

Vulnerable Adult Abuse Prosecution Manual



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**WORKING TOGETHER TO
PROTECT
WASHINGTON'S VULNERABLE
ADULTS**

This manual was prepared by the Medicaid Fraud Control Unit of the Attorney General's Office to assist in the prosecution of cases involving abuse or neglect of vulnerable adults.

**If you are investigating abuse or neglect committed by a Medicaid provider or that occurred in a Medicaid funded facility, please contact the Medicaid Fraud Control Unit for assistance:
(360) 586-8888**

Table of Contents

I.	INTRODUCTION.....	1
II.	VULNERABLE ADULT DEFINED.....	2
A.	STATUTORY DEFINITIONS.....	2
B.	VULNERABLE ADULT AS DEFINED IN THIS MANUAL.....	3
III.	THE VULNERABLE ADULT AS A WITNESS.....	5
A.	OVERCOMING BIAS AND STEREOTYPES.....	5
B.	INTERVIEWING THE VULNERABLE ADULT.....	6
1.	<i>Location.....</i>	<i>6</i>
2.	<i>Who Is Present.....</i>	<i>8</i>
3.	<i>Interview Touchstones.....</i>	<i>9</i>
4.	<i>Preparing for the Interview.....</i>	<i>9</i>
5.	<i>Obtaining Background Information.....</i>	<i>10</i>
6.	<i>Documents and Physical Evidence.....</i>	<i>12</i>
7.	<i>Conducting the Interview.....</i>	<i>12</i>
C.	COMPETENCY.....	14
1.	<i>Raising the Issue of Competency.....</i>	<i>14</i>
2.	<i>Competency Proceedings.....</i>	<i>15</i>
3.	<i>Mental Health and Developmental Disabilities Versus Competency.....</i>	<i>16</i>
4.	<i>Proving Competency.....</i>	<i>17</i>
IV.	CHARGING CONSIDERATIONS.....	19
A.	INITIAL CHARGING DECISION.....	19
B.	VULNERABLE ADULT SPECIFIC CRIMES.....	20
1.	<i>Criminal Mistreatment.....</i>	<i>21</i>
2.	<i>Abandonment of a Dependent Person.....</i>	<i>23</i>
3.	<i>Endangerment with a Controlled Substance.....</i>	<i>25</i>
5.	<i>Other Charging Alternatives.....</i>	<i>27</i>
a.	<i>Persons Crimes.....</i>	<i>27</i>
b.	<i>Property Crimes.....</i>	<i>28</i>
C.	SUPPLEMENTAL CHARGING ALLEGATIONS.....	28
1.	<i>Aggravating Factors.....</i>	<i>28</i>
2.	<i>Domestic Violence.....</i>	<i>29</i>
3.	<i>Sexual Motivation or Diminished Capacity of the Victim.....</i>	<i>30</i>
V.	EVIDENCE BASED PROSECUTION.....	32
A.	THE BUILDING BLOCKS OF EVIDENCE BASED PROSECUTION: CORROBORATING EVIDENCE... 32	32
1.	<i>Photographs.....</i>	<i>32</i>
a.	<i>Victim's Injuries.....</i>	<i>32</i>
b.	<i>Suspect's Injuries or Lack of Injuries.....</i>	<i>33</i>
c.	<i>Crime Scene.....</i>	<i>34</i>
2.	<i>Physical Evidence.....</i>	<i>34</i>
a.	<i>Weapons.....</i>	<i>34</i>
b.	<i>Damaged Property.....</i>	<i>35</i>
c.	<i>Victim's Diary.....</i>	<i>35</i>
d.	<i>Linens or Clothing.....</i>	<i>35</i>
e.	<i>Medications/Supplements/Assistive Devices.....</i>	<i>35</i>
3.	<i>Witnesses.....</i>	<i>36</i>
a.	<i>Witnesses to the Event.....</i>	<i>36</i>
b.	<i>Witnesses to Establish Capacity.....</i>	<i>37</i>
c.	<i>Expert Witnesses.....</i>	<i>37</i>
4.	<i>Suspect's Statements.....</i>	<i>37</i>
5.	<i>Diagrams.....</i>	<i>38</i>

6.	<i>911 Recording</i>	38
7.	<i>Officer's Report</i>	39
8.	<i>Medical Records</i>	40
a.	Obtaining Medical Records	40
i.	Health Insurance Portability and Accountability Act (HIPAA).....	40
ii.	Investigative Stage.....	42
iii.	Prosecution Stage	42
iv.	Licensed Care Facility Records.....	44
v.	DSHS Records	45
b.	Understanding Medical Records	46
i.	Face Sheet	46
ii.	Medication Record or Medication Administration Record (MAR)	47
iii.	Progress Notes.....	47
iv.	Dictations/Medical Reports/Consultation Reports	47
v.	Flow Sheets	48
vi.	Nutritional Assessment	48
vii.	Patient Care Plan	48
viii.	Wound Care Sheet.....	48
ix.	Emergency Transportation Reports	48
x.	Incident Reports	48
xi.	Staffing Schedules and Time Cards	49
9.	<i>Using Hearsay Statements</i>	49
VI.	LITIGATION TACTICS AND CONSIDERATIONS.....	53
A.	DISCOVERY	53
B.	CONTINUANCE MOTIONS	54
C.	MOTIONS IN LIMINE AND TRIAL ARRANGEMENTS	55
D.	TRIAL BRIEFS	56
E.	DEVELOPING THE THEME OF THE CASE	56
F.	VOIR DIRE	56
1.	<i>Setting a Conversational Tone</i>	57
2.	<i>Uncovering Bias and Prejudice</i>	57
3.	<i>Overcoming the Negative Connotations of Bias and Prejudice</i>	58
4.	<i>Myths and Stereotypes Associated With Vulnerable Adults</i>	58
5.	<i>Sample Voir Dire Questions</i>	60
a.	General Questions	60
b.	Vulnerability Questions	61
c.	Developmental Disability Questions.....	63
G.	OPENING STATEMENT	64
H.	CASE PRESENTATION	65
I.	CLOSING ARGUMENT	65
VII.	SENTENCING	67

VULNERABLE ADULT ABUSE GUIDELINES FOR PROSECUTORS IN WASHINGTON STATE

I. INTRODUCTION

Vulnerable adult abuse and neglect is a serious and growing problem in the United States.¹ It is a problem that will proliferate in upcoming decades as the elderly portion of the vulnerable adult population increases exponentially.² Unfortunately, vulnerable adult abuse and neglect frequently goes unreported.³ When it is reported, the complexities associated with investigating and prosecuting these crimes make it difficult to hold the perpetrators accountable. The vulnerable adults in our country need and deserve the protection of the criminal justice system. This protection comes from skilled officers and prosecutors who are supported in their endeavor for justice.

A unified effort is necessary to identify and address vulnerable adult abuse and neglect in Washington's communities. This can be achieved through public awareness and a coordinated effort between the various disciplines and professions that interact with, or provide services to, vulnerable adults. Law enforcement, prosecutors, health care providers, caseworkers and members of the community are just some of the groups who can work together to prevent and prosecute the crimes committed against our vulnerable adults.

This manual is designed to address some of the issues that are unique to prosecuting vulnerable adult abuse and neglect. Given the similarities between vulnerable adult prosecution and the prosecution of child abuse and domestic violence, prosecutors will be familiar with many of the tips and techniques outlined in this manual. This manual provides tools that prosecutors may find useful in vulnerable adult abuse and neglect prosecutions. This manual is not intended to establish a standard practice against which individual case preparation is to be evaluated.

¹ See Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 *Elder L.J.* 459, 462-64. (discussing the increase in reported incidents of elder abuse since 1981).

² Between 1990 and 2000, in the United States, the number of people over the age of 65 increased to 35 million. This represented a 3.7 million, or 12 percent, increase in the number of persons over the age of 65. That number is expected to double between 2000 and 2030. Approximately 70 million people will be over the age of 65, 4.7 million of whom are expected to be over 85 years old. Studies have shown that elders over 80 years of age are abused and neglected two to three times more often than other elders. Sandusky, 11 *Elder L.J.* at 463-66.

³ Over 550,000 cases of elder abuse are reported each year, but it is estimated that between 500,000 and 5,000,000 elders are mistreated each year. Nat'l Ctr. On Elder Abuse, *The National Elder Abuse Incidence Study*, 3-2, 4-3 (1998): www.gov/eldfam/Elder_Rights/Elder_Abuse/AbuseReport_Full.pdf; Sandusky, *supra*. at 463.

II. VULNERABLE ADULT DEFINED

In Washington, there are four crimes with a specific focus on protecting vulnerable adults: a) criminal mistreatment; b) abandonment of a dependent person; c) endangerment with a controlled substance and d) rape in the Second Degree or indecent liberties.⁴ In the context of these crimes the term vulnerable adult is defined. That definition is set out below in subsection II A. A broader definition of vulnerable adult is used throughout this manual. The scope of that definition and the context in which it can be used is discussed below in subsection II B. The broader definition is used in recognition that there are numerous adults in our communities who require and deserve the protection of the criminal justice system. Those adults may not meet a narrow definition of vulnerable adult. Nevertheless, the difficulties associated with prosecuting crimes in which they are victims arise without regard to the legal definition of vulnerable adult. Moreover, there are instances in which a sentence enhancement might be appropriate regardless of whether the vulnerable adult satisfies the legal definition of vulnerable adult.

A. Statutory Definitions

Chapter 9A.42 of the Revised Code of Washington (RCW) is designed to protect children and “dependent persons” from “abuse and neglect by their parents, by persons entrusted with their physical custody, or by persons employed to provide them with the basic necessities of life.”⁵ Vulnerable adults are considered dependent persons. A dependent person is:

a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. . .⁶

Under this statutory scheme, there are specific instances when a person is presumed to be dependent. A person is **presumed** to be a dependent person if the person is:

- A resident of a nursing home, as defined in RCW 18.51.010;
- A resident of an adult family home, as defined in RCW 70.128.010; and
- A frail elder or vulnerable adult, as defined in RCW 74.34.020(13).⁷

⁴ See RCW 9A.42, 9A.44.050, 9A.44.100.

⁵ RCW 9A.42.005.

⁶ RCW 9A.42.010(4).

⁷ See RCW 9A.42.010(4).

Although the statutes refer to both frail elders and vulnerable adults, the terms are defined in conjunction with one another and appear to be treated synonymously. A person is a frail elder or vulnerable adult if the person is:

- Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- Found incapacitated under RCW 11.88; or
- An adult with a developmental disability as defined under RCW 71A.10.020; or
- Admitted to any facility; or
- Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under RCW 70.127; or
- Receiving services from an individual provider.⁸

A developmentally disabled vulnerable adult is an adult who has:

a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found . . . to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation . . .⁹

The statute further requires that the disability:

- Arise before the vulnerable adult turns eighteen years of age;
- “Be expected to continue indefinitely;” and
- Constitute a substantial handicap.¹⁰

When prosecuting a crime specifically designed to protect vulnerable adults, the prosecutor will need to prove that the vulnerable adult meets one of the above-listed definitions. In some instances, this proof will be as simple as calling a witness to testify about where the vulnerable adult resides. In other instances, the prosecutor will need to rely on expert testimony relating to the vulnerable adult’s disability and the extent to which it constitutes a handicap. The prosecutor should be versed in these definitions so the prosecutor can select charges that most appropriately reflect the nature of the offense.

B. Vulnerable Adult as Defined in this Manual

While the aforementioned statutes are specifically designed to protect vulnerable adults, vulnerable adults are protected by all criminal statutes. In order to ensure that

⁸ RCW 74.34.020(13); *see also* RCW 9A.44.010(16).

⁹ RCW 71A.10.020(3).

¹⁰ *Id.*

perpetrators are held accountable, all charging alternatives should be considered when reviewing a case in which a vulnerable adult is a victim. This is of particular import because an adult may be vulnerable due to age, mobility concerns, living arrangements, or other circumstances, but fail to satisfy the legal definition of vulnerable adult. Nevertheless, the victim's vulnerability can form the basis for alleging an aggravating factor for sentencing purposes. Additionally, the victim's vulnerability frequently dictates how the prosecutor prepares a case. For example, these cases may need to go to trial quickly due to the potential deterioration of the vulnerable adult's health, or possible death, if significant delay occurs. Additionally, there may be a greater need for medical or expert testimony to establish the degree of injury or witness capacity. Accordingly, this manual uses a broad definition for vulnerable adult. In this manual, the term vulnerable adult refers to an adult who has unique vulnerability issues regardless of whether the legal definition of vulnerable adult is satisfied.

III. THE VULNERABLE ADULT AS A WITNESS

A. Overcoming Bias and Stereotypes

The first challenge prosecutors must overcome in cases involving vulnerable adult victims is the existence of biases and stereotypes about vulnerable adults. Frequently, people assume that vulnerable adults are not reliable witnesses. The vulnerable adult's ability to accurately perceive and testify about facts is often questioned due to stereotypes that vulnerable adults are senile, forgetful, fragile, and/or uncooperative. However, each vulnerable adult carries his/her own unique set of strengths, characteristics and values.

The most effective way to dispel stereotypes is through examination and education. The prosecutor should recognize when s/he is making assumptions based on stereotypes. Those assumptions must then be examined in order to determine whether there is any factual basis for the assumptions. This examination requires the prosecutor to consider the facts of the case, the vulnerable adult's observed abilities, and the observations of others. The examination also requires the prosecutor to become educated about any medical or mental health issues that the vulnerable adult possesses.

For example, a prosecutor may be told that a victim has dementia, or may identify the dementia through contact with the vulnerable adult. However, the prosecutor may know little about dementia and how it impacts different individuals; therefore, the prosecutor must become educated about dementia. This education process would reveal that there are different kinds of dementia: some related to alcohol, some related to strokes, or hereditary. Education will reveal that certain types of dementia deteriorate over time, while other types improve over time, and other types are treatable and may remain stable.

Understanding the vulnerable adult's symptoms and level of dementia enables the prosecutor to properly evaluate and prepare the case. It also enables the prosecutor to educate the jurors so that they can overcome their own stereotypes about vulnerable adults. It is important to educate jurors about the particular basis for the vulnerability. Lack of knowledge can lead to the dismissal of testimony as unreliable when it is, in fact, reliable. Examination of stereotypes in the context of voir dire is discussed in section VI F. of this manual.

Some vulnerable adults may have excellent memories and an ability to describe an event in great detail while others may completely lack the ability to speak. Each vulnerable adult must be treated in accordance with his/her own unique characteristics. The prosecutor should interview each vulnerable adult and/or those who have frequent contact with the vulnerable adult in order to gain a complete picture of that individual's ability to testify.

Interaction with the vulnerable adult and others who know him/her will also assist the prosecutor in determining how credible the vulnerable adult will be as a witness. Contact with the vulnerable adult and those who frequently interact with the vulnerable

adult will enable the prosecutor to identify any accommodations that will need to be made in order to facilitate the vulnerable adult's involvement in the prosecution.

B. Interviewing the Vulnerable Adult

The prosecutor should interview the vulnerable adult as soon as possible after the incident. An early interview aids in the development of a rapport with the victim and enables the prosecutor to assess the strength of the case. It also helps the prosecutor to assess capacity and evaluate what additional corroborating evidence or witnesses may be necessary to obtain a conviction. When interviewing the vulnerable adult the prosecutor should consider a variety of factors. This section identifies and discusses some of the factors that should be considered.

1. Location

The interview should occur at a location where the vulnerable adult is physically comfortable and feels emotionally safe. Identification of an appropriate location will depend upon the circumstances surrounding the case and the vulnerable adult's personal concerns.

When determining the location of a vulnerable adult interview the prosecutor should consider:

- The physical needs of the vulnerable adult.
 - Whether special accommodations need to be made for seating?
 - The period of time during which the vulnerable adult is able to sit, concentrate and be comfortable?
 - Whether there is a more comfortable chair for the vulnerable adult rather than the typical chair found in an interview room? (e.g. many interview room chairs have little or no padding whereas many computer chairs have padding and are adjustable).
 - If yes, consider making that type of chair available.
- Whether the vulnerable adult is ambulatory.
 - If yes, is any special equipment required for movement?
 - Does the vulnerable adult have that equipment? (e.g. a vulnerable adult who has been abused or neglected may require a wheelchair in order to move around but may have been deprived of the wheelchair as part of the abuse/neglect).

- If no, identify a location where the interview can occur while accommodating mobility concerns.¹¹
- Whether the vulnerable adult has difficulty hearing.
 - Background noise, voice tone and volume can all impact the vulnerable adult's ability to hear and respond during an interview.
 - Some vulnerable adults are reluctant to wear hearing aids, others are unwilling to admit that they cannot hear.
 - Efforts should be made to minimize distractions and address hearing related issues.
- Incorporate regular breaks into the interview because the vulnerable adult may:
 - grow uncomfortable if seated for lengthy period of time;
 - need to use the restroom on a regular schedule;
 - need to take medications at regular intervals;
 - have difficulty concentrating for long periods of time;
 - become tired and more easily confused; or
 - require regularly scheduled health care.

The interview should take place at a location that is accessible to the vulnerable adult. Many vulnerable adults have mobility concerns. Walking may be a difficult, if not impossible, task for the vulnerable adult. Additionally, the vulnerable adult may face transportation issues; some senior citizens and developmentally disabled persons cannot drive or do not own vehicles. Unless asked, the vulnerable adult may not disclose these barriers to attending an interview. As a result, the vulnerable adult may end up canceling the interview when arrangements for transportation fall apart. If mobility or transportation concerns are present, the prosecutor should consider interviewing the vulnerable adult where s/he resides, particularly if the vulnerable adult resides in a licensed care facility.

The prosecutor should also consider:

- The emotional needs of the vulnerable adult.
- Is the vulnerable adult still living at the scene of the crime?

¹¹ If the location identified is the vulnerable adult's residence the prosecutor should make arrangements in order to protect him/herself. Safety precautions should be taken whenever a prosecutor interviews a victim or witness at his/her residence. The prosecutor should never go to a private residence or living area alone. Preferably, the prosecutor should be accompanied by one of the officers on the case.

- If yes, consider conducting the interview in a different room in the house or care facility because the vulnerable adult may be traumatized by reliving the experience in the location where it occurred. A neutral environment may make disclosure and discussion of the events easier for the victim.
- Is the perpetrator living in the home?
 - If yes, then the vulnerable adult may fear retribution, retaliation or abandonment. This fear may be present in the home even if the perpetrator is not present at the time of the interview, or is in a different room at the time of the interview. The vulnerable adult may be afraid that the perpetrator will overhear what s/he is saying, or be angry that s/he is speaking with a prosecutor.
- Is the vulnerable adult more comfortable communicating with a particular gender?
- Is there a support person available who is not a suspect or witness who can accompany the vulnerable adult during the interview?
- Would the presence of a support person detract from the vulnerable adult's willingness to disclose due to embarrassment or fear?
- Will the vulnerable adult want to protect the perpetrator because s/he is a family member or care provider? Consider how to raise or respond to such concerns.
 - Frequently the vulnerable adult is dependent upon the perpetrator for food, bathing, transportation, and other daily needs. The vulnerable adult may be fearful about retaliation, abandonment, or placement in a care facility. Loss of independence through placement in a facility is a common fear amongst vulnerable adults.
 - The prosecutor should have some knowledge of the resources available to assist a vulnerable adult so that referrals can be made and so that these fears can be acknowledged and, possibly, allayed.

2. Who Is Present

The prosecutor, a victim advocate and/or an officer should be present during the interview. While the prosecutor will be conducting the interview the victim advocate or officer can facilitate by sharing their knowledge about the incident. The victim advocate or officer should bring a camera to the interview in order to photograph the progression

of any injuries. The officer should also be prepared to seize any additional evidence that is identified during the interview, or brought to the interview by the vulnerable adult.

If the vulnerable adult asks to have someone present during the interview the prosecutor should consider the potential impact that the person's presence would have on the vulnerable adult's candor. The request to have someone present may be an attempt to have support during the interview, or it may be the result of pressure from the perpetrator or the perpetrator's allies. Even if the request to have someone present is based solely on a desire for support during the interview, the prosecutor should be mindful that the vulnerable adult may be reluctant to discuss an incident in the presence of family members. Many vulnerable adults are reticent about discussing what they consider to be private matters with others. The vulnerable adult may also be embarrassed about the incident or be concerned about loss of independence.

If the vulnerable adult is deaf, does not speak English, or has difficulty communicating, then an interpreter may also need to be present. In the case of a vulnerable adult with a disability, s/he may have unique communication requirements or abilities. In order to develop an understanding of how to communicate with the developmentally disabled victim, the prosecutor should speak with health care providers, family members or others who are not suspects or aligned with the suspect. Arrangements for assistance communicating with the vulnerable adult should be made as necessary. Ultimately, the prosecutor must assess each individual case in order to determine who should be present during an interview.

3. Interview Touchstones

When interviewing a vulnerable adult the prosecutor should be mindful that:

- The victim may be reluctant to say something s/he is unsure of;
- The victim may be dependent upon others for daily needs and be reluctant to make negative statements about their care providers due to concerns that they would not be cared for;
- The victim may be subject to pressure from family members or the perpetrator and afraid of the possible consequences if s/he cooperates with the prosecutor;
- The victim may not understand the his/her role in a criminal prosecution; and
- Sometimes vulnerable adults experience loss of memory, time and place.

If the prosecutor can identify potential concerns in advance it may be easier to address those concerns during the interview. If the vulnerable adult's concerns are addressed they may be more cooperative during the interview.

4. Preparing for the Interview

The prosecutor must balance the need for an early initial interview against the need to thoroughly prepare for the interview. A successful interview depends upon thorough preparation. Preparation ensures that the prosecutor understands how to

successfully communicate with the vulnerable adult. Successful communication can only occur if the prosecutor is familiar with the vulnerable adult's physical, emotional, and mental health needs. This familiarity is gained by reviewing background information.

5. Obtaining Background Information

Before interviewing the vulnerable adult the prosecutor should speak with friends, family members, and health care providers in order to obtain background information regarding the vulnerable adult. These persons may help the prosecutor determine the best way to place the vulnerable adult at ease during the interview. They can also assist the prosecutor to determine the best time of the day for the interview. Some vulnerable adults are more lucid or energetic at a particular time of day, usually in the morning.

Before the interview the prosecutor should consider obtaining the following background information from the vulnerable adult's friends, family members, house/roommates and health care providers:

- Does the vulnerable adult have any mental, emotional or physical diagnoses or difficulties?
 - What are those difficulties?
 - How do they impact the vulnerable adult's ability to:
 - Communicate;
 - Understand questions;
 - Accurately observe events;
 - Hear.
- Has the vulnerable adult experienced any physical, mental, or emotional changes in the last year?
 - Describe the changes.
 - When did they occur?
 - Has s/he seen a health care provider for these changes?
 - Who?
 - When?
 - How often?
 - Is s/he undergoing any treatment for these changes?
 - Describe the treatment.
 - Does it involve the taking of medication(s)?
 - What medication(s)?
 - How do those medications impact the vulnerable adult?

- Does the vulnerable adult have any currently prescribed medications?
 - What medications?
 - What is the dosage?
 - How often are the medications supposed to be taken?
 - Does the frequency with which the medications are taken, or the dosage that is taken, vary from the prescription?
 - How do the medications impact the vulnerable adult?

- Where does the vulnerable adult live?
 - How long has s/he lived there?
 - Who does s/he live with?
 - Who does s/he rely on for assistance in meeting daily needs?
 - How long has the vulnerable adult lived there?
 - Where did s/he live before moving to his/her current residence?
 - Who did s/he live with at the previous residence?
 - Does s/he have a significant other, children, siblings, etc?
 - What are their names?
 - How old are they?

- Is the vulnerable adult employed?
 - Who is his/her employer?
 - How long has s/he worked there?
 - What are his/her responsibilities?
 - If no, has s/he ever been employed?
 - When?
 - Where?
 - Describe the responsibilities.

- What hobbies or activities is the vulnerable adult involved in?
 - How often does s/he participate in these activities?

- Does the vulnerable adult have any pets?
 - What kind of pet(s)?
 - What is the pet's name?
 - How long has the vulnerable adult had the pet?
 - If s/he does not currently have a pet, has s/he ever had a pet?

The above-listed questions are examples of the type of background information that can assist the prosecutor in determining how to effectively communicate and build rapport with the vulnerable adult. The information will also assist the prosecutor in assessing the vulnerable adult's ability to recall events and accurately report information, both of which will assist in determining capacity to testify.

6. Documents and Physical Evidence

The prosecutor should also review reports, statements, medical records, photographs and other information pertinent to the case before interviewing the vulnerable adult. Section V A discusses the type of information that the prosecutor should consider reviewing before an interview with a vulnerable adult. Familiarity with this information enables the prosecutor to conduct a focused and productive interview. It will also assist the prosecutor in the assessment of the vulnerable adult's capacity to testify, which is often raised in vulnerable adult prosecutions.

7. Conducting the Interview

At the beginning of the interview the prosecutor should explain who s/he is and introduce any other people who are attending the interview. The prosecutor should explain the reason for the interview. If the vulnerable adult expresses concerns, the concerns should be addressed openly and honestly. Assuming that the interview takes place during the early stages of a case, the interview is a good time for the prosecutor to provide the vulnerable adult with a copy of RCW 7.69.030, which sets out the rights of victims, survivors and witnesses. Appendix B consists of a handout that lists the rights of victims, survivors and witnesses. There are two versions of the handout: a one page version with standard size font, and a two page version with large font. The version with larger font may be easier for some vulnerable adults to read. When providing this handout, the prosecutor should review it with the vulnerable adult in order to ensure that the vulnerable adult understands his/her rights.

If the vulnerable adult has not already been put in contact with a crime-victim advocate, then contact information should be provided to the vulnerable adult so that s/he knows that there is support available throughout the process. Additionally, the prosecutor may want to provide the vulnerable adult with contact information for Adult Protective Services, the Division of Developmental Disabilities, or other agencies that provide services to vulnerable adults. Many of these agencies have local branches. The Aging and Disability Services Administration (ADSA) of the Washington State Department of Social and Health Services (DSHS) has a website that can help prosecutors locate local and regional offices: www.adsa.dshs.wa.gov/Resources/clickmap.htm.

At the beginning of an interview with a vulnerable adult, the prosecutor should ask simple background questions. This will put the vulnerable adult at ease and help to develop a rapport. It will also allow the prosecutor to assess the vulnerable adult's communication style, and ability to accurately relay information. The prosecutor should be mindful of pacing. Speak slowly and be prepared to wait for the vulnerable adult's

response. The prosecutor should not interrupt the vulnerable adult unless absolutely necessary. The vulnerable adult may provide more thorough responses if s/he does not feel rushed. Throughout the interview the prosecutor should call the vulnerable adult by name in order to get his/her attention.

The prosecutor should also explore the relationship between the vulnerable adult and the perpetrator. If the vulnerable adult is dependant upon the perpetrator for food, clothing, shelter, transportation, and/or health care, then s/he may be afraid that the perpetrator will not be able to meet these needs if convicted. The information obtained during this phase of the interview can be used to explain the relationship between the vulnerable adult and the perpetrator in the event that the vulnerable adult recants or becomes hostile to the prosecution. Discussing more neutral aspects of the vulnerable adult's relationship with the perpetrator can also place the vulnerable adult at ease.

During the interview the prosecutor should ask open-ended questions. The questions should be designed to elicit information from the vulnerable adult without divulging facts already known. This approach allows the prosecutor to gauge the vulnerable adult's independent recollection of the events in question. It also allows the prosecutor to learn the terminology that the vulnerable adult is comfortable using so that the prosecutor can use the same terminology throughout the litigation. Use of the vulnerable adult's terminology reduces the likelihood that the vulnerable adult will be confused by the questions being asked.

In order to avoid confusion during the interview, the prosecutor should use short, simple sentences. When moving to another topic, the prosecutor should notify the vulnerable adult of the change in topic. For example, the prosecutor might say, "Now I want to talk to you about your broken arm. How long has your arm been broken?" The prosecutor may also ask the vulnerable adult to draw a diagram or write down information if it appears that it would aid in the communication process.

During the interview, if the vulnerable adult is having difficulty remembering the details of an event, the prosecutor should encourage the vulnerable adult to picture the event as though it were occurring at that very moment. This technique is called cognitive reconstruction and may help the vulnerable adult to focus on the details of an event. The prosecutor should also encourage the vulnerable adult to report all details, even those that may seem unimportant. This includes a description of the details associated with each of the senses. Reporting concrete details will assist the vulnerable adult in picturing the event and recalling it.

At the end of the interview, the prosecutor should thank the vulnerable adult for his/her time and provide contact information to the vulnerable adult. The prosecutor should give the vulnerable adult the opportunity to ask questions and should explain the next step in the prosecution. If a hearing is scheduled, then the prosecutor should inform the vulnerable adult of the date and time of the hearing and explain what will occur at the hearing. Finally, the prosecutor should confirm the vulnerable adult's contact information.

C. Competency

The capacity of a vulnerable adult to testify is often raised in vulnerable adult abuse/neglect prosecutions. Sometimes the issue of capacity is properly raised. At other times, it is based solely on stereotypes. More frequently, it is raised by opposing counsel as a litigation strategy. A judicial finding of incompetence can have significant impact on a case as it precludes the vulnerable adult from testifying at trial. Because the issue of capacity is raised so frequently in the prosecution of vulnerable adult cases it is necessary to be familiar with the law governing capacity.

In criminal cases, witness competency is governed by Evidence Rule 601, Criminal Rule 6.12(c) and RCW 5.60.050. While the standard set out in these rules and the statute is consistent, courts usually cite the statute when deciding issues of competency.¹²

The party challenging witness competency must overcome a presumption that all witnesses are competent, unless proven otherwise.¹³ A witness is not competent to testify if the witness is:

- Of unsound mind;
- Intoxicated at the time of their testimony;
- Not capable of “receiving just impressions of the facts, respecting which They are examined, or of relating them truly.”¹⁴

1. Raising the Issue of Competency

The issue of witness competency can be raised by either party or the judge. The trial court may have a duty to raise the issue of witness competency *sua sponte* if there appears to be a need based on the record.¹⁵ Because witnesses are generally presumed to be competent, it is unlikely that the prosecutor will raise the issue of witness competence. While the prosecutor might not affirmatively raise the issue of competency, the prosecutor should consider developing a record on the issue of competence if there is evidence in the record that could call the witness’ competence into question. For example, if a witness is in the early stages of dementia then a failure to flesh out the parameters of the person’s dementia at the trial level could result in reversal on appeal. Whereas, if the prosecutor presents testimony indicating that the witness can accurately relate events despite having dementia then it is less likely to become an issue on appeal.

¹² 4A Wash. Prac. Series CrR 6.12, Witnesses, 410.

¹³ ER 601; *See also* RCW 5.60.020 (“Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.”).

¹⁴ RCW 5.60.050; *see also* Criminal Rule 6.12(c) (witnesses are incompetent if they are of unsound mind or intoxicated).

¹⁵ *See State v. Watkins*, 71 Wn.App. 164, 857 P.2d 300 (1993).

The decision to affirmatively broach the topic of witness competency formally (during a pre-trial hearing), or informally (through testimony presented during trial), is dependent upon the unique facts of each case. In some cases the prosecutor will determine that it is unnecessary to raise the issue. In other cases failure to raise the issue would be fatal on appeal. The prosecutor should be cognizant that there is a significant risk associated with ignoring a competency issue in hopes that the defense will not raise it. If the record indicates a potential competency issue and the issue is not addressed at trial, or raised by defense, the defendant may be able to allege ineffective assistance of counsel on appeal. If the issue of witness competence is not addressed before trial, but raised by the defendant during trial, the prosecutor runs the risk that jeopardy will have attached leaving the state to proceed without testimony from the victim. Whereas, if the witness is deemed incompetent before trial, then the prosecutor has the option of proceeding to trial without the witness, or dismissing the case without prejudice until competency can be restored. Regardless of who raises the issue of competency, if it is raised then a clear record should be created in order to preclude a successful appeal.

2. Competency Proceedings

The question of witness competency “is a preliminary fact question to be determined by the trial court.”¹⁶ As a general rule, if the issue of witness competency is raised, it should be addressed at a pre-trial competency hearing. The hearing should be held as close to trial as possible because the issue is whether the witness is competent at the time of trial.

At the competency hearing, testimony is taken and evidence is presented regarding the ability of the witness to understand the oath and accurately relate the facts. The party opposing the testimony has the burden of proving that a witness is not competent to testify.¹⁷

The manner of conducting the hearing is subject to the court’s discretion. It is within the court’s discretion to grant exceptions to the requirement that open ended questions be asked on cross-examination if the witness has a developmental disability or mental deficiency that might impact the witness’ ability to respond to open ended questions. For example, the court has the discretion to allow use of leading questions on direct examination if the witness has a low IQ.¹⁸ A court’s decision about the manner of conducting the hearing will not be overturned on appeal absent a showing of a manifest abuse of discretion.¹⁹

¹⁶ *Watkins*, 71 Wn.App. at 170.

¹⁷ *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982); *Watkins*, 71 Wn.App. at 169.

¹⁸ *Smith*, 97 Wn.2d at 803.

¹⁹ *Id.*

After considering the evidence and arguments, the judge must determine whether the challenged witness, “understands the nature of the oath and is capable of giving a correct account of what he or she has seen and heard.”²⁰ A determination of witness competency is subject to the court’s discretion and will not be overturned on appeal absent a finding of abuse of discretion.²¹

Although the competency hearing should take place outside the presence of the jury, after a victim is declared competent and is called to testify the prosecutor may want to re-examine the witness in front of the jury. Examination of the witness regarding the ability to tell the truth and accurately report his/her observations allows the jury to feel comfortable about relying on the victim’s testimony. It also assists the jury in weighing witness credibility.

3. Mental Health and Developmental Disabilities Versus Competency

As noted previously, given the unique characteristics of vulnerable adults the issue of competency is frequently raised without regard to the existence of a true legal issue associated with competency. Many vulnerable adults are vulnerable by virtue of a developmental disability or mental health issue. Developmental disabilities and mental health issues, standing alone, do not render a witness incompetent. A witness can have a history of mental disorders and still be competent to testify.²² A mentally deficient witness is presumed to be competent to testify.²³ Similarly, a witness with limited comprehension, developmental disabilities, or history of a mental disorder can be competent to testify.²⁴ On the other hand, when a witness has been previously adjudicated insane, the witness is presumed incompetent to testify.²⁵ This presumption can be rebutted by the proponent of the witness.²⁶

²⁰ *Watkins*, 71 Wn.App. at 169.

²¹ *Watkins*, 71 Wn.App. at 170.

²² *Watkins*, 71 Wn.App. at 169.

²³ *Smith*, 97 Wn.2d at 803.

²⁴ *Watkins*, 71 Wn.App. at 171; *State v. Wyse*, 71 Wn.2d 434, 429 P.2d 121 (1967) (fact that witness attended school for the mentally retarded and was of limited mental capacity held not to constitute evidence of “unsound mind” within the meaning of the statute); *Smith*, 97 Wn.2d at 803 (Trial court did not abuse its discretion when it allowed a witness with an IQ of 24 to testify when the witness understood her obligation to tell the truth and could accurately recount the event.).

²⁵ *Smith*, 97 Wn.2d at 803.

²⁶ *Id.*

4. Proving Competency

The focus of a competency hearing is whether a witness satisfies the legal prerequisites of a competent witness.²⁷ Competency can be proven in a number of ways: through the testimony of the challenged witness; through the testimony of lay witnesses; and through the testimony of expert witnesses.

The victim/witness can be asked a series of questions designed to assess the witness' ability to understand the oath and accurately describe events. The questions asked of the witness are similar to those asked of a child during a competency hearing. Examples of appropriate questions to establish competency are as follows:

- What is your name?
- How old are you?
- When is your birthday?
- Who is the president of the United States?

- Where do you live?
 - What city? State? Country?
 - What is your address?
 - Who do you live with?
 - Did you ever live anywhere else?
 - Where did you live before?
 - What street?
 - Who lived there?

- Do you have any children?
 - What are their names?

- Do you have any brothers or sisters?
 - What are their names?
 - Where do they live?

- Do you know anybody in this room?
 - Who do you know?

²⁷ It is important to distinguish competence to testify as compared to competence to consent. A witness may be capable of testifying truthfully and accurately without being able to legally consent. Competence to testify is a determination that is made by the judge. Competence to consent is a determination that is submitted to the jury. To avoid confusing the jury, a motion in limine may be appropriate.

- How do you know them?
 - What are their names?
 - Describe what they are wearing?
- You took an oath to tell the truth when you got on the stand. Please explain what the oath means?
 - Have the witness discuss the difference between the truth and a lie.

These are just examples of the types of questions that can establish competency. The information obtained during the interview of the vulnerable adult and the background information obtained to prepare for that interview will help the prosecutor to develop an applicable set of questions.

Mentally disabled victims often have a well-developed sense of fairness and right and wrong, even though they may not be able to explain why the action is right or wrong. In that instance, use of hypothetical questions and concrete examples may be the best way to establish competence.

The testimony of a lay witness can also be used to establish competency.²⁸ Lay witness testimony is usually used in conjunction with the victim's testimony. The lay witness can testify to facts that demonstrate the victim's ability to observe things and tell the truth. The lay witness can also verify the facts testified to by the victim in response to the previously listed questions. However, the lay witness cannot express an opinion about the ability of the victim to testify honestly.

A witness with expertise in mental health, developmental disabilities, or the unique traits of the vulnerable adult in question, can also be useful in establishing competency. Whether an expert witness is used in a given case will depend on the severity of the witness' developmental disabilities, medical issues, or mental health issues. In such an instance the expert witness can testify about the ability of the witness to accurately perceive items, and communicate them, as well as the ability of the witness to testify honestly depending upon the issues being raised. Testimony that there is no evidence that a witness is "out of contact with reality or having severe emotional problems" has been deemed sufficient to support a finding of competence.²⁹ This type of testimony may also be useful during trial as it speaks to the credibility of the witness. The court has discretion to determine whether expert testimony will be useful to aid the

²⁸ During the actual trial it may be important to have a lay witness testify about corroborating details if the defendant suggests that the witness might not be capable of accurately relating what the witness observes. See Section V, Evidence Based Prosecution, for further discussion on the use of corroborating testimony.

²⁹ *Smith*, 97 Wn.2d at 803.

jury in its evaluation of the testimony of a mentally defective witness or lay testimony of persons intimately acquainted with the witness.³⁰

Witness incompetence may not be fatal to a case. If a witness is found to be incompetent, it could actually strengthen the case by helping to establish an inability to consent to the conduct of the perpetrator. Additionally, a witness may have greater vulnerability if s/he does not have capacity. Moreover, many vulnerable adult abuse and neglect prosecutions are victimless prosecutions either due to witness unavailability (commonly caused by dementia, incapacity, or death) or recantation. A solid evidence based prosecution is not dependent on the ability of the victim to testify. Consequently, section V of this manual discusses an evidence based approach to prosecution.

IV. CHARGING CONSIDERATIONS

A. Initial Charging Decision

The prosecutor is responsible for reviewing the facts of a case and determining what charges are appropriate. Upon receipt of investigative reports the prosecutor should, as soon as is reasonably practicable under the circumstances, review the investigative reports, documents, and associated evidence in order to determine whether: 1) additional investigation is necessary; 2) charges should be filed; or 3) charges should be declined.

Given the nature of vulnerable adult abuse and neglect the prosecutor needs to ensure that the responsible investigating agency has performed a thorough factual investigation before making a decision to prosecute. If additional investigation is necessary then the prosecutor should balance the need to preserve victim safety against the extent to which further investigation is necessary. These factors will determine whether the prosecutor files the charges pending further investigation or refers the investigation back to the investigating officer before filing charges.

The decision to prosecute should be based on guidelines set forth in RCW 9.94A.411. When the investigation has been adequately completed, the filing of charges will ordinarily be indicated in the following circumstances:

- Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder; and
- Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a

³⁰ *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981).

reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.³¹

There are instances when it may be appropriate to decline prosecution, even though technically sufficient evidence exists. Prosecution might be declined when prosecution would serve no public purpose, would defeat the underlying purpose of the law in question, or would result in decreased respect for the law. Reasons for such a declination may include the following:

- Prosecution would be contrary to the legislative intent in enacting a particular criminal statute;
- The criminal charge would be based upon an antiquated statute which no longer serves a deterrent or protective purpose;
- The violation is *de minimus* in nature;
- The accused has been sentenced to a lengthy period of confinement, or is pending conviction, on another charge and conviction of a new offense would not serve any significant purpose;
- The cost of prosecution is highly disproportionate to the importance of prosecuting the offense in question;
- The motives of the complainant are improper and prosecution would serve no public purpose or would result in decreased respect for the law;
- The accused has been or will be given immunity in exchange for information or testimony that will enable law enforcement authorities to pursue more serious criminal conduct;
- The victim has requested that charges not be filed, the injury or loss incurred was minor, and public safety will not be jeopardized by acceding to the request.³²

B. Vulnerable Adult Specific Crimes

As noted previously, RCW 9A.42 contains four types of crimes specifically designed to protect vulnerable adults: 1) Criminal Mistreatment; 2) Abandonment of a Dependent Person; 3) Endangerment with a Controlled Substance; and 4) provisions of Rape in the Second Degree and Indecent Exposure.³³ In order to make an informed charging decision the prosecutor must be familiar with the elements of each offense and the pertinent definitions.

³¹ See RCW 9.94A.411.

³² See RCW 9.94A.411.

³³ RCW 9A.44.050; RCW 9A.44.100.

1. Criminal Mistreatment

There are four degrees of criminal mistreatment: 1) First Degree, which is a class B felony; 2) Second Degree, which is a class C felony; 3) Third Degree, which is a gross misdemeanor; and 4) Fourth Degree, which is a misdemeanor.³⁴ Under the Sentencing Reform Act (SRA), criminal mistreatment in the First Degree is a level nine offense and criminal mistreatment in the Second Degree is a level five offense. Appendix G contains the SRA scoring forms associated with these offenses. For purposes of this manual it is assumed that the term dependent person refers to a vulnerable adult.

In order to prove criminal mistreatment in the First Degree, the prosecutor must show that:

- The defendant withheld any of the basic necessities of life from a dependent person
- By withholding any of the basic necessities of life, the defendant recklessly caused great bodily harm to the dependent person; and
- The defendant is a person entrusted with the physical custody of the vulnerable adult or a person employed to provide the dependent person with the basic necessities of life.³⁵

“[F]ood, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication” are considered basic necessities of life.³⁶

A person acts recklessly “when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.”³⁷

The definition of “great bodily harm” is different in RCW 9A.42 than it is relative to other criminal offenses. Under RCW 9A.42.010(2)(c) great bodily harm is “bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ.” In contrast, great bodily harm as defined in RCW 9A.04.110(4)(c) requires injury that “creates a probability of death” or a “significant permanent loss or impairment of the function of any bodily part or organ.” These distinctions should be considered when making a charging decision.

³⁴ See RCW 9A.42.020 through 9A.42.037.

³⁵ RCW 9A.42.020(1).

³⁶ RCW 9A.42.010(1).

³⁷ RCW 9A.08.010.

Criminal mistreatment in the Second Degree has the same criminal intent as criminal mistreatment in the First Degree: recklessness.³⁸ The difference between the two offenses is the extent of injury inflicted upon the vulnerable adult. Under criminal mistreatment in the Second Degree the extent of injury actually caused to the vulnerable adult is lower than the extent of injury caused to the vulnerable adult under criminal mistreatment in the First Degree. Relative to criminal mistreatment in the Second Degree, the defendant must cause:

- Imminent and substantial risk of death or great bodily harm; or
- Substantial bodily harm by withholding the basic necessities of life.³⁹

Substantial bodily harm is “bodily injury which involves a temporary but substantial disfigurement or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.42.010(b). Although substantial bodily harm is specifically defined in RCW 9A.42, unlike “great bodily harm” the definition does not differ from the definition set out in RCW 9A.4.110(4)(b).

The criminal intent necessary to prove criminal mistreatment in the third and Fourth Degrees is lower than that required to prove criminal mistreatment in the first and Second Degrees. The applicable criminal intent is criminal negligence.⁴⁰ A person acts with criminal negligence if “he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.”⁴¹

Relative to criminal mistreatment in the Third Degree, the defendant must cause, through criminal negligence:

- An imminent and substantial risk of substantial bodily harm to the dependent person by withholding any of the basic necessities of life; or
- Substantial bodily harm by withholding any of the basic necessities of life.⁴²

Relative to criminal mistreatment in the Fourth Degree, the defendant must cause, through criminal negligence:

³⁸ Cf. RCW 9A.42.020(1) and RCW 9A.42.030(1).

³⁹ RCW 9A.42.030(1).

⁴⁰ See RCW 9A.42.035 and RCW 9A.42.037.

⁴¹ RCW 9A.08.010(1)(d).

⁴² RCW 9A.42.035(1)(a) and (b).

- An imminent and substantial risk of bodily injury to the dependent person by withholding any of the basic necessities of life; or
- Bodily injury or extreme emotional distress manifested by more than transient physical symptoms by withholding any of the basic necessities of life.⁴³

An officer who arrests a person for criminal mistreatment of a vulnerable adult is required to notify Adult Protective Services (APS).⁴⁴ Prosecutors should confirm that the arresting officer complied with the mandatory notification requirement. While not required, the prosecutor may want to notify APS of the arrest and any resulting prosecution. Notification is particularly important to ensure that the vulnerable adult does not suffer neglect during the prosecution. Local APS telephone numbers can be found on the DSHS website at www.aasa.dshs.wa.gov/Resources/clickmap.htm.

An inability to pay for the basic necessities of life is a defense to criminal mistreatment if “the person charged has made a reasonable effort to obtain adequate assistance.”⁴⁵ A person who is employed to provide the basic necessities of life is not entitled to this defense unless “the agreed-upon payment has not been made.”⁴⁶ Additionally, a caregiver who is being paid through Medicaid cannot require a vulnerable adult to pay additional money for care.

2. Abandonment of a Dependent Person

There are three degrees of abandonment of a dependent person: 1) First Degree, which is a class B felony; 2) Second Degree, which is a class C felony; and 3) Third Degree, which is a gross misdemeanor.⁴⁷ Under the Sentencing Reform Act, abandonment of a dependent person in the First Degree is a level nine offense and abandonment of a dependent person in the Second Degree is a level five offense. Appendix G contains the SRA scoring forms associated with these offenses. For purposes of this manual it is assumed that the term dependent person refers to a vulnerable adult.

In order to prove abandonment of a dependent person in the First Degree, the prosecutor must show that:

- The defendant recklessly abandoned the vulnerable adult; and
- as a result of being abandoned, the vulnerable adult suffered great bodily

⁴³ RCW 9A.42.037(1)(a) and (b).

⁴⁴ RCW 9A.42.039(2).

⁴⁵ RCW 9A.42.050.

⁴⁶ *Id.*

⁴⁷ See RCW 9A.42.060 through 9A.42.080.

- harm; and
- The defendant is:
 - A person entrusted with the physical custody of the vulnerable adult;
 - A person who has assumed the responsibility to provide to a vulnerable adult the basic necessities of life; or
 - A person employed to provide the vulnerable adult with the basic necessities of life.⁴⁸

Abandons is defined as leaving the vulnerable adult “without the means or ability to obtain one or more of the basic necessities of life.”⁴⁹ Recklessly and great bodily harm carry the same meaning as set out above in Section IV B 1.

Abandonment of a dependent person in the Second Degree has the same criminal intent as abandonment of a dependent person in the First Degree: recklessly.⁵⁰ The difference between the two offenses is the extent of injury inflicted upon the vulnerable adult. Under abandonment of a dependent person in the Second Degree the vulnerable adult is exposed to injury but either is not harmed or is harmed to a lesser degree than under abandonment of a dependent person in the First Degree. Relative to abandonment of a dependent person in the Second Degree, the defendant must cause:

- Imminent and substantial risk of death or great bodily harm; or
- Substantial bodily harm.⁵¹

Abandonment of a dependent person in the Third Degree also has the same criminal intent as abandonment of a dependent person in the first and Second Degrees: recklessness.⁵² The level of harm suffered by the vulnerable adult is simply lower in abandonment of a dependent person in the Third Degree. Relative to abandonment of a dependent person in the Third Degree, the defendant must cause:

- Bodily harm; or
- A substantial risk that the vulnerable adult will suffer substantial bodily harm.⁵³

If a person who is employed to provide a vulnerable adult with the basic

⁴⁸ RCW 9A.42.060.

⁴⁹ RCW 9A.42.010(7).

⁵⁰ Cf. RCW 9A.42.060(a) and RCW 9A.42.070(1).

⁵¹ RCW 9A.42.070(1)(b).

⁵² RCW 9A.42.080(1).

⁵³ RCW 9A.42.080(1)(b).

necessities of life gives “reasonable notice of termination of services and the services were not terminated until after the termination date specified in the notice” then the person has an affirmative defense to the charge of abandonment of a dependent person.⁵⁴

3. Endangerment with a Controlled Substance

The most recently enacted crime focused on protecting vulnerable adults is endangerment with a controlled substance.⁵⁵ This offense is related to the proliferation of the manufacture and use of methamphetamine. It is a class B felony. Under the SRA, endangerment with a controlled substance is a level four offense. There is not a current SRA scoring form associated with this offense.

Endangerment with a controlled substance makes it a crime for a person to:

- Knowingly or intentionally;
- Permit a vulnerable adult to be exposed to, ingest, inhale, or have contact with:
 - Methamphetamine;
 - Ephedrine;
 - Pseudoephedrine;
 - Anhydrous ammonia; or
 - The salts, isomers and salts of isomers of the above listed items if they are being used to manufacture methamphetamine.⁵⁶

A person acts knowingly when he “is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or . . . has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute as defining an offense.”⁵⁷ A person acts “intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.”⁵⁸

Unlike the criminal mistreatment and abandonment crimes, endangerment with a controlled substance does not require that the perpetrator have a caregiver relationship with the vulnerable adult.⁵⁹

⁵⁴ RCW 9A.42.090.

⁵⁵ RCW 9A.42.100.

⁵⁶ RCW 9A.42.100.

⁵⁷ RCW 9A.08.010(1)(b).

⁵⁸ RCW 9A.08.010(1)(a).

⁵⁹ See *State v. Cooper*, 156 Wn.2d 475, 128 P.3d 1234 (2006) (holding that the term “person” in the context of RCW 9A.42.100 is not limited to a parent, caregiver, or physical custodian).

4. Sexual Offenses

There are a number of provisions of rape in the Second Degree and indecent liberties designed to protect vulnerable adults.⁶⁰ Under those provisions sexual intercourse or contact is a crime when the victim is: a) incapable of consent by reason of being physically helpless or mentally incapacitated; b) developmentally disabled (if the defendant is not married to the victim and has supervisory authority over the victim); or c) when the victim is a frail elder or vulnerable adult (if the defendant is not married to the victim).⁶¹

Rape in the Second Degree and indecent liberties can also be premised on the status of the perpetrator. When the perpetrator is a health care provider who has sexual intercourse with a client or patient “during a treatment session, consultation, interview, or examination.”⁶² Rape or indecent liberties by a health care provider is most likely to occur in a licensed care facility or residential care facility where the vulnerable adult is living because there is greater access to the vulnerable adult than may be present during other interactions with a health care provider.

Rape in the Second Degree is a class A felony.⁶³ Under the SRA, rape in the Second Degree is a level eleven offense. It is also a most serious offense and a “two strikes” offense under the persistent offender statute. Indecent liberties is a class B felony. It is a level seven offense under the SRA. Appendix G contains the SRA scoring forms associated with these offenses.

In order to prove rape in the Second Degree, the prosecutor must show that:

- The defendant engaged in sexual intercourse with the victim;
- The defendant is not married to the victim;
- The victim is:
 - Incapable of consent by reason of being physically helpless or mentally incapacitated;
 - Developmentally disabled and the defendant has supervisory authority over the victim; or
 - A frail elder or vulnerable adult and the defendant has a significant relationship with the victim.

OR

⁶⁰ See RCW 9A.44.050(1)(b), (c), (d), and (f); 9A.44.100(1)(b), (c), (d), and (f).

⁶¹ *Id.*

⁶² RCW 9A.44.050(1)(d); 9A.44.100(1)(d).

⁶³ RCW 9A.44.050(2).

- The perpetrator is a health care provider who engaged in intercourse during a treatment session, consultation, interview, or examination.⁶⁴

A defendant has supervisory authority over a vulnerable adult if s/he is a proprietor or employee of a care or treatment facility.⁶⁵

The only difference between the elements necessary to prove indecent liberties as compared to those necessary to prove rape in the Second Degree is the requirement of intercourse (rape) as opposed to sexual contact (indecent liberties).⁶⁶

5. Other Charging Alternatives

While criminal mistreatment, abandonment of a dependent person, endangerment with a controlled substance, rape in the Second Degree and indecent liberties are crimes that specifically protect vulnerable adults, the prosecutor should consider all available charging alternatives when reviewing a referral. The facts of a case may support a variety of charges. The charge that best reflects the nature of the crime while holding the perpetrator accountable should be selected.

The following are some of the crimes commonly perpetrated against vulnerable adults:

a. Persons Crimes

- Assault – RCW 9A.36.011 to 041
- Coercion – RCW 9A.36.070
 - May be used in an effort to control the vulnerable adult, and perpetuate the perpetrator’s control over the vulnerable adult.
- Malicious Harassment – RCW 9A.36.080
 - Applies when a listed act is committed due to, among other things, the victim’s mental, physical, or sensory handicap.
- Interfering with the Reporting of Domestic Violence – RCW 9A.36.150
- Failing to Summon Assistance – RCW 9A.36.160

⁶⁴ RCW 9A.44.050.

⁶⁵ RCW 9A.44.020(11).

⁶⁶ *Cf.* RCW 9A.44.100 and RCW 9A.44.050.

- This offense may arise in the context of a licensed care facility if an employee is the perpetrator and another employee knows of the offense and fails to report the offense.
- Intimidating a Witness – RCW 9A.72.110
- Unlawful imprisonment – RCW 9A.40.040
 - This offense may arise when the vulnerable adult has difficulties associated with mobility.

b. Property Crimes

- Theft – RCW 9A.56.010 to 050
- Unlawful issuance of checks or drafts – RCW 9A.56.060
- Identity Theft – RCW 9.35.020

The text of these statutes is set out in Appendix A.

C. Supplemental Charging Allegations

When making a charging decision, the prosecutor should determine whether any supplemental allegations are appropriate. The prosecutor should consider whether to allege aggravating factors for purposes of sentencing. The prosecutor should also consider whether to use a domestic violence designation. Finally, the prosecutor should consider filing special allegations of sexual motivation or special victim vulnerability.

1. Aggravating Factors

Whenever a vulnerable adult is the victim of an offense, the prosecutor should consider alleging an aggravating factor in order to obtain a sentence above the standard sentencing range. There are two aggravating factors that usually apply in vulnerable adult prosecutions. The first applies when the victim is “particularly vulnerable or incapable of resistance.”⁶⁷ The second applies when the perpetrator abuses a “position of trust, confidence, or fiduciary responsibility.”⁶⁸

⁶⁷ RCW 9.94A.535(3)(b).

⁶⁸ RCW 9.94A.535(3)(n). Please note that the subsections cited are only examples of the most aggravating factors most frequently present in prosecution of crimes against vulnerable adults. Prosecutors are encouraged to exercise their discretion in considering all available aggravating factors given the unique set of facts and circumstances in a given case.

The prosecutor must provide notice of the intent to pursue an aggravating factor before “trial or entry of the guilty plea.”⁶⁹ Notice is timely if it is provided in a manner that does not prejudice the substantial rights of the defendant.⁷⁰ In order to prevent an argument that the notice was untimely, the notice should be provided early in the litigation. Providing notice at the time that the information is filed can preclude arguments about timeliness. This approach can also assist in plea negotiations; it provides the defendant with a complete picture of the potential penalty s/he faces. A sample notice of aggravating factors is provided in the Appendix C.

2. Domestic Violence

The prosecutor should also consider designating the crime as one of domestic violence if the facts support such a designation. A domestic violence allegation is appropriate if the victim and defendant are “family or household members.”⁷¹

Family or household members means:

Spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.⁷²

The prosecutor should consider including a domestic violence allegation in the charging document. The Washington Association of Prosecuting Attorneys’ (WAPA) charging manual notes that some prosecutors include the following charging language in the information:

“[A]nd furthermore, the defendant did commit the above crime against a family or household member; contrary to RCW 10.99.020.”⁷³

⁶⁹ RCW 9.94A.537(1).

⁷⁰ *Id.*

⁷¹ RCW 10.99.020.

⁷² RCW 10.99.020(3).

⁷³ Pamela Loginski, Charging Manual, 40 (WAPA 2004), www.waprosecutors.org/pubs.html.

Defendants who are convicted for domestic violence offenses are prohibited from owning or possessing firearms. Additionally, when charges involve domestic violence the prosecutor can seek an exceptional sentence if the offense:

- Was part of ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;
- Occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or
- Manifested deliberate cruelty or intimidation of the victim.⁷⁴

These factors must be proven to the jury and should be alleged as early as possible during the prosecution.⁷⁵

3. Sexual Motivation or Diminished Capacity of the Victim

There are certain special allegations that the prosecutor is required to allege if the allegations are justified by the facts.⁷⁶ Those special allegations include sexual motivation and diminished capacity of the victim. These special allegations must be filed unless they will interfere with the prosecutor's ability to convict the defendant.

The sexual motivation allegation may be alleged relative to any crime, other than a sex offense, if the facts indicate that the crime was sexually motivated.⁷⁷ On the other hand, in the prosecution of certain sex offenses the prosecutor may allege diminished capacity of the victim. Specifically, the prosecutor may allege that the victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, if the allegation is factually supported.⁷⁸

These special allegations must be proven to a jury and should be alleged in the charging document. The following language should be included in the charging document when the prosecutor alleges sexual motivation:

and further, that the defendant committed the crime with sexual motivation, i.e., that one of the purposes for which the defendant committed the crime was for the

⁷⁴ RCW 9.94A.535(3)(h).

⁷⁵ See RCW 9.94A.535 and 9.94A.537.

⁷⁶ RCW 9.94A.835 and 9.94A.838.

⁷⁷ RCW 9.94A.835.

⁷⁸ RCW 9.94A.838.

purpose of (his)(her) sexual gratification; as provided, proscribed and defined by RCW 9.94A.030 and RCW 9.94A.127 or RCW 9.94A.835.⁷⁹

Similar language should be included in the charging document when the prosecutor alleges diminished capacity on the part of the victim:

and further, that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult; as provided, proscribed and defined by RCW 9.94A.838.

Once a sexual motivation or diminished capacity allegation is made, the prosecutor cannot withdraw the allegation without court approval.⁸⁰ The court can only approve withdrawal of the allegation after finding that an error was made in the initial charging decision, or that the prosecutor is unlikely to be able to prove the special allegation.⁸¹

When the jury makes a finding of sexual motivation or diminished capacity the defendant is sentenced under the non-persistent offender statute.⁸² A finding of sexual motivation results in a minimum sentence that is “either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.”⁸³ A finding of diminished capacity results in a minimum sentence that is “either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.”⁸⁴

⁷⁹ WAPA Charging Manual, at 42, see note 73, supra.

⁸⁰ RCW 9.94A.838(3) and 9.94A.835(3).

⁸¹ *Id.*

⁸² RCW 9.94A.712.

⁸³ RCW 9.94A.712(3)(c)(a).

⁸⁴ RCW 9.94A.712(3)(c)(ii).

V. EVIDENCE BASED PROSECUTION

The term “evidence based” prosecution describes a prosecution that relies on physical and circumstantial evidence in order to establish guilt. Evidence based prosecution is frequently used when the victim refuses, or is otherwise unable, to participate in the prosecution. Solid evidence based prosecution requires a thorough investigation and thorough trial preparation.

Historically, evidence based prosecution has been used in domestic violence prosecutions because victims tend to recant or become unavailable during prosecution. Domestic violence victims are often pressured by the perpetrator, friends and family members to recant or “drop charges.” The vulnerable adult may be subject to similar pressures associated with fear, living arrangements and their dependence on others to meet their daily needs. Additionally, crimes against vulnerable adults often involve domestic violence. Moreover, as the result of deteriorated health or death, many vulnerable adults are not physically or mentally able to testify by the time a case is brought to trial. Therefore, cases involving abuse or neglect need to be prepared with the assumption that the victim will not be available to testify at trial.

A. The Building Blocks of Evidence Based Prosecution: Corroborating Evidence

In evidence based prosecution the prosecutor relies on evidence such as photographs, physical evidence, eye witness testimony, hearsay exceptions, statements or admissions by the defendant, and medical testimony and records. This section identifies the primary types of corroborating evidence used in vulnerable adult prosecutions.

1. Photographs

As a matter of course, officers should take photographs of the crime scene, victim, suspect, and any other items that may have evidentiary value in a case. The premise is that a picture is worth a thousand words. Photographs are particularly helpful to a jury that is trying to determine what happened, how it happened and which witnesses to believe.

When reviewing a vulnerable adult abuse or neglect case the prosecutor should look for the following photographs:

a. Victim’s Injuries

When an officer is investigating vulnerable adult abuse or neglect, the victim should be examined for injury. Ideally, a full body examination should be conducted because altercations often result in pain, bruising, scratches, or other injuries that the victim may not report because the victim is upset or focused on the most painful, or most

serious, injury. The extent to which such an examination can occur will depend on the surrounding circumstances in a given case.

In addition to describing the victim's injuries in a report, the officer should photograph the injuries. This includes photographs of scratches, bruises, lumps, cuts, loose hair, red abrasions, dislocated or broken bones, pressure ulcers, or any other visible injury. When photographing injuries, particularly pressure ulcers, measurements should be taken so that the size of the injury is documented. In a case involving pressure ulcers there is likely to be expert testimony. The size of the ulcer will be something that the expert will want to know. Additionally, the expert will want to know about the coloration of the wound site and whether it was dry or moist.

If the officer did not obtain photographs of the victim during the initial investigation, then follow-up investigation should be requested. If the victim has visible injuries at the time of the follow-up, the injuries should be photographed. Additionally, if photographs were taken during the initial investigation, the officer should check with the vulnerable adult to observe and photograph the progression of the injuries. For example, bruising changes color over time. Photographs of the progression of the bruising can be compelling evidence that will help the prosecutor explain the extent of injury to the victim.

If the officer did not obtain photographs of the injury and the injury is no longer observable, the prosecutor should check with medical personnel to find out if any photographs were taken during the course of treatment.

b. Suspect's Injuries or Lack of Injuries

The suspect should be photographed during the initial investigation. The photographs should be taken regardless of whether the suspect has any visible injuries. At a minimum, the photographs should show the suspect's face, neck, hands, and arms. The suspect should be given the opportunity to identify any other injuries so that they can be photographed. Frequently, any injuries sustained by the suspect are caused by defensive actions taken by the victim. Alternatively, complete absence of injuries can be used to disprove a claim of self-defense. In neglect cases, photographs of the suspect can illustrate personal hygiene, clothing care, and other physical condition, that can be compared or contrasted with the victim's physical condition.

If photographs of the suspect are not obtained by the officer during the initial investigation, the prosecutor should obtain the suspect's booking photograph (if it was taken on the date of the offense). At the very least, the booking photograph will show the injuries or absence of injuries on the suspects face. Additionally, if the suspect has tattoos the portions of his body that are tattooed may also have been photographed.

If the defendant was treated at a hospital on the date of the offense, the defendant's medical records may contain photographs of any injuries. For a discussion of how to obtain medical records, see Section V A 8 a of this manual.

c. Crime Scene

The crime scene should also be photographed. The type of offense will dictate what items are photographed. At a minimum, the photographs should include overviews of the scene because the importance of certain aspects of the scene may not be obvious during the initial investigation. An overview of the room from several perspectives helps to place the scene, and any close-up photographs, in context. An overview can also assist the prosecutor during cross-examination of a defendant if the defendant's account is inconsistent with the crime scene. This is especially significant where defendant claims "we only had an argument" or that the vulnerable adult "just fell." The physical evidence may not be consistent with these statements – there might be broken lamps, holes in the wall, knocked over chairs, etc.

Close-up photographs of items at the scene should also be taken. In an abuse case, photographs might show evidence of a struggle, injury, or interference with the vulnerable adult's ability to obtain help. Broken or overturned furniture, blood, phone cords ripped from the wall or unplugged, broken telephones and torn clothing are examples of the type of evidence that should be photographed at the scene of an abuse case.

In a neglect case: unsanitary living conditions, bare cupboards, an empty refrigerator, a broken toilet, soiled bedclothes, a lock on the outside of the vulnerable adult's door, no telephone available to the vulnerable adult, are examples of the type of evidence that should be photographed. If the perpetrator lives with the vulnerable adult then the perpetrator's living area should be photographed. In neglect cases there is frequently an obvious difference between the perpetrator's living conditions and those of the victim.

2. Physical Evidence

There are numerous types of physical evidence that should be seized in order to corroborate the details of an offense. Some types of physical evidence are automatically seized by the officer. Others may be overlooked. The prosecutor should review the initial investigation and identify, at the earliest possible stage, what evidence has already been seized and what additional evidence needs to be seized.

When reviewing a vulnerable adult abuse or neglect case the prosecutor should look for the following physical evidence:

a. Weapons

Officers should look for and seize weapons when there is evidence of abuse or assault using an inanimate object. Weapons such as guns, knives, and baseball bats are usually seized by the officer at the crime scene. Unfortunately, less obvious weapons are sometimes overlooked. An investigation may reveal that the abuse involves suffocation, burning, kitchen utensils, etc. Officers and prosecutors should review the signs of abuse

in order to identify and obtain less traditional weapons such as frying pans, scissors, clothing or curling irons, razors, shoes, boots, pillows, blankets, etc. It could also include items used to restrain the victim: rope, belts, rags, electrical cords, or socks etc.

If there is no evidence that a weapon was used by the perpetrator, it is still important for the officer to note the presence of weapons or evidence of weapons in the home, or at the crime scene. For example, the officer may want to note if there are holsters, cartridges, clips, knife sheaths, or other items in plain view at the crime scene, or in its vicinity. This type of evidence can help the prosecutor when addressing conditions of release or explaining why a victim might be afraid to testify.

b. Damaged Property

In addition to photographing the damage at a crime scene, the officer should seize the damaged property. If the officer did not seize the property but the crime scene was secured, then the prosecutor should have the officer follow-up and seize damaged property. Broken telephones, chairs, lamps, televisions, radios, or glassware are examples of the items that should be seized because they will help the jury gain a clear picture of what happened.

Evidence of drug use may be relevant to prove the abuser's motive to commit the crimes. It also can explain the nature of their relationship, e.g., he beats her every time he gets drunk or high or threatens her for drug money. In the context of neglect, there may be property damage such as a broken refrigerator, sink, toilet, microwave, stove, etc. The fact that these necessary fixtures are not working, and the length of time that they have not been working, can be relevant to the issue of neglect.

c. Victim's Diary

If the vulnerable adult keeps a diary it may contain documentation of the abuse or neglect. The prosecutor should ask the vulnerable adult about the existence of a diary, if the officer has not already done so.

d. Linens or Clothing

Clothing, sheets, blankets, couch covers or other items that are torn or have blood or possible bodily fluid stains are also useful in providing the jury with an accurate picture of the event. In instances of neglect, the bed linen may be soiled or caked with urine and/or feces. These items should be seized as evidence of neglectful living conditions.

e. Medications/Supplements/Assistive Devices

Officers should also look for and gather information about medications, nutritional supplements, and assistive devices. In cases of neglect, there may be medications that have been stockpiled and were not given to the vulnerable adult as

prescribed, or there may not be any medication available to the vulnerable adult despite a recent prescription. If the vulnerable adult needs to take nutritional supplements the absence of those supplements might be evidence of neglect. Alternatively, if the vulnerable adult is supposed to take nutritional supplements and they are in the house, but are outdated or on a shelf that cannot be reached by the vulnerable adult, their location may be evidence of neglect. Finally, if assistive devices such as a cane, wheelchair, bench in the bathtub are needed but are either not present, out of reach of the vulnerable adult, or broken, there may be evidence of neglect. The determination of whether these individual facts constitute neglect will be based upon the totality of the circumstances in the individual case. One factor standing alone may not rise to the level of neglect but can act as a flag for additional investigation.

3. Witnesses

There are a variety of fact witnesses who the prosecutor can rely upon to prove vulnerable adult abuse or neglect. Frequently these crimes occur in the vulnerable adult's room, apartment, home, or the residential care facility where the vulnerable adult lives. Often there are neighbors who may have heard or seen something that can provide the jury with a more complete picture of the events. If the officer has not identified and interviewed these witnesses when the case is referred for prosecution, then the prosecutor should request additional follow-up in order to obtain this information.

a. Witnesses to the Event

Aside from those witnesses who are present when the officer responds to the crime scene, or those who are identified as present during the crime, there may be other witnesses to the event who can be easily identified. For example, in an abuse case, neighbors might have heard raised voices, crying, shouting, whimpering, crashing, glass breaking, etc. The neighbors might have seen the defendant enter the residence, or leave the residence around the time of the crime. In neglect cases, neighbors, friends, acquaintances, or members of the vulnerable adult's church might have observed weight loss, signs of dehydration, poor hygiene, dirty clothing, depression, or other signs of deteriorating mental or physical state. It is also important to remember that evidence of lack of contact or care may be integral to proving neglect. Therefore, what a witness did not see may be relevant. For example, if neighbors did not see the care provider coming and going for several days, that evidence could be used to prove neglect.

The following list identifies some potential witnesses who should be interviewed:

- Attending physician/LPN/ARNP. Can be helpful in determining the patient's condition, progress, and/or deterioration over a period of time.
- Emergency room physician. Can assist in the determination of the patient's condition after the incident of abuse or neglect.
- Medical Examiner. Can provide information about the cause of death.
- Ex-employees and employees of the care facility where the victim resides. Can provide information regarding the care of the patient during their

employment, observations regarding staff members, and general knowledge about the practices and procedures at the facility. Volunteers or others who regularly visit the facility also might have relevant information.

- Other patients in the facility. Can provide information about general care. May also have witnessed abuse or neglect.
- Neighbors. Can provide information about physical and mental condition of the victim and any history relating to interaction with the suspect. Neighbors may also have factual information about the incident in question including suspicious conditions, changed circumstances, coming and going by the caregiver, etc.
- EMT's/Fire personnel/Ambulance employees. Can provide information about the physical and mental condition of the victim at the time of the incident. Usually these are the first responders who may have made crucial observations when they arrived on scene.
- Family and friends of the victim. Can provide contextual information relating to competency as well as any physical or emotional deterioration or changes. They may also have information relating to a change in living circumstances.
- X-ray technicians. May be able to explain the type of fracture or break and possible causes.

b. Witnesses to Establish Capacity

Neighbors, friends and family members can testify about the vulnerable adult's communication abilities and their ability to accurately describe an event. These are fact witnesses and care should be taken to ensure that they do not offer opinion evidence unless the defendant raises the issue. A more detailed discussion about capacity can be found in Section III C of this manual.

c. Expert Witnesses

Although expert testimony is not always necessary to prosecute vulnerable adult abuse or neglect, the prosecutor is more likely to use expert testimony in these types of cases. The need for expert testimony will depend upon the facts and circumstances of each individual case. Expert testimony may be necessary: to establish that the vulnerable adult's physical or emotional state is the result of neglect; to explain the extent of the injuries and how they would be sustained; or to establish capacity. Forensic nurses, geriatricians, experts on pressure ulcer development, and mental health professionals are examples of the types of experts commonly used in vulnerable adult abuse and neglect prosecutions.

4. Suspect's Statements

Admission, confessions, or inculpatory statements made by the defendant to law enforcement officers, health care providers, or others can be used to establish that the crime was committed. Exculpatory or neutral statements will also be important to the prosecution in order to assess the strength of the case, identify inconsistencies between

the physical evidence and a given version of the event, or for impeachment should the defendant testify.

The suspect's demeanor and physical condition should be noted by law enforcement officers. A difference between the suspect's living circumstances and the vulnerable adult's living circumstances may help to establish neglect. If the suspect is living in a clean environment, or lavishly, while the vulnerable adult lives in unsanitary squalor then there may be neglect. This can also be evidence of financial exploitation. Similarly, if the suspect is well groomed and clean but the vulnerable adult has poor grooming, then there may be neglect.

5. Diagrams

Diagrams of the crime scene can help the witnesses remember the details of the incident, and help the jury understand the witness' testimony. Similarly, body charts reflecting to size and location of injuries can help the officer provide the jury with a clear picture of the injuries sustained by the vulnerable adult. If a diagram of the crime scene or a body chart is not provided with the initial report, the prosecutor should consider requesting a supplemental report with those items if the information would prove useful at trial.

6. 911 Recording

If someone called 911 to report the incident in question, then a recording of that call should be obtained and listened to as soon as possible. If the 911 call was made by the vulnerable adult, it may contain statements, such as present sense impressions or excited utterances, that are admissible under an exception to the hearsay rule. The recording will also reflect voice tone, or provide other evidence of the victim's emotional state at the time (sobbing, gasping, etc). If the 911 call was made by the defendant then it may contain statements against interest, or information that contradicts subsequent statements by the defendant. The recording will also reflect the defendant's voice tone and, possibly, the defendant's emotional state.

If the 911 call was made by a third party, then that person should be identified, located and interviewed. The caller is another potential witness who can provide corroborating evidence. Additionally, some events result in more than one call to 911. Therefore, the 911 recording may lead to several witnesses, or statements that can be used in the case.

When playing a 911 call for the jury the prosecutor should consider providing them with a transcription of the call so that they can read along as they listen. While defense counsel may object to the use of a transcript on the premise that it unduly emphasizes the evidence, similar objections have been rejected by the courts. It is well settled that transcripts of recordings can be given to the jury as "listening aids."⁸⁵ As a

⁸⁵ *State v. Cunningham*, 93 Wn.2d 823, 834-35, 613 P.2d 1139 (1980).

prerequisite to use of the transcripts the prosecutor must establish that the transcripts are accurate, unless defense counsel stipulates to the transcript's accuracy.⁸⁶ Additionally, the transcripts are only to be given to the jury while the recording is being played; the transcripts cannot go to the jury room.⁸⁷

7. Officer's Report

While the prosecutor receives a report from the primary investigating officer, there may be other officers involved in the case. Sometimes only the primary officer prepares a report in a given case. At a minimum, the primary report should identify other officers who were present at the scene or involved in the investigation. The prosecutor should speak with the other officers to determine if they have any information relating to the case that is not otherwise reflected in the reports. If they have additional information a report should be prepared so that the prosecutor can comply with the state's discovery obligations.

In order to paint a clear picture for the jury and lay the foundation for any excited utterances or present sense impressions by the victim, the officer should:

- Describe the vulnerable adult's emotional state and demeanor at the time of arrival.
- Describe the vulnerable adult's physical appearance at the time of arrival.
- Describe the vulnerable adult's injuries.
- Note any difficulties that the vulnerable adult has moving or communicating.
- Include the vulnerable adult's height and weight and the defendant's height and weight.
- Describe the vulnerable adult's body language. (e.g. holding stomach, wincing, etc.)
- Write down direct quotes indicating the victim's state of mind or feelings of pain.
- Write down direct quotes relating to the defendant's explanation of the event.
- Describe what the vulnerable and the defendant were doing when the officer arrived.
- Describe where the vulnerable adult was when the officer arrived.
- The officer should also look for the following circumstances or items as they can be evidence of neglect:
 - Hoarding items. The abused or neglected individual might hoard food because they are afraid that they will be left alone without food. This behavior can arise when the individual has been deprived of food in the past. Hoarding can also be evidence of mental illness.

⁸⁶ *Id.*

⁸⁷ *Id.*

- Poor grooming. Matted hair, urine or feces on the vulnerable adult. Toenails or fingernails that have not been clipped.
- Unsanitary living conditions. Soiled or missing wound dressings. Urine or feces on the bed clothes. Dirty dishes, bad smells, etc.
- Medications. Lack of medications when they are prescribed. Medications that are out of reach or expired.
- Refrigerator and cupboard contents. There may not be any food available.

The officer should also obtain contact telephone numbers from the vulnerable adult as well as alternative contact numbers for close friends or relatives. The alternative contact information will help to track down the vulnerable adult in the event that s/he moves prior to trial.

8. Medical Records

Health care related records are essential evidence in abuse and neglect cases. Ideally, the prosecutor will receive the victim's medical records with the initial investigation report when the case is referred for charges. Unfortunately, it is not always possible for the investigating officer to obtain all of the medical records because the records do not always exist when the officer is conducting his initial investigation; medical providers are often testing and treating the victim at the same time that the officer is investigating. If the suspect was treated as a result of the incident his/her medical records should be obtained if injury, or lack of injury, is relevant to the case.

Upon receipt of the initial report the prosecutor should confirm that the officer obtained a release or search warrant for the medical records and is in the process of gathering those records. If the officer is not in the process of obtaining the records, the prosecutor should ask the officer to obtain the records, or the prosecutor should subpoena the records. Additionally, the prosecutor should consider obtaining medical records for one year before the incident through the time immediately after, including those located in the health facility to which the patient was transported. Those records help the prosecutor assess the extent of injury suffered by the vulnerable adult, may address capacity issues, and may be required by an expert witness. Medical records are admissible under the business records exception to the hearsay statement, as well as the statement for purposes of medical diagnosis or treatment exception.

a. Obtaining Medical Records

i. Health Insurance Portability and Accountability Act (HIPAA)

When an officer or prosecutor requires health care records for an investigation or prosecution they may encounter objections from the providers. Health care providers frequently point to the privacy provisions of HIPAA as a basis for denying access to health care records absent a waiver from the patient. While HIPAA does recognize the need for law enforcement to have access to health care records, it limits disclosure to

certain types of information to specific situations. This manual does not contain an in depth discussion of HIPAA law enforcement exceptions because many of them are permissive (they do not require disclosure to law enforcement), limit the amount of information that can be provided, or do not apply in the context of vulnerable adult abuse or neglect. Absent a waiver or consent to release of health care records from the patient law enforcement must often rely upon search warrants and other methods to obtain health care records. Instances when HIPAA permits disclosure to law enforcement will be discussed briefly in subsequent paragraphs.

HIPAA authorizes the disclosure of health care records to law enforcement in abuse, neglect or domestic violence cases “to the extent that the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law.”⁸⁸ In Washington there does not appear to be a law that requires such disclosure to law enforcement in these instances. There are instances in which disclosure to Adult Protective Services would be required and could result in disclosure to law enforcement. However, under current Washington law, disclosure to law enforcement in these circumstances is unlikely to occur unless the disclosure is necessary to prevent or lessen a serious and imminent threat to another.⁸⁹

Under HIPAA, law enforcement may obtain limited information from health care providers in order to identify or locate “a suspect, fugitive, material witness, or missing person.”⁹⁰ The information is limited to: name, address, date and place of birth, social security number ABP blood type and rh factor, type of injury, date and time of treatment, date and time of death (if applicable) and a description of distinguishing physical characteristics including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars and tattoos.⁹¹

HIPAA also authorizes disclosure of a victim’s health care records if the victim consents, is incapacitated, or the situation is emergent. If the officer seeks health care records on the basis of incapacity or an emergency, the officer must state that: 1) the information is necessary to determine if a crime was committed against the victim; 2) the information is not intended for use against the victim; and 3) delay in disclosure would materially and adversely affect the law enforcement activity.⁹² In light of the officer’s representations, the health care provider must then find that disclosure is in the best interests of the person’s whose records are sought.

⁸⁸ 45 CFR § 164.512(c)(1).

⁸⁹ 45 CFR § 164.512(j)(1)(i)(A)(B).

⁹⁰ 45 CFR § 164.512(f)(2).

⁹¹ *Id.*

⁹² 45 CFR § 164.512(f)(3).

HIPAA also authorizes disclosure of health care information if: 1) the patient has deceased and the health care provider suspects that the death was the result of criminal conduct; 2) a crime was committed on the health care provider's premises and the health care records are believed to contain evidence of the criminal conduct; or 3) a health care emergency exists and disclosure of health care records is required to alert law enforcement of the commission and nature of the crime, location of the crime, location of victim(s), and the identity, description, and location of the perpetrator.⁹³

HIPAA does require disclosure of health care records pursuant to a written release from the patient or a lawful court order such as a health care records subpoena, search warrant, or special inquiry judge subpoena.⁹⁴ As these are the methods that are the most likely to be used in a vulnerable adult abuse or neglect investigation/prosecution, those methods are discussed in Sections V A 8 a ii and iii of this manual.

ii. Investigative Stage

The quickest and easiest way to obtain medical records is through a release from the vulnerable adult, or his/her authorized representative. Ideally, the officer will obtain the release during the initial investigation. If the vulnerable adult or his/her representative will not provide a release, then the officer can obtain a search warrant authorizing the release of the medical records. The health care provider should produce medical records in response to a release or search warrant without significant delay. Additionally, most health care providers or facilities will provide medical records to law enforcement officer without attempting to charge for the documents.

Many medical records are double sided. The officer should be sure to review the documents when they are provided in order to ensure that copies of both sides of double sided forms or documents have been provided. The officer should also review the copies to ensure that no text was cut off or obscured during when they were copied.

iii. Prosecution Stage

If medical records are not obtained during the investigative stage, then the prosecutor can subpoena the medical records. One of the benefits to subpoenaing the medical records is that the prosecutor can define the parameters of the request. Drawbacks include a delay in obtaining the records, and the possible efforts by medical facilities to charge for production of the records because they were subpoenaed by an attorney.

In cases involving the use of certain enumerated weapons to intentionally cause harm, an officer or prosecutor can obtain limited medical information without a subpoena

⁹³ 45 CFR § 164.512(f)(4), (5) and (6).

⁹⁴ 45 CFR § 164.501.

or patient consent.⁹⁵ In those cases, the prosecutor may want to obtain basic information before issuing a subpoena for the records. The information can be obtained through a written or oral request to a nursing supervisor, administrator, or designated privacy official.⁹⁶ The scope of information that can be provided is limited, so medical records will still need to be subpoenaed. Nevertheless, the limited information can help the prosecutor refine the scope of the subpoena. The information that can be disclosed pursuant to the written or oral request is limited to:

- The name of the patient;
- The patient's residence;
- The patient's sex;
- The patient's age;
- The patient's condition;
- The patient's diagnosis, or extent and location of injuries as determined by a health care provider;
- Whether the patient was conscious when admitted;
- The name of the health care provider who determined the patient's condition, diagnosis, extent and location of injuries;
- Whether the patient has been transferred to another facility; and
- The patient's discharge time and date.⁹⁷

RCW 70.02.060, sets out the procedures governing the subpoena of medical records. In order to subpoena medical records the prosecutor must:

- Provide at least fourteen days advance notice to:
 - The health care provider;
 - The patient; and
 - The patient's attorney.
- The notice must be served or sent via first class mail.
- The notice must identify:
 - The health care provider from whom the information is sought;
 - What health care information is sought;
 - And the deadline for obtaining a protective order in order to prevent disclosure (at least fourteen days).⁹⁸

⁹⁵ RCW 70.02.050(2)(c).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ RCW 70.02.060(1).

After the outlined procedures have been satisfied, the medical records must be provided unless a protective order has been issued by a court of competent jurisdiction.⁹⁹

iv. Licensed Care Facility Records

Most prosecutors have at least some experience requesting and obtaining medical records from doctors, emergency rooms, and hospitals. In vulnerable adult prosecutions an additional source of medical or care related documents is the licensed care facility. These facilities are required to maintain certain types of documentation for licensure. When prosecuting a crime that has occurred in a licensed care facility the following documents may be relevant to the case:

- Nursing/Rest Home current license or license relating to the date of the offense;
- Incident Reports;
- Witness/Employee Statements;
- Witness/Employee Personnel Records/Evaluations;
- Employee Schedules and Time Sheets for the Week of the Incident;
- Nursing/Rest Home Floor Plan;
- Patient Abuse Information/In-Service Training, etc. given to the employees;
- Employee Handbooks/Information;
- Victim's Face Sheet; Patient Intake/Enrollment Information (including next of kin/responsible person information);
- Victim's Nurses Notes, Medication Sheets, Photographs of Injury, Progress Notes, Physician Orders (Daily and Monthly), Treatment Sheets, Intake and Outtake Sheets for one month prior to the incident and one month after the incident;
- Victim's Social Work Assessments;
- Victim's Hospital Records, Referrals and Discharge Form;
- If the suspect is an employee of the licensed care facility then the prosecutor should obtain the suspect's personnel folder including:
 - Current address
 - Current telephone number
 - Social security number
 - Date of birth
 - Marital status
 - Employment application
 - License/Board of Registration Certificate
 - In-Service training record
 - Verification of receipt of patient abuse information
 - Evaluation

⁹⁹ RCW 70.02.060(2).

- Prior Incident Reports/Warnings
- Statements made to Anyone Concerning Incident
- Suspension/Termination Notice due to Incident
- Outside agency information

Each licensed care facility will take a different approach to providing documents in a criminal investigation. Some will be very cooperative, others may be less cooperative. It may be useful for the prosecutor to speak with a local DSHS worker in order to determine whether they have any insight into the operations of the licensed care facility. If a resident of a licensed care facility has a DSHS case worker they may be able to assist the prosecutor in obtaining documentation from a licensed care facility. Residential Care Services (RCS) is the DSHS office responsible for the licensing and oversight of adult family homes, boarding homes, nursing facilities and certified residential programs. Local RCW numbers can be found on the DSHS website at www.aasa.dshs.wa.gov/Resources/rcshelp.htm.

v. DSHS Records

Many vulnerable adults have a DSHS case worker who works with the vulnerable adult to coordinate services. The case worker and DSHS may be a valuable resource for documents relating to the vulnerable adult's physical and medical needs. For example, a Comprehensive Assessment Reporting Evaluation (CARE) may have been completed in order to determine the extent to which the vulnerable adult needed assistance in daily living. CARE is the "the tool used by case managers to document a client's functional ability, determine eligibility for long-term care services, evaluate what and how much assistance a client will receive, and develop a plan of care."¹⁰⁰ A case worker may also provide insight into the communication abilities of the vulnerable adult.

DSHS is a large agency with numerous offices and divisions located throughout the state. Common DSHS offices or divisions that may have contact with vulnerable adults are:

- **Home and Community Services (HCS).** HCS staff help adults who require Medicaid funds to pay for services. Local contact information for HCS is available at www.aasa.dshs.wa.gov/Resources/clickmap.htm.
- **Residential Care Services (RCS).** RCS oversees adult family homes, boarding homes, and other licensed care facilities. Local contact information for RCS is available at www.aasa.dshs.wa.gov/Resources/rcshelp.htm.
- **Area Agency on Aging (AAA).** AAA facilitates the location of care, services and programs for older adults and provides support services to caregivers who

¹⁰⁰ DSHS website: www.aasa.dshs.wa.gov/professional/care/. This link points to additional information about CARE.

are family and friends. Local contact information for AAA is available at www.aasa.dshs.wa.gov/Resources/clickmap.htm.

- **Adult Protective Services (APS).** APS investigates allegations of abuse occurring in a vulnerable adult's own home. Local contact information for APS is available at www.aasa.dshs.wa.gov/Resources/clickmap.htm.
- **Division of Developmental Disabilities (DDD).** DDD provides various services to qualifying individuals with developmental disabilities. Frequently a developmentally disabled adult will have a DDD case worker who is familiar with his/her history and needs. Regional contact information for DDD is available at <http://www1.dshs.wa.gov/ddd/contacts.shtml>.

b. Understanding Medical Records

The number of medical records in a vulnerable adult case may be significantly greater than the ordinary assault case. In addition to the treatment records associated with any injuries sustained during the incident forming the basis of the underlying charge, pre-existing medical conditions may be relevant to determine the extent of the harm suffered and the victim's ability to testify. Therefore, it is important to have a basic understanding of the terminology associated with medical records. This basic foundation will enable prosecutors to confirm that requested documents have been received. It will also help the prosecutor prepare for interviews with medical witnesses. This basic knowledge can then be supplemented through interviews of the victim's treating physician, health care provider, or family doctor. The prosecutor may want to use a consultant with knowledge that can assist in the interpretation of medical records and assessing whether the care received was appropriate.

Medical records consist of a variety of documents or forms that are completed by health care professionals as the result of patient contact. Many medical records are double sided so prosecutors should make sure that both sides of the records were provided when the medical records were copied.

i. Face Sheet

The first page in a patient's medical record should be the face sheet. The face sheet contains basic information about the patient: name, residential address, date of birth, occupation, language spoken. The face sheet should also contain the provider's name and contact information as well as the names and contact information of other treating providers. The face sheet should also note the admitting diagnosis and the name and contact information of the patient's next of kin. Finally, if the patient has died the face sheet should contain information about the cause of death. The face sheet can be used to locate witnesses who may be familiar with the patient. Such witnesses may be familiar with any changes in physical condition or behavior experienced by the patient. Those witnesses and the information contained in the face sheet may also assist the prosecutor in establishing competency or cause of death.

ii. Medication Record or Medication Administration Record (MAR)

This chart lists the medications that have been prescribed to the patient along with the instructions and dosage associated with the prescription. The types of medication being taken by a victim can significantly impact a case. For example, if the injury in an assault case consists of substantial bruising then the prosecutor would want to know whether the victim was taking a blood thinner such as coumadin because that type of medication can impact bruising. If the patient is in a facility then the dates and times that the medication was administered are supposed to be recorded on the medication administration record. The nurse administering the medication should initial the date, time, dose, and strength on this chart. In neglect cases the medical records may not contain an MAR despite the fact the medications were prescribed.

iii. Progress Notes

As a general rule, the progress notes contain the notes that are made by physicians and nurses during the course of a patient's visit or stay. Some medical files will have separate sections with progress notes from the physician in one section and progress notes from therapists, dentists, or other health care providers in a separate section. Other medical files will have sequential progress notes that intermingle progress notes from health care providers from different disciplines. The progress notes can be quite useful in neglect cases because it may show ongoing medical issues that are not being treated, or a failure to adjust treatment when one approach is not successful.

Nurses may record their observations and treatment in the progress notes or there may be a separate section for the nurses' notes. In an in-patient or care facility environment the nurses notes should contain an ongoing narrative about the patient's condition, sleep patterns, moods, social interactions and reactions to treatments.

The S.O.A.P. (Subjective, Objective, Assessment, Plan) method is a widely accepted format for charting. Using this method the nurse or physician has the patient explain their health concerns; this is the subjective report. The nurse or physician then observes the patient's objective state, both physical and mental, and records the observations; this is the objective report. Based on the subjective report and the objective observations the patient's condition is assessed, or diagnosed. Finally, a plan of treatment is formulated.

iv. Dictations/Medical Reports/Consultation Reports

Many physicians dictate their notes after a patient has been seen. The dictations are then transcribed, reviewed, and placed in the patient's file. Frequently, dictations are associated with a surgical procedure, CT scan results, MRI results, or X-ray results. These reports may reference documents or other medical records that are not always provided in response to a request for medical records. Take note of the records

referenced in these reports so that the records can be obtained if they are believed to be relevant to the case.

v. Flow Sheets

These sheets should reflect vital signs, fluid intake and output, weight, nutritional intake, bowel and bladder training, turning of patient, positioning, use of restraints, dressing changes, etc. These sheets should be completed by the staff member performing the task.

vi. Nutritional Assessment

A detailed assessment of the patient's nutritional status that reflects the patient's weight, height, calorie requirements, and special diet restrictions. This assessment should exist if the patient had a significant stay in the hospital or resides in a residential care facility.

vii. Patient Care Plan

This plan identifies specific patient problems and indicates how the problems are being addressed. The patient care plan may be a separate or informal plan. It may also be incorporated into the progress notes.

viii. Wound Care Sheet

A wound care sheet contains diagrams of wounds, rashes and pressure ulcers. The sheet should reflect the development and care of the wound. An absence of a wound care sheet or other documentation associated with an advanced pressure ulcer may be evidence of neglect.

ix. Emergency Transportation Reports

These reports are prepared by the ambulance staff or fire department staff who are usually first responders. These reports are not always contained in the records at a hospital or care facility. Therefore, it is important to follow-up with the first responders in order to obtain their reports.

x. Incident Reports

These reports are usually found in the context of a licensed care facility or residential care facility. They are designed to document unusual occurrences and accidents relating to the patient or staff. The facility will conduct an internal investigation. This information may be useful to the prosecutor as it may assist in the identification of additional evidence or witnesses.

xi. Staffing Schedules and Time Cards

Staffing schedules are of particular import if the victim lives in a licensed care facility. The schedules may help the prosecutor identify witnesses to the offense or witnesses who can speak to the victim's physical or mental state prior to the suspected abuse or neglect.

9. Using Hearsay Statements

The successful evidence based prosecution often depends upon the use of statements that fall under an exception to the hearsay rule. The following hearsay exceptions are most commonly used in an evidence based prosecution:

- Present Sense Impression¹⁰¹
 - Common sources: 911 recordings; statements to officers; statement to emergency response personnel; statements to friends; statements to health care providers.
 - Common substance: statements indicating what the vulnerable adult is experiencing while the incident is in progress or immediately thereafter. The statement may describe what the person is doing to the vulnerable adult or how the vulnerable adult feels.
 - Examples: "Please stop hitting me." "Oh no, he's going to hit me." "My head hurts."
- Excited Utterances¹⁰²
 - Common sources: 911 recordings; statements made at the crime scene, or immediately following the incident.
 - Common substance: statements describing what occurred during the incident. The statement must be made when the vulnerable adult is still "under the stress of excitement caused by the event." Foundation requires a description of the emotional state of the vulnerable adult to establish that s/he was under the stress of the event.
 - Examples: Sobbing, the vulnerable adult says, "He twisted my arm until I heard a pop and now I can't move it." Screaming hysterically,

¹⁰¹ ER 803(a)(1).

¹⁰² ER 803(a)(2)

the vulnerable adult falls to the floor and repeatedly says, “I can’t believe he hit me.”

- Then Existing Mental, Emotional, or Physical Condition.
 - Common sources: 911 recordings, statements at the crime scene, statements to health care providers.
 - Common substance: statements describing a mental feeling, pain, or bodily health at the time it exists.
 - Examples: “I’m terrified that the defendant is going to come back.”¹⁰³
- Statement for Medical Diagnosis or Treatment.¹⁰⁴
 - Common sources: emergency response records or medical records.
 - Common substance: statements describing how the injury was sustained, where the injury is located, and how the injury feels. The statement must be made in the context of receiving treatment and must be reasonably pertinent to the treatment. How an injury is sustained is pertinent to treatment. Who caused the injury can also be pertinent to treatment, depending upon the facts.
 - Examples: vulnerable adult tells a nurse, “He kicked me in the stomach and now it hurts to breathe. It feels like I’m being stabbed each time I take a breath.” Vulnerable adult tells a doctor, “He wouldn’t give me water. I asked for water for days but he wouldn’t give it to me.”

The types of statements described above can be powerful evidence when trying a case involving vulnerable adult abuse or neglect. If the victim testifies then the prosecutor need only satisfy the foundation requirements for each applicable hearsay exception. When the victim is not available to testify prosecutors must determine whether the statement is “testimonial.”

¹⁰³ Depending on what was said, and what the issues are at trial, a statement relating to the victim’s state of mind might not be admissible. See *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980); *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650 (1983). A victim’s state of mind may not be initially relevant to the case, but it may become relevant if the defendant claims self-defense. It may also become relevant if the defendant challenges credibility or sincerity.

¹⁰⁴ ER 803(a)(4).

In *Crawford v. Washington*,¹⁰⁵ the United States Supreme Court concluded that the admission of testimonial hearsay statements violates the confrontation clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.¹⁰⁶ However, *Crawford* recognized that not all hearsay evidence is testimonial. Therefore, the admission of some hearsay evidence does not implicate a defendant's confrontation rights.¹⁰⁷ Business records are one of the exceptions recognized in *Crawford*.¹⁰⁸ This exception is derived from the non-testimonial nature of business records. Medical records are considered records and the statements contained in the medical records are usually for the purpose of medical diagnosis or treatment. Accordingly, medical records and statements contained therein are usually admissible under *Crawford*.

In determining whether a statement is testimonial, courts examine the purpose of the encounter; if it was for the purpose of preparing testimony for trial then it is testimonial.¹⁰⁹ An example of a testimonial statement would be an interview with law enforcement during a criminal investigation.¹¹⁰ However, not all contact that relates to law enforcement is testimonial. For example, 911 calls are not generally considered testimonial even though they involve contact with personnel associated with the police and government.¹¹¹ This is because the purpose of a 911 call is to obtain assistance.¹¹² Courts consider the circumstances surrounding the 911 call in order to determine whether it is testimonial, or a cry for help.¹¹³ If there is no evidence that the person was "testifying" then the call is admissible.

Washington courts have had the opportunity to apply *Crawford* to statements that are admissible under Evidence Rule 803(a)(4): statements for the purpose of medical diagnosis or treatment. Those courts "focus on the purpose of the declarant's encounter with the health care provider."¹¹⁴ In *Fisher*, the court considered whether the admission

¹⁰⁵ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

¹⁰⁶ *Crawford*, 541 U.S. at 51-52. Notably, if the witness testifies at trial, the confrontation clause has been satisfied.

¹⁰⁷ *Crawford*, 541 U.S. at 56.

¹⁰⁸ *Id.*

¹⁰⁹ *State v. Davis*, 154 Wn.2d 291, 299-300, 111 P.3d 844 (2005).

¹¹⁰ *Davis*, 154 Wn.2d at 300.

¹¹¹ *Davis*, 154 Wn.2d at 301.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Moses*, 129 Wn.App. at 729; *State v. Fischer*, 130 Wn. App. 1, 108 P.3d 1262 (2005).

of statements made to a physician violated the prohibition set forth in *Crawford*. *Fisher* examined how other states had addressed the issue and concluded that the statements were not testimonial. In reaching this conclusion, the court considered whether the physician was a government employee, and the purpose for gathering the information.¹¹⁵

Any analysis of whether a hearsay statement is testimonial is fact specific. If the prosecutor conducts the analysis and concludes that the statement is not testimonial, then the prosecutor should develop a record to support the conclusion in order to avoid reversal on appeal.

¹¹⁵ *Fisher*, 130 Wn.App. at 13.

VI. LITIGATION TACTICS AND CONSIDERATIONS

Trying the vulnerable adult abuse or neglect case is much like trying any persons crime once the prosecutor has an understanding of the issues and evidence involved. Because much of trial preparation is fact driven, it is difficult to recommend litigation tactics in the abstract. Additionally, prosecutors already have the knowledge necessary to structure the trial and address the strengths and weaknesses of the individual case being tried. Therefore, this section does not discuss the fundamental components of litigating a case. Rather, this section addresses unique litigation approaches that may generically apply to vulnerable adult prosecution.

A. Discovery

Often there are medical or capacity issues in vulnerable adult abuse and neglect prosecution. As a result, there is a greater likelihood that the defense will rely on testimony from fact and expert witnesses in an effort to undermine the credibility of the vulnerable adult. Consequently, the prosecutor needs to obtain discovery from the defense as soon as possible so that the prosecutor has the opportunity to review evidence, interview witnesses, and prepare for rebuttal.

The prosecutor should make a written request for discovery from the defense. The request should seek all information that the defendant is required to produce under CrR 4.7(b). Although not required, the prosecutor should consider setting a deadline for disclosure in the request. This provides a follow-up date for the prosecutor, and allows the prosecutor to extend the deadline while at the same time advising the defense attorney that a motion to compel will be filed if the extended deadline is not met. If there are any court appearances in the case while the prosecutor is pursuing discovery from the defense, the court should be informed of the status of the discovery requests. This may prompt the court to order disclosure by a date certain and may obviate the need for filing a motion to compel.

If the witnesses identified by the defendant refuse to speak with the prosecutor, then the prosecutor should consider asking the court to order a deposition. *See* CrR 4.6. If there are concerns about whether a vulnerable adult will be available to testify at trial, the prosecutor may want to consider taking a video perpetuation deposition. The potential for unavailability due to death or dementia is a real concern in vulnerable adult abuse/neglect prosecutions. Use of video depositions in criminal cases has been expressly approved by the Washington State Supreme Court.¹¹⁶

In order to take a video deposition the prosecutor must file a motion pursuant to CrR 4.6. The motion should indicate the method for recording the deposition (video) and why the deposition is necessary. Once a deposition is taken it can be used to impeach the

¹¹⁶ *State v. Hewett*, 86 Wn.2d 487, 491, 545 P.2d 1201 (1976).

witness. More importantly, it can be used in lieu of live testimony without violating the defendant's right to confrontation if:

- The witness is unavailable;
- The witness was sworn to testify during previous testimony;
- The accused was present and afforded the opportunity to cross-examine; and
- The foundation for admission of the prior testimony is established.

The foundation for use of a video deposition at trial is that:

- The audio portion of the tape is functioning properly;
- The video portion of the tape is functioning properly;
- The video operator is trained and experienced in use of video equipment;
- The audio portion of the tape is authentic and accurate;
- The video portion of the tape is authentic and accurate;
- No changes, additions, or deletions were made;
- The tape has been properly preserved;
- The video portion of the tape is clearly visible;
- The audio portion of the tape is sufficiently understandable; and
- The speakers on the tape must be identified.¹¹⁷

Once the video deposition is admitted, the prosecutor should consider giving the jury a transcript of the deposition to follow along with during the testimony. A transcript would be useful if the audio portion of the tape is difficult to hear, if the deponent speaks quickly, softly, or in some other unique manner. However, if the audio portion of the tape is easy to understand then the prosecutor needs to consider whether the transcript would distract from the jurors attention to the witness' demeanor.

B. Continuance Motions

Continuances can be particularly detrimental to the success of vulnerable adult abuse and neglect prosecutions. The victims may be more susceptible to memory loss or death than victims of other offenses. If the victim is available and ready for trial, a continuance can be frustrating and lead to reluctance to continue cooperating with the prosecution. Unless the continuance will not be detrimental to the prosecution, or will be advantageous to the prosecution, the prosecutor should vehemently oppose defense requests for continuances.

In order to minimize the likelihood that a continuance will be granted, the prosecutor should consider a proactive approach to scheduling defense interviews. The prosecutor can provide dates and times when experts and other witnesses are willing to make themselves available for defense interviews. These dates should be set out in a letter. If possible, the letter should be sent before the omnibus hearing. At the omnibus

¹¹⁷ *Hewett*, 86 Wn.2d at 493.

hearing the prosecutor can inform the court that the witnesses have been made available and state on the record that the prosecutor believes that the case is on track for trial as scheduled. This will help set the tone for any motions to continue and will strengthen an argument that the defense has not exercised due diligence in preparing the case for trial. Of course, the prosecutor should craft such an argument carefully in order to avoid creating an appellate issue.

The prosecutor should also be prepared to explain to the court, in concrete terms, how a continuance would have a detrimental impact on the case. The prosecutor should also consider presenting a detailed affidavit or testimony from a health care provider or therapist regarding the detrimental impact that delay would have on the vulnerable adult.

C. Motions in Limine and Trial Arrangements

Most prosecutors have standard motions *in limine* that are filed in every case. In addition to the standard motions, the prosecutor should consider whether it is necessary to arrange accommodations for the vulnerable adult during trial. If special arrangements are necessary, a motion *in limine* will ensure that the issues are addressed before the trial begins.

Examples of special arrangements that may need to be made when a vulnerable adult is a witness are:

- Use of microphones in the courtroom, if not ordinarily used, or increased volume on the microphones so that the vulnerable adult can hear the questions being asked.
- Use of a magnifying sheet by the vulnerable adult when looking at exhibits so that they can be read/identified or use of blow-ups of exhibits.
- Use of an assistive hearing device so that the vulnerable adult can hear the questions being asked.
- Relocation of the witness chair due to accessibility concerns. (e.g. difficulty with steps, wheelchair accessibility, etc).
- Frequent breaks to address difficulties sitting for long periods, or other personal health issues.

Prosecutors often litigate against a handful of defense attorneys on a regular basis. Some of the defense attorneys have standard tactics that are improper. The prosecutor should consider preparing standard motions *in limine* designed to address those tactics. If the prosecutor has transcripts of the hearings or trials during which the defense attorney previously used those tactics s/he should attach copies of the transcripts to the motion. Transcripts illustrate the concern and demonstrate that the defense attorney has used the improper tactic in the past. If the tactics are particularly egregious then the prosecutor's office may want to order the transcript, or portion of the transcript, that illustrates the tactic in anticipation of future motions. Alternatively, there may be cases that illustrate the tactic, which have already been transcribed for appeal.

D. Trial Briefs

Trial briefs can be valuable tools in vulnerable adult prosecution because they provide an opportunity to educate the court about the unique issues in the case and the law governing those issues. Trial briefs are particularly helpful if the charge is not one that is commonly filed in the jurisdiction.

E. Developing the Theme of the Case

There are several common themes in cases involving vulnerable adults. In a neglect case against a paid provider the theme might be greed or betrayal. In an abuse case the theme might be fear, isolation, or brutality. The prosecutor might talk about the golden years, or the value of life. The prosecutor might also discuss the child-like innocence of the victim or family related themes such as burden, jealousy, and entitlement. If there is a financial aspect to the abuse and neglect the theme might be jealousy or the “golden goose.” The facts and evidence in each case will dictate the theme of the case. The theme should be introduced during voir dire, preferably by a juror, and weaved throughout the entire prosecution.

F. Voir Dire

Effective voir dire is crucial to the success of any case, particularly in a case with unique issues such as those present in vulnerable adult prosecution. Voir dire is the first opportunity that a prosecutor has to present to the jury. It is an opportunity to uncover bias or prejudice. It is also an opportunity for a prosecutor to develop the theme of the case and educate jurors.

Voir dire is also one of the more difficult trial components to master. It is an art form unto itself that requires thorough preparation and practice in order to be effective. The goal of voir dire is to gather as much information as possible from the potential jurors in order to make an informed decision about who to strike from the panel. This section provides prosecutors with some tools and techniques for developing their own case specific voir dire questions in vulnerable adult prosecutions.

Voir dire is governed by Criminal Rule 6.4(b):

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask that prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

CrR 6.4(b). The rule governing voir dire should guide the development of questions so that the prosecutor can anticipate and respond to any objections made by opposing counsel. If an objection arises, the prosecutor should reference the rule and explain how the line of questioning is:

- Aimed at “gaining knowledge to enable an intelligent exercise of peremptory challenges;” or
- A “basis for [a] challenge for cause.”

The voir dire process differs across jurisdictions and according to judicial preference. Some judges will limit voir dire. The prosecutor should tailor any voir dire questions to comply with the court’s standard procedures. If the prosecutor believes that voir dire needs to depart from the standard procedures, in order to address specific subjects and ensure that an unbiased jury is selected, then a motion *in limine* is appropriate.

1. Setting a Conversational Tone

The most effective voir dire is more akin to a conversation than a question and answer session. The jury must be engaged to the point that they actively participate. Interaction with the attorney who is asking the questions as well as interaction with one another’s responses to questions should be encouraged. This type of interaction can be developed through the use of open-ended questions, hypotheticals, and follow-up questions that reference previous juror’s responses. One of the benefits to using this approach is that many jurors are familiar with a similar model for group conversations: the talk show.

Talk show hosts engage their audiences by providing examples, asking questions, encouraging responses and interaction. Familiarity with a process, even if it has been taken out of context and placed in a courtroom, can reduce juror angst about being questioned in a public setting. Moreover, engaging the jurors in a group conversation is more likely to uncover juror opinions while providing the prosecutor with insight into how the jurors will interact with one another.

2. Uncovering Bias and Prejudice

The prosecutor should use voir dire as an opportunity to examine stereotypes about vulnerable adults. Care should be used when conducting this portion of voir dire because many jurors are retired and may possess certain vulnerabilities. It is possible that such a juror would identify with the victim. However, it is equally possible that such a juror would distance him/herself from the victim, bristle at the prospect of being considered a vulnerable adult, and become offended if s/he perceives that s/he is being categorized as a vulnerable adult. Therefore, the prosecutor must walk the fine line between educating without offending. The presence of senior citizens or vulnerable adults on the venire panel can help to combat stereotypes. Engage senior citizens and

vulnerable adults in discussions about their various strengths and vulnerabilities. This can help jurors to view vulnerable adults as individuals.

3. Overcoming the Negative Connotations of Bias and Prejudice

The terms bias and prejudice are mentioned at the beginning of voir dire. They are terms that carry negative connotations. Jurors translate bias and prejudice into an inability to be fair. Most people want to be considered fair so they tend to try to give “the right answer” rather than the most accurate answer to a question. Because of this tendency, it is important for the prosecutor to put the terms bias and prejudice into perspective. There are numerous ways that this can be accomplished.

For example, jurors can be asked about their favorite sports team. Other jurors are invited to indicate whether they have a different team as their favorite. Discuss how one juror would root for one team, while the other juror might root for another team. Translate that into a bias in favor of a sports team, or against another sports team. Discuss the fact that every juror brings with them a life full of experiences and preferences to the courtroom, and depending upon the circumstances those experiences and preferences might impact how a decision would be made. Elaborate. Explain that this is referred to as bias in court and it is important for open and honest communication to occur so that the attorneys are provided with the opportunity to discuss those possible biases with the jurors.

Another line of questioning focuses on television programs. Ask jurors if there is a television program that they watch every week. Talk about when the program is on and whether they could be convinced to miss their program to watch another program. Bring other jurors into the conversation asking if they have a different favorite program. Continue the discussion about what circumstances could cause them to miss their program or watch another program. Talk about how choosing one program over another shows a preference which might also be referred to as a bias in the context of voir dire.

While discussing television programs the prosecutor may want to discuss law enforcement and legal based television programs with jurors in order to dispel the myths created by those programs (e.g. investigations and trials can be resolved in an hour, entire crime lab teams are available to work on cases, etc). Discussion of the myths created on television and in movies also provides a transition into addressing the myths and stereotypes associated with vulnerable adults.

4. Myths and Stereotypes Associated With Vulnerable Adults

Voir dire provides the prosecutor with an opportunity to have the jurors themselves identify stereotypes about vulnerable adults and explain why the stereotypes are not always valid. The prosecutor should also encourage discussion about the type of information that the jurors might want in order to feel comfortable assessing a vulnerable adult’s testimony.

The most damaging stereotype in vulnerable adult prosecutions is the characterization of the vulnerable adult as an unreliable witness. Usually this characterization is based on the assumption that vulnerable adults have poor memories, or cannot adequately witness events because their eyesight or hearing has deteriorated. With regard to the developmentally disabled vulnerable adult, jurors may believe that the developmental disability interferes with their ability to accurately recount events. These stereotypes can be dispelled through discussion during voir dire. The prosecutor should use the facts of the case to identify the specific issues that should be addressed during voir dire.

If the vulnerable adult's credibility might be challenged based on the stereotype that s/he has a bad memory the prosecutor might ask the jurors if:

- They know anyone who might qualify as a vulnerable adult.
 - How is the person vulnerable?
- Do all vulnerable adults have bad memories?
- Do some of them have excellent memories?
- What types of things does a person with a bad memory forget?
- What types of things might that person remember?
- Is a bad memory the equivalent of dishonesty?
- Would you be inclined to assume that a vulnerable adult has a bad memory?
 - What would you do to address this concern?
 - What would you want to know?
- Get the jurors to commit to listen to the testimony and weigh it with all the other evidence.
- Ask the jurors about their own memories.
 - Have any of them ever forgotten something at the grocery store?
 - Do they do anything to prevent forgetting things?
 - What?
 - Does the fact that they forgot something at the grocery store mean that they would not be able to describe a significant event?
 - Does it mean that they cannot be trusted?

If the vulnerable adult will have difficulty hearing a question, or becomes easily confused then the prosecutor will want to talk about why s/he may have to repeat or restate questions. The jurors themselves may have difficulty hearing or understanding questions during voir dire. This provides an opportunity to discuss the importance of hearing and understanding questions. The prosecutor should also discuss the significance or lack of significance of slow responses; some witnesses simply

communicate slowly, particularly when they are nervous. This approach can be used to address any potential stereotype about vulnerable adults.

5. Sample Voir Dire Questions

Most prosecutors have standard voir dire questions that they supplement with questions that relate to the specific issues in the case that is being tried. This section provides some sample questions that can be used in vulnerable adult abuse and neglect prosecutions. It is not intended to be an exhaustive set of questions. Rather, it provides examples of the types of issues or questions that may need to be addressed in a vulnerable adult prosecution.

a. General Questions

NEGLECT

- What comes to mind when you hear the term neglect?
- Neglect can come in many forms. What behavior might constitute neglect?

- Discuss indicators of neglect.
 - Lack of medical attention
 - Soiled clothing or linens
 - Inadequate food or liquids/Dehydration/Malnutrition
 - Rapid weight loss, dry skin, mouth sores

 - Restricting vulnerable adult's access to visitors, or use of phone or mail
 - Pallor, sunken eyes or cheeks
 - Uncut fingernails or toenails
 - Urine burns, dried fecal matter
 - Failure to provide adequate clothing
 - Failure to provide hearing aides, glasses, dentures or prostheses
 - Pressure ulcers
 - Over or under medicating
 - Include signs specific to the case at hand
 - Living conditions of vulnerable adult compared to the perpetrator
 - Lack of required medical aids (canes, wheelchairs, etc.)
 - Locks on the outside of the bedroom door, refrigerators, cupboards
 - Empty refrigerators, cupboards

ABUSE

- What comes to mind when you hear the term abuse?
- Abuse can come in many forms. What behavior might constitute abuse?

- Discuss indicators of abuse.
 - Unexplained bruises, welts, scratches, fractures, burns, scars
 - Scalp injuries, hand injuries, punctures, fractures, sprains
 - “History” of falls
 - Dehydration and malnutrition i.e. rapid weight loss, dry skin
 - Decubitus ulcers also known as pressure sores
 - Over or under medicating
 - Frequent documentation of or visits to the hospital for injuries of “unknown origin”
 - Include signs specific to the case at hand
 - Detached retinas
 - Changing doctors frequently to avoid detection
 - Depression
 - Broken bones, teeth or dentures
 - Signs of physical restraint such as rope or gag marks, bruising from grips

GENERAL

- What comes to mind when you hear the term vulnerable adult?
- What comes to mind when you hear the term dementia?
- What do you think of when you hear that someone lives in assisted living?
 - Have you ever been to an assisted living facility?
 - Do you have a friend, relative or acquaintance that lives in an assisted living facility?
- What do you think of when you hear the term that someone lives in a nursing home?
 - Have you ever been to a nursing home?
 - Do you have a friend, relative or acquaintance that lives in nursing home?

b. Vulnerability Questions

- Have any of you ever felt vulnerable before?
 - Tell us about that circumstance?
 - How did you handle it?
- Is there anyone who has never felt vulnerable before?
 - Can you conceive of a situation in which you would feel vulnerable?

- Would you agree that there are all kinds of ways that a person can feel vulnerable?
- How do you feel during various stages of pregnancy?
- How do you feel when you are walking across an icy parking lot? Walking on icy stairs without a railing? Walking up a steep hill covered with ice sheets? Driving up a steep hill covered with sheets of ice? Wearing high heels when the sidewalk is icy?
- How do you think a police officer feels when a person points a gun at him?
- How does a child feel when he encounters a bully at school? On the playground?

- Have any of you had to rely on another person for the basic necessities of life? (food, clothing, mobility)

- Have you ever been bedridden during an illness or after a surgery?
 - How did that feel?
 - Were you able to move?
 - Were you able to move without assistance?
 - Were you able to move as well as you did before the surgery?
 - Did they provide the basic necessities to you?
 - Did they feed you?
 - Did you ever have to wait to eat based on the caregiver's schedule?
 - Were they always available to you when you wanted them?
 - Were they always available to you when you needed them?

- How might a person feel if he cannot drive and is dependent upon another for groceries?
 - What feelings would he have for a person who was supposed to get him groceries?
 - Gratitude, trust, fear, resentment?
 - Would it depend on how reliable the person is?
 - Would it depend on how the person treats him?
 - How might it depend upon those factors?
 - How might those feelings carry into the courtroom?

- Isolation with limited mobility.
 - If a person has limited mobility (not able to drive, not able to get far from the house) and has little contact with others, how might that person feel towards a caregiver?

- How would those feelings change if the person's treatment of him changed?
- If you were dependent upon a caregiver and he stole from you, what would you do?
 - Would your response be different if the caregiver was a relative?
 - Would that change if you didn't have a phone?
 - Would that change if you had no children or friends who could take his place?
 - Might you fear the unknown? (possibility that another caregiver would be worse)
- What would you do if you were dependent upon another for meals and the person skipped a day?
 - How would you feel?
 - What would you do if they told you that they would skip even more days if you told anyone that they had skipped a day?
 - How would you feel if they threatened you if you told anyone about how they treated you?
 - How might you react to having to testify against such a person?

c. Developmental Disability Questions

- What comes to mind when you hear the term developmentally disabled?
- Have any of you ever known or had contact with someone with a developmental disability?
- How was that person different from someone without a developmental disability?
- How was s/he the same as people without developmental disabilities?
- What might you want to know about a person with a developmental disability if s/he was telling you about something that happened?
- Do people with developmental disabilities make you feel uncomfortable?
- Do you think a person with a developmental disability is more believable than someone without a developmental disability?
 - Do you think s/he is less believable?
 - How would you gauge credibility?
 - Would you gauge credibility any differently than you would the credibility of a witness without a developmental disability?
 - If the developmentally disabled witness has a quantifiable mental age that equates to the chronological age of a child the prosecutor may want to discuss contact that jurors have had with children that age.

G. Opening Statement

The opening statement is the prosecutor's first opportunity to tell the jury about the facts of the case. It is their introduction to the vulnerable adult and their first glimpse of the crime that has been committed. An effective opening statement sets the tone for the entire case and provides a framework for the evidence that will be presented. The first few minutes of the opening statement are precious. The prosecutor will have the jurors' undivided attention. These first few minutes should not be wasted on introductions or thanking the jurors. Rather, the prosecutor should capture the jurors' attention and draw them into the case using a narrative approach.

When preparing an opening statement the prosecutor should:

- Organize the facts logically;
- Use adjectives that bring the events to life while accurately describing the incident;
- Highlight the strongest evidence in the case;
- Avoid unnecessary details;
- Personalize the victim;
- Diffuse weaknesses in the case.

In a neglect case in which the victim has difficulty remember the events due to the severity of the neglect, the prosecutor might begin in the following manner:

Sadie Jones doesn't remember the police coming to her house on January 7, 2007. She doesn't remember the ambulance taking her to the hospital. She doesn't even remember the first few days in the hospital. But Sadie does remember giving the defendant money for groceries. She does remember that he told her he'd be back in an hour. And she does remember waiting. She remembers waiting for days for the defendant to bring her food. Waiting for days for the defendant to bring her water. Hoping that someone would come and help her to the bathroom. But the defendant didn't come. The defendant didn't bring Sadie food, or water. He didn't help her to the bathroom. He didn't change the soiled bed linens. He didn't set foot in her house after he got the grocery money. Instead, the defendant drew the curtains, locked the house, stopped the mail, and went on vacation. Instead, the defendant used the money that Sadie had given for groceries so he could take a trip.

Using this approach helps the jurors picture the incident. It also helps the jury appreciate some of the problems that the victim will have telling them what happened. Revealing potential memory issues in the opening allows the prosecutor to cast them in the proper light, so that the jury knows what to expect and can contextualize the testimony.

H. Case Presentation

The prosecutor will be in the best position to determine trial strategy in a given case. When determining how to present witnesses and evidence, the prosecutor should keep the primacy, recency, and the rule of three in mind.

According to the rule of three, jurors are more likely to recall a fact if they have heard it at least three times. Although it is not always possible to get the same facts before the jury three different ways there are a number of methods: 1) use of different witnesses to testify about the facts; 2) use of exhibits to establish facts; and 3) use of exhibits to explain and clarify testimony.

According to the rules of primacy and recency, jurors are more likely to remember the first and last things that they hear. Therefore, the prosecutor will want to call the most persuasive witness and/or admit the persuasive evidence at the beginning and end of their case in chief. Similarly, the prosecutor will want to keep rebuttal brief and limit it to the most persuasive testimony that is properly admitted through rebuttal.

During the case in chief, the prosecutor should also address any negative or potentially damaging facts. If these facts are brought out by the prosecutor then the jury is more likely to accept the state's characterization of the facts. Jurors are also more likely to believe in the state's case if they feel that they have been provided with a complete picture of the event.

When a case involves the use of expert testimony the prosecutor should determine the best timing for the expert testimony. Timing of expert testimony depends upon its importance and how long it is likely to take. If the expert testimony is of particular import the prosecutor may want to begin the day with the testimony because jurors are often more alert at the beginning of the day. Additionally, the prosecutor is more likely to complete the expert testimony in one day if the testimony begins in the morning. The prosecutor should ensure that the expert witness is prepared to explain terms of art so that the jurors will understand the testimony.

I. Closing Argument

Closing argument is the prosecutor's opportunity to draw the case together and help the jury see the case as the prosecutor sees it. Some standard touchstones for an effective closing argument are:

- Structure the argument logically.
- Explain the facts and the law clearly.
- Appeal to the juror's common sense when discussing the facts.
- Personalize the victim.
- Do not personalize the defendant.

- When referring to the defendant's version of the events use language that reflects uncertainty, e.g. the defendant's story, the defendant claims, the defendant tried to tell you.
- Emphasize the strengths of the case.
- Do not ignore weaknesses. Address weaknesses without dwelling on them.
- Tie the facts into the theme of the case.
- Do not read the argument.
- Convey conviction in your argument and the importance of your case.
- Make eye contact with the jurors.
- Refer to exhibits and charts as necessary/appropriate.

Ultimately, the prosecutor is in the best position to determine the most effective way to structure the closing argument given the issues in each individual case.

VII. SENTENCING

A prosecutor's sentencing recommendation should be designed to hold the defendant accountable for his actions, protect vulnerable adults in our communities, and deter the defendant and other potential offenders from victimizing vulnerable adults in the future. Under the SRA, the prosecutor's discretion is limited. Special designations, enhancements and aggravating factors provide the opportunity for greater discretion in the sentencing recommendation.

As discussed in Section IV C, *supra*, there are several aggravating factors or sentence enhancements designed to protect vulnerable adults in Washington. Those factors are discussed early in this manual because the decision to pursue them needs to be made at the beginning of the case. They will not be available at sentencing unless notice was provided early in the case and the aggravating factor has been proven to the judge or jury (depending on the circumstances).

As noted previously, the two primary aggravating factors available in vulnerable adult prosecutions are: 1) victim vulnerability; and 2) abuse of a position of trust.¹¹⁸ The jury must find that the aggravating factor is present in order for the court to rely on it to impose a sentence above the standard range.¹¹⁹ Evidence proving the aggravating factor is presented to the jury either during the trial itself, or as part of a bifurcated proceeding depending upon the relationship between the facts that support the aggravating factor and the facts that prove the crime itself.¹²⁰ The presence of an aggravating factor must be found beyond a reasonable doubt. If the jury finds that there was an aggravating factor then the court can:

[S]entence the offender . . . to a term of confinement up to the maximum allowed . . . if it finds, considering the purposes of [the Sentencing Reform Act], that the facts found are substantial and compelling reasons justifying an exceptional sentence.¹²¹

Given the potential impact that the presence of an aggravating factor can have on an offender's sentence, the prosecutor should make the strongest case possible in order to ensure that the offender is held accountable for his/her actions.

Many vulnerable adult abuse or neglect crimes are perpetrated by family members. If the defendant and victim are "family or household members"¹²² then the

¹¹⁸ RCW 9.94A.535(3)(b) and (n).

¹¹⁹ RCW 9.94A.535(3) and 9.94A.537.

¹²⁰ RCW 9.94A.537(3) and (4).

¹²¹ RCW 9.94A.537(5).

¹²² RCW 10.99.020.

prosecutor should consider designating the crime as one of domestic violence. Again, the decision to designate a crime as domestic violence needs to occur during the early phases of prosecution, preferably at the time of charging.¹²³ The importance of a domestic violence designation cannot be overstated. By the time that domestic violence is reported, it is usually just one act in a series of abusive acts. Unfortunately, the violence rarely stops with just one prosecution. Obtaining a domestic violence designation in one case may not significantly increase the sentence in that case, but may prove invaluable in future prosecutions. For example, a conviction with a domestic violence designation may help future prosecutors establish that the offense is “part of ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.”¹²⁴ In such instances the prosecutor can seek an exceptional sentence.

Finally, when appropriate the prosecutor should rely on special allegations such as: 1) sexual motivation; or 2) diminished capacity of the victim.¹²⁵ The sexual motivation allegation may be alleged relative to any crime, other than a sex offense, if the facts indicate that the crime was sexually motivated.¹²⁶ On the other hand, in the prosecution of certain sex offenses the prosecutor may allege diminished capacity of the victim. Specifically, the prosecutor may allege that the victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, if the allegation is factually supported.¹²⁷ These special allegations must be proven to a jury and should be alleged in the charging document.

When the jury makes a finding of sexual motivation or diminished capacity the defendant is sentenced under the nonpersistent offender statute.¹²⁸ A finding of sexual motivation results in a minimum sentence that is “either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.”¹²⁹ A finding of diminished capacity results in a minimum sentence that is “either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.”¹³⁰

¹²³ Pamela Loginski, Charging Manual, 40 (WAPA 2004), www.waprosecutors.org/pubs.html.

¹²⁴ RCW 9.94A.535(3)(h).

¹²⁵ RCW 9.94A.835 and 9.94A.838.

¹²⁶ RCW 9.94A.835.

¹²⁷ RCW 9.94A.838.

¹²⁸ RCW 9.94A.712.

¹²⁹ RCW 9.94A.712(3)(c)(a).

¹³⁰ RCW 9.94A.712(3)(c)(ii).

The serious nature of crimes against vulnerable adults is also reflected in the applicable sentencing ranges for criminal mistreatment, abandonment of a dependent person, and rape in the Second Degree. Appendix G contains offender scoring sheets for the offenses that have a specific focus on protecting vulnerable adults.

At the sentencing hearing the court advises the defendant of his/her appeal rights and gives the defendant an opportunity for allocution. Each party is provided with the opportunity to present information in support of their sentencing recommendation. Additionally, the victim, or his/her survivors, has the right “to present a statement personally or by representation.”¹³¹

In addition to the length of incarceration and community supervision, if authorized, the prosecutor should request restitution for medical bills and property damage. When authorized by law, the prosecutor should also request a no contact order, treatment for the defendant, and a prohibition on possessing of weapons. These are some tools available to prosecutors who are involved in protecting vulnerable adults from abuse and neglect. Depending upon the facts and circumstances of each case, the prosecutor may have other tools available to hold perpetrators accountable. Each prosecutor brings a unique set of knowledge and skills to the prosecution of these types of crimes. These are not simple cases to prosecute. They require perseverance, preparation and dedication. Fortunately, prosecutors throughout the state have these traits. Together we will protect Washington’s vulnerable adults.

¹³¹ RCW 7.69.030(14).