

Technical Assistance Brief

Working with Prosecutors: Ideas to Guide APS Programs

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With increasing recognition that some APS cases involve criminal conduct, the need to work with prosecutors has grown. With the increasing focus on prosecution of elder abuse cases, the differing roles, expectations, and rules of APS and prosecutors have times led to conflict and frustration. This Brief describes the role and responsibilities of the prosecutor, offers ideas for engaging prosecutors, and provides suggestions for maintaining the APS-prosecutor relationship. Tips for APS administrators, managers, and workers are included.

The Role of the Prosecutor

The prosecutor is primarily responsible for the prosecution of crimes, that is, offenses with a maximum punishment of jail or prison terms or a sentence of death. This is in contrast to civil matters which may result in restraining or protective orders or money judgments.

Foundational to working with prosecutors is an accurate understanding of the role of the prosecutor.

The prosecutor is a member of the Executive Branch of Government and is the chief law enforcement official in the community. His or her jurisdiction may include a city, county or parish, judicial district (may be a regional designation), state, tribal lands or other. The head prosecutor may be elected or appointed as provided by state or local law and may bear the title of District Attorney, Attorney General, State's Attorney, County Attorney, City Attorney, Commonwealth Attorney, Solicitor, Tribal prosecutor, or with federal crimes, United State Attorney.

Prosecutors perform many functions both in and out of court. They may have jurisdiction to handle criminal cases, certain civil cases, or both. They often house the victim witness assistance and victim of crime compensation programs. They may be authorized to seek restraining orders on behalf of victims and are typically not first responders to crime scenes.

Prosecutors represent the entire community they serve. As such they do not have a single client and do not represent a particular victim in a case that is being prosecuted by their office. This means that the APS client who is a victim of criminal elder abuse does not have an attorney-client relationship with the prosecutor.

The prosecutor has many roles. The American Bar Association Professional Standards describe the prosecutor as "an administrator of justice, and advocate, and an officer of the court" who must "exercise sound discretion in the performance of his or her functions." (ABA Standard 3-1.2(b)). "The duty of the prosecutor is to seek justice, not merely to convict" (ABA Standard 3-1.2(c)).

The prosecutor has independent power and discretion to decide who and what is charged, and so long as that discretion is not exercised in a manner that violates the state or federal Constitutions, cannot be forced or required to prosecute or not prosecute any particular matter. Because the prosecutor is independent and has no specific relationship with the victim; he or she is not bound by the wishes and desires of the victim regarding

whether or not to prosecute a particular case. That said, prosecutors do welcome information from the victim or their representative about the victim's desires and typically do consider victim wishes in making charging, bail and release recommendations, suggesting sentencing terms, requesting stay away and no-contact orders, etc.

Prosecutor Offices

Many offices, especially those outside of metropolitan areas, are small. The recent economic problems have reduced agency budgets requiring layoffs, reducing staff size, not filling open positions, and increasing caseloads for those who remain. The reality is that all cases which may be provable are not being prosecuted. There just are not enough prosecutors, courts, and resources to try every case.

Each prosecutorial agency decides how to handle its elder abuse cases. Some may assign elder abuse cases to a single attorney; others will assign them to attorneys throughout the office. Some offices will have the same attorney handle the case from beginning to end (called "vertical prosecution"); in others, a different prosecutor may handle each stage of the case. Most prosecutors are generalists who handle every kind of case from theft to murder. Most have little knowledge about elder abuse or the unique issues prosecutors face when prosecuting it. Few offices have designated elder abuse prosecutors or units.

Many states do not have specific elder abuse criminal laws or procedures to expedite the handling of these cases. In such situations prosecutors may have to rely on general crimes which may not completely describe the nature of the conduct or why a particular victim may have been targeted or victimized. Some states have created crimes against vulnerable adults which may not apply to many elderly victims.

Few prosecutors are familiar with Adult Protective Services and your capabilities and responsibilities. They lack experiences working with you to successfully prosecute cases.

Prosecutors are necessarily attuned to the crime issues in their community and will create priorities to match those issues. Understandably offices typically focus on violent crimes, crimes against children, driving under the influence, and drug and gang crimes. Individual offices have added other priorities as resources permit. Against this backdrop, APS and elder abuse cases historically have not been seen as high or top priorities. Advocacy to raise awareness of elder abuse can elevate prosecutor response.

When and How Do Prosecutors Act?

Cases are built on facts. Those facts are built from physical evidence; witnesses, including the victim; and perpetrator statements. Together those facts must be legally admissible and with sufficient proof to meet the highest burden of proof in law: beyond a reasonable doubt. This standard is far higher than that typically required for APS to initiate an investigation, substantiate an allegation of abuse or neglect, or offer services.

To begin an investigation APS or law enforcement requires very little information. This level of information is called "reasonable suspicion" and only allows a worker or officer to conduct an investigation about what has or has not occurred. If, as a result of the investigation, APS develops evidence that there is slightly more evidence in favor of the allegation than against its existence, APS can usually substantiate the allegation and offer services. This level of proof is called "preponderance of the evidence." This is the same standard for law enforcement to make an arrest but is called "reasonable or probable cause". The legal difference between the APS and prosecution standards of proof to prevail or act is significant. "Preponderance of the evidence" is the lowest level of proof in law and is typically used in civil law suits such as responsibility for an auto collision. "Beyond a reasonable doubt", the criminal standard for conviction of a crime, is the highest level of proof in law. It requires proof that leaves the fact finder (jury or judge) with an abiding conviction

that the charge is true (CALCRIM 220). Neither preponderance of the evidence nor reasonable or probable cause will support a criminal prosecution.

Charges are comprised of elements and each one must be proven beyond a reasonable doubt. APS workers who know the common criminal laws which may arise in elder abuse cases can help law enforcement recognize situations in which criminal conduct has occurred. APS workers and administrators can locate crime elements and definitions in your criminal codes or jury instructions.

Charging decisions are made after an objective review of the available evidence. Bad situations and even “bad” people do not make a case provable.

Engaging Prosecutors

As APS approaches prosecutors to create or enhance relationships an understanding of the prior content will help you be balanced and realistic. It is critical to realize that not every case of elder abuse can or will be prosecuted.

Prosecutors may need to be engaged by APS at two different levels: agency head (administration) and line attorney and/or victim advocate. The first should involve the APS administration, including local or regional managers, and its purpose is to develop agency to agency commitments for staffing, office priorities, and a process for protecting that relationship. The line worker or advocate to worker relationship really focuses on the handling of specific cases. Some APS– prosecutor relationships begin informally with a single worker and advocate or attorney; others start with agency heads. For long term sustainability the engagement of the head prosecutor will be critical.

Because prosecutorial jurisdiction varies from city to region to state or tribe, and because APS may operate from a single state office or through regional, county, or other offices with local managers, thought must be given to the best person to build APS-head prosecutor relationships. For some issues and for state-wide consistency, involvement of the state level APS head may be needed. For local matters the local manager may be the appropriate person to develop, support, and enhance APS-head prosecutor relationships. For tribal APS programs, the head of APS services and the tribal government may need to contact the prosecutor.

Suggestions for APS Administrators and Managers

Below are suggestions for APS administrators and managers assisting staff in dealing with prosecutors:

- Encourage staff to develop professional relationships with attorneys handling elder abuse cases and victim advocates in prosecutor offices.
- Encourage staff to develop professional relationships with local law enforcement officials especially as many jurisdictions require that cases be investigated by law enforcement before cases are reviewed by the prosecutor.
- Know the case processing procedures in your jurisdiction and determine if you can and should directly submit cases for filing to the prosecutor and if there are filing criteria you must meet before a case will be considered for charging. Determine if you can be present when law enforcement

Did you know? The U.S. Department of Justice has recently established its Prosecutor Resources website with federal pleadings and corporate integrity agreements, state pleadings, and elder justice statutes from around the United States which address financial exploitation criminal and civil laws, mandatory reporting, and long-term care regulations. The website is located at www.justice.gov/elderjustice.

submits a case for review and if cases are presented in person or mailed or dropped off at the prosecutor's office.

- Foster staff understanding of what is criminal conduct and common crimes and the types of documentation that will support a criminal prosecution where proof must establish guilt beyond a reasonable doubt. Encourage training of staff by law enforcement and prosecutors.
- Evaluate current caseloads and timelines. Allocate adequate time for staff to develop criminal cases. This includes time to meet with prosecutors, testify, and support clients. The investigation may take longer to complete because of the quantity of required evidence.
- Provide critical resources for staff such as current criminal codes and jury instructions
- Help staff develop realistic expectations about which cases can and should be prosecuted. That means that administrators must have a basic understanding of case law affecting admissibility of evidence and case building with and without a participating client/crime victim.
- Create an internal process to quickly identify problems with the prosecutor's office and address promptly and in private.
- Explore whether it's possible to present at a regularly scheduled statewide prosecutors' conference.

Suggestions for Engaging the Head Prosecutor

Below are suggestions for engaging the head prosecutor in your area:

- Learn about the agency leader; what are his or her priorities? Has the leader made supportive statements about protecting vulnerable or elderly crime victims? If not, can you link priorities to elder or vulnerable adults?
- Learn about the structure of the office, including its size and whether it has specialized attorneys or units? If so, would prosecution of elder abuse fit under an existing category such as domestic violence, consumer fraud or white-collar crime, or special victims?
- Schedule a meeting with the head prosecutor. If necessary, identify a respected community leader to introduce you or to arrange the meeting. At the meeting be prepared to describe your community's elderly and/or vulnerable population demographics, the nature and extent of abuse with local case examples, reasons why the prosecutor's office should make elder abuse a priority, the costs of elder abuse (if known), and what you can offer to assist the prosecution (e.g., expertise, resources, ability to obtain certain kinds of records, links to community services, and ability to assist with client/victim needs).
- Know what you want to obtain. Be realistic. No prosecutor can ethically promise to file more cases or send more people to prison. But a prosecutor may be willing to conduct a training for APS, attend a case review or MDT meeting to discuss a case, designate a point of contact, or agree to assign a single prosecutor or advocate to handle elder abuse matters.
- Create a process to resolve conflict quickly and privately.

Suggestions for Maintaining the Relationship

Once you have developed a relationship with the head prosecutor, that relationship must be nurtured:

- Commend good work by the office and specific staff members, whether a case results in a conviction or not.

- Share opportunities to demonstrate success such as press conferences, public appearances, and public awareness and education programs. Consider jointly sponsoring a conference, public awareness campaign, or similar.
- Support efforts to increase the prosecutor's staff, create a specialized unit, or co-locate workers and prosecutors.
- Settle differences privately. Avoid finger pointing and assure that your APS staff does likewise. Use differences as an opportunity to learn, educate, and improve. Accept criticism of your agency gracefully just as you expect the prosecutor to accept your criticism.
- Have regular and periodic meetings to review progress, support the relationship, suggest new efforts such as creation of an interagency protocol, FAST or fatality review team, or development of a forensic center.
- Encourage cross training on an ongoing and regular basis.

Conclusion

APS staff and administrators increasingly are handling cases in which crimes may have occurred. Prosecutors can be powerful allies in APS efforts to protect clients, hold offenders accountable, recover lost assets, and make clients safer. That said, the road from APS investigation to criminal justice system prosecution has not always been a smooth one. Some problems are due to the real differences in the roles, rules, and laws APS and prosecutors operate under; others are due to the lack of understanding between systems. Education, cross training, and experience may improve the former. The latter will require the development of relationships with prosecutors at the administrative and line levels. This Brief offers suggestions for addressing both sets of challenges. Prosecutors and APS share a commitment to reducing and addressing elder and vulnerable adult abuse. Through enhanced understanding and relationships both can be more effective in their work.

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