



Digging Deeper: When Consent is Not Consent

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DEPARTMENT OF JUSTICE
ElderJustice
INITIATIVE



OVCTTAC
OFFICE FOR VICTIMS OF CRIME Training and Technical Assistance Center



TECHNICAL OVERVIEW

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- ▶ If you have technical difficulties during the webinar, contact Jason Adams, who is providing technical support for this webinar. His email address is jadams@ovcttac.org.
- ▶ Today's session will be recorded and made available on the training website.
- ▶ If you have questions, type them in the feedback box. We will address as many as possible throughout the webinar.
- ▶ The views expressed on this webinar are the opinions of the presenters, and do not necessarily express the views of DOJ.

ELDER JUSTICE INITIATIVE

The **mission** is to support and coordinate the Department of Justice's enforcement and programmatic efforts to combat elder abuse, neglect, and financial fraud and scams that target older adults.

The Initiative does so by—

- Promoting justice for older adults.
- Helping older victims and their families.
- Enhancing state and local efforts through training and resources.
- Supporting research to improve elder abuse policy and practice.

ELDERJUSTICE.GOV

You're fighting elder abuse on the front lines. We've got your back.

The mission of the Elder Justice Initiative is to support and coordinate the Department's enforcement and programmatic efforts to combat elder abuse, neglect, and financial fraud and scams that target our



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DIGGING DEEPER - WHEN CONSENT IS NOT CONSENT

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Disclaimer and background



- Views expressed are those of the presenter.
- Colorado is a system that has “at-risk” crime based on age (over 70), or on certain disabilities(18-70). C.R.S. 18-6.5-102.
- Colorado has an elder financial exploitation statute: C.R.S. 18-6.5-7.5. Harassment, intimidation, deception and undue influence are recognized as methods which can be used to exploit a senior or other person who is at-risk.



Goals

- Break down elder cases involving supposed consent and potential exploitation
- Think about how to structure and develop your case
- Review different fact patterns
- Adapt for your own jurisdiction and your own cases

Collaboration First

Improvement of work product - through:

- Partnership with law enforcement
- Collaboration with Adult Protective Services
- Multi-disciplinary team
- National resources
- Finding and working with experts, and using expert testimony
- Working with civil attorneys, public administrators, and forensic accountants

A Quick Poll

- Polling Questions 1 & 2

DIGGING INTO CONSENT

Consent Cases

- SEX CASES - Defendant alleges consensual conduct
- NEGLECT - “This was what they wanted” “I was respecting their wishes”
- FINANCIAL CASES “She wanted me to have it”

This presentation will focus on consent in financial cases.

A Constant Issue

- Will come across your desk regularly
- Multitude of different fact patterns
- Often involve family feuds
- Oftentimes, difficult to determine true consent
- Or, may look like exploitation but difficult to charge due to passage of time and related incapacity or death of victim

Common Fact Patterns - Exceeding Authority

- Victim has given consent for limited use of a credit/debit card or other financial transaction device to perpetrator
- Generally to make purchases on behalf of the victim
- Authority exceeded without knowledge of victim
- Scope of the consent given comes from the victim
- Prosecutor reviews both the transaction history and in some cases the initial “consent”

Common Fact Patterns - The Additional Signer

- Often used instead of a POA
- The perpetrator becomes a second signer on the senior's account, with consent of account holder
- Unauthorized spending takes place without the senior's agreement or knowledge
- Scope of the authority given comes from the victim
- Prosecutor will look at the spending history but may also dig into also the initial act of adding the perpetrator, to determine if this was consensual

Common Fact Patterns - Agent under POA abusing authority

- A POA is signed giving the perpetrator control over the victim's financial assets with the consent of the senior
- The perpetrator then uses the senior's money or property in ways inconsistent with that fiduciary relationship, and not for the benefit of the principal
- Prosecutor will look at the transaction history, but may also dig into the condition and capacity of the senior when the consent and authority was given

Analysis of these Fact Patterns

- Crimes chargeable based on the “paper trail” of the financial history plus statements of victim
- Victim cannot participate? - can dig deeper in some cases to the originating act
- May not have been a fully knowing and voluntary act by the victim
- Other parties can give their observations of the senior’s condition, or of statements made to them by the senior
- May involve expert evidence about the capacity of the senior at the crucial time

Breaking it Down: Defining “Consent”?

In the context of elder financial cases:

- Free and voluntary choice
- Knowledge of the true nature of the act
- Capacity to enter into that particular transaction

Were these requirements met, or was the choice compromised by a third party to the senior’s detriment? Differentiate from making bad choices.

Elder Financial Exploitation Cases

- Complaint about exploitation of a senior prompts an investigation
- Investigation reveals that senior has transferred funds, or assets, or has appointed the suspect as a fiduciary, or beneficiary, or any or all of the above
- These acts appear to have been done with the knowledge and CONSENT of the senior
- Transactions benefit or potentially benefit a third party.

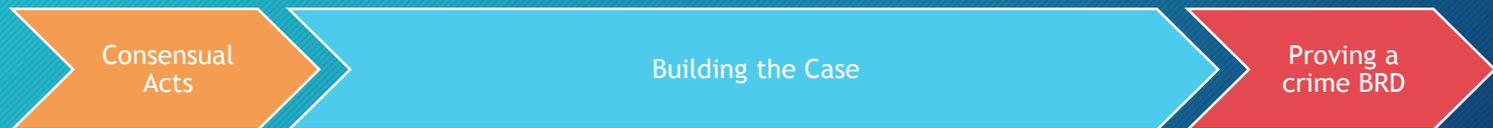
DIGGING INTO EXPLOITATION

Who Reported and Why?

- Mandatory reporter who has been trained in signs of abuse and exploitation
- Friend or neighbor who can feel excluded
- Someone who is uncomfortable with the senior divesting themselves of money needed for care
- Family member
- Person who does not like the optics of the situation

Common Factor?

- Reporter suspects/believes that these transfers are not legitimate
- Reporter feels that senior is being “taken advantage of”
- How can the system respond, and where appropriate prove BRD that a crime occurred?



What's Going On - First Steps

Dig into the relationship of the perpetrator with the victim

- Is it a “sweetheart” relationship?
- Are they family?
- Is the suspect a caregiver?
- A trusted adviser or fiduciary?
- Spiritual counselor?
- Someone else who has become important?

Identify acts in question

- Made gifts, or “loans”
- Purchased big ticket items, e.g. car, jewelry
- Sold property at an undervalue or quitclaimed it
- Made the suspect their fiduciary or beneficiary
- Taken out loans, reverse mortgages or credit
- Court orders for bank records - all accounts
- Dealership paperwork
- Will or POA, copies of deeds

FE case: Victim knows about these transactions and has given “consent”

Assess Situation

- Identify the timing of events, and how they fit into what is going on in the senior's life at the time
- If this happened some time ago, what is the current situation?
- Before victim is interviewed, confirm:
- Victim cognition - how actively can they be involved in the case? Is it too late for that?
- Victim attitude - are they open to being involved in the case?

Where is Victim at Cognitively?

There is a diagnosis of severe dementia already or this victim has passed away

The victim will not be participating in this case

Victim appears to have some significant impairment/possible dementia going on

Plan to preserve evidence of this impairment to show vulnerability

Victim is able to recall and recount what has happened

This witness will be testifying if the case goes forward to trial



THESE CASES CAN STILL BE CHARGED AND PROSECUTED NO MATTER WHICH CATEGORY THE VICTIM FALLS INTO

Is the Victim On Board?

It's my money to give away if I want to, keep out of it and leave me alone

Aligned with perpetrator

I am starting to realize that maybe (s)he wasn't exactly what (s)he seemed to be

Stage of realization

I was stolen from, deceived and swindled. I'm ashamed and embarrassed that this happened

Post exploitation, recognizes has been victimized there are still barriers for this victim

Victim who can recall and recount what happened



STRUCTURING YOUR CASE

Lack of Victim Input

- Most cases built around the victim and his/her statements
- These cases require fundamentally different approach
- Bonus if victim is able to contribute and is willing to do so
- Generally, you will be building your case from other sources

Challenging Consent

Goal: build a case that negates an apparently knowing and voluntary act by a person who apparently had capacity to agree to it.

To prove BRD that act was NOT consensual or legitimate, need relevant evidence relating to the **KNOWING** and/or **VOLUNTARY** nature of the transaction, and/or the **COGNITIVE CONDITION** of the victim.



Undermine Apparent Consent

- Perpetrator tactics - e.g. exercised influence over the senior (voluntariness)
- Perpetrator tactics - e.g. used deception (knowledge)
- Often both co-exist
- Victim vulnerability - victim “lacked capacity” to enter the transaction



Voluntariness - Influence

- Dig into the methods of influence used - physical presence, frequent communication, isolating, tapping into sexual or spiritual affinities, taking the lead in discussions, physical contact, dominating conversation, claiming to be “like family”
- Influence may be to do something, but also not to do certain things, e.g. not consult with natural confidant or advisers
- Is the transaction or transfer out of character for the senior?
- Look for coercive or pressurizing behavior

= NOT SO VOLUNTARY

Knowledge - Deception

- Evidence of deception is a powerful way to prove these cases
- May come from victim, who has been given information by the perpetrator about what the money or property is needed for
- E.g. surgery, to avoid foreclosure/pay for housing, divorce, court case, spiritual purposes, or to secure some larger payout
- Perpetrator may try to alienate the victim from trusted sources e.g. your grandkid wants to put you into a home, your attorney cannot be trusted, etc.
- Collect non-testimonial statements made by victim to third parties - admit not for the truth

=NOT A FULLY KNOWING TRANSACTION

Capacity - Impairment

If you are looking at whether the victim had the ability to carry out the transaction, remember that capacity requirements vary depending on the act in question, and be familiar with your state's requirements:

- Testamentary capacity
- Capacity to handle financial affairs
- Capacity to execute a contract

Capacity - Case Example

- Victim very elderly professor
- Perpetrator was a former receptionist from his eye doctor, who moved in with him
- Within a month she was trying hard to change his will so that she would inherit his home
- Took him to an attorney - he had handwritten changes on his current will to make her sole beneficiary
- (A different draft will she had prepared, also leaving her the house, was found in his home)

Capacity - Case Example

- Capacity evaluation done a couple of months later
- Evaluating expert testified that victim HAD testamentary capacity UNLESS he was being unduly influenced.
- Despite his testamentary capacity, he was extremely impaired and vulnerable to third party influence, and had been impaired months earlier during these events

Can be controversial for a jury for an expert to reach back in time to assess past capacity

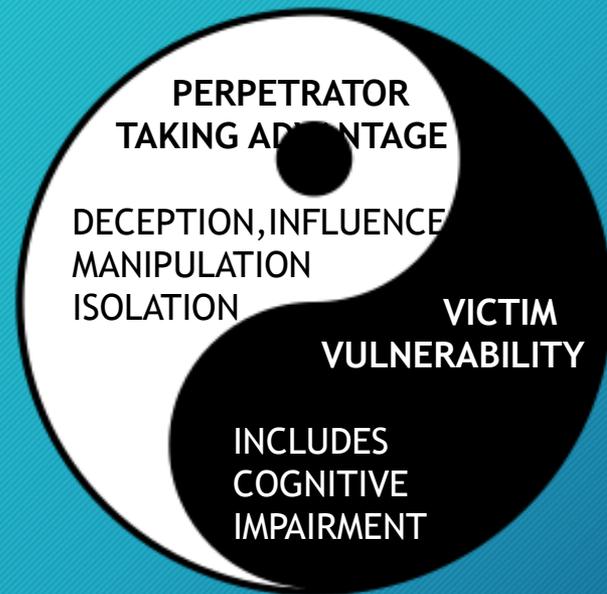
Capacity/Impairment

- Difficult to have an expert reach back in time in a way that's credible if you have transfers over years
- Some victims may have had capacity to execute the act, but were deceived and/or influenced into making the “gift” or transfer
- Does not work well with high functioning victims - your victim may not WANT TO HAVE THEIR CAPACITY ASSESSED.
- Age-related jurisdictions like Colorado - no need to prove a specific disability
- Can use victim vulnerability caused by aging

Prosecution Focus

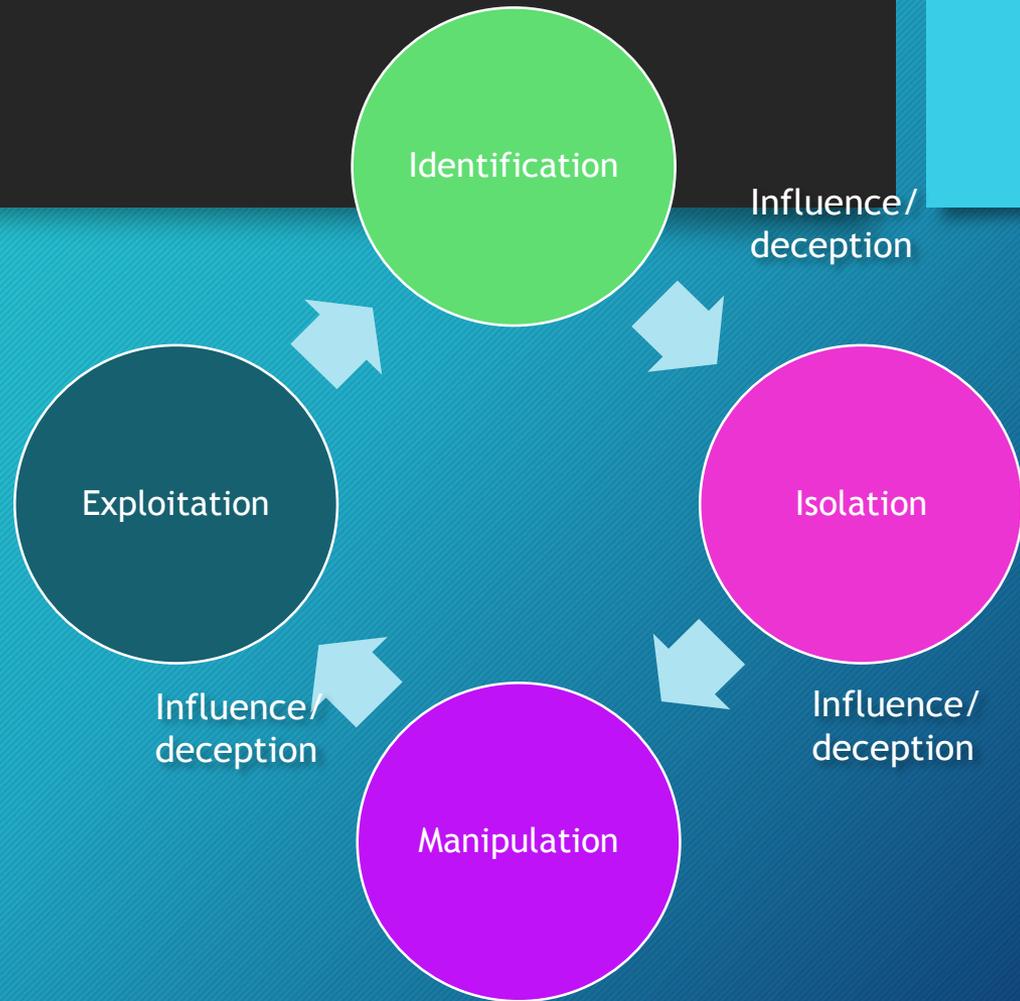
- Where a capacity evaluation has been obtained, this can change the focus of the trial, highlighting victim condition as the key factor. Remember to keep the case in balance. Keep the jury focused on the criminality of the perpetrator's acts.
- Goal is offender focused, victim centered prosecution.

Balance the Case Structure

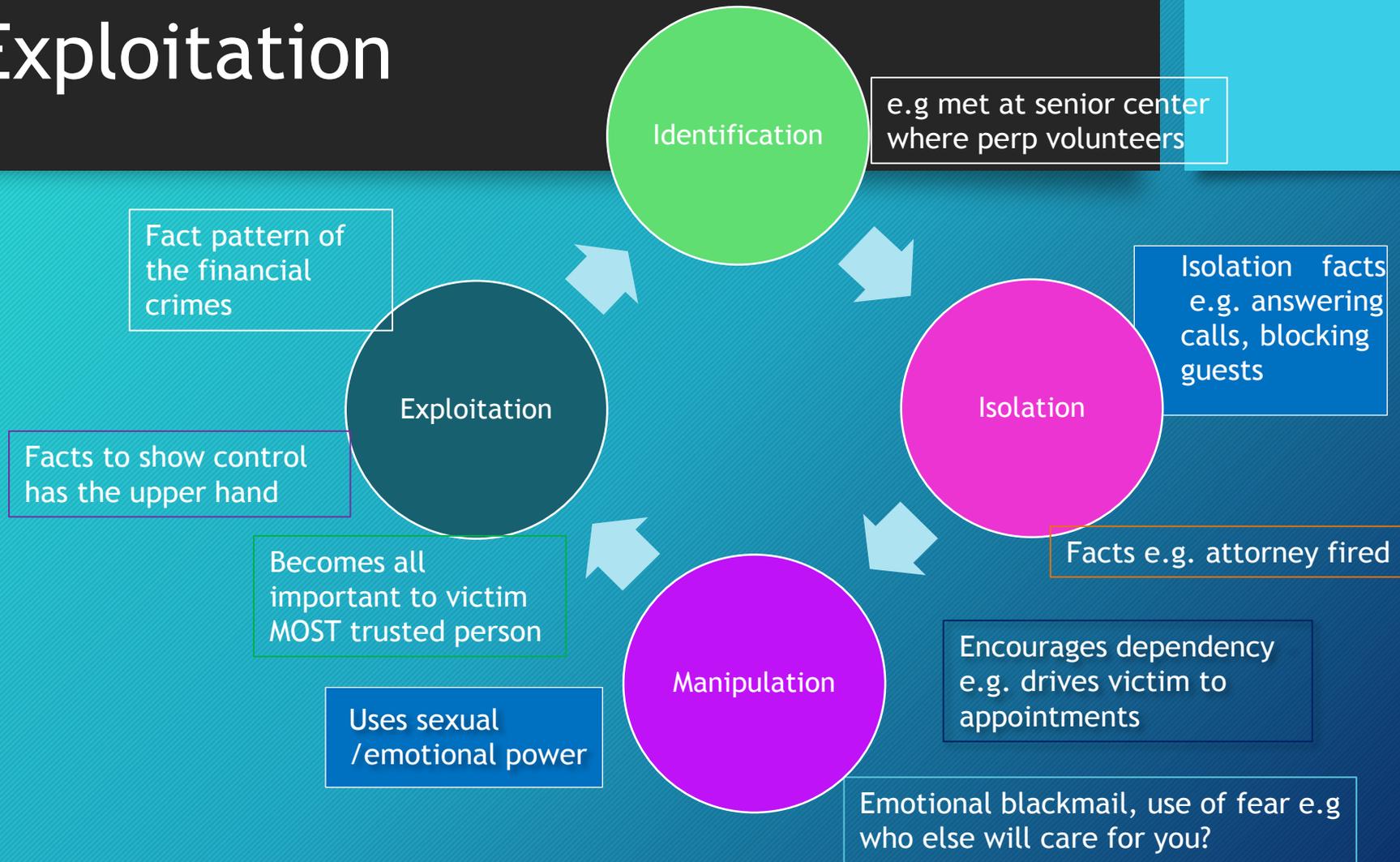


Exploitation

Abuser Tactics Taking Advantage



Exploitation



VICTIM VULNERABILITY

Challenges of Aging

- Health issues and cognitive decline
- Bereavement and/or loneliness
- Decreased mobility/unable to drive
- Loss of independence
- Reduction of social circle

The backdrop to your case - other factors affecting vulnerability

Cognitive Functioning and Impairment

- We all know instinctively that as people age they become more susceptible and vulnerable.
- Dangerous to assume that most people who are exploited have “mild dementia”.
- If there is a DIAGNOSIS of dementia, or it is clear that the victim is extremely impaired and a diagnosis will likely be forthcoming during the case, structure your case accordingly

Incapacitated Victim - Strategy

If your victim has significant impairment and/or a diagnosis of dementia already, that will dictate your case strategy.

- Victim's Medical Records
- Possible Capacity Evaluation, or evidence of diagnosis
- Medical evidence
- Prove victim did not have capacity to enter that particular transaction

Cognitive Functioning and Impairment

- Research confirms that cognitive deficits can develop years before a diagnosis of dementia is appropriate
- Some cognitive deficits are just part of normal brain aging
- Financial decisions are the first to take a hit, with math and reasoning skills peaking at age 53*
- **Think of cognitive ability in older adults as a spectrum, not just a line in the sand marked by a yes/no as to whether someone has capacity.**

What is the Age of Reason?

by [David Laibson](#), [John C. Driscoll](#), [Sumit Agarwal](#) and [Xavier Gabaix](#)
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Older, Less Impaired Victim

- Victim is an older adult, no diagnosis but may have some memory issues
- He/she may have age-related cognitive deficits and/or health issues that can impact cognitive functioning
- Does NOT mean they have “mild dementia”
- Strategy to present this case?

Expert Evidence

You can work with a neuropsychologist or geropsychologist and call him or her as a “blind” expert, to talk about:

- Brain aging generally
- Cognitive deficits which develop as people age
- Effects on executive functioning
- How cognitive impairment impacts complex decision making and insight

Why is this Effective?

Makes real life sense to juries

Should fit in well with evidence from other sources in your case - e.g. friends, family

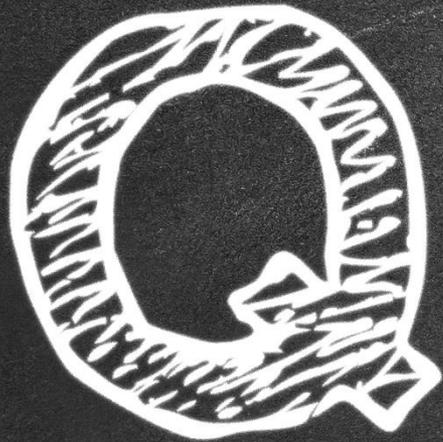
Does not stigmatize your high functioning victim - applies to all of us as we age

The blind expert educates the jury to understand why the victim may be vulnerable and susceptible to influence and deception in a way that he or she might not have been twenty years earlier.

Recap.....

Plan if this is a case where the victim can be involved early on
Use various strategies to attack apparent consent
Keep your case well balanced
Can you fit your fact pattern into the structure of exploitation?
Keep the focus on perpetrator conduct, and victim vulnerability
Keep digging. You will continue to see cases where older adults are apparently consenting to acts that are not consensual and are exploitative.
Thank you.

THANKS ALSO TO: Dr. Kathryn Kaye, Dr. Eric Chess, Elder Justice Coalition of Boulder County, Denver Forensic Collaborative, the NCALL and NIPEA teams, and many colleagues in Denver and Boulder.



Questions

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