



The Case for Specialized Elder Abuse Prosecutors

By Page Ulrey

Had 64-year-old Leonard Swenson's case been reported to the police in 1998, rather than in 2008, he would likely have been told it was a "civil matter," and that there was nothing that could be done about it. When the case was reported in 2008, Leonard was still failed by most of the systems he encountered. However, because of the dedication of a handful of people in the criminal justice system, he had the rare experience of sitting in a courtroom and watching his exploiter get handcuffed and taken to prison.

Leonard's Story

Early in the fall of 2008, Peter Montemayor, a domestic violence detective for the Renton Police Department, called me to ask for help with a case. Montemayor had been assigned to investigate an assault case involving Swenson as the victim. The case was turning out to be significantly more complex than he had anticipated, and he wondered if I could assist him with the victim interview. I was the elder abuse prosecutor for the King County Prosecutor's Office in Seattle, Washington, at the time, and it was common to receive such calls from detectives. Then, and now, depending on the jurisdiction, detectives receive little, if any, training on how to investigate elder abuse cases. Because elder

financial exploitation in particular is different from the crimes law enforcement typically investigates, it is especially challenging. After receiving a brief run-down of the facts, I agreed to drive down to Montemayor's precinct to sit in on his interview of Swenson.

Despite the detective's description of Leonard as "vulnerable," I was ill-prepared for what I saw when Montemayor escorted him into the conference room. Leonard was strikingly slight, standing at most 5'1" and weighing perhaps 120 pounds. As he pulled out a chair to sit down, I caught sight of his hands. Each one was missing his entire forefinger. Nervously, Leonard scanned our faces and waited for us to speak. Detective Montemayor cleared his throat and then began to tell him why we had asked him to meet with us. "You and your daughter came into the precinct to report that you had been assaulted and exploited by Lisa O'Neill. We need to ask you some more questions about what exactly happened to you." Leonard nodded hesitantly. When he finally began to talk, his impediment was immediately apparent. He had a great deal of difficulty enunciating his words, causing us to ask him to repeat himself numerous times. He told us he had had a stroke and couldn't speak well as a result. He answered our questions in short, spare sentences, rarely looking at us. Over the next several hours, we pulled the story from him, strand by strand.

Leonard and Joanne, his wife of 34 years, had three grown children. Leonard had worked for years at a local auto body shop, while Joanne worked at a seafood processing plant. Because he was



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“no good at numbers,” Joanne handled all of the couple’s financial matters. Despite their relatively low-paying jobs, they had lived frugally. They owned their own home and had life and health insurance and very little debt.

One morning in 2005 when she was driving to work, Joanne was struck and killed by a drunk driver. In an instant, Leonard’s life was shattered. His best friend, his social support, his partner, his protector, was gone. Unable to think of what else to do with himself, Leonard went back to work the following week. He began to stop at a local bar on his drive home, seeking solace in the company he found there. Unaware of his vulnerability, he talked to anyone who would listen about the loss of his wife, his grief, and his conversations with the insurance company over the settlement he would soon be receiving.

Forty-three-year-old Lisa O’Neill lived alone in a rental house in a working class suburb of Seattle. She had a boyfriend of 14 years, with whom she had a history of domestic violence; she was sporadically employed and had a massive amount of debt. In August 2006, O’Neill approached Leonard at the bar, introduced herself, and sat down next to him. After a few drinks, she asked him to come home with her. With that invitation, Leonard felt like a door that had been shut tight inside him since the death of his wife cracked open. He went to O’Neill’s house, sat and talked with her, and had another drink. At the end of the night, O’Neill asked Leonard if he’d like to spend the night, pointing to a guest bedroom in her basement. Leonard said yes.

After that night, O’Neill’s attentiveness continued. She invited Leonard to take a break from work and come to her house for lunch. She fixed him dinners and drank with him, confiding in him about certain aspects of her troubled life. When Leonard would attempt to kiss her, she would gently push him away. Leonard told himself that these things take time. Two to three weeks after they met, having successfully kept from him the fact that she had a boyfriend, O’Neill invited Leonard to move into the bedroom in her basement. Despite the fact that he had his own home—or perhaps because of

the memories there—Leonard said yes. That night, he excitedly told his daughter Beverly that he might have met her new stepmother.

About a month after meeting her, Leonard told O’Neill’s father that he wanted to marry her. O’Neill’s father responded that, rather than buying his daughter a ring, Leonard should pay off her truck loan. Leonard agreed, cashing out a CD in which he had invested some of the proceeds from his wife’s insurance settlement to pay off the \$23,000 loan. Thus began a pattern of Leonard giving O’Neill money. Fed by his hope for the future and by her promise to repay him some of the money, Leonard wrote checks to pay off O’Neill’s many debts, gave her cash, and bought her a computer and anything else she wanted. Leonard told us, “She said someday we might get married, that age don’t make a difference.”

When Leonard moved into O’Neill’s basement, he virtually disappeared from his children’s lives. One day not long after he left, Beverly was reviewing her father’s bank statements when she noticed a number of uncharacteristically large withdrawals. She called her father, but he didn’t answer his phone. She and her brother, Tony, then went to their father’s bank to see if there was anything they could do to protect his assets. As they drove into the parking lot, they saw their father’s truck parked there, Leonard in the passenger seat, smoking a cigarette, and O’Neill in the driver’s seat. As Tony and Beverly sat there unnoticed, they heard O’Neill loudly instruct their father to cash out the remainder of his bank accounts. In a panic, Beverly called 911.

A patrol officer responded to the call at the bank and interviewed the parties. O’Neill, angry and shouting, claimed that Leonard’s children were trying to prevent him from accessing his own money. Leonard, shaken and upset, insisted that he had the right to give his money to O’Neill. The police officer, having had no training on elder financial exploitation, deemed the matter a civil dispute and advised Beverly to move the money to another account to protect it from O’Neill. He did not write a report. Neither he nor the bank reported the case to Adult Protective Services (APS).

Shortly after this, O'Neill announced to Leonard that they were moving his accounts to a bank where his money would "do better." By this time, O'Neill had taken over Leonard's bill-paying, promising him she would take care of his finances. She made herself a joint account holder on his new accounts. Once this was accomplished, she began to systematically drain Leonard of his remaining assets. Whenever a check was deposited into Leonard's account, she conducted an online transfer of the money to her own account. Not knowing how to use a computer, Leonard was unaware of these transfers or of the steady decline of his account balances. Because O'Neill arranged to have the bank statements sent to a post office box, Leonard never saw them.

One day in January 2007, while he was at work, Leonard suffered a stroke. He was rushed to the hospital, where he stayed for several days. His speech significantly affected, his left side weak, and his cognition even more impaired, Leonard was discharged back to his own home and the care of his son. A week later, on his first day back at work, O'Neill approached him and asked him to move back in with her, promising that she would take care of him. Ever hopeful, Leonard agreed. Upon moving back in with O'Neill, Leonard stopped taking the medications that had been prescribed after his stroke, stopped attending his physical therapy sessions, and never returned to his treating physician for follow-up visits. He would not see his children again for the next year and a half.

Once O'Neill's hold over Leonard was secure, the emotional and physical abuse commenced. She began to call him names like "moron," "faggot," and "leprechaun." When they went out with her friends, Leonard reported, "[She told me] not to say nothing to nobody else. Don't talk. . . . I couldn't talk good anyways, so she told me to be quiet." When O'Neill became frustrated with Leonard, she began to hit him or shove him. Once she pushed him down the basement stairs and then walked away. Over time, she turned him against his children, effectively convincing him they were

only after his money, and that she was his protector.

Just months after she obtained control of Leonard's financial accounts, O'Neill stopped paying his bills. Eventually, foreclosure proceedings began on his home. O'Neill arranged for him to do a short sale, transferring the proceeds from their joint account to her individual one as soon as they appeared. O'Neill returned Leonard's beloved truck to the dealer, telling Leonard he could no longer afford the payments. She allowed his cell phone service to be cut off, leaving him without a means of communicating with anyone besides her and the people with whom she socialized. Over an approximately two-year period, O'Neill drained Leonard of literally every asset he had.

In July 2008, Leonard woke up early one morning, packed his belongings in two garbage bags, and slipped out O'Neill's front door, quietly shutting it behind him. Filled with shame, anger, and grief, he began the long walk to the home of his friend and former employer, Virginia Banker. Virginia took Leonard in, and, after listening to his story, contacted his children. Beverly insisted on taking him to the local police department to report what O'Neill had done. From that visit, a report was generated and the case assigned to Detective Montemayor to investigate.

The Investigation

Beverly also reported what had happened to APS. An APS worker interviewed Leonard and his son. After finding that he was oriented to person, place, and time and was able to perform his activities of daily living without assistance, the APS investigator reluctantly concluded that Leonard was not a vulnerable adult under Washington law and closed the case.

After our interview of Leonard, Detective Montemayor and I remained in close contact and collaborated on the plan for his investigation, which involved obtaining a capacity evaluation of Leonard by a geriatric psychiatrist, executing search warrants for Leonard's and O'Neill's bank records, and conducting interviews of bank employees, O'Neill's family and friends, Leonard's children and co-workers, the care dealer who dealt with

the return of Leonard's truck, and the real estate brokers and attorneys who handled the short sale of Leonard's home.

Facts on Elder Abuse

Leonard Swenson is not alone. Millions of older adults are abused, neglected, and exploited in this country every day. See Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292 (2010). Yet only one in 23 cases ever comes to the attention of authorities. LIFESPAN OF GREATER ROCHESTER, INC., *UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY* (2011).

Even fewer cases are investigated or prosecuted. In my experience, cases of financial exploitation such as Leonard's, where there is apparent undue influence, are even less likely to be investigated or treated as potentially criminal. Though often perceived as less serious than the forms of elder abuse resulting in physical injury or death, financial exploitation can be just as fatal. This is borne out by a study conducted by geriatrician Mark Lachs, who found that all forms of elder abuse, including financial exploitation, increase the victim's likelihood of dying prematurely by 300 percent. Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428 (1998).

King County

Why was the criminal justice system in King County more receptive to Leonard's case in 2008 than it would have been in 1998? The answer is quite simple: because in 2001, Norm Maleng, then the elected prosecutor, created an elder abuse prosecutor position in his office. His inspiration to do this was San Diego Assistant District Attorney Paul Greenwood, one of the first dedicated elder abuse prosecutors in the country. At the urging of two of my colleagues, Maleng had seen Greenwood speak and met with him about his work. Those experiences inspired Maleng to create a similar position in our own office. The person he appointed in 2001 was me, but it could have been any prosecutor who was hard working and willing to take some risks.

My Experience

When I got the call from Detective Montemayor about Leonard, our office had had a dedicated elder abuse prosecutor for seven years. By that time, I had handled enough cases and conducted enough trainings that most detectives in King County's police agencies knew there was someone in my office with whom they could consult on these cases. They also knew that we would actually file charges on the cases they investigated when the evidence and our resources allowed. I also had accrued enough experience to be able to handle a case like Leonard's. I knew about undue influence, and I knew that even though in Washington, as in most states, we did not have a crime of undue influence, the concept could be used in the right case to overcome a defense of consent at trial simply through the expert testimony of a geriatric psychologist or psychiatrist who had examined the victim and argument to the jury. And by the time Leonard's case landed on my desk, I had developed some resilience. I had lost many cases and had learned the painful and common lesson in the elder abuse field that it is often the bringing of a case, not the winning of a case, that is the victory.

The Criminal Case

So in June 2009, with some trepidation, I filed one count of felony theft and one count of misdemeanor assault against Lisa O'Neill for the financial exploitation and physical abuse of Leonard Swenson. When O'Neill rejected our plea offer and set her case for trial, I had the luxury of having a second prosecutor and a forensic accountant assigned to assist me. Together, we sifted through our evidence, put together our witness list, created our exhibits, and readied ourselves for trial.

The jury trial against O'Neill began in January 2011. The defense was, predictably, consent: Leonard loved O'Neill and wanted her to have his money. More subtly, it was an appeal to individual rights: we Americans value our freedom, including the freedom to make bad choices. Leonard Swenson made bad choices, and now the overreaching State of Washington wants Lisa O'Neill to pay for them.

We called numerous witnesses in our

case, including Detective Montemayor and the patrol officer who was called to the bank, the real estate agent and attorney who handled the short sale, the forensic accountant, Leonard's children, and Angela Heald, the geriatric psychiatrist who evaluated him. Heald testified that although Leonard did quite well on the Mini Mental Status Exam (MMSE), meaning that his memory was intact, his executive function was impaired as a result of frontal lobe vascular dementia and an intellectual disability. She concluded that he lacked the capacity to handle his own finances and was vulnerable to undue influence.

Leonard was on the witness stand for almost a day and a half, enduring hours of aggressive cross-examination by the defense attorney. On the night after his first day of testimony, an ice storm hit the Seattle area, shutting down public transportation and closing the courthouse the following day. On the morning we were set to resume, I got to the courtroom early, hoping to protect Leonard from an interaction with O'Neill. He was already there when I arrived, seated alone on a bench outside the courtroom, a bright red stain of blood on the left knee of his jeans. He had fallen on the ice on his way into the courthouse. He refused my offers of bandages or a recess to get his injury treated. He wanted to finish.

Finally, after four weeks of testimony, we gave our closing arguments. Several hours after the jury began deliberating, we were summoned to the courtroom to respond to a question from the jury: "Do we have to be unanimous in reaching a verdict of not guilty?" Our hearts sank. Then, the following afternoon, their verdict: guilty on all 14 counts of felony theft; not guilty of misdemeanor assault. The jury also found that Leonard was unusually vulnerable, thereby justifying an exceptional sentence above the standard range on each count.

In February 2012, Lisa O'Neill was sentenced to 62 months in prison, an exceptional sentence above the standard prison term of 43–57 months. Leonard attended the sentencing hearing. When asked if he wanted to speak, he simply said, "Thank you."

What Leonard's Case Reveals

Elder financial exploitation cases are, like Leonard's, often complex, involving issues such as cognitive capacity, consent, competency, powers of attorney, guardianships, undue influence, and dementia. Few law enforcement officers, 911 dispatchers, or prosecutors receive training on any of these subjects. Cases like Leonard's don't fall into any of the categories we have been taught to recognize as a potential crime: they are not scams because the victim is in some kind of relationship with the perpetrator, and they are not theft because the victim "consented" to give the perpetrator his or her assets or control of those assets.

APS, too, is often ill-equipped to handle these cases. With insufficient resources and tools to conduct screening for cognitive capacity, and little, if any, training on undue influence, APS investigators frequently screen out cases of financial exploitation on the grounds that the victim does not meet the statutory definition of the population they serve or because they determine, based on the victim's statements alone, that the financial transaction is consensual.

The result of this lack of training is that reporters of these crimes, like Beverly Swenson, who called the police from her father's bank, are often turned away from the criminal justice system and told that their complaint is "civil" in nature. Left with no recourse besides paying for a private attorney, reporters often give up, and the exploitation goes on.

In order for the criminal justice system to begin to address cases of elder abuse properly, we must have dedicated elder abuse prosecutors. What happens when a prosecutor is designated to handle only elder abuse cases is that complicated, labor-intensive cases like Leonard's are no longer pushed to the back burner in favor of simpler ones that are easier wins. Trainings are attended, knowledge is attained, and relationships with other agencies in the community are built. Undue influence is better understood, as is dementia and its impact, not only on memory, but on judgment. Virtually all larger prosecutors' offices have

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should be pursued.” ABA Model Rule 1.3 cmt. [1].

Third, although lawyers must diligently represent their clients, “[a] lawyer is not bound . . . to press for every advantage that might be realized for a client.” ABA Model Rule 1.3 cmt. [1].

Fourth, although a lawyer “shall act with reasonable diligence and promptness in representing a client,” “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” ABA Model Rule 1.3 & cmt. [1] (emphasis added).

Fifth, a lawyer may withdraw from representing a client (even if there is “material adverse effect on the interests of the client”) if “the client insists upon taking action that the lawyer considers *repugnant or with which the lawyer has a fundamental disagreement.*” ABA Model Rule 1.16(b)(1), (4) (emphasis added).

In addition to these important “safe harbors,” the ethics rules contain several statements of lawyers’ affirmative right to act in a way that our professional instinct tells us should be acceptable.

First, lawyers are free to provide these clients legal advice without being asked for it. “[A] lawyer is not expected to give advice until asked by the client,” but a lawyer “may initiate advice to a client when doing so appears to be in the client’s interest.” ABA Model Rule 2.1 cmt. [5].

Second, lawyers can give advice even if they know the clients will not like that advice. Thus, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” ABA Model Rule 2.1 cmt. [1].

Third, lawyers can provide their clients moral as well as legal advice. The ABA Model Rules indicate that “[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.” ABA Model Rule 2.1 cmt. [2].

Although perhaps not as important as the “safe harbors,” these provisions should embolden lawyers to be the sort of “trusted advisors” that many clients need—even if the clients do not recognize their need.

Most lawyers want to act professionally. Even in states where ethics rules do not punish incivility, lawyers can rely on

some ethics rules provisions in serving their clients while courteously interacting with everyone around them. And at the least, these ethics provisions take away any excuses that a “scorched earth” lawyer might be tempted to use. ♦

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units specializing in child abuse, sexual assault, and domestic violence, yet few have prosecutors, let alone units, specializing in elder abuse. Thanks in large part to a small grant program by the U.S. Department of Justice’s Office on Violence Against Women, this is beginning to change, but we have miles to go before it is the norm.

Conclusion

Three years ago, Dan Satterberg, who became King County’s elected prosecutor upon Norm Maleng’s death, created a second elder abuse prosecutor position in our office. We continue the never-ending work of improving our collaboration with other agencies and disciplines through trainings and work in multidisciplinary teams. As a result, our community’s response to these cases continues to improve, and our caseload continues to increase.

As both Maleng and Satterberg understood so well, if the prosecutor’s office broadcasts to the community that it will take on elder abuse by creating a dedicated position, law enforcement will investigate the cases. Adult Protective Services will make more referrals to law enforcement. And reporters who have information on a case will be more likely to report it. As is true for all elder abuse victims, no one can fully restore what Leonard Swenson lost as a result of the abuse and exploitation he suffered. But by treating what happened to him as the crime it was, Leonard’s community was at least able to give him some sense that justice was finally done. ♦