

July 2015

Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?

Carolyn L. Dessin

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Elder Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Dessin, Carolyn L. (2005) "Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?," *Akron Law Review*: Vol. 38 : Iss. 4 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol38/iss4/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

SHOULD ATTORNEYS HAVE A DUTY TO REPORT FINANCIAL ABUSE OF THE ELDERLY?

Carolyn L. Dessin *

I. INTRODUCTION

Exploitation of older persons is a growing problem in America.¹ As a result, our legal and social systems are struggling to develop structures that will prevent, remedy and punish instances of abuse. From all indications, financial abuse is becoming increasingly common, and can be devastating to its victim.²

States have enacted a wide variety of statutes aimed at alleviating financial abuse.³ There are two relevant bodies of law: a state's protective services law and the state's criminal law. Although one may normally think of the purpose of the criminal law as deterring and punishing crimes, and the protective services law as protecting a state's vulnerable citizens, the two bodies of law are frequently closely intertwined in this area. Thus, a law enforcement officer may have a duty to notify the appropriate protective services personnel of suspected abuse and the protective services worker may have a duty to report suspected abuse to law enforcement.

*Associate Professor of Law, The University of Akron School of Law. J.D., Villanova University School of Law; M.M., Westminster Choir College; B.M. Ed., Temple University. The author would like to thank the University of Akron School of Law for its support of the research for this article. She also thanks Christopher Stewart for his research assistance.

1. See generally *Elder Abuse: A Decade of Shame and Inaction: Hearing Before the Subcomm. on Health and Long Term Care of the House Select Comm. on Aging*, 101st Cong. 1 (1990) (discussing prevalence of abuse) [*hereinafter* 1990 House Report]. The 1990 House Report was the follow-up to a 1981 report: STAFF OF HOUSE SELECT COMM. ON AGING, 97TH CONG., *ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM* (Comm. Print 1981) [*hereinafter* 1981 House Report].

2. See 1981 House Report, *supra* note 1, at XV. Cf. National Survey of Abuse of the Elderly in Canada, 4 J. ELDER ABUSE & NEGLECT (1/2), 5 (1992) (finding that financial abuse is the most common type of elder abuse in Canada).

3. See generally Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267 (2003) (describing various approaches).

Each state has a mechanism for protecting vulnerable citizens. Thus, a state will have some agency charged with protecting the interests of those who need protection. Additionally, each state has a mechanism to allow a court of proper jurisdiction to appoint a guardian for the estate of a person who is adjudged incompetent. These protective arrangements intervene when a person is likely to be taken advantage of by others, but only after the protective services personnel learn of a potential problem.

With respect to criminalizing exploitation, states have taken a variety of approaches. Some states specifically criminalize financial abuse of the elderly.⁴ Others rely on criminal statutes of general application to proscribe exploitation.⁵ Still others use the age or vulnerability of the victim as a sentencing enhancement.⁶

In addition to the statutes proscribing exploitation, many states have chosen to impose a duty to report suspected abuse.⁷ This is an attractive addition to the arsenal of weapons to combat exploitation. The rationale underlying these reporting statutes is simple: many more cases of abuse are likely to receive the attention they require from law enforcement and protective services agencies if we impose a duty to report suspected abuse to one or both of those agencies.

There has been some discussion about the effectiveness of mandatory reporting statutes. Some see them as an important tool in remedying elder abuse while others see them as relatively unimportant because failure to report is seldom prosecuted.⁸ Regardless of the actual

4. See, e.g., CAL. PENAL CODE § 368 (2005); COL. REV. STAT. ANN. § 18-6.5-103(5) (2004).

5. See, e.g., D.C. CODE ANN. § 22-3211 (2004) (setting forth offense of theft); see IOWA CODE ANN. § 726.8 (2003) (criminalizing “wanton neglect or nonsupport of a dependent adult”).

6. See, e.g., MICH. COMP. LAWS ANN. § 750.174a (2004).

7. See *infra* notes 4-6, 10-14 and accompanying text.

8. See, e.g., Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STAN. L. & POL’Y REV. 175, 188 (2003); Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 611 (2003); Victoria Vron, Note, *Using RICO to Fight Understaffing in Nursing Homes: How Federal Prosecution Using RICO can Reduce Abuse and Neglect of the Elderly*, 71 GEO. WASH. L. REV. 1025, 1031 (2003). See also B.E. Blakely et al., *Improving the Responses of Physicians to Elder Abuse and Neglect: Contributions of a Model Program*, 19 J. GERONTOLOGICAL SOC. WORK 35, 37 (1993) (discussing a model program for improving elder abuse reporting by physicians); Carolyn Lea Clark-Daniels et al., *Abuse and Neglect of the Elderly: Are Emergency Department Personnel Aware of Mandatory Reporting Laws?*, 19 ANNALS OF EMERGENCY MED. 970, 970 (1990) (stating that “[m]any medical professionals are either unaware of state mandatory reporting laws or choose to disregard them”); Charles Pratt, Comment: *Banks’ Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 CAL. W. L. REV. 195, 202 (2003).

efficacy of such statutes, they exist in many jurisdictions.⁹ This Article will therefore put the efficacy issue aside and focus on whether an attorney can and should report suspected abuse under a mandatory reporting statute.

Part Two of this article will examine the various states' approaches to mandatory reporting of abuse. Part Three will explore the various states' rules governing attorney conduct. Part Four will analyze the interaction of the mandatory reporting provisions with the rules governing attorney conduct. Finally, Part Five will discuss whether requiring attorneys to report suspected elder abuse is desirable.

II. THE VARIOUS STATES' APPROACHES TO MANDATORY REPORTING

States have enacted a variety of statutes mandating reporting of suspected financial abuse of the elderly. These approaches will be discussed seriatim.

First, some states mandate that anyone having a reasonable suspicion that an older person is being abused has a duty to report it.¹⁰ This sweeping approach would include attorneys as mandatory reporters.

Second, some states require that only those members of certain listed professions have a duty to report elder abuse. In some states, that list includes attorneys,¹¹ while in other states it does not.¹²

Third, some states do not impose any mandatory duty to report

9. See *infra* notes 10-14 and accompanying text.

10. DEL. CODE ANN. tit. 31, § 3910 (2005); IND. CODE ANN. § 12-10-3-9 (2004); KY. REV. STAT. ANN. § 209.030(2) (2004); LA. REV. STAT. ANN. § 14:403.2(C) (2004); MISS. CODE ANN. § 43-47-7 (2004); MO. ANN. STAT. § 660.255(1) (2004); N.C. GEN. STAT. § 108A-102(a) (2004); N.M. STAT. ANN. § 27-7-30 (2005); OKLA. STAT. ANN. tit. 43A, § 10-104 (2004); R.I. GEN. LAWS § 42-66-8 (2004); S.C. CODE ANN. § 43-35-25 (2004); TENN. CODE ANN. § 71-6-103(b) (2004); TEX. HUM. RES. CODE ANN. § 48.051 (2004); UTAH CODE ANN. § 62A-3-305 (2004); WYO. STAT. ANN. § 35-20-103(a) (2004).

11. ARIZ. REV. STAT. ANN. § 46-454(B) (2004); MONT. CODE ANN. § 52-3-811(3)(f) (2004); NEV. REV. STAT. § 200.5093 (2004); OHIO REV. CODE ANN. § 5101.61A (2005).

12. ALA. CODE § 38-9-8 (2004); ALASKA STAT. § 47.24.010 (2004) ARK. CODE ANN. § 5-28-203 (2004); CAL. WELF. & INST. CODE § 15630 (2005); COL. REV. STAT. § 26-3.1-102 (2004); 2005 Bill Text CO S.B. 98 (pending legislation to make reporting mandatory in Colorado); CONN. GEN. STAT. ANN. § 17b-451 (2004); D.C. CODE ANN. § 7-1903 (2005); FLA. STAT. ANN. § 415.1034(1) (2004); GA. CODE ANN. § 30-5-4 (2004); HAW. REV. STAT. ANN. § 346-224 (2004); IDAHO CODE § 39-5303 (2004); ILL. COMP. STAT. ANN. ch. 320, § 20/2(f-5) (2004); IOWA CODE ANN. § 235B.3 (2003); KAN. STAT. ANN. § 39-1431 (2003); ME. REV. STAT. ANN. tit. 22, § 3477 (2004); MD. CODE ANN. FAM. LAW § 14-302 (2003); MASS. GEN. LAWS ANN. ch. 19A, § 15 (2005); MICH. COMP. LAWS ANN. § 400.11a (2004); MINN. STAT. ANN. § 626.5572(16) (2004); MO. ANN. STAT. § 565.188 (2004); NEB. REV. STAT. § 28-372 (2004); N.H. REV. STAT. ANN. § 161-F:46 (2004); VT. STAT. ANN. tit. 33, § 6903 (2004); VA. CODE ANN. § 63.2-1606 (2004); WASH. REV. CODE § 74.34.035 (2004); WASH. REV. CODE § 74.34.020 (2004); W. VA. CODE § 9-6-9 (2004).

suspected abuse.¹³ Some of these states establish a procedure by which one wishing to report abuse may report it.¹⁴

III. RULES GOVERNING ATTORNEY CONDUCT

A. *The Model Rules of Professional Conduct*

Any mandatory reporting statute immediately implicates the attorney's duty to maintain client confidences. Thus, consideration of the issue must begin with an examination of the contours of that duty.

The provisions of the Model Rules of Professional Conduct govern attorney behavior in most states, although some states have made significant alterations to those rules.¹⁵ As a result of "Ethics 2000," the American Bar Association approved changes to the Model Rules of Professional Conduct.¹⁶ Most states that have adopted some version of the Model Rules of Professional Conduct have not yet changed their professional conduct rules in accordance with the Ethics 2000 revisions.¹⁷ Of the states that have not adopted the Ethics 2000 revisions, all states except Georgia have either a state bar committee conducting a review of the revisions or have a state bar report issued pending further action on adopting the revisions.¹⁸ Accordingly, this article will examine both the old and new rules as they relate to mandatory reporting.¹⁹

Although there are clear rules regarding the attorney's duty to maintain client confidences, the Model Rules of Professional Conduct do not directly address the issue of mandatory reporting. Thus, the attorney should keep in mind the admonition in the Scope of the Rules: "The

13. New York and South Dakota are such states, as are North Dakota, New Jersey, Pennsylvania, and Wisconsin. N.D. CENT. CODE § 50-25.2-03 (2003); N.J. STAT. ANN. § 52:27d-409 (2000); PA. CONS. STAT. ANN. § 10225.302 (2000); WIS. STAT. ANN. § 46.90 (2004).

14. See, e.g., N.D. CENT. CODE § 50-25.2-03 (2003).

15. An overwhelming majority of states have adopted some version of the Model Rules of Professional Conduct. Hence, the discussion in this article will focus on the Model Rules rather than the older Model Code of Professional Responsibility, including the Ethical Considerations and Disciplinary Rules. For comparison, this article will briefly discuss the rules of the state of Ohio, a Code state. See *infra* notes 24-31 and accompanying text.

16. A chart showing the state-by-state status of the Ethics 2000 changes appears at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf.

17. *Id.*

18. *Id.*

19. See *id.* For a comprehensive state-by-state examination of the Model Rules, see GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, App. 4 (2d Ed. 2001). See also Dan W. Holbrook, *Where There's a Will: How the New Ethics Rules Affect Estate Planners*, 39 TENN. B.J. 31 (2003).

Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.²⁰ Further, the drafters of the Rules did not intend the Rules to completely define the parameters of a lawyer's duties.²¹ Rather, the drafters intended the rules to operate in a larger social and ethical context. Thus, an attorney must frequently look beyond the Rules in resolving difficult ethical dilemmas.

1. Pre-Ethics 2000 Rules

Under the pre-Ethics 2000 version of the Model Rules of Professional Conduct, it would be difficult to argue that an attorney could reveal confidential information concerning potential financial abuse. Rule 1.6 of the pre-Ethics 2000 Model Rules of Professional Conduct provides:

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.²²

It would be extremely difficult for an attorney to argue that he could reveal confidential information pertaining to potential financial

20. MODEL RULES OF PROFESSIONAL CONDUCT Scope ¶ 14 (2004).

21. MODEL RULES OF PROFESSIONAL CONDUCT Scope ¶ 16 (2004) (providing: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.").

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002).

abuse under this formulation of Rule 1.6. Under subsection (b)(1), only abuse bad enough to result in serious imminent physical harm could be revealed, and most financial abuse does not rise to that level.

2. Ethics 2000 Revisions to the Rules

The Ethics 2000 revisions to the Model Rules for Professional Responsibility made several changes to the rule governing confidentiality of information. Rule 1.6 of the revised Model Rules for Professional Conduct provides:

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules; to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or to comply with other law or a court order.²³

Under this revised version of Rule 1.6, it seems clear that an attorney could reveal confidential information to comply with a mandatory reporting statute under subsection (b)(4). Subsection (b)(1) might also be implicated if the financial abuse or potential thereof is severe enough that it is likely to result in serious physical harm, which seems less likely.

What also seems clear, however, is that revised Rule 1.6 would not allow a lawyer to report potential financial abuse unless his state requires reporting. Thus, in a state that allows reporting but does not require it, the attorney could not argue that disclosure of confidential information relating to the abuse was "to comply with" state law.

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2004).

B. The Code of Professional Responsibility

Because a handful of states have attorney discipline rules based on the older Model Code of Professional Responsibility, including the Ethical Considerations and Disciplinary Rules, a brief comparison of those rules is warranted. These states' rules vary fairly significantly, and the Ohio Code of Professional Responsibility will be used as an example.

The Code of Professional Responsibility Model consisted of three parts: the Canons, the Ethical Considerations and the Disciplinary Rules. In the words of the preface to the Ohio Code of Professional Responsibility:

The Canons of this Code are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.²⁴

Each of the relevant Canons, Ethical Considerations and Disciplinary Rules relating to maintaining client confidences must be considered in determining whether an attorney can report suspected exploitation. Canon 4 states that "a lawyer should preserve the confidences and secrets of a client."²⁵ Additionally, the following Ethical Considerations are relevant:

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free

24. OHIO CODE OF PROFESSIONAL RESPONSIBILITY Preface (2002).

25. *Id.* at Canon 4.

to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be presented. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical

obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of clients continues after the termination of employment. A lawyer should also provide for the protection of the confidences and secrets of clients following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.²⁶

The Disciplinary Rules place limits on an attorney's ability to reveal confidential information. Disciplinary Rule 4-101 states:

DR 4-101. PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

26. *Id.* at EC 4-1 - 4-6.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.²⁷

Thus, with respect to mandatory reporting of suspected exploitation, Ethical Consideration 4-2 allows the disclosure of confidential information when required by law.²⁸ Further, Disciplinary Rule 4-101(C)(2) allows disclosure of confidential information when required by law.²⁹ Additionally, if the abuser is the attorney's client, Disciplinary Rule 4-101(C)(3) allows the lawyer to reveal confidential information relating to his client's intended criminal activity.³⁰

27. *Id.* at DR 4-101.

28. *Id.* at EC 4-2.

29. *Id.* at DR 4-101(C)(2).

30. *Id.* at DR 4-101(C)(3).

Accordingly, an attorney could report suspected abuse under a mandatory reporting statute, which Ohio has enacted.³¹

IV. THE INTERACTION OF MANDATORY REPORTING AND RULES GOVERNING CLIENT CONFIDENCES

When a state requires an attorney to report suspected abuse of an older or vulnerable person, it immediately creates the possibility that an attorney will be required to reveal confidential information learned in the course of the attorney-client relationship. Despite this inevitable interaction of a mandatory reporting duty and the attorney's professional duty to keep a client's confidences, few states have spoken definitively on the issue.³² Thus, an attorney is often left to determine whether he can and should report abuse.

Three basic approaches to the interaction are possible. First, a state may impose a mandatory reporting duty on attorneys without speaking on the issue of the attorney's duty to maintain client confidences. This is the approach in Arizona,³³ Delaware,³⁴ Indiana,³⁵ Louisiana,³⁶ Mississippi,³⁷ New Mexico,³⁸ North Carolina,³⁹ Ohio,⁴⁰ Oklahoma,⁴¹ Rhode Island,⁴² Tennessee,⁴³ Utah⁴⁴ and Wyoming.⁴⁵

Second, a state may impose a reporting duty on attorneys and provide that an attorney may raise the attorney client privilege as a defense for failing to report. This is the approach taken by Florida,⁴⁶ Kentucky,⁴⁷ Montana,⁴⁸ Nevada,⁴⁹ New Hampshire⁵⁰ and South

31. OHIO REV. CODE ANN. § 5101.61(A)(6)(g)(ii) (2005).

32. *See e.g., infra* notes 33-52.

33. ARIZ. REV. STAT. ANN. § 46-454(B) (2004).

34. DEL. CODE ANN. tit. 31, § 3910 (2005).

35. IND. CODE ANN. § 12-10-3-9 (2004).

36. LA. REV. STAT. ANN. § 14:403.2(C) (2004).

37. MISS. CODE ANN. § 43-47-7 (2004).

38. N.M. STAT. ANN. § 27-7-30 (2005).

39. N.C. GEN. STAT. § 108A-102(a) (2004).

40. OHIO REV. CODE ANN. § 5101.61A (2005).

41. OKLA. STAT. ANN. tit. 43A, § 10-104 (2004).

42. R.I. GEN. LAWS § 42-66-8 (2004).

43. TENN. CODE ANN. § 71-6-103(b) (2004).

44. UTAH CODE ANN. § 62A-3-305 (2004).

45. WYO. STAT. ANN. § 35-20-103(a) (2004).

46. FLA. STAT. §§ 415.1034, 415.1045 (2004).

47. KY. REV. STAT. ANN. § 209.030 (2004). In Kentucky, an Attorney General's Opinion provides that an attorney need not, in fact cannot, report domestic abuse if a client directs otherwise. Ky. Op. Att'y. Gen. 83-367 (1983). Presumably this same reasoning would apply to elder abuse, although an argument for a different approach could be made. For a discussion of personal autonomy concerns involving elder abuse reporting, see *infra* notes 58-59 and accompanying text.

Carolina.⁵¹

Third, a state may impose a reporting duty on attorneys and specifically abrogate the attorney-client privilege when the attorney suspects that abuse is occurring. Only Texas takes this approach to the interaction of mandatory reporting and the attorney's duty to protect client confidences.⁵²

In the remaining states, an attorney is not under an obligation to report suspected abuse of an older or vulnerable person. Frequently, however, there is a mechanism in place should the attorney choose to report such abuse.⁵³ The attorney in these states is faced with a difficult question: can he report potential abuse? In light of the language of Model Rule of Professional Conduct 1.6 in both the pre- and post-Ethics 2000 versions, it is unlikely that an attorney could argue that he was reporting to avoid serious physical harm or comply with law.⁵⁴ Thus, it seems unlikely that an attorney could argue that he was allowed to report if the report required the disclosure of otherwise confidential information. Under a Model Code formulation, the attorney might be able to reveal confidential information regarding commission of a crime, but only if his client is the abuser rather than the victim and only if the crime has not yet been committed.⁵⁵

V. THE DESIRABILITY OF REQUIRING ATTORNEYS TO REPORT SUSPECTED ELDER ABUSE

Although empirical study of the issue is difficult if not impossible, there have been reliable estimates that elder abuse is widely underreported. One study suggested that only one in eight cases gets reported.⁵⁶ It seems clear that society has an important interest in attempting to prevent and remedy abuse.⁵⁷ In light of what appears to be

48. MONT. CODE ANN. § 52-3-811(3)(f) (2004) (providing an attorney has an obligation to report suspected exploitation unless the attorney acquired the facts causing the suspicion from a client and the information is protected by the attorney-client privilege).

49. NEV. REV. STAT. ANN. § 200.5093 (2004) (providing an attorney has an obligation to report suspected exploitation unless the attorney acquired the information underlying the suspicion from a client who has been or may be accused of the exploitation).

50. N.H. REV. STAT. ANN. § 161-F:48 (2004).

51. S.C. CODE ANN. § 43-35-50 (2004).

52. TEX. HUM. RES. CODE § 48.051 (2004).

53. *See, e.g.*, N.D. CENT. CODE § 50-25.2-03 (1999).

54. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2004).

55. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (2002).

56. *See* 1990 House Report, *supra* note 1.

57. *See generally* 1990 House Report, *supra* note 1.

significant underreporting of incidences of abuse, mandating reporting of suspected abuse is a rational attempt to accomplish increased reporting.

Any discussion of the desirability of requiring attorneys to report suspected elder abuse must begin with an attempt to define of such abuse. When defining financial abuse, states generally rely on concepts like the “misuse” of another’s assets without “consent.” The difficulty in precisely defining exploitation comes in the attempt to give meaning to the fairly vague term “misuse.”⁵⁸

Most alleged incidents of exploitation involve the transfer of assets from one person to another. In order for a transfer to be a “misuse,” it would probably have to be made involuntarily or without consent. This presents the attorney with a difficult situation. How can an attorney look inside the client’s mind to determine whether a transfer is being made with consent? Of course, it is impossible to “know” the subjective intent of another. The attorney will have to rely on the client’s statements and surrounding actions and on the attorney’s impressions of the propriety of the situation as a whole.

A further difficulty for the attorney arises from the very nature of intra-family transfers. Consider a mother who comes to the attorney and declares that she wants to transfer a major portion of her assets to her son immediately and as an outright gift. It is impossible to state that such a transaction is *per se* abusive or *per se* not abusive. If the client is competent and is making the transfer voluntarily and knowingly, the transfer is probably not a product of exploitation. People transfer assets for any number of reasons - pure donative intent, estate planning, entitlement planning, or persuasion by the donee to name but the few most common motivations.

Thus, even when a client declares an intent to transfer the bulk of her assets, the attorney should not simply conclude that the transfer is abusive. Such a conclusion would be a serious intrusion on the personal autonomy of the donor. As long as the attorney thinks that the client is capable of making an informed decision, the attorney should not equate what the attorney views as an unwise choice with exploitation.

Nevertheless, it is important that attorneys consider the potential for abuse in property transfers. In addition to an attorney’s duty to maintain client confidences, an attorney also has a duty to provide competent

58. Sometimes, the statutory proscription is so vague that it fails to pass constitutional muster. See *James Cuda v. State of Fla.*, 639 So. 2d 22, 23 (Fla. 1994) (holding that FLA. STAT. ch. 415.11 (1991) is unconstitutionally vague).

representation.⁵⁹ It would be difficult to argue that an attorney that allows a known abusive transfer of assets to proceed is providing that representation.

Thus, despite the difficulty of the task, the frequent role of the attorney as a client's most trusted and knowledgeable advisor suggests that attorneys cannot be relieved of a duty to consider whether proposed transactions are abusive. Other than the transferor and transferee, the attorney may be the only person to know that a transfer is being made. Although legislative histories are silent on the topic, this is most likely the rationale that has led some states to make attorneys mandated reporters. Similarly, some states have chosen to make other trusted financial advisors mandatory reporters, probably for the same reason.⁶⁰

The attorney, then, is faced with the difficult task of deciding whether a particular transfer requested by a client is potential abuse. In this regard, an attorney will need to use his or her best judgment in light of the circumstances surrounding the transaction. There is no easy formula for deciding when a transaction is abusive. The transferor's clear sense of the purpose for the transaction is important, but the attorney must be careful not to impose his or her feelings about the worth of that purpose on an otherwise competent client.

There are, of course, two added complications that must be considered. First, it is not unusual for an older client to be brought to the lawyer's office by another person. Frequently, that person remains in the office with the older client during consultation with the lawyer. This sometimes raises an issue concerning who the client is.

Consider a situation in which an adult child brings her father to the attorney's office and sits with him during the lawyer's consultation. The daughter tells the lawyer, "Dad wants to re-title the house in my name." Presumably the lawyer would not take such a step without being certain that that is what the father, the asset's owner, really wants. But who is the client in that circumstance? The daughter? She is the one who directed the lawyer's work. The father? He is the one for whom the work is really being done. Both the daughter and the father? Their presence together in the lawyer's office could suggest that they view this as a joint representation.

There is some literature about the ethical considerations of

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (2004) (providing: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

60. See, e.g., ARIZ. REV. STAT. § 46-454(B) (2004) (applying to accountants); ARK. CODE ANN. § 5-28-203 (2004) (covering bankers).

representing multiple members of the same family who belong to different generations.⁶¹ Sadly, that literature suggests that there are no easy answers for the attorney involved with members of multiple generations of the same family. That attorney may frequently find himself in situations in which he is unsure of who the real client is and whether he has is representing clients with conflicting interests. In most cases, the Model Rules provide no clear answer.

Second, an attorney may be asked to accomplish a transfer of assets from an older person to a younger person, by the younger person. This raises several ethical questions. Again, there is the issue of determining who is the client. Many attorneys take the position that the unseen asset owner is the client, despite the fact that he is not the one directly consulting the attorney. If this is the case, if the transferee pays the attorney's fee, the Model Rules of Professional Conduct give guidance about the attorney's responsibilities.⁶² The discussion above regarding maintaining client confidences would apply equally to this situation because the potential victim is still the client.

On the other hand, the attorney may consider the transferee to be his client. Were that the case, the attorney would be learning of the potential abuse from the perpetrator rather than the victim. Under the older Model Code of Professional Conduct, an attorney can reveal confidential information concerning his client's intent to commit a crime.⁶³ Under the Model Rules of Professional Conduct, however, there is no such exception to the duty to maintain client confidences.⁶⁴

Two basic policies compete in attempting to resolve the issue of whether attorneys should be mandated, permitted and encouraged to reveal client confidences relating to whether exploitation is occurring.

61. See, e.g., Russell Carlisle, *Model Rule 1.6 – Confidentiality of Information*, NAELA QUARTERLY, Winter, 2001 (stating that “joint representation pervades the practice of elder law. In the elder law setting, the persons present at the initial conference almost always include other family members, either spouse or children.”); Teresa Stanton Collett, *Response to the Conference: The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994); Carolyn L. Dessin, *Protecting the Older Client in Multi-Generation Representations*, 30 FAM. L.Q. 247, 247 (2004).

62. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (2004), which provides:
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
Id.

63. MODEL CODE OF PROFESSIONAL CONDUCT DR 4-101(C)(3) (1980).

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2004).

First, there is a strong policy underlying the protection of client confidences. Second, there is an equally strong policy underlying the protection of vulnerable citizens from abuse.

How these two policies should be balanced depends on whether the client is the victim or the abuser. If the client is the victim, the attorney should report potential abuse only in two very limited circumstances. First, an attorney should report suspected abuse if he believes the client lacks the facilities to understand the fact that he is being abused. This would be a state of mind similar to the standard for determining incompetence. I am not, however, suggesting that a client must be adjudged incompetent before the attorney can conclude that he lacks the facilities to understand that he's being abused.

This focus on the client's state of mind gives the appropriate respect to the client's personal autonomy. The attorney will report suspected abuse only if the attorney in her best judgment believes that the client's state of mind is such that he could not consent knowingly to the transfer. There is no provision for this in states that have no mandatory reporting statute or in states that have disciplinary rules that do not allow revealing client confidences "to comply with law," but the spirit of the disciplinary rules to provide competent representation should be used to allow such reporting.

Second, an attorney should report suspected abuse when he learns of the abuse from the perpetrator, i.e., the perpetrator is his client. Again, there is no explicit provision for this in states that have no mandatory reporting statute or in states that have disciplinary rules that do not allow revealing client confidences "to comply with law," but the importance of preventing and remedying exploitation of the elderly should overcome the duty to maintain client confidences in those circumstances.

VI. CONCLUSION

Sadly, financial abuse of older citizens seems to be a rapidly growing problem. As states look for solutions, mandatory reporting of suspected abuse by those most likely to see the signs of abuse is one attractive weapon against abuse. Although many have criticized mandatory reporting as ineffective, there is no reason to do away with it if some reports of suspected abuse are made that would otherwise not be made.

Attorneys are in an excellent position to discover abuse, particularly financial abuse. An attorney is frequently an older client's most trusted

2005]

DUTY TO REPORT FINANCIAL ABUSE OF THE ELDERLY

723

advisor on financial matters. Further, the attorney is often the only person with access to “the big picture” – the client’s net worth, assets, estate plans and tax returns. Accordingly, the attorney may be the only person with enough knowledge of the client’s financial situation to be able to spot a potentially abusive transaction.

In sum, then, the societal interest in protecting a vulnerable person from abuse is so compelling that the attorney’s duty to maintain client confidences should not defeat the furthering of that interest. When an attorney has reason to suspect that abuse is occurring or will occur, the attorney should report that potential abuse to the appropriate protective authorities if the client seems incapable of consenting to the allegedly abusive conduct or if the attorney learns of the conduct from the alleged abuser. Such reporting is a necessary limitation on the maintenance of client confidences that may help stem the rising tide of abuse of the vulnerable.