthy town. She was the young woman seen as having no future. They were the young men headed to college, expected to accomplish big things.

The National Organization for Women and other feminist groups objected to the way the young woman was depicted by the defense attorneys and by town residents. They staged protests in Glen Ridge and outside the courthouse and sent representatives to watch the five-month trial.

There was national press coverage, a book — Our Guys by journalist Bernard Lefkowitz — and a made-for-TV movie from that book.

### **The key to conviction**

Today, prosecutors have more weapons to bring these cases: There's better protection of the rights of rape victims in court. There are more laws to protect people with disabilities. And, for evidence, there's DNA testing.

At the time of Glen Ridge, almost 25 years ago, DNA wasn't so commonly used. Now it is one of the best tools in these cases.

There was an example last year in Boynton Beach, Fla. Prosecutors reopened a cold case — from 13 years earlier. Back in 2004, police suspected a man of raping a disabled woman. She got pregnant. But the woman couldn't speak. The man denied the charge, and the case died. Then, in 2016, police reopened the case and later ran a new DNA test, and that linked the suspect. Pascal Estime was arrested at the airport in July 2017 as he was about to board a plane, police said, headed to Haiti. But in November, [a judge freed Estime](#), ruling that police had waited too long to do the DNA testing and that the statute of limitations had run out.

DNA evidence will be presented at the March trial of Khrishad Clark.

Still, the key to conviction in these cases is often the testimony of the victim.

In the current case in Essex County, the prosecutors will spend many extra hours with the woman who was the victim, just to make sure she understands the legal process and to get her comfortable in a courtroom. Recently, Lyons-Boswick, the prosecutor, took the woman to the actual courtroom, to let her see what it looks like. She showed her the prosecution's table, where the judge sits at the bench, and she had the woman sit on the witness stand, next to the jury box.

The judge explained, things, too. She shook the woman's hand and introduced herself. The judge put on her dark robe, like she will be wearing in court.

Clark, at a preliminary hearing in June, and in a letter he sent to NPR from jail, says the evidence will show he did not commit rape.

(Another case that got national attention that the office prosecuted showed how complicated these cases can get. In 2015, Essex County prosecutors won the conviction of college professor Anna Stubblefield for sexually abusing a man with significant disabilities who did not speak words. Prosecutors, and the man's family, said the man did not have the ability to consent to sex. Stubblefield said she and the man had fallen in love and had a consensual relationship. Last year, an appeals court threw out the conviction, saying the judge erred by not allowing defense testimony that argued the man could communicate — with words — by using a controversial method called "facilitated communication.")



Some courts — but not in New Jersey — allow victims with intellectual disabilities to keep a service animal, one trained just for court testimony, that will hide from the view of jurors so dog lovers won't be biased. Other courts let victims with intellectual disabilities avoid being in a scary courtroom, and take their testimony on videotape.

It's hard work. It's extra work. And prosecutors like Laurino and Lyons-Boswick say it pays off.

Barbara Van Woerkom contributed reporting to this story.



This is the third installment in our series on successfully investigating sexual assault against people with disabilities. In the previous installment, we introduced the topic of how to evaluate a victim's general capabilities during the course of a sexual assault investigation. This is relevant when the victim's cognitive disability might be severe enough to preclude the ability to consent to sexual acts. If this is the case, the victim's lack of capacity to consent constitutes a legal element of the crime. In this installment, we continue this topic by discussing the more formal assessment of a victim's specific capacity to consent to sexual acts.

## **Severe or Profound Cognitive Disabilities**

While any disability the victim has can affect a sexual assault investigation, only cognitive disabilities have the potential to constitute a legal element of the crime. The question is whether the impairment is severe enough to prevent the person from being able to legally consent to sexual activity. If so, the investigation must establish three legal elements:

1. Sexual contact or penetration was committed by the suspect against the victim.
2. The victim lacked the capacity to consent to the sexual activity, based on a severe cognitive impairment.
3. The suspect knew, or should have known, the severity of the victim's cognitive impairment.

In theory, a consent defense cannot be raised in such a case. However, there is no "bright line" for establishing how severe a cognitive impairment must be to render an individual incapable of consent. This must be determined based on the evidence gathered during a thorough law enforcement investigation, including a current assessment of the victim's disability and a formal evaluation of the victim's capacity to consent.

## **Conducting a Formal Evaluation of Capacity to Consent**

There are a number of characteristics that influence an individual's ability to consent to sexual activity, including their IQ, adaptive behavior, and current sexual behavior, as well as any sex education they may have received (Kennedy & Niederbuhl, 2001).

Various tests are used around the country to evaluate such characteristics and make this determination. Knowing what test is used in your jurisdiction will guide the questions that need to be addressed during the law enforcement investigation.

## Investigating Sexual Assault Against People with Disabilities: Part 3

### *Evaluating Capacity to Consent to Sexual Acts*

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On the following page, we provide a summary of the various tests for capacity to consent that are used in each state. The material is adapted from Morano (2001), but it has been updated with new information as of December 2013.

Name of Test	States that Use This Test
<b>Nature of Conduct:</b> This test requires that a person have an understanding of the sexual nature of any sexual conduct as well as the voluntary aspect of such activity, in order to be considered capable of consent.	Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, and Utah.
<b>Nature and consequences:</b> This test requires that a person understand both the nature and consequences of a sexual act in order for consent to be valid. Additionally, the individual must understand the potential risks of sexual behavior, including negative outcomes such as unwanted pregnancy or sexually transmitted infections.	Alabama, Alaska, Arizona, Arkansas, Indiana, Iowa, Kansas, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wyoming
<b>Morality test:</b> This test necessitates that a person have a moral understanding of sexual activity in addition to understanding its nature and consequences for consent to be valid.	Colorado, Hawaii, Idaho, Illinois, New York, and Washington
<b>Totality of circumstances:</b> This test requires the fact finder to examine all of the relevant circumstances to determine whether the victim was capable of consenting to the sexual acts in question.	Illinois
<b>Evidence of mental disability:</b> This test must consider “evidence of mental disability.”	Connecticut, Maryland, Massachusetts, Michigan, Mississippi, Missouri, South Dakota, West Virginia, and Wisconsin
<b>Judgment test:</b> This test is used in to determine whether the individual can give knowing and intelligent consent to sexual activity.	Georgia and Minnesota

## **Investigating Sexual Assault Against People with Disabilities: Part 3**

### *Evaluating Capacity to Consent to Sexual Acts*

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Law enforcement professionals are not required to become experts in determining a victim's capacity to consent to sexual activity. However, understanding the test used in a particular jurisdiction can help guide officers and investigators in the type of information that should be gathered to help others make that determination. For more detailed information on each of these tests, please see the OLT Module entitled: [Successfully Investigating Sexual Assault Against People with Disabilities](#).

### **Specific Questions That Can Be Asked**

While the specific questions asked during an assessment will vary based on the test used in a particular jurisdiction, it will be important to begin by establishing what terms the victim uses for male and female genitalia. Once these terms are established, the interviewer should use the same words the victim does and proceed by asking questions such as the following:

- What do boys/girls do with that part of their body [using the victim's terms]?
- Do you have a \_\_\_\_\_?
- What do you call it when a man puts his \_\_\_\_\_ inside a woman's \_\_\_\_\_? Do you know a name for that?
- What is sex?
- Why do people have sex?
- Where do babies come from?
- If a woman wants to have a baby, what does she do?
- If a woman wants to stop from having a baby, what does she do?
- Do boys have babies?
- When a man does that, does he like it? Does a woman?

Other questions can address whether the victim understands that people can contract a disease from sexual activity, is able to differentiate between appropriate and inappropriate times and places to have sex, and recognizes situations or people that may pose a threat (Kennedy & Niederbuhl, 2001).

## Investigating Sexual Assault Against People with Disabilities: Part 3

### *Evaluating Capacity to Consent to Sexual Acts*

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#### Up Next

Now that we have provided an overview of how to evaluate the victim's general capabilities as well as their specific capacity to consent to sexual acts, we transition to the topic of the victim interview. In the next two bulletins, we provide information on how to prepare for, and conduct the detailed follow-up interview with a victim who has an intellectual or developmental disability.

#### For More Information

This training bulletin is an adapted excerpt from the OnLine Training Institute (OLTI) module entitled: Successfully Investigating Sexual Assault Against People with Disabilities, by Sgt. Joanne Archambault (Retired, San Diego Police Department), Kimberly A. Lonsway, Ph.D., Shirley Paceley, MA, and Christine Herrman, JD.

For more information, you can register for the interactive training module in the [OLTI](#), or you can print out the document in our [Resource Library](#). Please note, however, that the document version does not include the review exercises or test questions that are included in the OLTI. After successfully completing the module in the OLTI and passing the end-of-course test, you can also download a personalized certificate of completion.

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# **Perpetrator Tactics**

## **Tactics of Violence: General**

- Becoming a relied upon caregiver
- “Grooming”
- Exploiting trust

## **Tactics of Violence: Physical**

- Forcing mobility without assistive device
- Causing injuries by taking advantage of disability
- Withholding food, personal care, medications
- Overmedicating or misusing medication to cause pain
- Refusing to comply with safety or medical recommendations
- Ignoring symptoms of illness
- Unnecessary use of restraints

## **Tactics of Violence: Sexual**

- Threatening to leave or deny care if they don’t consent to sexual activity
- Abusing intimate body parts; grabbing genitals while providing care
- Taking advantage of lack of understanding about sex
- Forcing sterilization

## **Tactics of Violence: Emotional**

- Threatening, harming or scaring away service animals
- Ridiculing disability
- Discounting feelings by attributing them to disability
- Ignoring their presence and requests
- Denying their pain and needs
- Exploiting Credibility
- Making them think their crazy

### Tactics of Violence: Isolation

- Controlling access to or breaking communication devices
- Taking away service animals
- Misusing medication for sedation
- Firing/harassing aides, nurses, personal assistants
- Stealing/Destroying adaptive equipment

### Tactics of Violence: Economic

- Coercing them to become payee, sign checks or other financial documents
- Fostering financial dependency
- Cancelling health insurance
- Exploiting power of attorney
- Controlling income (SSI/SSDI/AABD)

### Tactics of Violence: Exploiting Children

- Exploiting disability to get custody
- Undermining their authority as a parent based on their disability
- Minimizing them or ridiculing them as a parent because of disability

### Tactics of Violence: Using Privilege

- Exploiting lack of accessible service providers
- Exploiting their disability to undermine their credibility to service providers, courts, police
- Exploiting privilege of being a person without a disability
- Controlling clothing, food, activities, medications
- Belittling their intelligence
- Stating that they are lucky to have a relationship
- Making unilateral decisions
- Emphasizing their dependence and vulnerability
- Denying needed supports

### Tactics of Violence: Minimizing, Denying, Justifying & Blaming

- Blaming their disability as the cause for abuse (i.e. burden, stress of caregiving)
- Denying their pain; minimizing challenges caused by their disability
- Exaggerating their disability; denying their abilities
- Justifying the abuse

### Tactics of Violence used against Deaf People

- Interpret falsely or inaccurately
- Striking/attacking before they can sense what is coming
- Not allowing children to use ASL
- Put them down by saying they aren't good enough because they are Deaf
- Use intimidation with body language & proximity when signing
- Move away from the Deaf community
- Check or destroy technology
- Erase messages or falsely reply
- Throw inappropriate objects to get attention
- Deny abuse by saying it is ok in Deaf culture
- Take advantage of lack of accessible services for Deaf survivors



# The Power and Control Wheel for Elders and People with Disabilities

Identified below are common tactics used by abusers. At the hub of the wheel is the intention of all the tactics: to establish power and control. Each spoke of the wheel describes a tactic. The rim of the wheel, which gives it strength and holds it together, is fear and physical abuse, or the threat of it. (Adapted from the Minnesota Coalition for Battered Women by the Vermont Network against Domestic Violence and Sexual Assault)



# **Grooming Behaviors Toward Victims with Disabilities and Older Adults**

## **Dynamics**

When working with people with disabilities and older adults who have been victims of crime and domestic violence, the dynamics of the victim's relationship with a suspected abuser is important to consider.

Grooming is a predatory tactic, utilized by abusers. Grooming is practiced by perpetrators, who target and manipulate vulnerable people for exploitation.

While it is a common assumption that grooming is only practiced on the very young, identical emotional and psychological processes are commonly used to abuse or exploit adults the elderly, and those with compromised mental facilities.

## **Grooming behavior includes:**

Stage 1: Targeting the victim. The offender targets a victim by sizing up the person's vulnerability, emotional neediness, isolation, lack of knowledge and lower self-confidence.

Stage 2: Gaining the victim's trust.

Stage 3: Filling a need.

Stage 4: Isolating the person.

Stage 5: Maintaining control.

# Defendant Tactics

Below are the types of abuse and the defenses that defendants will use to avoid suspicion and guilt.



## Physical Abuse

- Self-defense
- Victim fell
- Accident
- Victim's injuries were self-inflicted
- Not abuse but caused by medications, underlying medical conditions, skin breakdown



## Sexual Abuse

- Thought there was consent (victim unable to give legal consent)
- Victim misinterpreted normal necessary care for sexual abuse



## Caregiver Neglect

- I'm not the legal caregiver
- Even if I am the legal caregiver, this was not my responsibility (e.g., facility cases)
- Doing the best I can
- Victim's condition due to underlying medical condition, not neglect
- Lack of resources
- What the victim wanted



## Emotional/Psychological Abuse

- No intent to cause suffering
- Not the level of conduct required to cause suffering
- Misinterpreted what was said
- Caregiver stress
- Victim is unstable and overacts



## Financial Exploitation

- Consent
- Gift
- Loan
- Quid pro quo (value for services rendered)
- Acting within legal authority (e.g., power of attorney, trustee, guardian/conservator)



## All Forms

- Victim imagined or misunderstood events due to dementia or intellectual disability
- Identity of the perpetrator
- Defendant is not legally responsible (insanity)

Adapted from: The Prosecutors' Resource Elder Abuse April 2017

<http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf>

## **Barriers for Older Adults and People with Disabilities**

- Fear of Retaliation
- Fear of Loss of Services
- Fear of Institutionalization
- Fear of being put in a nursing home or institution
- Cannot access private phone
- Isolation
- Lack of Access to Services and Supports
- Lack of Resources or Accommodations
- Communication Barriers
- Reluctance to Report family member and/or caregiver
- Dependence on abuser for daily living activities
- Culture of Compliance
- Lack of training and awareness regarding the intersection of violent crimes, older adults and people with disabilities
- Public attitudes (no one would hurt a person with disabilities or an older adult)
- Fear of not being believed
- Not knowing where or how to report

## Interviewing Tips

### Preparing for the Interview

- Assure the space is physically accessible and free from distractions.
- Recognize what the victim's disability is and provide any possible accommodations.
  - When in doubt...**ASK!**
- Take time to "listen" to the victim's account.
- Schedule extra time for the interview so you do not feel rushed.
- Be aware of the victim's schedule.
- Prepare to tell family members or support persons that you will need to interview the victim alone.
- It is best if a trained investigator can be assigned to handle this case through its entirety.

### During the Interview

- Remember that the individual might be feeling confused, anxious, irritable and depressed, and suffering from low self-esteem.
- Explain to the person that you are here to help.
- Ask the person for their consent to be interviewed.
- Provide facts about who you are, what you are going to do, and what happens next.
- Approach the individual from the front. An unexpected touch or drawing near from behind may startle or upset the person.
- Establish rapport.
- Communicate with individual like an adult, speak clearly, slowly and in a calm friendly tone.

- Speak directly to the person and not a support person or interpreter.
- Make eye contact and get at eye level with the person.
- Be aware of body language. Some people with disabilities and older adults are very receptive to body language. They are often able to detect if a person's body language depicts happiness, anger or other emotions, and then mimic the cues they see.
- If the person uses a wheelchair, mobility device or communication tool, ask permission before touching these.
- It is okay to offer assistance, but let the person decide if and what help is needed.
- Ask only one question at a time and allow time for an answer. If the person does not seem to understand, repeat the question using the same wording. If this does not work, after a few minutes, rephrase it.
- Allow adequate time to respond in conversation or when performing an activity. Rushing will increase confusion.
- Break down all tasks into simple steps. Tell the individual one step at a time what to do. Giving too many directions at once or too quickly will increase confusion. If the individual gets upset and becomes uncooperative, stop and try again later.
- If the individual repeatedly asks a question, keep in mind that the person cannot remember the response you have just given them. Instead of answering the question after a second or third repetition, reassure the individual in some way- everything is fine, you will be with them, you will help them.
- Use plain language, avoid jargon and sarcasm.
- Use the variety of sensory approaches, i.e. visual, auditory, movement. For example, try pointing to things to show what you mean.
- Let the person know that they are not in trouble and that you believe them.

- Let the person know that they are brave and they are helping others to be safe.

#### Following the Interview

- Contact the individual utilizing the preferred method of communication.
- If a follow up interview is needed, provide as much advance notice as possible.
- Check in to see if any additional accommodations are needed for the follow up interview.
- Provide updates on the status of the report.

Following a traumatic experience, all individuals need at least 2 nights of sleep, food and support before being able to provide complete and accurate information.

# The TEN Commandments:

## Etiquette for communicating with people with disabilities and deaf people

You may not always be aware that a person has a disability or hearing loss and the ten tips below are helpful in communicating with anyone.

1

When talking to a person with a disability or hearing loss...

Speak directly facing that person rather than through a companion or sign language interpreter who might be present. Even if you think that a person cannot understand or respond to you, it is rude to talk through someone else.

2

When introduced to a person with a disability...

It is appropriate to offer to shake hands. People with limited hand use, or who wear an artificial limb, can usually shake hands. Using the left hand to shake hands is also an acceptable greeting.

3

When meeting a person with low vision...

Always identify yourself and others who may be with you. When conversing in a group, remember to identify the person to whom you are speaking as well as yourself.

4

If offering assistance...

Wait until the offer is accepted. Then listen or ask for instructions. Do not be offended if the offer is not accepted.

5

Treat adults as adults...

Address people who have disabilities by their first name only when extending the same familiarity to all others present. Never patronize people who use wheelchairs by patting them on the head or shoulder.



**6****Do not lean or hang...**

Leaning or hanging on a person's wheelchair is similar to leaning or hanging on a person's body and is not okay. The chair is a part of the personal body space of the person who uses it. When speaking with a person in a wheelchair or using

**7****When talking with a person who has difficulty speaking...**

Listen attentively. Be patient and wait for the person to finish, rather than correcting or speaking for the person. If necessary, ask yes or no questions. Never pretend to understand, instead, repeat what you have understood and allow the person to respond. The response will clue you in and guide your understanding. Also keep in mind that a person may use other tools and devices as a way to communicate.

**8****When speaking with a person in a wheelchair or using crutches...**

Place yourself at eye level in front of the person to help with the conversation.

**9****To get the attention of a person who has hearing loss...**

Face toward them and wave your hand. Look directly at the person and speak clearly, slowly and expressively to find out if the person can read your lips. Not all people with hearing loss can lip read. For those who do lip read, be sensitive to their needs by placing yourself facing the light source and keeping hands, cigarettes and food away from your mouth while speaking.

**10****Relax...**

Do not be embarrassed if you happen to use common expressions such as, "See you later," or "Did you hear about this?" that seem related to the person's disability.

\*The Ten Commandments adapted from many sources as a public service by Karen Meyer, ADA National Center for Access Unlimited.

The following article was given to the Illinois Family Violence Coordinating Councils directly from Russell Strand, the co-author (January 2017).

## **The Forensic Experiential Trauma Interview (FETI)**

*Special Agent (Ret) Russell W. Strand*

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Traumatized individuals often undergo a process many professionals and victims do not commonly understand. Many professionals inside and outside law enforcement have been trained to believe when an individual experiences an event, to include a trauma event, the cognitive (prefrontal cortex) brain usually records the vast majority of the event including the who, what where, why, when and how and peripheral vs. central information. This approach often ignores the role of bottom-up attention of the more primitive portion of the brain during highly stressful or traumatic event. Therefore, when the criminal justice system responds to the report of a crime most professionals are trained to obtain this type of peripheral and higher level thinking and processing information often discounting the enhancement of memory traces – for what was attended, via bottom-up mechanisms and norepinephrine and glucocorticoid effects on the amygdala and hippocampus. Sadly, collecting information about the event in this manner while overlooking the manner in which the memory and trauma shapes the memory may actually inhibit traumatic or highly stressful or fear producing memory and the accuracy of the details provided. Trauma victims/witnesses do not generally experience trauma in the in the same way most of us experience a non-traumatic event. The body and brain react to and record trauma in a different way then we have traditionally been led to believe. When trauma occurs, the prefrontal cortex will frequently shut down leaving the less primitive portions of the brain to experience and record the event. The more primitive areas of the brain do a great job recording experiential and sensory information but don't do very well recording the information many professionals have been trained to obtain. Most interview techniques have been developed to interview the more advance portion of the brain (prefrontal cortex) and obtain specific detail/peripheral information such as the color of shirt,

When trauma occurs, the prefrontal cortex will frequently shut down leaving the less primitive portions of the brain to experience and record the event.

description of the suspect, time frame, and other important information. Some victims are in fact capable of providing this information in a limited fashion. Most trauma victims however are not only unable to accurately provide this type of information, but when asked to do so often inadvertently provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided. Stress and trauma routinely interrupt the memory process thereby changing the memory in ways most people do not accurately appreciate. One of the mantras within the criminal justice system is "inconsistent statements equal a lie". Nothing could be further from the truth when stress and trauma impact memory, research shows.

In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma. In addition, what many in the criminal justice field have been educated to believe people do when they lie (e.g., changes in body language, affect, ah-filled pauses, lack of eye contact, etc.) actually occur naturally when human beings are highly stressed or traumatized. Science of memory and psychological trauma must be applied to interview approaches and techniques.

Since the vast majority of traditional training and experience has caused many to focus on the higher functioning portions of the brain and research clearly shows these portions of the brain is not generally involved in experiencing, reacting to or recording the experience, the FETI process was developed and implemented as proven methods to properly interview the more primitive portions of the brain. This technique not only reduces the inaccuracy of the information provided but will greatly enhance understanding of the the experience, thereby increasing the likelihood of a better understanding of the totality of the event. FETI is highly effective technique for victim, witness and some suspect/subject interviews. FETI entails the adaptation of the principles used in critical incident stress debriefing and defusing (impact of the event including emotional and physical responses) as well as principles and techniques developed for forensic child interviews (open-ended non-leading questions, soft interview room and empathy) as well as neurobiology of memory and psychological trauma (initially tapping into the lower functioning portion of the brain to understand the experience as well as the meaning of the experience in a non-threatening, non-suggestive manner). This concept and approach of this technique can be described as a *forensic psychophysiological investigation* - an opportunity for the victim to describe the *experience* of the sexual assault or other traumatic and/or fear producing event, physically and emotionally. This method has resulted in reports of better victim interviews by those who have



used it. More importantly, the FETI interview process obtains significantly more information about the experience, enhances a trauma victim's ability to recall, reduces the potential for false information, and allows the interviewee to recount the experience in the manner in which the trauma was experienced. The FETI interview enhances the investigative process by taking a one-dimensional traditional investigation and turning it into a three-dimensional offense-centric investigation including subjective experiences indicative of trauma-based brain states. Traumatic memories are often encoded and retrieved differently than non-traumatic memories, so they have that dimension of the experience, and then presenting the fullness – and limitations – of the victim's memories, including the fragmented sensations and emotions, lack of narrative and sequencing, etc., which are then critical facts of their own.

This technique significantly enhances the quality and quantity of testimonial and psychophysiological evidence obtained. This method has also been shown to drastically reduce victim recantations, increase victim cooperation and participation and significantly improves chances for successful investigations and prosecutions.

The forensic experiential trauma interview includes using interview techniques described below:

## **A Paradigm Shift...**

### **Forensic Experiential Trauma Interview**

- **Acknowledge their trauma/pain/difficult situation**
  - **What are you able to tell-me about experience?**
    - **Tell me more about ... or that...**
  - **Help me understand your thoughts when...?**
  - **What are you able to remember about...the 5 senses**
  - **What were your reactions to this experience**
    - **Physically**
    - **Emotionally**
  - **What was the most difficult part of this experience for you?**
  - **What, if anything, can't you forget about your experience?**
  - **Clarify other information and details...after you facilitate all you can about the "experience" (FETI Funnel)**
  - **Closure – prep for future information sharing**

**a. Acknowledge the victim's trauma and/or pain.** This will assist you, the

One of the greatest needs of anyone who has experienced or is experiencing high stress and/or trauma is the need to be safe, trust is central to that need.

listener, to demonstrate genuine concern and empathy towards the interviewee in an attempt to provide a sense of psychological and physical safety during the interview process. It may be difficult to establish trust with someone whose trust may have been horribly violated by another human being they may have trusted. Every effort should be made by you to demonstrate genuine empathy, patience and understanding towards the person with whom you are facilitating a disclosure of their experience. You may need to spend additional time establishing this your sincere

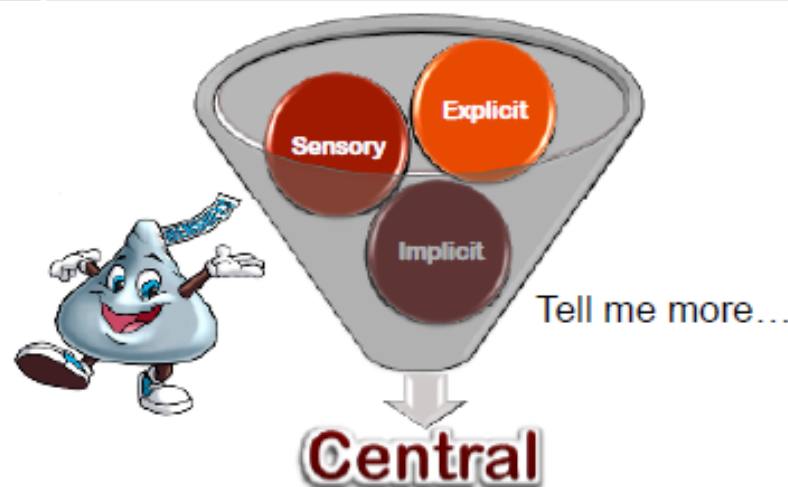
empathy and caring concern to be invited into their traumatic and/or painful experience. One of the greatest needs of anyone who has experienced or is experiencing high stress and/or trauma is the need to be safe, trust is central to that need. The interviewer must take responsibility to build trust in the most effective and appropriate way. Once trust is established, the interviewer may be invited into what can be termed as "the trauma bubble". The trauma bubble is where much of the most important psychophysiological evidence may reside. It is vitally important for the interviewer to demonstrate patience, understanding, and empathy in a non-judgmental manner throughout the interview process.

**b. Ask the victim/witness what they are able to remember about their experience.** Two key words in this question are "able" and "experience". Not all victims are able to recall all significant information about something that happened to them initially or even after a period of time. Using the word "able" has been proven to relieve some pressures on the trauma victim thereby increasing the information they are able to provide. Using the term "experience" encourages the victim to describe their actual experience relieving the pressure on the interviewee to try to figure out what is important to the interviewee in the context of a criminal investigation. As the victim/witness describes their experience, the Interviewer can better understand what happened as they are provided a recounting of the events that are generally extremely rich in details. Following the initial open-ended prompt, employ active listening techniques allowing the interviewee to free-flow their description of what they remember about their experience. The Interviewer

will enhance this description by adding additional open-ended prompts such as “tell me more about that” or “tell me more about \_\_\_\_”. This technique will allow the interviewee to provide even more significant information about their experience by prompting their memory in a more natural way. Open-ended prompts should include the interviewee’s emotional and physical experiences, before, during, and after the reported incident. Do not tell the interviewee to start at the beginning. This technique often inhibits trauma memory recall. Providing an opportunity for the victim to communicate his/her experience in the manner in which he/she recalls what happened is much more effective than initially requiring the victim to provide a chronological narrative. A sequential narrative may come to the victim later.

FETI Funnel – this term is used to describe the method to use clarifying questions to better understand both explicit and implicit memories. The use of “tell me more” questions are the most effective type of question to take an explicit memory such as “the rape”, “the man”, “the car”, “drinking”, “taking a shower”, etc. and better understand the context and impact of the particular remembrance. The interviewer should focus the interviewee’s thoughts on these particular topics to identify senses, thoughts, and feelings along with implicit memories. For example, if the interviewee states something along the lines of “and then he raped me.”, the interviewer should respond with “tell me more about the rape”. The interviewee may then respond by saying “he held me down and forced his penis into me.” The interviewer may then respond by saying “tell me more about him forcing his penis into you.” A follow-up question may then be “tell me what it felt like when...”, or what were you thinking when...”, or what did it smell like when...”

## ***The FETI Funnel***





**c. Ask the victim/witness about their thought process at particular points during their experience.** What was he/she thinking and how was he/she processing his/her experiences. This will assist the interviewer to better understand the actions/inactions and behaviors of the victim before, during, and after the assault. This will also reduce or even eliminate the need for the Interviewer to ask the victim/witness why they did or did not do something such as fight back, kick, scream, run, etc. Why questions of this nature have been proven to re-victimize victims, close them down, increase false information, and destroy or damage fragile trauma memories. By asking what their thought process was not only provides additional understanding of the victim/witness reaction and behaviors, but also increases their ability to recall additional psychophysiological evidence. For example, if the victim was sexually assaulted and during the sexual assault they may have “frozen” due to tonic immobility, asking them what they were thinking at the time they were being assaulted will often prompt will often solicit responses such as “I thought he was going to kill me”, “I couldn’t move or scream”, “I couldn’t understand what was happening at that moment”. This type of information not only assists the Interviewer in determining a better understanding of why the victim/witness did or did not do something, but also identifies significant forensic physiological evidence that will assist in proving or disproving and or corroborating the reported offense. ,

**d. Ask about tactile memories such as sounds, sights, smells, and feelings before, during, and after the incident.** This is one of the most important aspects of the FETI process and a central theme. Because the primitive portion of the brain is optimized to collect, store, and recount this information far more efficiently than peripheral information or details, this is crucial evidence to collect as well. It is also believed that tactile and sensory details may block some memories and negatively impact on the victim’s ability to disclose additional information. Asking about sensory information has been shown to increase the victim’s ability to relate to the experience in a way that produces significantly more information. Sensory information also assists fact-finders and juries to better relate to the experience of the victim as well. Asking about sights, sounds, smells, feelings (physical and emotional), and tastes throughout the interview about specific memories related by the interview is extremely beneficial for the interviewer to better understand the experience and assist the interviewee in remembering and

relating essential memories including central details (those details most important to the interviewee) and peripheral details (those details judged not important to the interviewee). For example, during the interview of an experienced police officer who witnessed a woman shooting herself in the head (specifically – “blew her brains out” as related by the officer) following an attempt to talk her out of shooting herself, this officer provided details of the events surrounding this experience. Following open-ended questions about this officer’s experience, the officer concluded he recounted all the details he could recall. This officer was then asked what, if anything he was able to remember about what it smelled like after the woman “blew her brains out”. This officer appeared to reel back in his chair, his nose started to twitch and he appeared to become emotional following this question. The officer then recounted in a very animated manner that he smelled “honeysuckle”. Following his disclosure about the honeysuckle, this officer became even more animated and disclosed, and demonstrated, that this woman’s hand was shaking and she was breathing deeply after she shot herself. This officer then added that her blood flowed from her open head “like motor oil”. This officer had not remembered these specific details during previous traditional interviews and was surprised by the amount of detail he was able to recall following the sensory cue provided by the FETI interviewer. This is but one example of many in which victims and witnesses of trauma can be assisted to recall specific sensory memories, which often assist them in remembering not only explicit memories, but implicit memories as well. Sensory information is often at the core of central details for most individuals. Therefore, asking specific questions about the various senses throughout the FETI process greatly enhances the likelihood of obtaining accurate experiential information increasing the ability of the interviewee to recall essential central details of the experience. Some individuals will recall certain senses better than others, so it is important to ask about all senses separately while obtain specific memories during specific aspects of the experience before, during and after the traumatic event.

**e. Ask the interviewee how this experience affected them physically and emotionally.** This is extremely important to understand because the effects of the assault will increase the Interviewer’s understanding the context of the experience, as well as provide evidence and insights about the trauma in ways that will further an in-depth conception of the impact of the assault on the victim. How the victim felt before, during, and after the event under investigation is fundamentally important for the Interviewer to understand and collect. During fear producing and traumatic events the sympathetic and parasympathetic system of the human body react to the fear stimulus in significant ways. The victim/witness may experience the emotional feelings of fear, shock, anger, rage, sadness, etc. The



victim/witness may also experience physiological reactions to the trauma including the emotional feelings combined with the physical manifestations of stress, crisis, and trauma such as shortness of breath, increased heart rate, dilated pupils, muscle rigidity and/or pain, light-headedness and or headache, tonic immobility, dissociation, etc. Identifying and properly documenting these reactions to their experience are essential pieces of information that can greatly assist the Interviewer in understanding the context of the experience and provide significant forensic psychophysiological evidence.

**f. Ask the victim/witness what the most difficult part of the experience was for them.** Trauma victims/witnesses will often intentionally or unintentionally repress extremely difficult to handle information about their experiences. A sensitive inquiry about the most difficult part of their experience may provide significant evidence of the trauma experience and/or crime and will in many cases increase understanding of the totality of circumstances in reference to the victim/witness experience. Additionally, the most difficult part of the interviewee's experience is more often than not the "key" central detail that may have not only framed the manner in which the trauma was experienced and remembered, but may also be a fundamentally important aspect for investigators to better understand the context of that experience and subsequent reactions/behaviors of the interviewee following that experience.

**g. The interview should inquire what, of anything can't the interviewee forget about their experience.** This question may assist the interviewer and interviewee to better understand another critical "central detail" and a better understanding of the interviewee's perception and response to the trauma. This question also may obtain additional psychophysiological evidence. For example, a victim of a robbery in which the victim was brutally beaten by two assailants with hammers, was initially interviewed by a responding police officer utilizing traditional who, what, where, why, when, and how police questions in an attempt to obtain a chronological narrative immediately following the event. This particular victim became increasingly frustrated during the interview because he could not remember and did not know the answers to the majority of the questions the police officer was asking the robbery victim. Questions such as "what time did the incident occur", "how many times did they hit you", "how long did they hit you", "what did they look like", how tall were they", what were they wearing", "why didn't you let them take your watch" (the victim continued to hold his arm on which he was wearing the watch during the attack – possible tonic immobility). As these questions, and many others, were being asked, the victim continued to become more frustrated and agitated because he felt he should know the answers simply because

the police officer was asking them. This line of questioning was potentially increasing the victims stress level, increasing stress hormones, decreasing the ability of the victim to answer the questions and possibly increasing the possibility that the victim, with a desire to assist the officer, to provide inaccurate information. During a subsequent FETI interview of this same victim, the victim was initially unable to provide any additional experiential information. This victim was then asked, "what, if anything, can't you forget about your experience?" Following this question, the interviewee began to hit his head stating "the hammers hitting my skull, the hammers hitting my skull, I can't get that sound out of my mind, I can't sleep well, I can't concentrate, the hammers hitting my skull". After this disclosure, this victim was able to remember significant details about the robbery including other sensory information, what happened before, during and after the robbery, and other significant information about this experience.

**h. The interviewer should clarify other information and details (e.g. who, what, where, when, and how) after facilitation and collection of the forensic**

**psychophysiological experiential evidence.** Although the primitive portions of the brain collect, store, and recall information pertaining to the experience, the cognitive brain may have collected or is able to retrieve from other portions of the brain information pertaining to the who, what, where, when, and how types of information. Interviewers should be careful about asking specific questions pertaining to length of time and elements of distance due to the fact that fear and trauma often distorts time and distance. The Interviewer should explore the additional central/peripheral information and who, what, where, when, and how type of information in a sensitive and empathetic manner taking great care not to inhibit or change already fragile testimonial trauma evidence.

**i. The interviewer should remember to close the**

**interview as empathically as it began.** The interviewee should be allowed to control the length and breadth of the interview. Upon termination of the interview the interviewer should provide reassurance to the interviewee that it is normal after the interview for them to remember additional elements of their experience. In large part this is due to the way in which the brain continues to process through a traumatic experience. Further there may be elements of their day to day activities that will cause particular remembrances. This is commonly known as triggers, such as sights,

Memory encoding during a traumatic event is diminished and sometimes inaccurate, and due to bottom-up attention processes focused only on central details perceived as essential to survival and self-defense many aspects of the event, including those deemed by investigators as essential facts of the crime, may not be encoded strongly or at all.



sounds smells, tastes, feelings, and body sensations. These triggers are often caused by these sensations and/or explicit memories triggering the implicit memories. The interviewee should be encouraged to make note of these remembrances and the interviewer should encourage them to share that information as it may prove critical and noteworthy to the investigation and potential prosecution. Finally the interviewer should address any concerns/questions the interviewee has at that time and close by thanking the interviewee for their participation and willingness to trust the interviewer with the disclosure. Also, it is important to remember, if done effectively, there may be a trauma related bond between the interviewer and interviewee. Provide some time for closure and normalization prior to the final completion of the interview. Ensure the interviewee has follow-on resources available, as needed, such as a victim advocate or other helping professional.

The FETI interview methodology is specifically designed to provide an opportunity for the Interviewer to obtain significantly more psychophysiological evidence than traditional interview techniques. Psychophysiological evidence is defined as “evidence which tends to prove or disprove the matter under investigation based on psychological and physical reactions to the criminal conduct the person experienced or witnessed. Examples would include, but are not limited to: nausea, flashbacks, muscle rigidity, trembling, terror, memory gaps, etc.” In addition, these techniques provide the victim a better avenue for disclosure, reducing the potential for defensive feelings and uncooperative behavior, which can limit the information/evidence provided to an Interviewer.

Memory encoding during a traumatic event is diminished and sometimes inaccurate, and due to bottom-up attention processes focused only on central details perceived as essential to survival and self-defense, many aspects of the event, including those deemed by investigators as essential facts of the crime, may not be encoded strongly or at all. But the assault’s psychophysiological impact is registered with much greater accuracy and strength in the brain’s circuitries of fear and stress, and remembered with far more precision. The impact of the psychophysiological experience also continues to produce potential psychophysiological evidence long after the event. Indeed, psychophysiological evidence is often the only evidence available to distinguish between consent/non-consent and levels of incapacitation. It is also extremely beneficial in demonstrating the ‘three dimensional’ assault experience and subsequent victim reactions and behaviors.

Victims should not be treated as witnesses to their own crime – they have an experience we have a duty to facilitate a disclosure, document and present in a three dimensional manner

## Communication After Trauma

### Factors that influence communication:

1

Following a trauma, it may be more difficult for a person to follow what is being said and to speak.

5

Some people can understand what is said; however, have difficulty expressing what they want to say.

2

A person's ability to communicate what happened to them is not necessarily related to cognitive understanding or truth-telling.

6

We all have different ways of understanding others and expressing ourselves. Attempt to use multiple means of communication to increase the likelihood of being understood.

3

It is easier for a victim to communicate what happened to them when speaking with someone they trust.

7

Some disabilities can impact how a person responds under stress. Do not be misled or misinterpret a person's affect.

4

Some people communicate in nontraditional ways or ways that are not easy for us to understand; however, they can still communicate if we take the time to understand.

8

It may be easier for victims to talk about what they felt, saw, heard, smelled or tasted than to recall facts in a chronological order.

## **Capacity, Consent, and Undue Influence**

In working with victims with disabilities and older adults it is important that law enforcement personnel understand the issues of credibility, consent, and undue influence. Many people with disabilities and older adults are capable of making all of their life decisions and it is important to presume competence. Some people with disabilities and older adults, however, do not have the capacity to consent to sexual activity. Others may not meet the criteria to testify in a court hearing. Some individuals can be considered credible witnesses without having the capacity to consent to sexual activity.

### **Credible witness issues**

The general criteria for a credible witness includes understanding the difference between truth and lie, remembering what happened, and being able to communicate what happened. The majority of people with disabilities and older adults are credible witnesses. To assess 'understanding the difference between truth and lie' in a person with an intellectual disability, it is best to use several concrete questions. For example: "There is an elephant in the room. Is that the truth or a lie?" or "My shirt is red (when your shirt is green). Is that truth or lie?" After a few of these questions, ask the person, "Is it better to tell a lie or the truth?" and "What happens if someone tells a lie?" This concrete approach can give you a wealth of information.

Keep in mind that the person may need some accommodations to be able to explain what happened to them in a way that is easy for others to understand. Common accommodations for someone with an intellectual disability include allowing extended time to respond to questions, use of concrete words to communicate with the individual, and allowing the person to point to pictures or use a communication device or book.

A victim's ability to sequence events is not required. In this situation, it is helpful to establish understanding of the victim's routine. The victim may be able to reference events surrounding the assault(s) by their activities when they are unable to use a clock or calendar.

### **Capacity to consent to sexual activity**

Consent for sexual activity is when someone can voluntarily make a decision whether or not to participate in sexual activity. If a person is not able to make that decision, legal charges can be filed against the person who engages in sexual activity with the person who lacks capacity to consent. Therefore, it is important that law enforcement and prosecutors understand what this diminished capacity means. This capacity is evaluated by a professional (usually a psychologist) who has specific training and understands the professional guidelines for making such determinations. The determination is then decided through adjudication. It is best for law enforcement to work with prosecutors in determining what needs to be investigated in this regard.

Consent for sexual activity has three components: knowledge, reasoning, and voluntariness. Knowledge includes facts needed to make a decision and risks such as

diseases, pregnancy. Reasoning is the ability to understand and weigh different options in making an informed choice. Voluntariness is the ability to protect oneself against coercion in making sexual decisions.

One study of more than 300 psychologists (Kennedy and Niederbuhl, 2001), revealed that important elements of consent include

- Being able to say or demonstrate “no.”
- Knowing that having intercourse can result in pregnancy.
- Being able to make an informed choice when given options.
- Knowing that having intercourse or other sexual relations can result in obtaining a disease.
- Being able to differentiate between appropriate and inappropriate times and places to engage in intimate relations.
- Being able to differentiate between males and females.
- Being able to recognize individuals or situations which might be a threat to him/her.
- Being able to stop a behavior if another person tells him/her “no”.

This list may be helpful to prosecutors in determining if someone needs an evaluation of their capacity to give consent for sexual activity.

Just as someone who is under the influence of alcohol or illegal drugs may lack the capacity to give consent for sexual activity, a person with mental illness who is adjusting to new medications may lack consent for sexual activity.

### **Capacity**

Capacity refers to an individual’s ability to perform certain tasks. Mental capacity refers to the ability to perform mental tasks such as remembering, reasoning, and understanding the repercussions of one’s actions. When these abilities are impaired, the individual becomes vulnerable to financial exploitation.

The level of capacity that is needed for performing financial transactions depends on the specific nature of the transactions. The more complex the transaction, the more capacity is needed. For legal purposes, there are several levels of capacity: testamentary capacity; the capacity to contract; the capacity to give medical consent; and the capacity to testify. The types of capacity that generally come into question in financial abuse cases are testamentary capacity and the capacity to sign contracts and other documents.

Testamentary capacity is needed for on making wills. For a will to be legal, the individual must have sufficient mental capacity to:

- Understand the nature of the act.
- Understand and recollect the nature and extent of his or her property.
- Remember and understand his or her relation to living descendants, spouse, and parents whose interests will be affected by the will.

Although there is no universal standard for what mental capacity is needed to enter into a contract, capacity for signing contracts is generally defined as understanding the nature and consequences of the transaction (i.e. the ability to know what one is doing and appreciate the effects of their actions). Some states have also addressed “volition” in assessing capacity. This relates to the fact that some individuals understand the nature and consequences of their actions, but lack volitional control. An individual suffering from manic depressive illness may, at times, lack volitional control.

A myriad of problems surround discussion about capacity. This includes disagreement about what levels of capacity are needed for specific tasks. In Illinois, for example, courts have generally ruled that executing deeds requires the same level of capacity as executing contracts. However, in another state recently, a court ruled that the level of capacity needed for executing deeds was testamentary.

Another inherent problem in discussing capacity is that mental status is usually measured through mental status examinations. These tests measure categories of mental functioning including cognition and memory. It is not always clear how these measurements apply to the performance of specific legal functions. A variety of other issues further complicate assessments of capacity. Additionally, some severely impaired individuals have periods of lucidity. For this reason, abusers who are charged with exploiting an older person’s incapacity can always claim that a victim was “lucid for a moment” (e.g. when he/she signed a contract or gave a gift). Consequently, financial exploitation investigators must consider how often a person is affected and how long the impairment lasts. Additionally, a mental impairment in and of itself does not render a person incompetent to make decisions or testify. The seriousness or gravity of a situation also affects the degree of competency that is needed.

## **Consent**

Determining whether financial exploitation has occurred may involve assessing if an individual consented to make purchases, accept assistance, or transact business. To exercise consent, an individual must have knowledge of the true nature of an actor transaction. He/she must also act freely and voluntarily and not under the influence of threats, force, or duress. He/she must further possess sufficient mental capacity to make intelligent choices about whether or not to do something that is proposed by another individual. Mere passivity does not amount to consent.

## **Undue Influence**

Another factor which comes into play when signing contracts or, executing wills, or managing other financial matters is undue influence. Undue influence is a shorthand legal phrase that is used to describe excessive pressure or persuasion by a dominant person to someone who is vulnerable to pressure. Undue influence is a result of weakness on the side of the vulnerable party, strength on the other party's, or a combination of the two. When undue influence is exerted, the weaker party is prevented from acting according to his/her own wishes or judgment or are induced to do something that he/she would not do if left to act freely. If a contract is obtained through undue influence, the document is invalid. Courts will consider several factors when assessing if undue influence or over persuasion has been used (Neivod, 1992), including:

- Discussion of the transaction at an unusual or inappropriate time.
- Consummation of the transaction in an unusual place.
- Consistent demand that the business be finished at once.
- Extreme emphasis on untoward consequences of delay.
- Use of multiple persuaders by the dominant side against the vulnerable party.
- Absence of the third-party advisors to the vulnerable party.

## **Financial Exploitation Investigative Checklist**

While the type of information that should be collected in financial exploitation cases will depend on the form of exploitation that is alleged and the reason for the investigation, the following guidelines can be instructive to law enforcement officers:

- Interview victims and alleged abusers separately.
- Determine the relationship between the parties: Is the suspect a member of the victim's family? Is he or she in a position of trust? Does he or she live with the victim? Is he or she in a position of trust? Does he or she live with the victim?
- Find out the sources of income, dollar amounts, and payment due dates. Where are checks deposited?
- Determine the extent of the victim's estate, including real properties, bank accounts, certificates of deposit, stocks, home furnishings, personal belongings, and vehicles, where are these located? Are there safety deposit boxes? Where and who has keys and/or access to the box? Where are the personal belongings (jewelry, art, valuable collections) kept? Insurance policies? What kinds and who are beneficiaries?



- Find out who owns the victim's home, whose name is on the deed, who pays rent, and who pays the taxes.
- Find out whose names are on bank accounts, investment accounts, etc. Where, what type and approximate balance in each.
- Find out who is the representative payee, power of attorney, accountant, or guardian.
- Find out who pays the bills. What is the amount of monthly bills? Who writes and signs checks? What debts exist?
- Find out how the person's pension, social security, or other income checks are received and deposited in the bank.
- Find out how cash is obtained. Are there credit cards or ATM cards? Does victim use them? Who else is listed on accounts?
- Determine if anyone is using the victim's residence or utilities without permission.
- Find out if loans and/or gifts have been recently made and to whom.
- Determine if there is a will and where it is located.
- Determine whether the victim is literate.
- Secure samples of the victim's and the alleged abuser's signature.
- Determine what documents signed by the victim have placed the estate in the suspect's control. They may include powers of attorney, bank signature cards, and vehicle pink slips.
- Get copies of whatever documents were signed.
- Determine the income of the alleged abuser.
- Collect evidence from other agencies.
- Check for previous criminal charges against the alleged abuser. Find out whether the victim is receiving adequate medical care, food, clothing, etc.
- Determine the victim's mental status: Is the victim mentally capable of understanding documents, testifying, or assisting in the investigation?

- If the person is incapacitated, or his or her capacity is questionable, contact family members, friends, or service providers to obtain mental health evaluations and histories. These should include information about the length of time that the victim has had diminished capacity in order to determine if he or she was able to give consent at the time it was given.
- If questionable purchases have been made, find out the value of the purchases, by and for whom they were made, the value of the purchases in relation to the abuser's salary and whether there has been a history of gift giving.
- Determine if the person's estate is still at risk of theft, misappropriation, or embezzlement. If so, secure the estate as soon as possible.
- Follow the funds! Determine who has (or had) possession of all misappropriated funds or property.

Adapted from the following resources:

Delaware Office of the Attorney General's Financial Exploitation Investigative Check list  
Financial Abuse of the Elderly by Lisa Nerenberg, produced by the San Francisco Consortium for Elder Abuse Prevention for National Center on Elder Abuse, 1996.

# Trends: Close Up

December 2016

## Animals in Court

There are a variety of different scenarios that can bring animals to the courthouse. They may be accompanying a witness, a litigant, an attorney in a court case, or someone entering the court to file paperwork.

When someone enters a courthouse with a possible service animal, court staff may, by law, ask only two questions: 1) Is the animal necessary because of a disability? and 2) What has the animal been trained to do to assist the individual? Even if an animal qualifies as a service animal, the public entity can ask them to leave if the animal is not housebroken or is out of control. In addition, if the presence of the animal would cause a fundamental alteration to the service or program, the animal may be excluded.<sup>1</sup> A comfort animal used for psychiatric support is differentiated from a service animal.

Under Title II of the Americans with Disabilities Act (ADA) service animals must be permitted, but not emotional support, comfort, or therapy animals. Most states also have their own regulations that apply to service animals. If the state laws or regulations are broader than the ADA, those would also apply, but the state

## About the Series



These special reports are part of the National Center for State Courts' "Trends in the State Courts" series and serve as informative and timely updates for state court leaders. Any opinions expressed herein are those of the authors, not necessarily of the National Center for State Courts.

regulations cannot place limits on the ADA regulations. Emotional support animals are permitted under the broader definitions of Section 504 in the area of housing and transportation. Under the ADA, service animals are defined as any dog that is trained to perform tasks to benefit the person with the disability.<sup>2</sup> Although only dogs are included under the definition, a special provision makes an exception for miniature horses in certain cases.<sup>3</sup>

So while a comfort dog that provides emotional support is not allowed under the ADA, an animal that has been trained to provide specific tasks, including preventing epileptic seizures or interrupting behaviors that the individual has trouble controlling, is allowed under the ADA. These animals have had "alert training," examples of which might include nudging the person

<sup>1</sup> 28 C.F.R. §35.136.

<sup>2</sup> "Any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." 28 CFR 35.104.

<sup>3</sup> 28 CFR 35.136 (i).



*The public entity can only ask:  
1) If the animal is required because of a disability and  
2) What the animal has been trained to do.*

## **"Staff may not ask for certification and the animal is not required to wear special tags, vests, or harnesses."**

or walking around the person in a circle, to prevent seizures or interrupt certain behaviors. These are considered to be specific tasks that require training, but the disability is usually not visible. The Department of Justice (DOJ) has released "Frequently Asked Questions about Service Animals and the ADA," which explain the difference between an emotional support animal and a service animal. If someone is having an anxiety attack and an animal helps to calm them, that is an emotional support animal and not covered by the ADA. If the animal has been trained to sense that an attack is imminent and can take an action to help avoid or reduce the attack, then the animal qualifies as a service animal. Since the public entity can only ask if the animal is required because of a disability and what the

animal has been trained to do, this may be a difficult determination for a frontline court employee. Service animals do not have to be trained by a professional, so the individual with the disability may have trained their own service animal. The ADA does not cover service animals that are still in the training stage; however, some states provide coverage under state statutes. Staff may not ask for certification, and the animal is not required to wear special tags, vests, or harnesses.<sup>4</sup>

Miniature horses were excluded by the proposed DOJ regulations that limited service-animal species to dogs that were individually trained to perform work for persons with disabilities. The final revised regulations include a special provision for miniature horses.

<sup>4</sup> U.S. Department of Justice, "Frequently Asked Questions about Service Animals and the ADA," [https://www.ada.gov/regs2010/service\\_animal\\_qa.html](https://www.ada.gov/regs2010/service_animal_qa.html).



## ADA Service Animal Checklist for Courts

### What animals are permitted by the ADA?

All breeds of dogs are covered by the ADA and can be service animals. A special provision was added to the final rule that includes miniature horses. State law may broaden protections for service animals but may not limit the federal regulations. For example, some states cover service animals in training while the ADA does not.

### Do service animals need special training or certification?

No. The individual may train his or her own service animal. The work or tasks performed by a service animal must be directly related to the individual's disability. Service animals may be used to assist people with any disability, including neurological or psychiatric disabilities if the service animal is trained to prevent or interrupt "impulsive or destructive behaviors."

### When can service animals be excluded?

All types and breeds of dogs are allowed under Title II, but the public entity can ask the person to remove the animal if the animal is not housebroken or if it is out of control. In addition, if the presence of the animal would cause a fundamental alteration to the service or program the animal may be excluded. The alteration must be more than a minor financial or procedural change.

### Can judges or court staff ask for certification, tags, vests, or other documentation?

Neither judges nor court staff may ask for certification, and the animal is not required to wear special tags, vests, or harnesses under the ADA. Individuals are not required to provide documentation that an animal is a service animal; "credible verbal assurances" should be sufficient.

### What about comfort, therapy, or support animals?

These animals are not covered by the ADA and can be excluded in some circumstances. Differentiating between a service animal trained to prevent an anxiety attack and a comfort animal who provides emotional support to the individual with PTSD may be difficult for a frontline employee. Additionally, a person may request a comfort animal as a reasonable accommodation under the ADA so this can further complicate the analysis. Requests for an animal as a reasonable accommodation should be treated in the same manner as any other request for accommodation.

28 CFR 35.104 Definitions.

28 CFR 35.136 Service Animals.

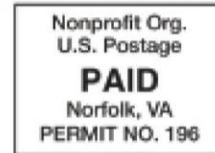
US Department of Justice. "Frequently Asked Questions about Service Animals and the ADA."

[https://www.ada.gov/regs2010/service\\_animal\\_qa.html](https://www.ada.gov/regs2010/service_animal_qa.html).





300 Newport Ave.  
Williamsburg, Virginia 23185  
(800) 616-6164  
ncsc.org



Many advocacy organizations provided input on why to include miniature horses. Reasons included severe allergies to dogs, fear of dogs, longevity (miniature horses can live 30 years), strength (horses can pull a wheel chair), sharp eyesight, and calm nature. Miniature horses are about the size of a large dog and have been used in other venues, such as schools. Four factors are used to determine if a miniature horse must be accommodated: 1) Is the animal housebroken? 2) Is the animal under the owner's control? 3) Can the facility accommodate the type, size, and weight (usually 70-100 pounds, similar to a large dog)? and 4) Is there a legitimate public-safety concern?<sup>5</sup>

## Comfort Animals

Comfort or therapy animals are used in some courts for therapeutic reasons. (e.g., Florida Dependency Courts). While this is a relatively new practice, courthouse

therapy or comfort dogs are being used in several courts in California, Colorado, Florida, Maryland, Michigan, Pennsylvania, and Washington State. Statutory authority exists in some but not all of these states. Typically, these programs are started by the prosecuting attorney's office as a way to provide support for child witnesses who have been traumatized. Veterans courts have also started to recognize the therapeutic benefits of comfort animals. Courts that allow or even encourage the use of comfort/therapy dogs for the benefit of victims or litigants are not dealing with ADA or Section 504 issues.

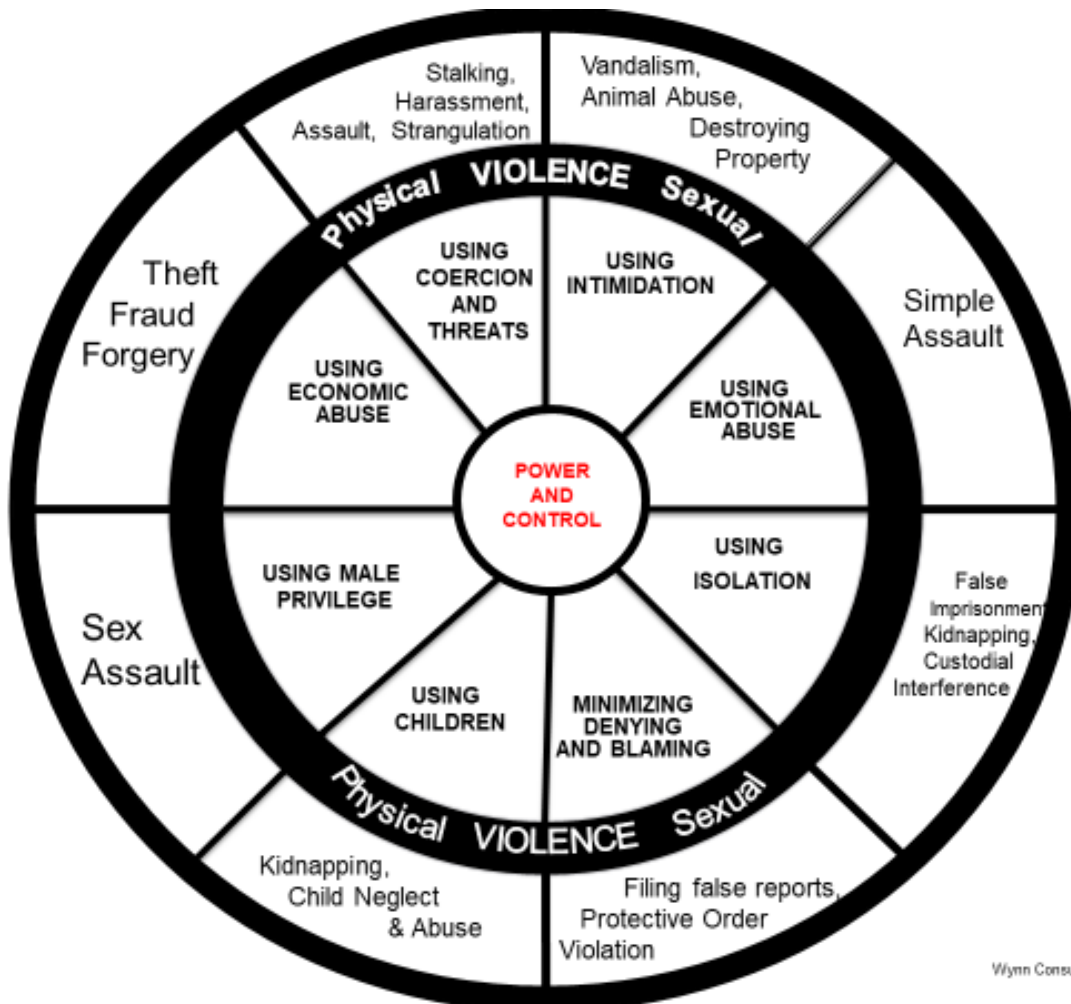
Author: Deborah W. Smith

\* For an electronic copy of this report, please visit [www.ncsc.org/trendscloseup](http://www.ncsc.org/trendscloseup)

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<sup>5</sup> 28 CFR 35.136 Service animals.

# CHARGING WHEEL



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## Sample of Motion in Limine

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE TH JUDICIAL CIRCUIT

COUNTY OF

THE PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff )

) No. CF

Vs. )

) **MOTION IN LIMINE #**

John Doe, Defendant )

) **TO BAR INTRODUCTION**

) **OF EVIDENCE OF**

) **VICTIM'S PSYCHOLOGICAL**

) **CONDITION OR MENTAL**

) **HEALTH**

NOW COME the People of the State of Illinois by \_\_\_\_\_, State's Attorney, County, Illinois, and \_\_\_\_\_, Assistant State's Attorney, and in their Motion in Limine to Bar Introduction of Evidence of Victim's Psychological Condition or Mental Health state as follows:

1. That the defense may intend to bring the victim's mental health into the trial as an issue regarding her credibility.
2. That there is no competent evidence of the victim's mental health in any reports or statements of which the State is aware.
3. That the defense would not be able to bring in evidence which is not competent of the victim's mental health or psychological condition.



4. Therefore, this issue may not be raised.

5. That if the defense were to somehow procure evidence of the victim's mental health state, that the victim is asserting her privilege under the Mental Health And Developmental Disabilities Confidentiality Act (740 ILCS 110/10 et seq.).

6. That the burden is on the defense to prove how a victim's mental health is relevant to the case. "There is nothing about a witness' mental health generally that renders it relevant to the issue of a witness' credibility." People v. Printy, 598 N.E.2d 346, 354, 174 Ill. Dec. 149, 157 (2<sup>nd</sup> Dist. 1992). The burden is on the defendant to show how the witness' mental health bears on the question of credibility. Id.

7. That it is not abuse of discretion for a trial court to prohibit a defendant from questioning a victim as to a mental health diagnosis. Id.

8. That among the public policy reasons for not allowing the defense to make issue of a victim's mental health are:

A. Under the Rape Shield Provisions of the Illinois Statutes, a court may not order mental examination of sex victim, ostensibly to prevent harassment of victims. 725 ILCS 5/115-7.1.

B. To "prevent irrelevant inquiries or inquiries that threaten to distract the jury from the actual issues by unduly emphasizing details of a witness' life." Printy at 157.

9. That in this case, there is much evidence to support the victim's statements, specifically, corroborating physical evidence.

10. That therefore, the case does not rest solely on the testimony of any one witness and any mental health history of the victim is not relevant.

WHEREFORE, the People respectfully request the Court to bar introduction of evidence relating to the victim's psychological condition or mental health, either through testimony or in argument.

THE PEOPLE OF THE STATE OF ILLINOIS

By: \_\_\_\_\_  
Assistant State's Attorney

## What Happens in Court

When someone has hurt you and that person has been arrested there may come a time when you are asked to give information to help put the person in jail, this is called a trial. This paper will tell you some of the things that may happen during the trial. At this time, explain some of the different people you may work with and places you will be.



### THE PEOPLE YOU MAY MEET

**“PROSECTOR”** The prosecutor is sometimes called a State’s Attorney. The prosecutor works for the county or the state where the illegal thing that happened to you took place.

**“COURT ADVOCATE”** sometimes called a **“VICTIM ADVOCATE”** The Court (Victim) Advocate will help you to understand what is happening at the court.

**“JUDGE”** The judge is the person who sits in front of the courtroom. Sometimes the judge wears a black robe. The judge is the boss in the courtroom and listens to what the witnesses say. Not all witnesses have seen something, sometimes they may be an expert police officer’s, medical examiner’s etc. The judge may ask you or other witnesses questions. The judge always wants to hear the truth. If there is no jury, the judge decides what will happen to the defendant.

## **“JURY”**

Sometimes the jury decides if the person is guilty or not guilty. The jury is a group of 12 people. Their job is to listen carefully to everything that the witnesses, the lawyers and the judge have to say.



**“BAILIFF”** The Bailiff is a deputy sheriff; the bailiff wears a uniform. The bailiff’s job is to keep the courtroom a safe place. The bailiff is there to protect the judge and everyone else in the courtroom. Sometimes the bailiff brings witnesses into the courthouse.

**“COURT CLERK”** The Court Clerk helps the judge in court. The court clerk writes or types notes for the judge. Either the court clerk or judge will ask you to raise your right hand and promise to tell the truth.

**“DEFENDANT”** The defendant is the person who is accused of doing something wrong. Accused means that others say that they have done something wrong. The defendant will be in the courtroom while the witnesses, including you, answer questions.

**“DEFENSE ATTORNEY”** The Defense Attorney is the lawyer for the defendant. The defense attorney will ask you and the other witnesses questions. The questions may be about yourself, what you saw and know.

## **THE PLACES YOU MAY GO**

**“COURTROOM”** The courtroom is a special room where witnesses go to tell what they know.



**“STATES ATTORNEY’S OFFICE”** The States Attorney’s Office is where the Prosecutor works. You may go to this office for meetings before the trial.

## **TERMS YOU MAY HEAR IN COURT**

### **“ACQUITTAL”**

This means that the judge or the jury has decided that there is not enough evidence to prove that the defendant has committed the crime they have been charged with.

### **“ADMISSIBLE”**

A term used to describe evidence that a jury or judge can think about when deciding whether someone is guilty or not.

### **“ARRAIGNMENT”**

When a person is brought into court and told what they are being charged with, they are asked to plead guilty or not guilty. This is called an arraignment.

### **“BAIL”**

To get out of jail, a person must make bail. Bail is the amount of money the judge decides a person must pay to get out of jail. This is done to make sure that the person shows up to court. Sometimes the judge decides that a person does not have to pay money but can get out of jail.

### **“CONVICTION”**

When the person who is on trial is found guilty it is called a conviction.

### **“EVIDENCE”**

Information presented in testimony or in documents that is used to persuade the judge or jury to decide the case in favor of one side or the other.

### **“FELONY CRIME”**

A serious crime that if a person is convicted can mean they may go to prison for at least one year.

### **“MISDEMEANOR CRIME”**

A crime that a person commits that, if they are convicted, will have them put in or jail for one year or less. See also felony.

**“MOTION”**

A request by either the prosecutor or a defense attorney to a judge for a decision on an issue relating to the case.

**“PLEA”**

In a criminal case, the defendant's statement pleading "guilty" or "not guilty" in answer to the charges.

**“SENTENCE”**

The punishment ordered by a court for a defendant found guilty of a crime. The judge has the defendant come back to court another time to tell them what their sentence will be.

**“SUBPOENA”**

An order from the court that tells a person they have to come to court and tell the court what they saw or heard.

**“TESTIMONY”**

When witnesses tell the judge and/or jury what they saw or heard or sometimes witnesses testify as experts.

**“VERDICT”**

When the judge or the jury decides the guilt or innocence of a criminal defendant.

**“VOIR DIRE” OR “JURY SELECTION”**

Jury selection is when the prosecutor and defense attorney ask questions of the people who may be on the jury to find out if they would be good jurors.

**“GUILTY”**

The word guilty means that the judge or jury has decided that the defendant did what they are accused of.

**“NOT GUILTY”**

When someone is found “Not Guilty” it means that the judge or jury do not believe they have enough evidence to say for sure the defendant committed the crime.

## **WHAT HAPPENS BEFORE THE TRIAL**

You may have one meeting or many meetings with the prosecutor, to help them know about what happened to you. They might ask you many times what happened to you. They may practice with you to tell what happened to you in the courtroom.

You may take a tour of the courtroom to get you ready for when it is your turn to talk. You will see where everyone sits: the jury, judge, defense attorney, prosecutor and defendant.



## **WHAT HAPPENS DURING THE TRIAL**

A trial may have a jury to decide in the case or a judge may make the decision in the case. Sometimes a trial is long and sometimes a trial is short. You may or may not be able to be in the courtroom during the trial. If you are going to talk to the judge and the jury about what happened to you, you will not be able to be in the courtroom. You and the prosecutor will decide whether you can attend. During the trial you may tell the judge or the jury what happened to you.

At the end of the trial, the judge or jury decides what will happen to the defendant. If you have questions about what is happening during the trial or after the trial, you can ask the prosecutor or the victim advocate.

You have done a very important job in court.

# NATIONAL, STATE, AND LOCAL COMMUNITY RESOURCES

### **Adult Protective Services**

Adult Protective Services Agencies designated by the Illinois Department on Aging to investigate reports of alleged mistreatment of older persons and persons with disabilities age 18-59, and, where substantiated, to work with the person to resolve the situation. Anyone suspecting abuse, neglect, or financial exploitation of a person 60 years of age or older or an adult with disabilities age 18-59 should call the Department's Senior Helpline 1-866-800-1409 (9/13). A trained caseworker will respond within a specified period of time. For more information on the roles, responsibilities and services provided through Adult Protective Services, see <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1452&ChapterID=31>.

**Illinois Department on Aging's Toll Free Number: 1-866-800-1409 (Voice or TDD)  
1-888-206-1327**

### **Court Disability Coordinators (CDCs)**

CDCs have been appointed by the Chief Judges in every Judicial Circuit in Illinois. In most cases, each courthouse has its own CDC. CDCs are trained regarding appropriate terminology, etiquette, and practices for ensuring people with disabilities can access court programs and services. They are also familiar with the legal requirements governing physical and programmatic access to the judicial system for people with disabilities.

The Disability Rights Bureau may be reached at the following telephone and TTY numbers:

Chicago:

(312) 814-5684 (Voice)

(800) 964-3013 (TTY)

Springfield:

(217) 524-2660 (Voice)

(877) 844-5461 (TTY)

### **Centers for Independent Living**

Illinois Network of Centers for Independent Living (INCIL), is the statewide association representing the 23 Centers for Independent Living (CILs) in Illinois. Centers for Independent Living provide valuable resources for people with disabilities and can provide critical information to law enforcement regarding needed accommodations. For the Illinois Network of Centers for Independent Living go to: [www.incil.org](http://www.incil.org)

### **Illinois Coalition Against Sexual Assault (ICASA)**

The Illinois Coalition Against Sexual Assault (ICASA) is a not-for-profit corporation of 29 community-based sexual assault crisis centers working together to end sexual violence. Each center provides 24-hour crisis intervention services, counseling and advocacy for victims of sexual assault and their significant others. Each center presents prevention education programs in Illinois schools and communities. <http://www.icasa.org>



### **Illinois Coalition Against Domestic Violence (ICADV)**

The Illinois Coalition Against Domestic Violence (ICADV) is a not for profit, membership organization that works to eliminate domestic violence by promoting the eradication of domestic violence throughout Illinois; ensuring the safety of survivors, their access to services, and their freedom of choice; holding abusers accountable for the violence they perpetrate; and encouraging the development of victim-sensitive laws, policies and procedures across all systems that impact survivors. <http://www.ilcadv.org>

### **Illinois Department of Human Services**

DHS Office Locator Map is a web-based application that assists in locating Department of Human Service's resource offices and service providers. The application may be accessed 24 hours per day, seven days per week. The DHS locator is searchable by office type and location.

The locator is on the main screen of the DHS website, so it appears at the bottom of the screen when you reach the DHS website. <http://www.dhs.state.il.us/page.aspx?>

### **Illinois Imagines**

Illinois Imagines is a statewide project which addresses sexual violence against persons with disabilities through a federal grant. The Illinois Department of Human Services and the Illinois Coalition Against Sexual Assault are two of the primary entities and there are 32 collaborative teams across the state. Each community with a Rape Crisis Center has a collaborative team which can be consulted for assistance.

For more information go to: [www.illinoisimagines.org](http://www.illinoisimagines.org)

### **Speech-To-Speech Relay Service**

Speech-to-Speech (STS) is one form of Telecommunications Relay Service (TRS). TRS is a service that allows persons with hearing and speech disabilities to access the telephone system to place and receive telephone calls. Speech to Speech enables persons with a speech disability to make telephone calls using their own voice (or an assistive voice device). Speech to Speech uses specially trained operators to relay the conversation back and forth between the person with the speech disability and the other party to the call. These operators are specially trained in understanding a variety of speech disorders, which enables them to repeat what the caller says in a manner that makes the caller's words clear and understandable to the called party.

### **Using STS**

A special phone is not needed for Speech to Speech. You simply call the relay center by dialing 711, and indicate you wish to make a Speech to Speech call. You are then connected to a Speech to Speech operator who will repeat your spoken words, making the spoken words clear to the other party. Persons with speech disabilities may also receive Speech to Speech calls. The calling party calls the relay center by dialing 711 and asks the operator to call the person with a speech disability.

## Web-Based Resources

Administration on Developmental Disabilities	<a href="http://www.illinois.gov/hfs">www.illinois.gov/hfs</a>
Arc of Illinois, Disability Advocacy and Resources	<a href="http://www.thearcofil.org/">www.thearcofil.org/</a>
ARC US National Center for Criminal Justice and Disabilities	<a href="http://www.thearc.org">www.thearc.org</a>
American Bar Association Commission on Mental and Physical Disability Law	<a href="http://www.americanbar.org/">www.americanbar.org/</a>
Americans with Disabilities Act	<a href="http://www.ada.gov">www.ada.gov</a>
Autism Society of America	<a href="http://www.autism-society.org">www.autism-society.org</a>
Deaf Hope	<a href="http://www.deaf-hope.org">www.deaf-hope.org</a>
Vera Institute of Justice	<a href="http://www.vera.org">www.vera.org</a>
Epilepsy Foundation	<a href="http://www.epilepsyfoundation.org">www.epilepsyfoundation.org</a>
Hub for Social Service Organizations	<a href="http://www.guidestar.org">www.guidestar.org</a>
Learning Disabilities Resource	<a href="http://www.LDonline.org">www.LDonline.org</a>
National Adult Protective Services Association	<a href="http://www.napsa-now.org">www.napsa-now.org</a>
National Alliance for the Mentally Ill	<a href="http://www.NAMI.org">www.NAMI.org</a>
National Association of the Deaf	<a href="http://www.nad.org">www.nad.org</a>
National Centers for Independent Living	<a href="http://www.NCIL.org">www.NCIL.org</a>
National Federation of the Blind	<a href="http://www.nfb.org">www.nfb.org</a>
National Organization on Disability	<a href="http://www.nod.org">www.nod.org</a>
Registry of Interpreters for the Deaf	<a href="http://www.rid.org">www.rid.org</a>
Self-Advocates Becoming Empowered National Self Advocacy Organization for People with Intellectual Disabilities	<a href="http://www.sabeusa.org/">www.sabeusa.org/</a>
Safe Place	<a href="http://www.austin-safeplace.org">www.austin-safeplace.org</a>

## **Additional Online Resources**

AEquitas' The Prosecutors' Resource on Violence Against Women

<http://www.aequitasresource.org/>

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys

<http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2012/01/AttorneyHandbookFINAL2Jan2012.pdf>

The Prosecutors' Resource on Elder Abuse

<http://www.aequitasresource.org/Prosecutors-Resource-on-Elder-Abuse.pdf>

Understand autism, the person and what to do – The National Autistic Society

[https://youtu.be/Lr4\\_dOorquQ](https://youtu.be/Lr4_dOorquQ)