Making the Case

Civil Process/Criminal Process
In Elder Financial Exploitation Matters

Maine Elder Abuse Summit, May 15, 2015
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Geneva's Case: A Criminal Matter

- Geneva had not been receiving her bank statements for months. She called the bank. The teller told her "Geneva we are sending the statements. You know your account is overdrawn."
- Geneva's unemployed grandson, Duane, using Geneva's debit card, had drained her account and was intercepting her bank statements. He assumed Geneva would die soon and never know the difference.
- Geneva's daughter alerted the police who interviewed Duane and the bank officers and Geneva.
- Duane confesses and pleads to theft by deception.

Ruth and Vince: A Civil Matter

- Ruth and Vince lived in their farmhouse for all fifty years of married life.
- As Vince's dementia worsened Ruth was overwhelmed and losing her eyesight. Their daughter Judy helped with some errands and handled her parent's finances.
- One day Judy arrived at the house with a notary friend and presented her parents with a deed. She directed them to sign the deed as way to "save the house from the state" and stay out of a "home." They signed, putting the house "in Judy's name."
- Judy paid no money to her parents and reserved no life estate for them.
- Two months later Judy served a Notice to Quit on her parents.

Aunt May's Case

Jane moved in with her Aunt May and became her aunt's agent pursuant to a financial power of attorney. Aunt May never married and has no children. Jane has been taking May to her medical appointments, purchasing May's groceries and paying May's bills with May's checkbook. Although Jane is a co-owner of joint bank account with May all of the deposits to the account are from May's pension.

Aunt May's dementia progressed to the point that Jane placed her in Serenity Manor – a boarding home. Since May's mortgage was paid long ago and she lived frugally there should have been sufficient funds in her account to pay the Manor until May's home could be sold.

The Manor calls. May's monthly bill has not been paid for months. They have learned that May's home was transferred to Jane two years ago. They want to evict May. May reaches out for legal help.

What can Denis Do as Civil Attorney?

- Interview May, gather facts and documents readily available
- Merit assess including reliability of client and possible remedy
- Pick a court (Probate Court a possible due to POA, 18-A MRS § 5-916)
- Seek attachment of real estate and bank accounts (trustee process)
- File suit (perhaps in forma pauperis)
- Record Lis Pendens/Clerk's Certificate at registry of deeds
- If an Answer is filed, begin discovery (document requests, requests for admissions, interrogatories, subpoenas, depositions, etc.)
- CANNOT THREATEN CRIMINAL ACTION!

What can Leanne Do as Assistant Attorney General?

- Wait for someone to provide more information substantiating that a crime may have been committed.
- What quantum of information is necessary to open a criminal investigation?

What Agencies and others can do at this point

- Adult Protective Services, Office of Securities, Long Term Care Ombudsman, referring attorneys and other agencies and concerned individuals can seek appropriate referral (sometimes *multiple* referrals – civil and criminal) and obtain and preserve bank records, real estate documents, legal documents of all kinds as possible future evidence.
- Preserve/protect the paper trial.
- Present to a "road map" to investigators (subject to confidentiality issues and other concerns) "with tabs" (says Leanne).

Civil Remedies Available (Denis)

- Improvident Transfer of Title Unjust enrichment
- Abuse of a Confidential Relationship
- Conversion
- Other torts
- Cause of action in Probate against agent 18-A MRS § 5-916

Improvident Transfer of Title (Denis)

- Transfer of 10% or more of assets or *any* real estate
- To a person who has a confidential or fiduciary relationship with the elder
- By a "dependent" or "partially dependent" elder (60 or older)
- For less than full consideration
- Without independent representation by counsel the
- Transfer is <u>deemed</u> the result of undue influence.

Unjust Enrichment

- A benefit conferred upon the defendant by the plaintiff;
- An appreciation or knowledge by the defendant of the benefit; and
- the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Abuse of a Confidential Relationship

- The actual placing of trust and confidence in fact by one party in another
- A great disparity of position and influence between the parties to the relation.

Judicial Relief in Probate Court Title 18-A M.R.S.A. § 5-916

- (a). The following persons may petition the Probate Court or the Superior Court for the county in which either the principal or the agent resides to construe a power of attorney or review the agent's conduct and grant appropriate relief ...
- Principal or agent, conservator or other fiduciary, health care POA agent, principal's spouse or registered domestic partner, presumptive heir of principal, beneficiary of trust etc., governmental agency with regulatory authority to protect welfare of principal, principal's caregiver or person who demonstrates sufficient interest in principal, a person asked to accept the power of attorney.

Criminal Statutes Available (Leanne)

- Theft by Deception
- Theft by Unauthorized Taking
- Misuse of Entrusted Property

Theft by Deception

- When a person obtains or exercises control
- Over the property of another
- As a result of deception
- With the intent to deprive the person of the property.

THEFT BY UNAUTHORIZED TAKING OR TRANSFER

A person is guilty of theft if:

The person obtains or exercises unauthorized control over the property of another

with intent to deprive the other person of the property

Standard of Review – Burden of Proof

Civil: Preponderance of the evidence
 More likely than not



Criminal: Beyond a Reasonable Doubt
 Almost certainly true

More Facts

• Through civil discovery Denis learns that Jane had entered into an agreement to provide care for May in return for living in her home rent-free. Denis obtains May's bank records pursuant to informal discovery or subpoena to bank and Jane's bank records pursuant to a discovery request. He finds a series of withdrawals from May's account, along with debit card spending at computer game stores, wedding shops and gun shops. He also finds transfers from may's account to Jane's and a great many pain medication prescriptions filled for May – many after she moved to the Manor. Some after the Notice to Quit was served.

What Can Denis Do?

- Amend the Complaint to add a contract Claim and note missing pain meds
- Pass <u>all</u> discovery on to Leanne, with a narrative or roadmap describing the case and referencing the relevant records. Extra points for a table of contents with corresponding tabs.

What Can Leanne Do?

- Request an investigator be assigned
- Obtain the Power of Attorney (from May or Denis)
- Obtain real estate transfer records from registry of deeds
- Seek May and Jane's bank records through Grand Jury subpoena
- Seek May's prescription records
- * Can there be a theft of money from the joint account if Jane is a co-owner and if Jane is the agent pursuant to a Power of Attorney?

Title 17-A: MAINE CRIMINAL CODE Chapter 15: THEFT §352. DEFINITIONS

4. "Property of another"

includes property in which any person

other than the actor has an interest that the actor is not privileged to infringe,

regardless of the fact that the actor also has an interest in the property.

Model Penal Code Commentary: "Parties to joint bank accounts also may be convicted of stealing from each other by unauthorized withdrawals from the account."

The role of the Criminal Investigator

- Interview May on tape.
- Interview Boarding home director regarding his contacts with Jane and record of payments.
- Prepare a summary of interview of each witness.
- Request Jane's records through Grand Jury subpoena.
- Obtain records from the gun shops, computer game stores and wedding shops.
- Analyze records. Create chart showing paper trail from May's to Jane's accounts.
- Confront Jane
- Draft a case memo narrative telling the story developed in the investigation.

What Can Leanne Share with Denis?

- Nothing obtained through the Grand Jury process.
- But under the Intelligence and Investigative Record Information Act, she can share information with a crime victim or that victim's agent or attorney.
- 16 M.R.S. 805(2)

What Can Denis Share with Leanne?

• Everything

What is Next in Criminal Case?

- Investigator having created charts tracking the money may now attempt to interview Jane.
- Announced v. Unannounced interview
- Defendant's Rights. 5th Amendment privilege.

Jane refuses to talk to the investigators

Denis deposes and Jane takes the Fifth based on pending criminal investigation. How does this impact criminal vs. civil case?

<u>Indictment – Criminal Complaint</u>

- After determining that Jane transferred over \$10,000 in cash to herself from May's account Leanne seeks indictment.
- Presents case to Grand Jury sitting in Jane's county.
- What 's a Grand Jury? 13 to 23 persons summonsed to serve as grand jurors to consider whether there is probable cause to file felony charges (Class C or above).

What can Leanne share with Denis now?

- Nothing that occurred before the Grand Jury.
- No records obtained by Grand Jury subpoena (unless later used as exhibits at trial or hearing.
- Indictment not public until the Grand Jury "rises" at the end of its term.

Civil Case Timeline

- Complaint
- Clerk's Certificate
- Ex parte attachment
- Discovery
- Alternative Dispute Resolution (if Superior Court)
- Summary Judgment Motion
- Trial management/settlement conference
- Trial

Civil Case Resolution

- Judgment on the Pleadings
- Alternative Dispute Resolution or other settlement
- Summary Judgment
- Judgment*

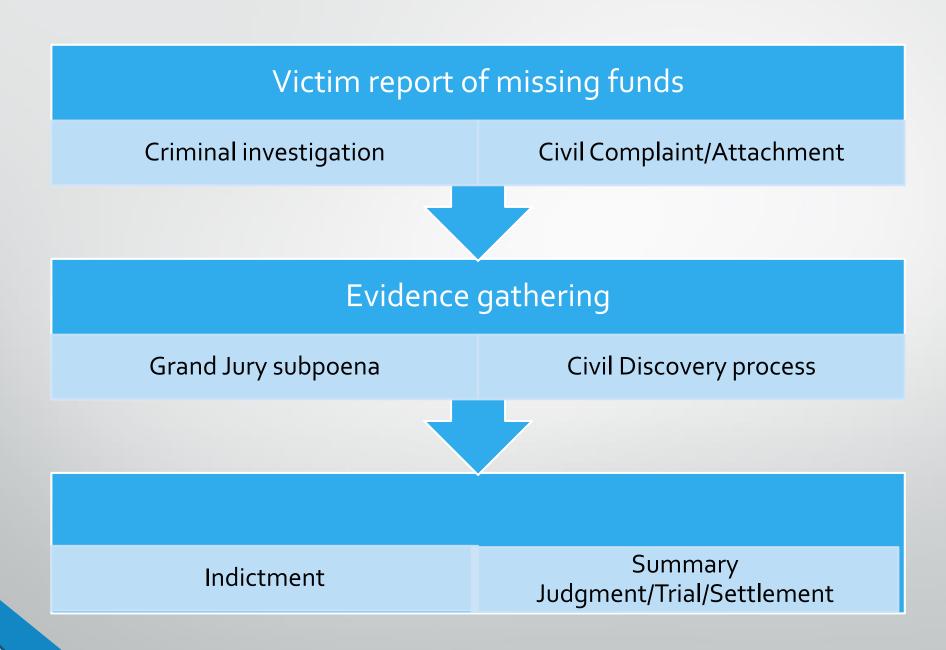
*Collection of a money judgment is always uncertain. Retransfer of real estate by judicial order pursuant to Improvident Transfer of Title is easier to achieve.

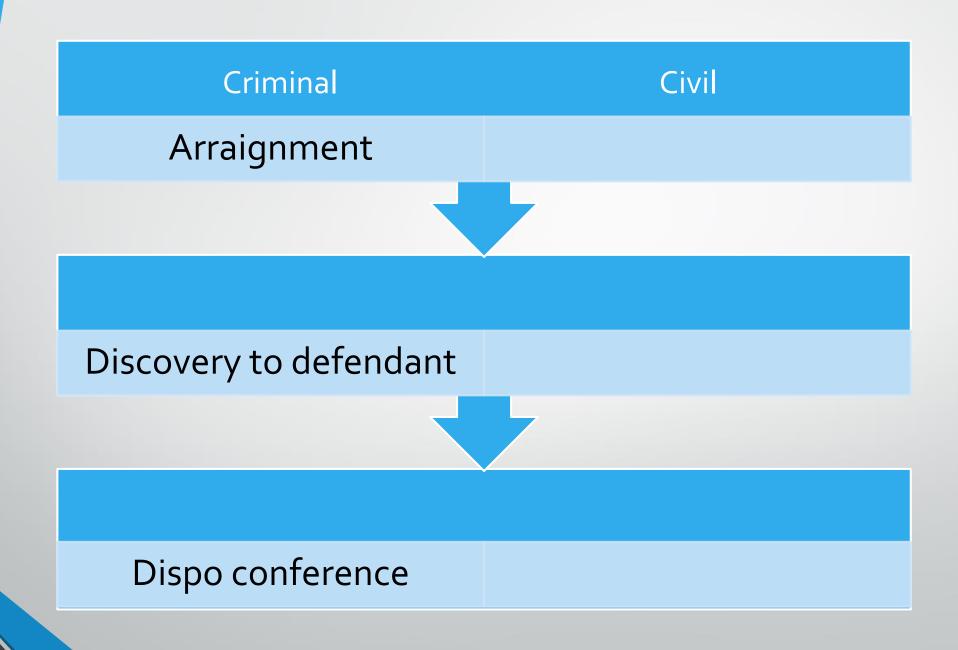
Criminal Case Timeline

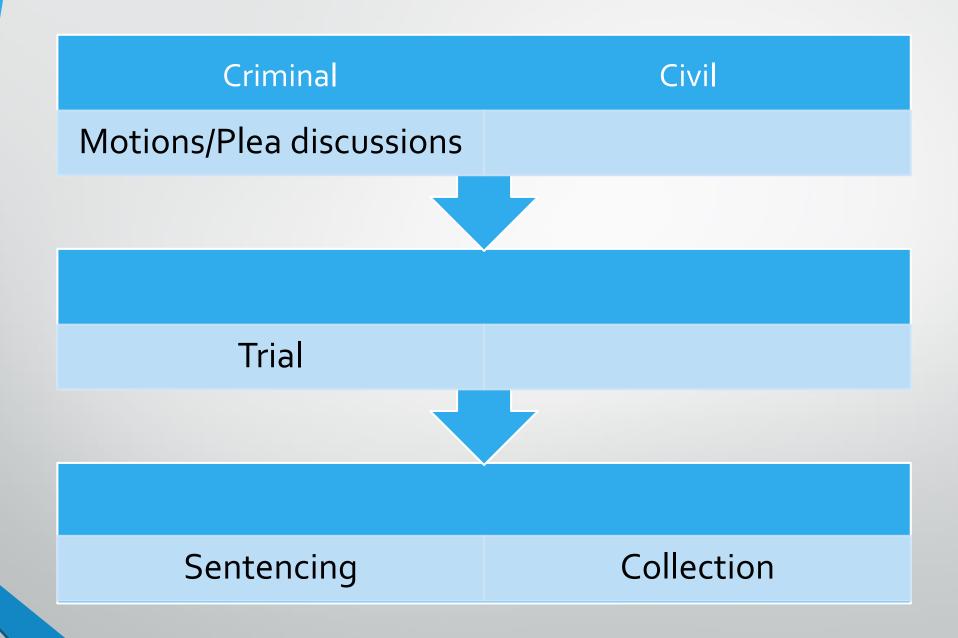
- Investigation
- Indictment
- Arraignment
- Discovery (must be shared fully with Defendant)
- Defense motions (including suppression motions)
- Plea negotiations/plea deal
- Trial
- Sentencing

Criminal Case Resolution (if no plea deal)

- Sentence if State prevails
- Jail time
- Probation conditions
- Restitution
- Community Service
- Criminal Record for Defendant







Criminal v. Civil

- Don't file until you are ready for trial.
- Public prosecution seeks to punish and deter. Making victim whole comes second.
- Pick the strongest cases for maximum deterrent.
- Victim has say but no control of the outcome sought by the prosecutor.

- File complaint based on credible allegation. Develop evidence through discovery
- First and only responsibility is to the victim. Make the victim whole.
- Client/victim decides whether to file.
- Client/victim decides what to accept to resolve the case.