

ATTORNEY PERSPECTIVES  
OF FINANCIAL CAPACITY  
AMONG OLDER ADULTS

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## ABSTRACT

Annually in the United States, around five million older adults fall victim to financial abuse and/or exploitation of some form, losing an estimated \$2.9 to \$36.5 billion each year (National Council on Aging, 2021). While it is known that financial exploitation is under-detected and underreported, there are few data to explain the process of assessing capacity within the legal field. Using thematic analysis methodology, 18 attorneys with varying levels of elder law experience participated in a semi-structured virtual interview. Specifically, the current study sought to examine how attorneys perceive financial capacity, the typical conditions under which capacity issues are identified, and the protocol followed to address capacity concerns. Using thematic analysis, major and minor themes, as well as subthemes, were identified to explain ways in which attorneys tend to rely on their own experiential knowledge, semi-structured interview and evaluation process, and often longstanding relationships with their clients and/or their families to assess for financial capacity and detect financial capacity or exploitation concerns.

Attorney understanding of financial exploitation was typically limited to family, friend, and/or caregiver perpetrators, though some attorneys cited past issues with financial representatives and/or designated power of attorney as well. Examples of cues included abnormal financial spending and/or requests and suspicious interpersonal relationships or interactions. In regards to assessing financial capacity, attorneys tended to again rely on experiential learning, as well as the use of routine interview questions, typically related to psychosocial and financial background. These findings highlight not only the need for future

financial capacity and exploitation research involving attorneys and their older adult clients, but also the importance of increased interdisciplinary work among those in close proximity with older adults and improved policies to make financial capacity assessment and financial exploitation prosecution more feasible for all to obtain.

## DEDICATION

To my husband, CP. My gratitude for you over this journey is inarticulable. Thank you for always being my best friend and my lighthouse. Put simply, I love you and I could not have gotten through this process without your unconditional and unwavering support.

## LIST OF ABBREVIATIONS AND SYMBOLS

- N Total sample size
- FE Financial exploitation

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disciplines take more significant steps to better serve each of you. The author reports no conflicts of interest related to this work.

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## INTRODUCTION

In recent decades, older adults have experienced financial exploitation at an increasing and alarming rate (Teaster et al., 2012). Various studies report the prevalence of elder financial exploitation ranges from 2.7 percent to 6.6 percent (Deane, 2018). Annually in the United States, around five million older adults fall victim to financial abuse and/or exploitation of some form, losing an estimated \$2.9 to \$36.5 billion each year (National Council on Aging (NCOA), 2021). This issue has been deemed both a “public health crisis” and “virtual pandemic”, and is likely to be underreported (Acierno et al., 2010; Lachs & Pillemer, 2015; Deane, 2018). In fact, New York’s “Under the Radar” study estimated 44 undocumented incidents involving financial exploitation take place for each reported incident (United States Government Accountability Office, 2011).

To prevent and/or mitigate issues related to financial exploitation, the rights of older adults must be carefully considered. This involves the assessment of one’s financial autonomy, capacity, and competency. However, there are large gaps in data and barriers to empirical research (e.g., older adults who might not realize they are being exploited or are too embarrassed to report), which prevent us from quantifying the enormity of this problem. Previous research calls for heightened sensitivity among non-psychological professionals (finance, law, healthcare) to help detect and assist older adults with a history of financial exploitation, as well as those who are subject to exploitation in the future (Lichtenberg, 2013; Deane, 2018). The U.S. Securities and Exchange Commission called for a reform through the development of an integrated and systemic approach that includes creation of cross-communication and collaboration between the

financial and health service industries (Deane, 2018). Coined by Dr. Jason Karlawish as a “whealthcare system,” the plan calls for health issues, especially those like cognitive impairment (CI), to be seen not only as medical problems, but also as public health problems (Karlawish, 2015; Deane, 2018).

With dramatic increases in the older adult population and an average of 10,000 Americans turning 65 each day (U.S. Census Bureau, 2017), older adults will likely continue falling victim to financial exploitation without more research, assessment, and prevention planning. In an article concerning the need for elder abuse reform, Loue (2001) writes that the medical and legal fields are the most critical for screening and preventing financial abuse. The purpose of the current research is to examine attorneys’ perspectives of financial exploitation among older adults to explain how a group of non-mental health professionals identify and assess financial capacity. While it is known that financial exploitation is under-detected and underreported, there are few data to explain the process of assessing capacity within the legal field. Once this process is better understood, future research and policy changes could bolster an attorney’s ability to detect, prevent, and report financial exploitation.

### **Financial Capacity and Financial Exploitation**

Financial capacity involves the ability to manage money and/or other financial assets in such a way that is consistent with one’s self-interest and personal values (Flint, et al., 2012). There are three abilities involved with financial capacity: declarative knowledge, procedural knowledge, and sufficient judgment regarding “sound” financial decisions (Pinkser, et al., 2010). For the purposes of this research, financial capacity is applied to legal standards, which involve specific decisions, as well as general knowledge of finances. Often, older adults demonstrate

impairments related to financial skills, financial judgment, and detection of potential financial exploitation (Stiegel, 2012).

Conrad et al. (2010) defined financial exploitation of older adults as follows: “the illegal or improper use of an older adult’s funds or property for another person’s profit or advantage.”

They proposed six domains of financial exploitation: theft and scams, abuse of trust, financial entitlement, coercion, signs of possible financial abuse, and money-management issues.

Exploitation can occur by another person or entity across any setting, whether home, community, or facility. Of note, while cut-off ages for older adults can vary, literature on financial exploitation typically includes adults who at least 60 years old (Lichtenberg, 2013; Peterson, 2014).

Financial exploitation can result in impoverishment, guardianship, health concerns, and/or eviction (Plassman et al., 2008). It also commonly takes an emotional toll on the victim and/or involves physical harm (physical and/or sexual abuse by caretakers, family, or strangers; Deane, 2018). Older adults are not the only victims involved with financial exploitation, as it can also cause substantial economic losses for families and businesses, change in access to government programs, and increase reliance on federal health care programs (e.g., Medicaid; Deane, 2018).

Exploring this theme further, financial exploitation can involve family members, acquaintances, or strangers. Financial abuse and elder fraud often involve taking advantage of older adults’ expectations of trust or targeting this population due to their age and/or disability. In a 2012 study, Teaster et al. reviewed 1,248 media articles about “elder financial abuse” over three months, analyzing 314 articles containing more specific details about the instance and parties involved. They found that 51% of exploitation incidents involved strangers, compared to

34% involving acquaintances (e.g., family members, friends, neighbors, etc.) and 16% involving businesses and Medicare fraud (Teaster et al., 2012). These events resulted in financial losses among older adults totaling \$530 million.

To provide further context, Acierno and colleagues (2010) surveyed a national sample of community-residing adults aged 60 years and older. They found that 5.2% of their 5,777 respondents experienced financial exploitation involving a family member within the previous year, with 60% of these incidents involving “misappropriation” of money by a family member. Moreover, a 2008 survey found 3.5% of 3,005 older adults reported an incident of financial exploitation over the previous year (Laumann, et al., 2008). Similarly, Beach and colleagues (2010) reported 3.5% of their sample ( $N=903$ ) experienced financial exploitation within the previous six months. These studies clearly demonstrate the prevalence of financial exploitation among older adults, highlighting the need for increased awareness and prevention efforts.

### **Risk Factors for Financial Exploitation**

The U.S. Securities and Exchange Commission’s Office of the Investor Advocate cited three factors contributing to disproportionate targeting of older adults compared to other age groups: financial and retirement trends, significant increases in the older adult population, and higher percentages of health-related impairment (Deane, 2018). Given the high percentage of financial institution funds that fall under the control of adults who are 65 and older, it is a key interest of these institutions to detect and report elderly financial exploitation (EFE) to law enforcement and/or Adult Protective Services (Consumer Financial Protection Bureau, 2017; Dessin, 2000). While some older adults’ accumulation of wealth and/or assets through life makes them susceptible to exploitation, others living on a fixed income may be more open to the risks of a “get-rich-quick scheme” (Deane, 2018). According to pension trends, older adults are

increasingly more likely to manage retirement savings and investments on their own (Deane, 2018). However, changes in financial management technology and growth of one's assets value can become problematic for older adults, who might misplace trust in the wrong person (Hafemeister, 2003; Central California Legal Services, 2001; National Committee for the Prevention of Elder Abuse, 2001).

Studies have proven to be instrumental in predicting outcomes and identifying common risk factors related to financial exploitation of older adults, but these factors are complicated due to the diversity among older adults and the nature of aging. Consistent with findings from capacity literature, dementia, depression, anxiety, psychosis, psychological vulnerability, and trauma history are all linked to financial exploitation (Appelbaum & Grisso, 1988; Acierno, et al., 2010; Beach et al., 2010; Lichtenberg et al., 2013). Financial incapacity correlates include activities of daily living (ADL) deficits (Beach et al., 2010), living alone (Teaster et al., 2012), nonuse of social services (Acierno, et al., 2010), and low levels of social support (Pinsker, et al., 2010). Demographic risk factors, as identified by Adult Protective Services reports, include identifying as a white female between the ages of 70-79. However, Lichtenberg and colleagues (2010) reported younger older adults may be more susceptible to financial exploitation, while Laumann (2008) reported African Americans may be at a higher risk. To illustrate this point, Lichtenberg and colleagues (2013) examined prospective data using the 2002 Health and Retirement Survey to predict fraud among a predominantly white sample of 4,400 older adults. The results indicated a fraud prevalence rate of 4.5%, while identifying lower age (51-64 years; "younger older adults"), higher education (13.9 years and above), and more severe depression as significant predictors. Using a retrospective approach examining those deemed to be "most psychologically vulnerable" (p. 143), lower financial satisfaction and poorer social status were

identified as significant predictors of reported fraud. Among these younger older adults with the highest depression and lowest social-needs fulfillment, fraud prevalence tripled in likelihood (14%) compared to the rest of the sample. Thus, risk factors are likely to vary, making it important to assess for perception of financial need and psychosocial difficulties, especially among younger older adults and/or those with higher education.

Although past research has found a strong relationship between cognition and financial decision-making, they are independent constructs that simultaneously decrease with neurocognitive decline regardless of age (Boyle, et al., 2012, 2013; Han et al., 2015). Research has also found that cognitive decline and lessened decision-making ability are related to higher susceptibility to scams and financial exploitation (Boyle, et al., 2012; Lichtenberg et al., 2016). For example, Shulman and colleagues (2005) explored 25 testamentary capacity cases involving older adults that had been retrospectively challenged. This examination indicated that dementia's relationship with financial decision-making not only involved cognitive deficits, but also behavioral and psychological factors (e.g., delusional thoughts, susceptibility, lack of awareness, etc.).

### **Financial Capacity Assessment**

Financial exploitation is likely under-detected and underreported, suggesting the support networks surrounding older adults (e.g., family, friends, professionals) fail to identify and/or understand the factors and skill deficits most closely correlated with potential abuse. A formal financial capacity evaluation may be necessary to identify specific risk factors and provide a comprehensive assessment of the elder adult's procedural knowledge.

In *Assessment of Older Adults with Diminished Capacity*, the American Psychology Association (APA) and American Bar Association (ABA) highlighted the lack of clinical

judgment scales for assessment of financial capacity (2008). The University of Alabama at Birmingham's conceptual mapping model (Conrad et al., 2011), assesses financial capacity by testing for procedural knowledge (e.g., how to manage a checkbook). While most measures allow consideration of general financial management skills, cognitive abilities, and rational decision-making, they do not address contextual variables when evaluating a person's specific abilities related to a decision. Thus, they are insufficient for legal standards regarding financial capacity, which are closely tied to informed decision-making (e.g., how to make a specific financial decision or transaction).

One exception is Marson (2001)'s Financial Capacity Instrument (FCI), which assesses financial capacity among older adults through a range of cognitive abilities using three elements: specific financial abilities, broad domains of financial activity, and overall financial capacity. Marson (2016) reported the FCI model was based on eight separate domains of financial capacity that, in sum, compromise independent functioning. Although this measure may be informative, it does not assess capacity regarding a specific transaction, which might only involve a select few skills. For example, an older adult, who is interested in a legitimate investment opportunity might lack the necessary skills for completing unrelated financial tasks, such as counting coins or managing a checkbook, and, consequently, the older adult is found to lack capacity. As such, it may be problematic to unnecessarily strip away the older adult's autonomy to make beneficial, informed decisions. Marson concluded that the FCI, which uses general vignettes to assess hypothetical financial decision-making, is limited in legal contexts and real-world functioning. The Social Security Administration has synchronously recommended a measurement of financial abilities that involves "real world activity" (Lichtenberg, 2018). Lichtenberg and colleagues (2015) note the importance of legal standards focusing on individualized scenarios when

assessing financial decision-making abilities, determining financial incapacity, and/or determining risk for vulnerability to financial exploitation. Their model emphasizes the importance of financial situational awareness, psychological vulnerability, and susceptibility to undue influence. Using conceptual frameworks from Mast's (2011) Whole Person Dementia Assessment model and Appelbaum and Grisso's (1988) decision-making model (elaborated below), Lichtenberg and colleagues created the Lichtenberg Financial Decision-making Rating Scale (LFDRS; 2015).

Collaborative care models and person-centered approaches for treatment of older adults suffering from neurocognitive disorders are becoming increasingly common due to the emphasis placed on an individual's autonomy (Fazio, 2013; Whitlach, 2013). In 2011, Mast introduced the Whole Person Dementia Assessment approach to ensure protection from elder mistreatment, while also ensuring protection of that person's values, choices, and preferences. Elder mistreatment is "intentional actions that cause harm or create serious risk of harm to an older adult by someone who stands in a trust relationship to the elder or is a caregiver" (Dong & Simon, 2012, p. 11). Underlying assumptions to Mast's standardized and person-centered approach include: evaluating a person as more than their cognitive abilities; a balanced emphasis of a person's strengths and weaknesses; and the importance of a person's subjective experience, especially in relation to the behavior of others (Mast, 2011). By shifting from hypothetical vignette scenarios to specific, individualized scenarios, the LFDRS protects autonomy and prevents potential exploitation through its person-centered principles and standardized psychological evaluation associated with the Whole Person Assessment.

Appelbaum and Grisso's (1988) decision-making model first relies upon clear communication of choice. This is followed by demonstrated comprehension and awareness of

the nature of the potential decision under consideration in terms of risks and benefits. The third requirement is appreciation, which involves insight into the situation and its potential consequences. Appreciation can be examined through discussion of the proposed decision's impact not only on the older adult, but on others as well. Finally, an older adult must be able to demonstrate reasoning through a comparison of other options, and the ability to provision rationale explaining their choice.

### **Non-Psychological Professionals and Financial Capacity**

The responsibility to consider and/or assess financial decision-making abilities of older adults often falls on non-mental health professions, such as Adult Protective Service (APS) workers, lawyers, trust officers, bankers, financial planners, insurance sales personnel, and employees who wire money for older adults at businesses (e.g., Walmart; Wood & Lichtenberg, 2017). While including mental health professionals (e.g., psychologists, social workers) produces the most effective elder-abuse teams for examining and/or prosecuting financial exploitation, professionals in any discipline that work closely with older adults should learn how to appropriately measure financial capacity (Lichtenberg, 2012; 2016).

This knowledge is fundamental, considering that the research on financial decision making among older adults clearly identifies the need for a comprehensive picture of an older adult's functioning and abilities across a myriad of facets (Stella et al., 2015; Wood & Lichtenberg, 2017). Professionals might ignore signs (e.g., not realize a client appears disoriented) or trust in certain capacity aspects too much (e.g., assume money management skills equate to capacity). For example, one study found patients diagnosed with Alzheimer's Disease overestimated their financial skills compared to their objective performance (Wadley et al., 2004). Similarly, a professional should not solely rely on one report (informant or self) as there

may be significant issues related to incongruent reporting depending on the stage of the informant's perception of caregiver strain, the older adult's stage of cognitive impairment, and their ability to engage in specific Activities of Daily Living (ADL) tasks, such as shopping, money use and management, and telephone use (Siodrdia, 2012; Stella et al., 2015; Zanetti, et al., 1999). In fact, research identifies money management to be the area of greatest inconsistency between self- and informant reports, especially among older adults with mild cognitive impairment (Okonkwo et. al, 2008; Siordia, 2012).

### **Attorneys and Financial Capacity**

Since 1993, the American Bar Association (ABA) Commission on Law and Aging has emphasized the criticality of lawyers' role in the prevention and detection of abuse (2018). They called for legal professionals (e.g., law enforcement and community corrections officials, judges, prosecutors) to better understand the concepts, tools, and documents frequently associated with financial elder abuse (2015). The Commission also recommended lawyers be mindful of several characteristics (e.g., older age, female gender, cognitive impairment, physical impairments, mental health issues, and social isolation) and situational factors (e.g., changes in finances, documents, property, and relationships) in their practice (Chen, 2017; Sabatino, 2018). Regardless of apparent factors, the Commission noted the benefit of interviewing all clients about financial management concerns (Sabatino, 2018).

The ABA Commission on Law and Aging also emphasizes the importance of screening as a step following risk factor consideration. However, they note that there is currently no evidence-based standard for attorneys to screen for elder abuse. In conjunction with the Elder Abuse Forensic Center in Michigan, The National Adult Protective Services Association sponsored a 2014 webinar which raised awareness regarding the deficit of administrable tools

measuring financial capacity. Further, the Elder Law and Special Needs Section’s Elder Abuse Committee specified the need for attorneys’ skills to assess capacity to protect clients from exploitation by their Power of Attorney (POA), despite lacking formal education on the issue (Duval & Levin, 2016). The authors explain that a clinical setting (e.g., medical or psychiatric) may seem necessary for capacity determinations, but it is an inherently essential step within the attorney-client relationship (Duval & Levin, 2016). The commission thus called for lawyers to prioritize prevention of financial exploitation through education (e.g., presentations and materials) for older adults and related professionals, referrals to needed health and/or social services, and minimization of risk through steps (e.g., limiting joint bank accounts or including POA oversight provisions; Sabatino, 2018).

Lori Stiegel, who served as senior attorney for the Commission on Law and Aging for thirty years, wrote a “pocket guide” on legal issues and risk factors related to elder abuse for criminal justice professionals (2015). The Commission on Law and Aging also implemented the Elder Investment Fraud and Financial Exploitation Prevention Program – Legal (EIFFE), which included attorneys practicing across an array of specialties (e.g., elder law, trust and estate law, family law, business law, tax law, administrative and government law, and general practice; Stiegel, 2015). This initiative sought to educate and train attorneys to recognize mild cognitive impairment and possible vulnerability among clients (Stiegel, 2015). With the assistance of Investor Protection Trust in 2017, EIFFE created a one-page checklist of possible indicators of financial exploitation (e.g., accompanied by a stranger, confusion about missing funds, etc.) and screening questions (e.g., “Did you want this person to come with you to this appointment? Did that person insist that you come see me? Did they take you to see other lawyers before me?”).

EIFFE also encourages attorneys to consider ethical issues and report suspected abuse to the appropriate authorities (Stiegel, 2015).

APS and ABA’s mandatory reporting laws differ across the U.S., varying in elder abuse definitions, identifying mandated reporters and under what circumstances they must report, and the legal action pursuant to those who commit abuse (ABA, 2022; Nursing Home Abuse Justice Team (NHAJT), 2021). Though there are at least 8 states who mandate all citizens to report elder abuse, typically these laws apply to health care professionals and staffing members (ABA, 2022; NHAJT, 2021). Some states, like Arizona and Ohio, require mandatory reporting for all attorneys, while others, like Colorado and Kentucky, make exceptions for attorneys and/or have Adult Protection Acts that “neither requires nor permits attorney to report, contrary to client’s wishes, spouse abuse inflicted upon his client” (ABA, 2022).

Thus, it is often up to the individual attorney to consider ethical and reporting duties after suspecting financial abuse. The Commission on Law and Aging provided some helpful tools in lieu of screening, such as a chapter on “Lawyer Assessment of Capacity” and a four-page capacity worksheet found in the ABA and APA’s *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005). This resource provides descriptions for the following steps that a lawyer should take during an informal capacity assessment: “a) observe and interpret signs of diminished capacity; b) evaluate understanding in relation for the specific legal elements of capacity for the transaction at hand; c) consider the degree of risk to the client and the ethical factors set out in the Comment to Rule 1.14; d) complete the legal analysis; e) document the capacity observations; f) take appropriate actions in response” (ABA & APA, 2005, p. 13). If an attorney concludes that a client shows mild (e.g., some evidence of diminished capacity) or “more than mild problems,” ABA & APA recommend that the attorney proceed

with “great caution,” and consider a medical or mental health referral, consultation, and/or formal capacity assessment. (2005, p. 21).

The Commission also recommended the Consumer Financial Protection Bureau’s book series on exploitation signs and common scamming tactics: *Managing Someone Else’s Money* (2019). Finally, they point to the incorporation of related screening tools when applicable, such as the California Undue Influence Screening Tool (CUIST; Quinn, et al., 2017). The CUIST assesses Client Vulnerability, Influencer’s Authority/Power, Actions/Tactics, and Unfair/Improper Outcomes. Further, it includes next step recommendations, such as a neuropsychological evaluation, capacity assessment, collaborative interview, etc. (Quinn et al. 2017). Following financial exploitation, attorneys can take steps to protect their client through legal action (e.g., obtaining a separation/divorce on behalf of the client, petitioning for protection orders, changing the appointment of a guardian/conservator, etc.) and civil action (e.g., breach of fiduciary duty, fraud, restitution, etc.; Sabatino, 2018).

### **Need for Study**

Despite the alarming numbers associated with prevalence rates and financial, physiological, and/or psychological costs, financial exploitation cases are difficult to prevent, detect, and pursue civil remedies. Some researchers have pointed to structural issues within society as one of the most significant barriers to case detection (Wood & Lichtenberg, 2017). For example, Wood and Lichtenberg highlighted the wide array of professionals and settings (e.g., attorneys) where elder financial exploitation may go undetected due to a lack of formal training to identify and assess the most significant factors (2017).

Little is known about attorneys’ capacity to assess older adults prior to making a substantial financial decision (e.g., investment, withdrawal, transfer, purchase, etc.). Clearly,

there is need for research examining these professionals in terms of their conceptualization of and experience with financial elder abuse, both in terms of detection and subsequent procedures to address concerns. Currently, only three U.S. states require mandatory reporting for attorneys, which is a promising step for detection and prosecution. While the ABA and APA have provided recommendations to assist attorneys with informal capacity assessments, it is unknown if, and to what extent, attorneys are aware of the guidelines. Further, it is unknown how attorneys apply available resources to cases specifically involving financial capacity issues.

Criminal remedies are underutilized, but increased involvement of law enforcement and prosecutors could help strengthen laws and penalties against elder abuse. However, even this progress will be sold short without better understanding how attorneys perceive and approach financial capacity when working with older adults. This could allow for more effective and realistic provisional training and tools specifically designed for lawyers to assess financial capacity.

The overall goal of this project was to gather, present, and theorize attorney perspectives of financial capacity among older adult clients. This study sought to examine the experiences and perceptions of non-mental health professionals when working with older adults at risk for financial exploitation. Key research questions included: (a) How do attorneys understand financial exploitation?; (b) What cues lead to consideration of a client's financial capacity?; (c) How do attorneys assess a client's financial capacity? Further, this study sought to examine potential similarities and differences in phenomena among attorneys' work experience (e.g., general attorney vs. elder attorney, formal training vs. informal training, etc.).

## METHOD

### Participants and Procedure

A total of 18 attorneys practicing elder law were recruited and interviewed for the current study. Researchers recruited attorneys who practice within the legal specialty of elder law. Elder lawyers are defined as a specialized area of legal practice focused on related topics associated with older adults and include estate planning, wills, trusts, advanced care planning, social security and retirement benefits, elder abuse, guardianship, etc. With the assistance of state bar associations and the National Association of Elder Law Association, we recruited participants who self-identified as elder lawyers within their state.

The participants of the study were: (a) graduates of a law school accredited by the ABA; (b) recipients of Juris Doctor degree; (c) approved by the ABA and state bar association to practice; with (d) at least five years of law practice; and I at least three years of practice in elder law. The researcher chose the said population as they have unique firsthand knowledge and experience concerning the research phenomenon of financial exploitation among older adults. This study aimed to purposively sample for participants located in different geographic regions (North, South, East, West) and elder law experience (lawyers recognized by National Elder Lawyer Foundation (NELF) or their state bar as elder lawyers vs general attorneys).

**Table 1**

<b>Attorney Demographics</b>							
	Region of US	Practices	Associations/Memberships	Continuing Education	Years Practicing	% of Elder Law Cases	No. of Financial Exploitation Cases

1	South	Trust and Estate Planning, Elder Abuse Litigation, Elder Law, Estate and Wealth Protection, Fraudulent POA Litigation, Guardianships and Conservatorships, Municipal Law, Probate, Real Property, Will Contests,	County Bar; State Bar; Elder Counsel Member	Yes (presents on elder law, retirement planning, estate planning, asset protection, and Probate Court practice/procedures)	10	50	40
2	South	Tax law, Bankruptcy, Trust Fund Recovery, IRS Collection	County Bar; State Bar; ABA: Taxation, American Society of Tax Problem Solvers	Yes (presents on bankruptcy, trust fund recovery, IRS collections, tax problems, etc.; active on listservs)	30	75	40
3	Northeast	Elder law, Trust and Estate Planning	American College of Trust & Estate Counsel; NAELA	Yes (creates websites/blogs to offer solutions to clients and attorneys; active on listservs)	15	70	10
4	Midwest	Elder Law, Medicaid/Long-Term Care Planning, Guardianship & Conservatorship, Financial Exploitation Remedies for Impaired Adults, Estate and Trust Administration	County Bar; State Bar; State Bar: Elder Law Section, State Advocates for Better Care, State Women Attorneys Association; NAELA	Yes (editor for law journal and state bar; presented seminar series on elder law, attended conferences, presented at conferences, active on listservs)	30	100	50
5	West	Wills, Trusts, POAs, Advanced Health Care Directives, Estate, Elder Law, Guardianships and Conservatorships	State Bar	Yes (attends state bar conferences)	25	75	5
6	South	Elder Law, Estate and Medicaid Planning	State Bar; State Association for Women Lawyers; State Chapter Advisory Board for Parkinson's; NAELA	Yes (certified Elder Law Attorney by NELF; presents at conferences and to community, attends conferences, active on listservs)	8	50	15
7	Northeast	Elder Law, Special Needs, Wills, Estate Planning, Trusts, Tax Law	State Bar; NAELA	Yes (attends conferences)	25	60	60
8	West	Elder Financial Abuse, Elder Abuse, Consumer Fraud/Protection Class Action, Personal Injury	County Carb; State Bar; ABA; AAJ; Consumer Attorneys of State; Public Justice	Yes (attends and presents at conferences, publishes papers, leads classes and seminars, teaches trainings on Elder Abuse Protection)	20	100	100

9	South	Elder Law, Estate Planning, Probate	Northern State Bar: Probate, Estate Planning; State Bar; NAELA	Yes (teaches Elder Law courses, attends seminars and conferences, active on listservs)	7	10	1
10	South	Elder Law, Estate Planning, Business Planning, Trust, Probate Administration	County Bar; State Bar: Elder Law, Estate Planning, Probate, & Trust; NAELA; Elder Counsel; WealthCounsel	Yes (attends conferences, seminars, and trainings; presents at conferences and to community; teaches)	8	95	3
11	South	Elder Law, Estate Planning, Probate, Family Law, Guardianships, Custody Law, Adoptions, Mediation	County Bar; State Bar: Probate & Trust; Estate Planning, Family Law, Adoption; State Bar Association Committees: Diversity, Lawyers Helping Lawyers; State Lawyers for Children; Association of Family and Conciliation Courts; NAELA; National LGBT Bar Association	Yes (prepares research, attends conferences and trainings, presents seminars and conferences, teaches and researches)	18	60	15
12	Northeast	Elder Law, Estate and Medicaid Planning, Probate and Estate Administration	State Bar	Yes (attends conferences, active on listservs)	20	80	3
13	Midwest	Elder Law, Estate Planning, Trusts, Probate	State Bar: Probate & Trust; ABA; NAELA	Yes (attends and presents at conferences, active on listservs)	15	75	10
14	South	Elder Law, Special Needs Planning, Guardianship, Wills, Trusts, Estate Planning, Long-Term Care Planning, Probate	State Bar; State Chapter Board; NAELA	Yes (completed classes, attended online courses, attended conferences and monthly bar meetings, presented at conferences, active on listservs)	20	80	12
15	South	Elder Law, Medicaid & Special Needs Eligibility, Guardianship, Probate, Trusts, Estate Planning	County Bar; State Bar; NAELA	Yes (presented to public and for CLE credit, attended conferences, written publications, active on listservs)	40	75	15
16	South	Elder Law, Trust, Guardianship, Probate, Estate Planning	County Bar: Probate, Estate Planning, & Elder Law; State Bar: Elder Law; NAELA	Yes (attends conferences and trainings, presents at conferences, active on listservs and open forum discussion)	10	50	15
17	Northeast	Elder Law, Wills, Trusts, Estate Planning, Planning for Special Needs and Disability, Guardianship, Medicaid & Asset Preservation Strategies, Estate &	State Bar: Elder Law and Special Needs	Yes (lectures on Elder Law, attends conferences and quarterly education meetings, active on listservs)	35	100	4

		Trust Administration, Residential Real Estate Transactions						
18	Northeast	Elder Law, Trust & Estate Planning, Disability Advocacy, Medicaid Eligibility, Guardianships, Supplemental Needs Trusts, Probate Estates and Administration	County Bar: Disability Law, Surrogate Court Practice and Procedure, Elder Law; State Bar: Trust & Estates and Elder Law; NAELA: Special Needs	Yes (teaches at law school, lectures to community on Elder Law and Disabilities, presents as certified CLE instructor)	15	100		5
Total	N	18	18	18	18	18	18	18 18

*Demographics for Attorney Interviews (N = 18)*

Participants were recruited via e-mail listservs of state bars and NELF. Those who contacted the provided email for participation in the study were scheduled for an interview via a HIPAA compliant version of Zoom video-conferencing software. Informed assent, along with the 30-minute semi-structured interview, were audio-recorded in secure office space. Interviews were then uploaded onto a secure file sharing folder accessible only to the research team. Data on occupation history was collected for each participant.

Attorney participants represented a myriad of states across all U.S. regions, including Alabama, Arkansas, California, Connecticut, Georgia, Kansas, Kentucky, Maine, Massachusetts, Michigan, New York, Ohio, Oklahoma, Texas, and Utah. They demonstrated a 100% rate of involvement in continued education (e.g., listservs, training, conferences, seminars, and/or teaching), as well as at least one legal association membership. Participants reported a wide variety of practice areas related to elder law with six specifying their work as being centralized more around estate, will, and trust planning opposed to elder law.

Several attorneys emphasized the distinctions between elder law and estate planning. One participant explained, “There is an overlap between estate planning and law, though they are two different areas. Any good estate planning attorney is going to have competency in elder law and capacity. Not all of their work involves older adults, but the overwhelming majority certainly

does, so they have to know it.” Other attorneys explained that work as a primarily elder law attorney requires capacity consideration as a cornerstone of all the work they do with their clients, whereas estate planners described it like Attorney 4 did, stating capacity and exploitation was something that was typically only considered “if it comes up, if my antennae goes up...otherwise, I am sticking to the legal question at hand, getting it done quickly.” An attorney who frequently worked on both the elder law and estate planning sides noted that elder law consultations cost more money, which might preclude some clients from their services, thus missing out on a more thorough evaluation related to financial capacity by the attorney.

### **Measures**

The primary investigator asked a predefined, standard list of open-ended questions (see Appendices B and C) about the elder lawyer’s understanding of financial exploitation and any previous training and/or work experiences related to financial capacity involving older adults. Questions also concerned the frequency of commonly associated factors involved with indicating risk of financial capacity concerns. The primary investigator asked the lawyer to walk through previous cases which included concerns regarding the client’s financial capacity and the client a) was referred for a financial capacity evaluation and b) was not referred for a financial capacity evaluation. Finally, the investigator asked the attorneys about their perception of overall pro and cons regarding financial capacity work and what future changes would benefit attorneys, as well as their older adult clients.

### **Analyses**

The goal of the qualitative data collection through individual interviews is to achieve “saturation” through a process of collecting data until new interviews yield redundant, minimal, or no new information (Russell & Gregory, 2003; Sandelowski, 1995, 2000, 2010). Interview

questions were subject to modification or revision over the course of constant comparison. Questions were altered, deleted, and/or accompanied by additional questions stemming from the emergence of new lines of inquiry as each interview progresses. The project used thematic analysis due to its flexibility and comprehensive approach to identifying and analyzing patterns within the data (Braun & Clarke, 2021). Unlike other approaches, such as grounded theory or content analysis, thematic analysis is not tied to a specific theoretical framework or preconceived categories (Braun & Clarke, 2021). It also allows for a more subjective and interpretive approach to understanding the meaning and significance of the data, making it well suited for this project. For the purposes of this project, thematic analysis examined eighteen attorneys' perspectives of financial exploitation among older adults to explain how non-mental health professionals identify and assess financial capacity. In addition, Nvivo12 by QSR was also employed to systematically organize, code, and identify the hierarchy of themes from the interviews. Three research questions guided the researcher:

RQ1. How do attorneys understand financial exploitation?

RQ2. What cues lead to consideration of a client's financial capacity?

RQ3. How do attorneys assess a client's financial capacity?

Individual interviews were transcribed using Dragon Audio Transcription Voice to Text Software and spot checked by the research team to ensure transcription accuracy. Following transcription, audio recordings were deleted. Once the first piece of data was gathered, a continuous iterative process began, collecting and analyzing data simultaneously (Glaser & Strauss, 1967).

The researcher applied Braun and Clarke's (2006) thematic analysis approach in analyzing the interviews and generating the themes that address the three research questions of

the study. In this case, a total of seventeen themes were discovered. With the help of Nvivo12 by QSR, the themes were categorized based on their significance, where major and minor themes were considered parent themes and subthemes were child themes. Lastly, subthemes are incorporated as needed, where the parent themes' exact details and examples are presented. Table 2 displays the complete number of themes per research question. Finally, similarities and differences among lawyers' background, experiences, and perceptions were compared to further enrich the theory (Glaser & Strauss, 1967).

Table 2

*Breakdown of the Number of Themes Per RQ*

Research Question	Number of Major Themes	Number of Minor Themes	Number of Subthemes	Total
RQ1	1	3	0	4
RQ2	1	3	4	8
RQ3	1	1	3	5
Total	3	7	7	17

## RESULTS

Thematic analysis revealed three major themes, seven minor themes, and seven subthemes. Twelve of the eighteen participants viewed and understood financial exploitation as having a family member or caregiver misuse an older individual's money for their benefit. Regarding the cues that lead to consideration of a client's financial capacity, ten participants use their knowledge of questionable money management in older adult clients as a prompt to further investigate the financial conditions and capacities of their clients. Finally, eleven of the eighteen participants assess and evaluate an older adult client's financial capacity, particularly when there are questions and doubts surrounding the client's condition. Specifically, they ask more questions than usual to ensure clients are aware of and understand their decisions. Table 3 contains the breakdown of the study themes in response to the three research questions. Only the themes related to research questions with a notable number of participant references (more than one) are further discussed in the study.

Table 3

*Breakdown of the Number of Themes Per RQs 1 to 3*

Research Question	Themes	Number of References	Number of Participants
RQ1. How do attorneys understand financial exploitation?	<i>Having a family member or caregiver misuse an older adult's money for their benefit</i>	17	12
	Assessing the requests for special power of attorney carefully, as this is one of the primary sources of exploitation	6	5
	Needing to be reactive and quickly work with the bank to stop exploitation	2	2

RQ2. What cues lead to consideration of a client's financial capacity?	Learning about questionable money management of older adult clients	16	10
	<i>*Being managed by those with no fiduciary responsibility</i>		
	<i>*Being solely managed by one child when there are other children</i>		
	<i>*Receiving complaints from one family member or other family members</i>		
	<i>*Older adults being more proactive in sharing financial matters than usual</i>		
	Requesting sudden and questionable changes by the older adult	3	3
	Being asked to go to hospitals or nursing homes to execute documents	3	2
	Being isolated from family members or children	3	2
RQ3. How do attorneys assess a client's financial capacity?	Asking more questions than usual to ensure clients are aware of and understand their decisions	16	11
	<i>*Having tests and questionnaires in place</i>		
	<i>*Creating discussions and conversations ensuring that the client understands their decisions</i>		
	<i>*Seeking help from third-party neuropsychologists or other medical practitioners</i>		
	Having specific and thorough measures of testamentary capacity	5	5

### ***RQ1. How do attorneys understand financial exploitation?***

The first research question explored how attorneys understand financial exploitation from their knowledge and experience. Most participants (n = 12) defined *financial exploitation* as having a family member or caregiver misuse an older adult's money for their benefit. Two other minor themes, assessing the requests for special power of attorney carefully and needing to be reactive and work quickly to stop exploitation, received fewer participant references. Table 4 contains the breakdown of the study themes in response to the first research question.

Table 4

*Breakdown of the Number of Themes Addressing RQ1*

Research Question	Themes	Number of References	Number of Participants
RQ1. How do attorneys understand financial exploitation?	Having a family member or caregiver misuse an older adult's money for their benefit	17	12
	Assessing the requests for special power of attorney carefully, as this is one of the primary sources of exploitation	6	5
	Needing to be reactive and quickly work with the bank to stop exploitation	2	2

**Major Theme 1: Having a family member or caregiver misuse an older adult's money for their benefit.** The first major theme uncovered from the analysis was the 12 participants' understanding of financial exploitation as having a family member or caregiver misuse an older adult's money for their benefit. According to the participants, from experience, financial exploitation is represented and committed through many different practices. According to Participant 10, it has become common to work with older adult clients who are vulnerable and unable to protect themselves from the interests and schemes of those around them. The participant explained:

.... I think, you know, the ability to recognize if they're being exploited, is also a component because sometimes I work with older people who are just lonely, you know, and so they don't really pay attention to their own red flags when it comes to their finances or being taken advantage of. I think if a person is in a position and that stage of life where they can't protect themselves from that, then that may warrant a limited guardianship just to protect them from being exploited.

Meanwhile, Participant 12 used the term "voluntariness" to understand the idea behind financial exploitation, especially of the older adult. For this participant, it is crucial to know and be aware of distinguishing the actions and intentions of the people surrounding them early, as such would

determine if they are being exploited. The participant shared the following:

It's the issue of voluntariness, and it is so difficult to make the distinction between a voluntary act and an act of a person who lacks the ability to protect her own resources. So, the things that go towards voluntariness is fear. I'm afraid you're gonna hit me, so I'm gonna write you a check or so it's coercion same kind of thing. Or I don't really have a sense of the scope of my property or how it should be managed. And that that's so hard to pinpoint it in time because alarm bells don't necessarily go up off.

For Participant 13, an example of financial exploitation is when a child has no source of income, and such a child somehow lives off their older adult parents' bank accounts, saying:

Well, you know, the things that do sound like financial exploitation is child living with mom trails on mom's bank accounts. Child has no source of income; child is living off mom, and mom's assets are going blank.

Meanwhile, Participant 14 is fearless in asking for explanations and other details from the clients to ensure that financial exploitations do not happen. In addition, financial exploitation was described as having unusual withdrawals or requests from the older adult client's accounts, stating:

And, you know, if things start to sound uncomfortable to me, I do follow up. And I'm not afraid to ask for explanations from my clients if I feel like it's an unusual withdrawal from an account or an unusual request to pay some, you know, individual that is not recognized because most of my clients I've worked with for a number of years. And so, you just get to know them right? You know what their usual activity is, and what their usual interactions involve.

Participant 18 shared an example of a caregiver suddenly taking over caring for an older adult

individual but no family geographically close to serve as oversight.

It looks like a caregiver has come and taken something...a lot of times, they started taking care of mom or dad or something, and the problem typically is that the rest of the family is in another area of the state or country. So, they're not there regularly to check up on mom or dad or wherever the relative is, or it could be a sibling, you know, caring for the person. And sometimes it's three sides of the story.

Finally, several attorneys spoke of the inability to often act on financial exploitation due to their client not wanting to pursue charges, the difficulty of finding a referring attorney to take the case, and the unlikelihood of successful evidence collection, conviction, and reparations. Participant 6 addressed this and also cited doubt about the estimated prevalence of financial exploitation in the U.S.:

I've seen exploitation a few times but even when I do, there's nothing I can do about it. I don't think exploitation is as common as we see in pop culture. I don't think it's happening as often as pop culture would make it seem. When it does happen, it tends to be a new wedding. I call it the 'spoiled food test:' enough time has to have passed to have food spoiling in the fridge before a spouse moves on after the other one dies. I see a lot of men getting married within a year of their spouse dying. A lot. That concerns me a lot. I have a friend who does prenups on speed dial for them.

***Minor Theme 1: Assessing requests for special power of attorney carefully.*** The first minor theme that followed the major theme was the need to thoroughly assess requests for special powers of attorney, as such documents, which are critical sources of exploitation for the older adult. For Participant 1, it is crucial to be extra careful when enforcing a power of attorney. From experience, this participant narrated:

Either they don't have family members or friends or anybody that they can depend on. You know, I do have cases where I talk to folks about a power of attorney, and they absolutely have nobody that they would be willing to give that to. And you stress the fact that you know that these people have obligations. And legally, they're supposed to only act in your best interest, but you should never grant that to somebody that you don't have absolute faith that they would follow those rules, irrespective of what the law is.

...if you have [someone who is] not the client calling you, but somebody trying to call on their behalf, saying they need a power of attorney, that that first of all puts up an antenna....They say, 'I need to have a power of attorney for this person.' And you say, 'Well, I need to talk to that person, they are my, ...they're my client, and I'm doing a power of attorney for him.' So... raises the first red flag.

Meanwhile, Participant 11 provided scenarios wherein a lawyer encounters financial exploitation issues and the necessary actions to address them. According to Participant 11, the following financial exploitation situations have been common throughout the years:

The first area is, when I entered the general part of interviewing people, and I wanted to determine whether or not they have capacity to hire me, let alone financial capacity. The second is when the adult children contact me, and they say, well, I need to get a durable power of attorney over my mom.... I say, 'Can your mom buy a car? Can she sell a house? Can she start a business? And so, it's really quick?' 'Oh, no, she couldn't do that. That's why I don't know.' 'That's why you need a guardianship...' In the third, of course, is when another adult child calls and says, 'My brother's agent and the durable power of attorney spent all mom's money on himself.' Or Mom calls and says, 'I left my son all this money to buy a house for us to live in. And now he's kicking me out.'

***RQ2. What cues lead to consideration of a client's financial capacity?***

The second research question considered the cues that lead to consideration of a client's financial capacity. Results suggest lawyers are prompted to become more aware and proactive when they learn about questionable money management of older clients. Table 5 contains the themes in response to the study's second research question.

Table 5

*Breakdown of the Number of Themes Addressing RQ2*

Research Question	Themes	Number of References	Number of Participants
RQ2. What cues lead to consideration of a client's financial capacity?	Learning about questionable money management of older clients	16	10
	<i>*Being managed by those with no fiduciary responsibility</i>		
	<i>*Being solely managed by one child when there are other children</i>		
	<i>*Receiving complaints from one family member or other family members</i>		
	<i>*Older adults being more proactive in sharing financial matters than usual</i>		
	Requesting sudden and questionable changes by the Older adults	3	3
	Being asked to go to hospitals or nursing homes to execute documents	3	2
	Being isolated from family members or children	3	2

**Major Theme 2: Learning about questionable money management of older adults clients.** The second major theme that emerged concerned the most common signal or prompt for lawyers to consider a client's financial capacity. Specifically, 10 participants acknowledged learning about the questionable money management of older adults clients prompting them to become more careful and proactive. Specifically, the actual cues included: being managed by those with no fiduciary responsibility, being solely managed by one child when there are other children, receiving complaints from one family member or other family members, and having an

older adult being more proactive in sharing financial matters than usual. Each of these themes is discussed in detail below.

*Subtheme 1: Being managed by those with no fiduciary responsibility.* One subtheme that emerged was witnessing older adults clients managed by individuals with no formal fiduciary responsibilities. Participant 4 is prompted about unusual financial decisions from the older adult, and an example was provided regarding the financial representatives of the older adult::

Most of the time I feel they've been financially exploited it's by their current financial representatives who aren't doing the right thing for them... The worst ones are the insurance guys... The insurance, personal financial, IT advisors, right?... If I see that their [the client's] assets are 100% in insurance products, or 50% of them are in oil and gas wells. Wells are highly liquid, you know. Private limited partnerships and real estate investments, but they [client] can't even tell me what they are, right? It's pretty clear that they're... financially being exploited... As a general rule, it's a really odd portfolio posture in odd investments, and it gets my antenna up.

Meanwhile, Participant 7 shared how caregivers who have taken over the management of the older adult are often a source leading to financial exploitation issues and conditions. At the same time, when there is unusual spending tracked, lawyers would typically reconsider the financial capacity of the older adult:

I like it when the kids are all aligned, and they're not fighting amongst each other. Because usually, you know, the sibling cases become challenging... But if they're all aligned or if it's an only child, and then the caregiver just came in and started isolating, manipulating mom, I try to get their deeds and see if they've been changed. I try to find out, you know, what their memory and their capacity was, in last years of their life, and

get a subpoena for their bank records to look at spending habits, both before and after the abuse.

And usually, it's egregiously more and more and more and more and more. You see a pattern of their spending before, which is just baseline. And then, as soon as you get into the caregiving, the more they get away with, the worse they start getting. So, they start off stealing a little bit. And then they get more like, you know, I had case result recently where they would take, you know, \$1,000 a month. Suddenly, it got up to \$10,000 a month, and it was \$16,000 a month.

*Subtheme 2: Being solely managed by one child when there are other children.* Another minor theme that followed is the situation wherein the older adults client's estate and bank accounts are managed solely by one child when the older adults client has other children. According to Participant 5, there is a need to reconsider the financial capacity of the older adult when one child has taken over managing the needs and decisions of an older adult client. The participant narrated:

If they come in with one child, and they've got other children, and that child is basically providing 100% of the care... that child is on all the bank accounts, that child is living in the house with them, it makes you suspicious. I would never ever, ever let that child in the room with the person... Don't have your daughter come in here and tell me what birth dates are. You tell me what you are. And if you don't remember everything, that's not necessarily bad, depending on how many grandkids you got. But can you tell me how old she is? Can you tell me what month this kid was born? And usually, when you start talking to him, I think I can pull it out.

When you've got somebody bring in the kid, that smacks of undue influence. So even if it doesn't, even if they're being very circumspect about allowing their parent to make that [financial] decision. The others have a good argument that you unduly influence that person, because she's already starting to slip cognitively a little bit, that makes her more susceptible to undue influence. And you're the one who's there, you're the one who's giving all this care, you're the one who's whispering in her ear all the time. And it sounds like you're unduly influencing, so to protect her and protect what she wants done with her estate, you as the attorney exclude them from the conversation. You say, 'Okay, you go away for an hour and a half and come back.'

Similarly Participant 18 summarized:

A big red flag is when it's the parent and child coming in- that's pretty much an automatic indication that they need to be on the elder law side because capacity is going to be more of a concern.

*Subtheme 3: Receiving complaints from one family member or other family members.*

The third subtheme included attorneys receiving targeted complaints from a family member or family members about unfair financial management and distribution. For Participant 6, disagreements between family members serve as prompts for considering financial capacity of an older adult client. The participant stated:

Often when we hear about messages from family members saying they think somebody's being exploited. What can we do for the client themselves or family member of the client, usually family member of the client? And I've gotten contact with people who are having trouble because a parent is sending money overseas and they think is totally legitimate. And the children or in-laws can't convince them that it isn't. So that can be a problem.

Other times family members or a caretaker come in, and say they think other family members are taking money. And that can be very delicate. Again, it's usually somebody else who raises the issue, and that somebody's not paying their bills.

*Subtheme 4: Older adults being more proactive in sharing financial matters than usual.*

Another cue is when older adults clients are more proactive in sharing their financial choices and decisions than usual. As an example, Participant 2 provided an experience:

If they started talking about how their caregiver or someone else manages their money, or how their friends have asked them for help, Or if they just start, without me prompting them, to tell me about gifts that they're making to people they aren't related to.

Participant 9 clarified that sometimes complaints from family members are actually just a misunderstanding, stating:

I might have some children come to me and say you know my mom's living in the nursing home right now but wants to leave money behind to her grandchildren, so how do we do that? Nursing homes are expensive and if you don't have a lot of money, it's hard to financially plan for all of that especially once a parent has started losing capacity. You want to be respectful of your parent's wishes but you need help planning and moving things around financially for them.

### ***RQ3. How do attorneys assess a client's financial capacity?***

The third research question considered how attorneys assess a client's financial capacity.

Table 6 displays the themes in response to the third and final research question.

Table 6

#### *Breakdown of the Number of Themes Addressing RQ3*

Research Question	Themes	Number of References	Number of Participants
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RQ3. How do attorneys assess a client's financial capacity?	Asking more questions than usual to ensure clients are aware of and understand their decisions <i>*Having tests and questionnaires in place</i> <i>*Creating discussions and conversations ensuring that client understands their decisions</i> <i>*Seeking help from third-party neuropsychologists or other medical practitioners</i>	16	11
	Having specific and thorough measures of testamentary capacity	5	5

**Major Theme 3: Asking more questions than usual to ensure clients know and understand their decisions.** The third major theme of the study considered attorneys asking more questions than usual to ensure clients are aware of and understand their decisions. In particular, the additional measure included having tests and questionnaires in place, creating discussions and conversations ensuring that the client understands their decisions, and seeking help from third-party neuropsychologists or another medical practitioner. Each of the subthemes is discussed in detail below.

*Subtheme 1: Having tests and questionnaires in place.* The first subtheme under the third major theme was the placement of tests and questionnaires in evaluating the financial capacity of older adult clients. Participant 2 shared the common questions they ask the older client to assess or evaluate their financial capacity, saying:

We just start with the basics, ‘Who’s in your family? Where do you live?’ We don't tend to talk about their diagnosis because, especially people who are newly diagnosed, a lot of times they're in denial. We encourage them to bring other family members if they want to, to have that sort of support network. We've asked whoever is the responsible party to also fill out a questionnaire about their assets. So just a super easy worksheet, and then we actually talk about it... ‘Who's joined on these accounts? Who's the beneficiaries on

these accounts?' So, it's not just a question of what do you have, but it's like, do you have understanding of it and then after reviewing the responsible party's answers, it's the question of do you also understand that you have this money as well, right? And do you know who all has access to this money?

We work off of a really easy two-page worksheet that we ask people to fill out before they come see us. The first page is 'Who's in your family?'... And the second page is, 'What do you owe?'... And we asked them to fill out as much as they're able to, and so we get everything.

Participant 17 provided an example of a client wanting to execute a will:

During my interview, I sit down for a conversation about what they are wanting. To execute a will, this is pretty much the bare minimum type of capacity. You have to demonstrate more capacity to get married in this country. When I talk to them I am looking to see their understanding of what it is they're seeing me for and then if the spouse is doing the majority of the talking, I'll find a way to get them out of the room, send them to get coffee or tea or something and spend some time talking one-on-one to the client to see how they're doing. If I need to, I'll go through the checklist.

*Subtheme 2: Creating discussions and conversations ensuring that client understands their decisions.* The second subtheme that followed was the creation of discussions and conversations with older adult clients to gauge better and understand their situations or conditions. For Participant 13, it is crucial to communicate closely and listen to the suggestions and advice of relevant individuals, such as legal and medical professionals. The participant narrated:

Be sure to take time to listen to their words. Take time to listen to the people. In [redacted county name], where I am, the public defender has two or three lawyers whose job it is to represent people in involuntary commitments and Guardianships or as guardian ad litem, right? And they're really good at what they do, and our system works fairly.

Participant 18 shared the common questions they ask in their conversations and discussions. The participant explained:

So, you have kind of a general conversation to ... get a basic understanding of kind of their mental state. You might throw in 'who's the President?' just to make sure there's some sort of ... processing and memory happening currently. And then you really talk to them about why they're here to see if they have the understanding of it and kind of appreciation for whatever decision they might make and what it would mean.

Similarly, Participant 8 narrated the importance of communication and having conversations to assess the financial capacity of older adults. The participant highlighted the following during the interview:

We have a long conversation ... I don't even know how to make sure. But we would really want to have a long conversation ... to understand what you're doing, you understand that you know, if you do this, you're not leaving anything for your family. And I guess there's a point where we have to decide that we're comfortable with that. And that, again, it's about the person knowing and understanding what he or she is doing.

Participant 2 emphasized the importance of thoroughly investigating a red flag to ensure an older adult client's autonomy, explaining:

Sometimes things that family doesn't like or might seem like a red flag at first to me by the sounds of it but then when I talk to the client, they just really don't like one of their

children and don't want to leave them money or assets behind, and what they're saying makes sense and it's their opinion. They have the right to that... There's a bias inherently with older adults. I'm not going to take someone to trial and try and strip them of their autonomy because you don't like their choices or actions. They'll have to get over that.

*Subtheme 3: Seeking help from third-party neuropsychologists or other medical*

*practitioners.* The third subtheme considered lawyers seeking additional assistance and advice from a third-party medical practitioner. Participant 9 provided a metaphor to describe the difficulty referring older adult clients to obtain formal capacity evaluations, stating:

I call it the 'boiling frog problem.' you know to boil a frog successfully you need to put it in boiling hot water. When you put a frog in hot water and try to heat it up to boiling, the frog is just gonna jump right out. And that's what we are seeing with capacity and our older adults. They don't want to go [for evaluation].

According to Participant 11, although neuropsychologists are challenging to access and often expensive, it is crucial to get to know their analysis of older adult clients' cognitive and financial capacity. The participant shared:

Because we have, you know, in [Southwestern state], one neuropsychologist trained...at the fellow level in dementia. And for people who are already in a facility, there are visiting doctors who will see them for less than two hours and scribble something out. So... we get everything from a good two-day exam in neuro psych.

Meanwhile, Participant 7 reported using the same process and practice. The participant stated the following:

I asked them questions about their finances. And if they have no clue about their finances, or what's going on, then, you know, they, they probably don't have capacity.

But there's a spectrum... people can have capacity for some things and not for others.

And if I have a question about whether they actually do have capacity, I'll tell them they need to get a capacity evaluation by a thorough neuropsychologist.

Occasionally, attorneys addressed other concerns related to requesting more thorough protocols, such as formal checklists and neuropsychological testing aside from the fluctuating nature of capacity and the time and cost of evaluations. She explained that because it is not routine protocol for capacity to be formally examined, so in the event of legal proceedings, it can potentially harm their client's case if an evaluation was suggested by their attorney, explaining:

In the event checklists were the norm and then you do order an evaluation, courts can say, 'Well, you did go through a checklist with the client so obviously you suspected some kind of capacity concern. Do you do that for all your clients?' I don't. That would take more time and more of their money if I did them for everybody and that wouldn't be fair...So courts can see it as a red flag that it was ordered.

Finally, Participant 18 emphasized the need for interprofessional and intersectional approaches for older adults to bolster cognitive functioning and capacity awareness in order to protect their clients' best interest and mitigate abuse and exploitation. She stated:

We need more transparency and I'd really like to see more cultural sensitivity across different professions. We need resources for caregivers and police and APS that help older adults that can no longer take care of themselves. We need communal support. People only tend to notice things that are wrong. By the time they meet with me, a lot of times it's too late. I'm expensive and my time is valuable, so a lot of people can't afford someone who they can trust to do a good job taking care of them. I've had some really tough cases that never should've gotten to the point they're at. I really wish doctors,

neurologists and gerontologists especially, talk to their patients about the importance of DPOA and getting that set up in advance with someone they trust before it becomes a problematic situation because by the time they get to me, it can be a lot more difficult especially if capacity is a concern.

## DISCUSSION

This study aimed to examine attorneys' perspectives of financial exploitation among older adults and explain how non-mental health professionals identify and assess financial capacity. The researcher applied a thematic analysis approach in analyzing interviews with 18 attorneys practicing in this area. Three research questions guided this study and thematic analyses identified emergent themes.

### ***RQ1. How do attorneys understand financial exploitation?***

#### **Major Theme 1: Having a family member or caregiver misuse an older adult's money for their benefit**

Participants understood financial exploitation as occurring when a family member or caregiver misuses an client's money for their benefit. This finding supports Conrad et al. who defined financial exploitation as the improper use of an older adult's funds for personal benefit (2010). Financial exploitation of an older adult manifests in various ways and practices. According to study participants, financial exploitation can manifest when a child has no income source and lives off their older parents' bank accounts. Unusual withdrawals or requests from the older adult client's accounts may also indicate exploitation. Further, exploitation may occur when a caregiver abruptly takes charge of the care for the older adult client. These findings regarding perpetrators of financial exploitation are consistent with Wood and Lichtenberg (2017), who concluded family members, caregivers and individuals close to the older adult client are the most likely to engage in exploitation. Further, these data are also congruent with Conrad et al.'s (2010) assertion that financial exploitation takes various forms, with abuse of trust, signs of possible financial abuse, and money-management issues being some of the misuse domains.

The prevalence of financial exploitation of the older adult has prompted attorneys to work with vulnerable clients unable to protect themselves from the interests and schemes of those around them. Participants reported attempting to understand the factors contributing to financial exploitation of older adults. Attorneys felt that distinguishing the actions and intentions of the people surrounding the older adult might help determine whether the client is truly experiencing exploitation. This finding emphasizes the call for inclusion of mental health professionals in financial capacity assessments, and to provide appropriate training and resources to other professionals in disciplines related to working with older adults (Lichtenberg, 2012; 2016). The finding also emphasizes the ABA and Commission on Law and Aging's position underlining the criticality of lawyers' role in preventing and detecting abuse (2018). The ABA suggests it is not enough to identify misuse, but the attorney must also alert the client and ask them to explain unusual expenditure requests.

***Minor Theme 1: Assessing the requests for special power of attorney carefully, as this is one of the primary sources of exploitation.***

The findings revealed the request for power of attorney was a loophole for financial exploitation. Thus, lawyers should consider thoroughly questioning requests for special powers of attorney as such documents are key sources of exploitation for older adults. This stance gives merit to the Elder Law and Special Needs Section's Elder Abuse Committee's specification that attorneys must have skills in assessing capacity to protect clients from exploitation by their Power of Attorney (POA). It is especially important for lawyers to guide clients lacking formal education regarding POA (Duval & Levin, 2016). Again, the finding emphasizes the call for lawyers to prioritize the prevention of financial exploitation through education for older adults and minimizing the power of attorney risks (Sabatino, 2018).

***RQ2. What cues lead to consideration of a client's financial capacity?***

## **Major Theme 2: Learning about questionable money management of older adult clients**

The findings revealed that lawyers become more alert, aware, and proactive when they learn about older adult clients' questionable money management issues. More specifically, these questionable money management phenomena include finances managed by those with no fiduciary responsibility or solely managed by one child when there are other children, complaints received from one family member or other family members, and having an older adult client be more proactive in sharing financial matters than usual. The findings highlight, when assessing financial capacity, it is critical to generate a comprehensive picture of an older adult's functioning and abilities across myriad of facets (Stella et al., 2015; Wood & Lichtenberg, 2017).

The study findings on finances being managed by questionable persons align with the conclusions by Wood and Lichtenberg (2017) who noted financial exploitation was mostly orchestrated by persons socially close to the elder client, such as family members, caregivers and trusted advisors. The authors also suggest elder law practitioners be trained on financial assessment and how to use available tools to conduct an assessment. This conclusion is consistent with this study's finding that lawyers should generate comprehensive reports of their clients which is only possible by using informal and formal assessment methods.

### *Subtheme 1: Being managed by those with no fiduciary responsibility*

The first cue for the need for financial capacity assessment was witnessing older adult clients' finances and/or activities managed by individuals with no formal fiduciary responsibilities. Such unusual decisions were sometimes influenced by service providers with no fiduciary duty, such as the insurance representative and personal financial and IT advisors. This observation suggests financial exploitation of the older adult is aided by businesses and Medicare fraud (Teaster et al., 2012). For example, some older adult individuals lacking financial capacity to make relevant decisions pertinent to such investments fell victim to exploitation by financial

investment advisors. This finding gives weight to the Commission on Law and Aging Elder Investment Fraud and Financial Exploitation Prevention initiative. This initiative requires attorneys practicing across an array of specialties, such as estate and business law, be adequately educated and trained to recognize mild cognitive impairment and possible vulnerabilities among clients that could expose older clients to exploitation by professionals (Stiegel, 2015).

Further, the finding highlights the need to assess an older adult's financial reasoning by asking the client to compare multiple options and provide a rationale explaining their choice (Lichtenberg, 2012; 2016). Lawyers can use Lichtenberg's conceptual framework to assess an older adult's financial reasoning (2012; 2016). Practically, the tool helps lawyers assess elder clients contextual and intellectual factors and consistently apply these abilities. These include financial awareness in areas like sources of income and spending awareness. The tool also helps to assess psychological vulnerabilities like anxiety and depression and asks questions to establish possibilities of undue influence. The tool further assesses intellectual capacity aspects like choice-making, rational decisions and demonstration of understanding.

Participants also noted caregivers taking over the management of an older adult's finances, as another red flag, particularly when evidence of unusual spending presents simultaneously. One respondent noted cases where caregivers "start off stealing a little bit. And then they get more like, you know, I had case result recently where they would take... \$1,000 a month, suddenly, it got up to \$10,000. And it was \$16,000 a month." In such cases, respondents reviewed past deeds, checking for exploitative amendments or a subpoena of bank records to look at spending habits before and after the abuse, which can help reveal possibilities of financial exploitation.

*Subtheme 2: Being solely managed by one child when there are other children.*

Participants also noted potential need for financial capacity assessment when the older adult client's estate and bank accounts are managed solely by one child when the older adult client has other children. In such cases, they recommended adhering to the Social Security Administration's recommendations, a financial ability measurement involving "real-world activity" (Lichtenberg, 2018) . The process involves asking the client cognitive questions in the absence of the child or the caregiver about the arrangement of one child serving as sole manager of the finances to establish the potential for undue influence. The approach aligns with Lichtenberg et al.'s (2015) recommendations to utilize legal standards focusing on individualized scenarios when assessing financial decision-making abilities, determining financial incapacity, and/or determining risk for vulnerability to financial exploitation.

Another important observation related to financial exploitation are the risk factors that increase the chances of financial exploitation, including the client's lack of family or social support network. Participants noted isolated older people may ignore their own red flags regarding their finances. The observations support findings that living alone (Teaster et al., 2012), nonuse of social services (Acierno, et al., 2010), and low levels of social support (Pinsker, et al., 2010) are financial exploitation risk factors.

*Subtheme 3: Receiving complaints from one family member or other family members.*

Participants also noted receiving complaints from other family members about unfair financial management and distribution as another cue necessitating inquiry into a client's financial capacity. Concerns included family members feeling excluded or questioning the financial decisions of the older adult. In some cases, caregivers are suspected of taking money from older adults, or service providers not paying bills or making tax returns without the knowledge of the older adult. These circumstances pointed to a need for immediate intervention and perhaps a financial assessment. Such difficulties were indicative of possible cognitive

impairment and speculation regarding their ability to engage in specific Activities of Daily Living (ADL) tasks, such as shopping, money use, management, and telephone use (Siordia, 2012; Stella et al., 2015; Zanetti, et al., 1999). Specifically, attorney respondents reported money challenges as an area of most significant inconsistency between self and informant reports, especially among older adults with mild cognitive impairment (Okonkwo et al., 2008; Siordia, 2012).

Siordia (2012) examined the relationship between cognitive impairment and difficulties with ADLs, including money management, in older adults living in rural areas. They determined older adults with cognitive impairment had more difficulty with ADLs related to finances, which suggests such difficulties may be an early warning sign of cognitive impairment. Further, financial assessment self-reports tended to be self-biased and inconsistent with informant reports, although both were useful in detecting early signs of mental and cognitive impairment. Similarly, Stella et al. (2015) considered the relationship between cognitive impairment and functional abilities in older adults living in a community setting. Data suggest older adults with cognitive impairment had more difficulty with ADLs related to finances, such as managing their money and paying bills. Finally, Zanetti et al. (1999) explored the relationship between cognitive impairment and difficulties with ADLs in older adults living in an institutional setting. Older adults with cognitive impairment had more difficulty with ADLs related to finances, such as managing their money and making financial decisions. Taken together, these studies suggest difficulties with ADLs related to money management may be an important indicator of cognitive impairment in older adults. Healthcare professionals and caregivers may want to pay special attention to any changes in an older adult's ability to manage their finances, as this may be a sign that further cognitive assessment is needed.

*Subtheme 4: Older adults being more proactive in sharing financial matters than usual*

Another cue for financial capacity is when the older adult share their financial choices and decisions more proactively than usual. Questionable behavior often takes the form of excessive sharing of details about money management or voluntarily narrating about money gifts to strangers. As provided in the ABA and APA's *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), the lawyer can perform a financial assessment wherein they observe and interpret signs of diminished capacity or if questions arise about client understanding concerning specific legal elements for a transaction at hand.

***RQ3. How do attorneys assess a client's financial capacity?***

**Major Theme 3: Asking more questions than usual to ensure clients know and understand their decisions.**

When cues indicate a need for financial capacity assessment, lawyers reported asking older adult clients more questions than usual to ensure they are aware of and understand their decisions. Some participants reported using tools or tests, but for the most part, they described using interview questions that they or their firm created. Attorney respondents also engage the clients in informal discussions and conversations, ensuring they understand their decisions. On occasion, attorneys sought help from third-party neuropsychologists or other medical practitioners, though opinions of these assessments' benefit to their clients were mixed.

In a financial assessment, respondents mentioned looking for additional risk factors that increase the chances of financial exploitation, including the client's lack of family or social support network. Participants noted lonely older people tend to ignore their red flags regarding their finances. The observations support findings that living alone (Teaster et al., 2012), nonuse of social services (Acierno, et al., 2010), and low levels of social support (Pinsker, et al., 2010) are financial exploitations risk factors.

*Subtheme 1: Tests and Questionnaires*

Where financial capacity was questionable, some participants reported using tests and/or questionnaires to informally evaluate the financial capacity of older adult clients. In line with ABA and APA (2005), informal capacity assessment covers a complete legal analysis and documentation of the capacity observations. These interviews also cover basic demographic information, such as family and residency. While one attorney discussed the importance of knowing diagnoses related to cognitive impairment, others emphasized relying on their own or their teams' observations and voiced caution related to formal cognitive assessments. Concerns included the fact that diagnoses and cognitive assessment present only one data point of their client's functioning and that dementia and financial capacity are distinct constructs. Other attorneys considered avoiding questions about their physical and mental health, because people newly diagnosed with diseases, such as dementia or Multiple Sclerosis, might be hesitant to disclose and/or experiencing denial as a way of coping (Alzheimer's Association, 2023; Burgoyne et al., 2015; Petrie & Weinman, 2012; Wadley et al., 2004). In addition, the older adult client may benefit from being accompanied by persons from their support network, which reinforces screening questions from measures, such as the EIFFE (e.g., "Did you want this person to come with you to this appointment? Did that person insist that you come to see me? Did they take you to see other lawyers before me?" (Stiegel, 2015).

Formal financial capacity questions cover whoever is the responsible party for decisions, but were not used as frequently in attorneys' standard practice. Many assessments, such as the EIFFE, ask about the older adults' assets and inquires who has joined these accounts, the beneficiaries on these accounts, who else has access to this money, and any existing loans. Two attorneys had used the EIFFE and one reported occasionally using the Lichtenberg Decision Making Scale. While some expressed interest in learning about and using more formal tools,

others expressed confidence in their interview questions and experience and/or voiced issues with the potential consequences of finding poor results on a more standardized measure. Beyond the tests, it is recommended that attorneys ensure adequate time to ask more questions, perform any relevant tests that would help them accurately identify the client's financial capacity, conduct any needed collaborative interviews, consult with their team as needed, and have careful discussions with their clients.

*Subtheme 2: Creating discussions and conversations ensuring that client understands their decisions.*

Attorneys also assessed client financial capacity by creating discussions and conversations to gauge and better understand their situations or conditions. This process required communicating closely, listening, and incorporating relevant individuals' suggestions and advice, such as other legal practitioners and medical representatives. Conversations may include general and current affairs to provide insight into the older adult client's basic understanding and mental state. These findings align with Pinsker et al. (2010), who concluded elder clients should be assessed to check their social intelligence. During assessment discussions, they recommend practitioners test client propensity to credulity and gullibility which may increase vulnerability to financial exploitation.

*Subtheme 3: Seeking help from third-party neuropsychologists or other medical practitioners*

Participants reported seeking additional assistance and advice from a third-party medical practitioner. This finding echoes the recommendation by the California Undue Influence Screening Tool CUIST that lawyers assess: a) Client Vulnerability, b) Influencer's Authority/Power, c) Actions/Tactics, and d) Unfair/Improper Outcomes (CUIST; Quinn, et al., 2017). If deemed necessary, attorneys should then refer for a neuropsychological evaluation or capacity assessment. As noted by one participant, competent neuropsychologists can be difficult to access, have extensive wait times, are costly, and may provide findings that do not necessarily

align with the older adult's interests. Some attorneys even mentioned concern their client would take their business elsewhere at the suggestion of questioning their capacity and/or requesting a formal assessment. This concern was exacerbated by the potential of their client ending up in the office of an attorney who would not pursue the older adult's interest in the most ethical or thorough way or did not possess the same qualifications and/or experience level as the respondent.

Despite this, in some cases it was crucial to have a neuropsychological analysis of the older adult clients' cognitive and financial capacity. Specific signs that an older client required neurophysiologist services included difficulty managing finances and bills, poor and inconsistent judgement in financial decision-making, and an inability to answer questions about their finances. It is highly possible clients who lack knowledge about their finances or what is happening may lack financial capacity (Wood, 2017; Lichtenberg, 2015). Of note, people can have the capacity for some things and not for others. Overall, some respondents did see certain situations where a formal capacity assessment was necessary, although there were layers of caveats that should be considered. These reported concerns can inform the development of guidelines and protocols for attorneys working with older clients to ensure that their legal needs are met while also addressing their cognitive well-being, financial well-being, and overall best interest.

Several attorneys reported the need for a more preventative approach to capacity assessment within the healthcare system via general physicians or gerontologists. This highlights the need for better interdisciplinary approaches to financial capacity and exploitation considerations. While all Medicare plans include an optional brief assessment during an older adult's annual "Wellness" visit, only Medicare Part B includes a full visit dedicated to a more

comprehensive review of cognitive functioning by a doctor or specialist to assess diagnoses (not only for dementia, but also mental health issues and delirium that can present as cognitive impairment), and create a treatment plan (Medicare, 2023). Given the fact that 48% of eligible older adults are enrolled in Medicare Advantage plans, it is a strong proactive option with the potential of preventing financial exploitation and/or detecting it in a more timely fashion (Medicare, 2023; Freed et al., 2022). However, it should be noted that Medicare enrollment is generally lower in rural states and only those who have met their deductible or are able to pay the co-pay as part of Plan B would have access to the separate cognitive assessment (Freed et al., 2022).

### **General Discussion**

This study examined attorneys' perspectives of financial exploitation among older adults to explain how this group of non-mental health professionals identified and assessed financial capacity. According to these findings, financial exploitation most often occurred when a family member or caregiver misused an older adult's money for their benefit. Abuse comes in several forms with examples including a child living off their older adult parents' bank accounts, unusual withdrawals or requests from the older adult client's accounts, a caregiver suddenly taking over caring for the older adult client, or exploitation by service providers with no fiduciary responsibility, such as the insurance representative and personal financial and IT advisors (Teaster et al., 2012; Conrad et al., 2010). Attorneys reported working with the older adult to curb the prevalence of financial exploitation. They collaborate with mental health professionals and experts in disciplines that closely interact with older adults to appropriately measure financial capacity (Lichtenberg, 2012; 2016).

Data from the current study suggest special powers of attorney designation may be a source of exploitation for the older adult. Attorneys must therefore have skills in assessing capacity to protect clients from exploitation by their Power of Attorney (POA), despite clients lacking formal education on the issue (Duval & Levin, 2016). Lawyers must prioritize the prevention of financial exploitation through education for older adults and minimizing the power of attorney risks. Thus, lawyers must comprehensively understand an older adult's functioning and abilities across many facets (Stella et al., 2015; Wood & Lichtenberg, 2017). Further, attorneys practicing across various specialties, such as estate and business law, should be adequately educated and trained to recognize mild cognitive impairment and possible vulnerability among clients (Stiegel, 2015).

With varying mandatory reporting of financial exploitation for attorneys in each state, the findings in this study are key propositions for detecting financial exploitation. When assessing financial capacity, lawyers asked the older adult clients more questions than usual to ensure they were aware of and understood their decisions. The lawyers used tests and questionnaires to examine the client's financial capacity. Further, they had discussions and conversations with the clients ensuring they understood their decisions. Where necessary, attorneys sought help from third-party neuropsychologists or other medical practitioners.

A final consideration brought to light in this study regarded prosecution options associated with financial exploitation. While regulations and laws vary by state, attorneys were unified in emphasizing confusion among their clients and difficulty related to prosecution. They reported a misconception related to financial exploitation being commonly viewed as a criminal offense, explaining that civil financial exploitation cases were far more common, which means that there are currently no retributions in place for perpetrators (e.g., criminal record or jail time)

aside from having to pay back what was stolen with possible additions related to interest and attorney fees. For some clients, if criminal prosecution could apply, it is still avoided due to the nature of exploitation often being associated with family and friends of the older adult (Godfrey, 2020). This aligns with ABA findings that civil cases and the possibility of obtaining treble damages are rare for the victim of financial exploitation (Godfrey, 2020).

Whether these laws should be changed was discussed by three attorneys, who questioned how Adult Protective Services and law enforcement could play a more critical role in the detection and prosecution of exploitation, especially in light of the fact that for civil cases, it can often be difficult to find counsel, evidence, and proportionate remedies for older adult clients. While the Consumer Financial Protection Bureau (CFPB) also points to the need of collaboration between financial institutions, law enforcement, and APS via education and training, it would be advantageous to include attorneys and healthcare workers to these multidisciplinary networks working to address elder abuse issues (2017). Further, cases often do not present themselves to attorneys until it is too late to assist in a meaningful way. Attorneys cited explained that longer periods of time result in lower asset recovery and it is more difficult to pursue if the older adult has often been repeatedly stolen from until left in a precarious situation related to overall health or finances. Finally, court settlements can go on for years, which can place significant strain and distress upon the victim. Two attorneys highlighted the expense associated with hiring and retaining counsel, as well as the bar that is often set for only pursuing cases of higher amounts that are stolen. This can cause discrimination in the justice system for those victims who were already economically disadvantaged.

## **Implications**

The objective of this project was to collect, present, and develop theoretical frameworks for attorneys' viewpoints on the financial capacity of older adult clients. The aim of the study was to explore how attorneys work with older adults who are vulnerable to financial exploitation by examining their experiences and perceptions. At the commencement of this study, researchers had limited knowledge about attorneys' experiences assessing financial decision-making capacity in older adults.

The dearth of literature in this area pointed to a need for research examining these professionals in terms of their conceptualization of and experience with elder financial abuse, both in terms of detection and subsequent procedures to address financial exploitation concerns. The study suggests participating attorneys conceptualized financial abuse of older adults as being most often perpetrated by individuals closest to them, such as family members, caregivers, and financial advisors. Further, malpractices can manifest in various ways, including children living off their older parents' bank accounts, unusual withdrawals or requests from the older adult client's accounts by caregivers, or individuals suddenly usurping the role of caregiver with the intention of financial exploitation.

The findings support the supposition that attorneys need to be aware of and distinguish the actions and intentions of the people surrounding the older adult client by fearlessly asking for explanations and other details from the clients to ensure that financial exploitations do not happen. Lawyers should thoroughly assess requests for special powers of attorney as such documents are the key sources of exploitation for the older adult. The findings further help to theorize the following as cues that a financial capacity assessment may be necessary: 1) finances seem to be managed by those with no fiduciary responsibility, 2) finances are solely managed by

one child when there are other children, 3) complaints arise from one family member or other family members, and 4) an older adult proactively and openly shares financial matters than usual.

The second implication is that attorneys should accelerate their work in protecting the interest of vulnerable older adults. Relying on legal provisions and other research resources, lawyers should gauge the intentions and behaviors of people surrounding the older adult and use the findings to determine if they are being exploited. These findings support other studies and regulatory bodies that attorneys play a critical role in preventing and detecting financial exploitation and abuse of the older adult, and lawyers should act accordingly.

As caregivers and family members are the most likely to abuse their privilege, attorneys should treat the power of attorney documents held by family members and caregivers with caution. Underlining the Elder Law and Special Needs Section's Elder Abuse Committee specification, attorneys need skills in assessing capacity to protect clients from exploitation by their Power of Attorney (POA). These skills are more necessary when clients lack knowledge regarding a POA in terms of procedure/enactment and associated responsibilities. (Duval & Levin, 2016). Related to this issue, lawyers should prioritize the prevention of financial exploitation through education for older adults and minimization of power of attorney risks by being extra cautious.

Further, attorneys in the fields of family and elder law should be adequately educated and trained to recognize mild cognitive impairment and possible vulnerability among their clients to ensure that they are able to provide effective legal representation and protect the interests of their clients. In addition to training practitioners on financial assessment techniques, the findings imply a need for standardized assessment tools. As Siordia (2012) found, practitioners encountered differences in self-reports, informant reports and clinician reports when conducting

financial assessments. Lawyers would benefit from exposure to professional financial capacity assessment tests and questionnaires (e.g., CUST, EIFFE, Lichtenberg's Financial Decision-Making Scale). Standardized tools are needed to assess financial capacity because they provide a structured and objective way to measure an individual's abilities in this domain, identifying strengths and weaknesses in one's financial capacity, and providing data to monitor it over time. Standardization also ensures the assessment is administered consistently across individuals, thus reducing the risk of bias and increasing the reliability of results. Further, it also allows for comparison of results across individuals and populations, which can help inform decision-making and interventions. Sensitizing lawyers about the nature and appropriate content of conversations with older adult clients can help them to use these tools more effectively and to tailor their communication style to the individual's needs and abilities.

Few U.S. states require mandatory reporting of financial exploitation for attorneys. Although a promising avenue for detection and prosecution, this requirement could jeopardize attorney-client privilege and the attorney's (general) obligation to prioritize the client's wishes. Despite this, law makers should consider if mandatory reporting state and federal policies could address this prevalent, costly, and harmful issue. The propositions from this study can help accelerate the wide-spread adoption of policies to aid in accountability for those engaging in financial exploitations, justice for the older adult victim, and consideration of the client's right to privacy (e.g., to decline legal action). Finally, these data imply a need to address structural challenges limiting the utilization of financial capacity assessment.

A lack of access to, and a limited number of, neuropsychologists make it challenging to access clients' cognitive and financial capacity when the service was deemed necessary. Research exploring prevalence and procedures associated with capacity in general and also

specifically financial capacity and suspected exploitation within our healthcare systems would be beneficial as a future direction. Further addressing these structural and resource issues is essential to enhancing the assessment or evaluation of an individual's financial capacity.

### **Limitations**

These important data must be considered within the context of methodological limitations. First, this qualitative study included data from a small purposive sample of 18 legal practitioners handling elder law matters. This sample included individuals with professional expertise in elder law. However, the extent to which similar results would arise with attorneys who do not specialize/practice in this area is unknown. Further, the recruited group of attorneys demonstrated high rates of continued education and membership/associations to learn, train, and teach over the course of their careers. Those who chose to participate did so without any financial incentive, taking billable hours out of their work day, often reporting incentive associated to the importance of helping older adults from exploitation and capacity-related concerns. It is unclear how representative these volunteers were even compared to those who work in elder law and/or estate planning.

The experiences reported by attorneys only pertained to clients engaging in financial planning and able to afford legal counsel. When considering financial exploitation, several attorneys emphasized that the amount of money in question played a significant role in consideration regarding their involvement in the case. Plainly, the results may suffer from sample selection bias due to the sampling design and results likely exclude older adults coming from lower socioeconomic backgrounds.

Although this study has provided knowledge and shed light on to what extent attorneys are aware of the guidelines, it was beyond the study's scope to identify or ascertain participant

financial assessment skills. Future quantitative studies may consider this question. The ABA and APA recommend equipping attorneys with informal capacity assessments. Although some participants indicated applying these skills in their practices, it was beyond this study's ability to review the interview questions typically used or confirm/disconfirm the level of skills possessed.

The results revealed a lack of a universal understanding of how attorneys perceive and approach financial capacity when working with older adults. Research is necessary to identify the knowledge gaps to allow for more effective, realistic goal-oriented training and the development of tools specifically designed for lawyers who assess financial capacity. The findings also suggest lawyers recommend clients get financial capacity reports from mental health practitioners as needed and collaborate more closely with these practitioners in helping older adults at risk of exploitation and emphasize the need for more neuropsychologists due to scarcity and lengthy waitlists. It was also evident that they encountered clear cases of older adults' financial exploitation. However, it was unclear if and to what extent the respondents worked with enforcement agencies or assisted their clients in seeking legal remedies when exploitation had occurred.

The literature review and current data suggest several tools and assessment questionnaires are available. Some respondents indicated using these tools to assess the financial capacity of the older adult, while others indicated only engaging the clients in in-depth investigative conversations. However, the extent of use of these tools was unclear, as well as the effectiveness and accuracy of the tools were unclear. These gaps are opportunities for future research.

## **Conclusions**

In describing their work with older adults, attorneys relied on experiential knowledge when it came to matters concerning financial capacity and exploitation consideration. Suspicious and/or concerning factors were often detected due to the attorney's often longstanding relationship with their client, sometimes reported as existing over several decades. As a result, attorneys are often in a unique position to have a more comprehensive pattern of psychosocial and financial history of older adult clients compared to other professions, which makes the attorney role all the more critical in cases of capacity. Their established baseline of capacity and ability to detect variation in presentation and responding likely provides them with a deeper level of insight than others might have. Further, given the established, trusting, and confidential relationships that might be in place with their clients, it is possible older adults would feel more comfortable disclosing cases of exploitation to someone designated as having their "best interest" in mind.

Attorney understanding of financial exploitation was typically limited to family, friend, and/or caregiver perpetrators, though some attorneys cited past issues with financial representatives and/or designated power of attorney as well. Examples of cues included abnormal financial spending and/or requests and suspicious interpersonal relationships or interactions. In regards to assessing financial capacity, attorneys tended to again rely on experiential learning, as well as the use of routine interview questions, typically related to psychosocial and financial background.

While there are many areas of future research needed to grasp a better understanding of financial capacity and exploitation of older adults in a more comprehensive way and inclusion of more diverse populations considered, this study also illustrated the importance of improved

relationships across professionals (e.g., attorneys, bankers, financial institutions, psychologists, physicians, social workers, law enforcement, etc.) working with older adults to ensure protection of their best interest and autonomy. Specifically, an emphasis needs to be placed on preventative measures via routine capacity assessments and financial exploitation education among older adults and bolstered detection and reporting systems among financial institutions. While financial institutions focus on involvement of law enforcement and APS, it would be beneficial to consult with healthcare and legal professionals, given some of the issues in APS detection and criminal prosecution related to financial exploitation. It is likely that improved policies and laws could assist in mitigating the underreporting and bolstering the remedies for older adult victims involved in exploitation.

Although every state is different, this study also pointed to the need for increased access to neuropsychological assessment for financial capacity evaluations and improved laws to assist with detection and prosecution of financial exploitation.

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## APPENDIX A

### RECRUITMENT EMAIL

***Please help with attorney and forensic mental health research!***

Are you a legal professional? If so, please consider helping our research team better understand legal professionals' perceptions of financial capacity and experiences working with older adult clients. To participate in this study, you will complete a virtual interview on your professional background, experiences with, and opinions of financial capacity assessment.

You may withdraw from participation at any time. Responses are completely anonymous, and no personal identifying information will be recorded, such as your name, email, or IP address.

Participation is expected to take **30 minutes**.

You can participate in this study by emailing [embownes@crimson.ua.edu](mailto:embownes@crimson.ua.edu) with 2-3 dates and times that you would be available over the next two weeks. You will receive an email confirming a time, which will include a HIPAA-compatible Zoom link to access the interview.

We sincerely hope that you will participate and **consider forwarding this email to others who may be eligible**. Thank you for considering our request.

Questions regarding the purpose or procedures of the research should be directed to:

Elizabeth Bownes, M.A.  
University of Alabama  
348 Gordon Palmer Hall  
Box 870348  
Tuscaloosa, Alabama 35487  
205-205-1177  
[embownes@crimson.ua.edu](mailto:embownes@crimson.ua.edu)

If you have questions about your rights as a person in a research study, call Ms. Tanta Myles, the Research Compliance Officer of the University, at 205-348-8461 or toll-free at 1-877-820-3066.

## APPENDIX B

### WAIVER OF DOCUMENTATION FORM

#### **Informal Consent**

**Please read this informed consent carefully before you decide to participate in the study.**

**Consent Form Key Information:**

- Participate in a 30-minute interview for a study about attorneys' experiences with and perspectives on financial capacity.
- No information collected will connect identity with responses

**Purpose of the research study:** While it is known that financial exploitation is under-detected and underreported, no theory exists to explain the process of assessing capacity within the legal field. Using grounded theory methodology, 18-24 attorneys with varying levels of elder law experience will participate in a semi-structured virtual interview (i.e., Zoom). Specifically, the current study seeks to examine how attorneys perceive financial capacity, the typical conditions under which capacity issues are identified, and the protocol followed to address capacity concerns. Once this process is better understood, future research and policy changes could bolster an attorney's ability to detect, prevent, and report financial exploitation.

**What you will do in the study:** The interview will be conducted by the primary investigator and will consist of questions regarding your experience with and opinions regarding financial exploitation and financial capacity evaluations. First, you will be asked about your professional background. Next, you will begin the interview and, your responses will be audio recorded and transcribed. The interview will take approximately 30 minutes. You may skip any question that makes you uncomfortable to answer and you may stop the interview at any time.

**Time required:** The study will require about 30 minutes of your time.

**Risks:** There are no anticipated risks in this study. The primary potential risks associated with participation includes potential anxiety or discomfort while answering questions about your opinions.

**Benefits:** There are no direct benefits to you for participating in this research study. The study may help us understand the practices, approaches, and legal professionals' opinions of financial exploitation and financial capacity evaluations, which may have significant legal implications. A better understanding could identify attorneys' awareness and use of available resources associated with financial capacity.

**Confidentiality:** The information that you give in the study will be handled confidentially. Your background experience will be categorized and entered into a secure data sheet at the beginning

of the study. Your interview responses will be assigned a code number. The interviewer will not reference any personal information about you once the audio recording begins. Please do not share anything you would not feel comfortable having recorded.

If you disclose personal and/or identifying information about yourself during the interview and do not wish to have it recorded, please let the interviewer know. She can delete your interview recording or a particular portion of the interview immediately. Your name and/or identifying information will not be used in any report.

Background experience, interview responses, and audio recordings will be uploaded and saved on the University of Alabama's UABox, run through the UA Office of Information Technology (OIT). Audio recordings will be deleted after transcription is completed within one month of the interview.

**Voluntary participation:** Your participation in the study is completely voluntary.

**Right to withdraw from the study:** You have the right to withdraw from the study at any time without penalty. If you agreed to audio recording, then your tape will be destroyed should you decide to withdraw.

**How to withdraw from the study:** If you want to withdraw from the study, tell the interviewer you would like to stop the interview. There is no penalty for withdrawing.

**Compensation/Reimbursement:** You will receive no payment for participating in the study.

**If you have questions about the study or need to report a study related issue please contact, contact:**

Name of Principal Investigator: Elizabeth Bownes, M.A.

Title: Graduate Student

Department Name: Psychology

Telephone: 334-233-3693

Email address: embownes@crimson.ua.edu

Faculty Advisor's Name: Jennifer Cox, Ph.D.

Department Name: Psychology

Telephone: 205-348-7908

Email address: jennifer.m.cox@ua.edu

**If you have questions about your rights as a participant in a research study, would like to make suggestions or file complaints and concerns about the research study, please contact:**

Ms. Tanta Myles, the University of Alabama Research Compliance Officer at (205)-348-8461 or toll-free at 1-877-820-3066. You may also ask questions, make suggestions, or file complaints and concerns through the IRB Outreach Website at <http://ovpred.ua.edu/research-compliance/prco/>. You may email the Office for Research Compliance at [rscompliance@research.ua.edu](mailto:rscompliance@research.ua.edu).

**Agreement:**

- I agree to participate in the research study described above.
- I do not agree to participate in the research study described above.
- I agree to audio-recording in the research study described above.
- I do not agree to audio-recording in the research study described above.

## APPENDIX C

### ATTORNEY BACKGROUND QUESTIONS

#### FE Attorney Interview

*Today I am going to ask you a few questions about working with older adults and financial capacity cases. The purpose of our study is to better understand how attorneys think about these issues and how it might impact their work. We hope to learn more about how financial exploitation cases are commonly identified and assessed. As we are talking, please consider your own experiences as related to your legal practice.*

#### **Interview Details**

Employ. Hx:

Experience:

EL Experience:

FCA Training/Experience:

% of EL Cases:

# of FE Cases:

In your own words, could you please briefly describe your employment history (include questions about previous work with older adults, training on financial capacity)?

--

APPENDIX D  
ATTORNEY SEM-STRUCTURED INTERVIEW

Participant #: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

**Questions to Ask Interviewer**

Question #1: How would you define financial capacity as it relates to your legal jurisdiction?

Notes: Enter notes

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Question #2: What is your understanding of financial exploitation?

Notes: Enter notes

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Question #3: How often do you work with a client you suspect might be at risk for financial exploitation?

Notes: Enter notes

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Question #4: What are the typical circumstances you find yourself considering financial capacity?

Notes: Enter notes

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Question #5: What types of cues might you notice that indicate a client might be at risk of FE?

Notes: Enter notes

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Question #6: How do you handle a case when you suspect someone is at risk of financial exploitation?

Notes: Enter notes

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Question #7: Please give one example of a case in which you questioned a client's financial capacity and you DID NOT REFER them for an evaluation.

Notes: Enter notes

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Question #8: What kind of guidelines or tools do you use during an informal capacity assessment?

Notes: Enter notes

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Question #9: Please give one example of a case in which you questioned a client's financial capacity and you DID NOT refer them for an evaluation.

Notes: Enter notes

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Question #10: Please give one example of a case in which you questioned a client's financial capacity and you DID refer them for an evaluation. (Specify: At which stages of the legal process do you typically refer a client for a capacity evaluation?)

Notes: Enter notes

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**Additional Notes**

Enter Additional Notes. (What kind of changes, if any, would you like to see regarding FE cases within the legal field (e.g., experience with/open to conducting assessments)?)

## APPENDIX E

### ATTORNEY STATE BAR AND ORGANIZATIONS CONTACTED

1. National Association of Elder Law Attorneys
  - a. States: Alabama, Alaska, Arkansas, California, Colorado, Delaware, Georgia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New York, New Hampshire, Nevada, North Dakota, Oregon, Texas, Utah, Washington, Wisconsin, Wyoming
2. State Bar Associations
  - a. Alabama, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, New York, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont

APPENDIX F  
IRB APPROVAL LETTERS

October 6, 2021

Elizabeth Bownes, M.A.  
Department of Psychology  
College of Arts & Sciences  
The University of Alabama  
Box 870348

Re: IRB # 21-08-4899 "Attorney Perspectives of Financial Capacity among Older Adults"

Dear Mrs. Bownes:

The University of Alabama Institutional Review Board has granted approval for your proposed research. Your protocol has been given exempt approval according to 45 CFR part 46.104(d)(2) as outlined below:

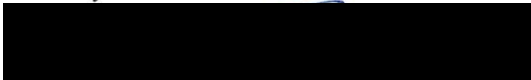
*(2) Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met: (iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by §46.111(a)(7).*

The approval for your application will lapse on October 5, 2022. If your research will continue beyond this date, please submit the annual report to the IRB as required by University policy before the lapse. Please note, any modifications made in research design, methodology, or procedures must be submitted to and approved by the IRB before implementation. Please submit a final report form when the study is complete.

Please use reproductions of the IRB approved informed consent form to obtain consent from your participants.

Good luck with your research.

Sincerely,

  
Carpantato T. Myles, MSM, CIM, CIP  
Director & Research Compliance Officer

Jessup Building | Box 870127 | Tuscaloosa, AL 35487-0127  
205-348-8461 | Fax 205-348-7189 | Toll Free 1-877-820-3066

October 3, 2022

To: Elizabeth Bownes, M.A.  
Department of Psychology  
College of Arts & Sciences  
The University of Alabama  
Box 870348

From: Carpentato T. Myles, MSM, CIM, CIP  
Director & Research Compliance Officer

Re: **Notice of Approval**

IRB Application #: e-Protocol 21-08-4899-R1  
Project Title: "ATTORNEY PERSPECTIVES OF FINANCIAL CAPACITY AMONG OLDER ADULTS"  
Submission Type: Renewal  
Approval Date: October 3, 2022  
Expiration Date: October 2, 2023  
Funding Source: None  
Review Category: EXEMPT  
Approved Documents: Waiver of Written Consent, Recruitment Email

Dear Mrs. Bownes:

The University of Alabama Institutional Review Board has approved your proposed research . Therefore, your application has been approved according to 45 CFR part 46 *as outlined below*:

*(2) Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met:*

*(iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by §46.111 (a)(7).*

The approval for your application will lapse, as noted above. If your research will continue beyond this date, please submit the Continuing Review to the IRB as University policy requires before the lapse. Please note any modifications made in research design, methodology, or procedures must be submitted to and approved by the IRB before implementation. Please submit a final report form when the study is complete.

All the best with your research.

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