

**ETHICAL AND PROFESSIONAL CHALLENGES
OF
DEALING WITH ELDER FINANCIAL ABUSE**

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INTRODUCTION

The prevalence of financial abuse in our society has increased exponentially in recent years. Elder and vulnerable individuals are particular targets of these abusers and scammers. When abuse is suspected, lawyers and other professionals who represent and work with elder and vulnerable adults must balance their own innate desire to protect these individuals with the equally important goal of retaining the adult's autonomy and dignity to the greatest extent possible. A challenging array of ethical and professional responsibility issues arise in this situation.

A. The Elder Population

1. The senior population is growing in the United States, and advances in healthcare generally mean that people are living longer. Baby boomers, who are the majority of members of the elder population, began turning 65 in 2011.

a. The average life expectancy in the U.S. increased from 68.52 years in 1952 to 77.3 years in 2021 (down from 78.8 in 2019 due in large part to the COVID-19 pandemic).

b. The number of Americans age 65 and older: 58 million in 2021 (about 16.5%).

c. By 2030, 20% of the U.S. population is expected to be age 65 and older.

d. Individuals age 85 and older comprise the fastest growing segment of our population.

2. Georgia has the 11th fastest growing 60+ population in the U.S. and the 10th fastest growing 85+ population.

3. Members of the senior population are, in general, wealthier than their younger predecessors and counterparts:

a. The median household income of households headed by someone age 65 or older has increased dramatically since 1967 --- a whopping 130% --- and that growth has far outstripped that of younger households.

b. People over the age of 50, who make up about 1/3 of the population:

(1) Hold 61% of the bank accounts and 70% of bank deposits;

(2) Control over 70% of the nation's wealth

c. Individuals who are age 75 and older have the highest median net worth in our country.

d. A 2016 study published in JAMA showed a life expectancy gap between the richest and poorest Americans: on average, the richest men were expected to outlive the poorest men by 15 years and the richest women were expected to outlive the poorest women by 10 years.

4. There is a gender disparity in the senior population that increases with age:

a. The overall U.S. population is split almost evenly between males and females.

b. In the segment of individuals age 75-84, there are 76 males per 100 females.

c. In the segment of individuals age 85 and older, there are 53 males per 100 females

5. Many members of the senior population are living alone – that is, without a spouse or partner (20% of men and 35% of women).

a. 46% of women age 75 and older live alone.

b. Seniors are getting divorced in increasing numbers.

(1) While the overall rate of divorce has leveled off in the U.S., since 1980, the divorce rate for Americans age 50 and older doubled, and the divorce rate tripled for those over the age of 65.

c. Of the approximately 800,000 people who lose a spouse to death each year, about 700,000 are women.

6. Many members of the senior population are exhibiting signs of diminishing capacity.

a. “Dementia” (“Neurocognitive disorder”) is not a single disease but rather a term that covers a wide array of medical conditions that result in the loss of cognitive function.

(1) Cognitive function includes memory, language skills, visual perception, problem-solving, self-management, ability to focus and pay attention.

(2) In addition to loss of cognitive function, dementia can also affects an individual’s ability to control her emotions and can even alter her personality.

b. Starting at age 65, the risk of developing Alzheimer’s disease doubles every 5 years. By age 85 years and older, between 25% and 50% of people will exhibit signs of Alzheimer’s disease.

c. About 6.2 million Americans age 65 and older are currently exhibiting signs of Alzheimer’s disease.

(1) Two-thirds of these individuals are women.

d. The average time between the appearance of the first symptoms of impairment to a diagnosis of dementia is 2.8 years. (Brookmeyer et al., Baltimore Longitudinal Study of Aging, 2002).

B. Elder Financial Abuse (“EFA”)

1. The National Committee for the Prevention of Elder Abuse defines EFA as “the illegal or improper use of an older person’s funds, property or resources.”

a. Georgia uses the term “exploitation,” which is defined as “the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another's profit or advantage.” O.C.G.A. §30-5-3.

2. According to reports of the National Adult Protective Services Association, the rate of EFA is high:

a. One in 20 older adults indicated some perceived financial mistreatment had occurring in the recent past.

(1) However, it is estimated that only 1 in 44 cases of EFA is ever reported.

b. In 2011, the annual cost to victims was estimated at \$2.9 billion (Met-Life Study). Some recent estimates are as high as \$36 billion (plus additional “social costs” of investigating, prosecuting, etc.)

(1) The FTC “Protecting Older Consumers 2018-19 Report” showed that people age 60+ filed more than 265,000 fraud reports in 2018, describing losses of about \$400 million.

c. A lack of data is an obstacle to giving more accurate descriptions, but EFA has been referred to as “a burgeoning public health crisis” and a “virtual epidemic”.

3. EFA can take a variety of forms (& there are a variety of ways for professionals to help their clients avoid EFA):

a. “Pilfering”: the caregiver keeps the change after buying groceries, or takes a few dollars from the elder’s wallet. (Often starts small and grows over time.)

(1) One prevalent tactic is stealing checks from the back of the victim’s checkbook so that the missing checks often go unnoticed.

(a) Advise your clients of the importance of checking bank statements every month.

(2) Unauthorized use of ATM cards and debit cards is also an issue.

(a) Inform your client that there are companies (like TrueLink) that allow for a customized debit card that limits withdrawals, prohibit online spending, block international transactions, etc.

b. Agent uses a power of attorney to transfer the elder’s assets to himself.

(1) If your state has adopted the Uniform Power of Attorney Act, discuss carefully the ramifications of granting the so-called “hot” powers.

(2) Consider requiring the attorney in fact (agent) to make periodic reports to a third party.

c. Relative takes over the care of an elder person, resulting in that person being dependent upon the relative and thus susceptible to changing wealth transfer documents to benefit the relative (often at the threat of being abandoned).

(1) Gather information about your client’s family members, (particularly those with whom the client is living).

d. Financial advisor sells inappropriate products to the client (e.g., an annuity with a 25-year payout to an 89-year-old). Investment fraud “tricks of the trade” include:

(1) The "Phantom Riches" Tactic—dangling the prospect of wealth, enticing you with something you want but can't have. "These gas wells are guaranteed to produce \$6,800 a month in income."

(2) The "Source Credibility" Tactic—trying to build credibility by claiming to be with a reputable firm or to have a special credential or experience. "Believe me, as a senior vice president of XYZ Firm, I would never sell an investment that doesn't produce."

(3) The "Social Consensus" Tactic—leading you to believe that other savvy investors have already invested. "This is how ___ got his start. I know it's a lot of money, but I'm in—and so is my mom and half her church—and it's worth every dime."

(4) The "Reciprocity" Tactic—offering to do a small favor for you in return for a big favor. "I'll give you a break on my commission if you buy now—half off."

(5) The "Scarcity" Tactic—creating a false sense of urgency by claiming limited supply. "There are only two units left, so I'd sign today if I were you."

e. “Stranger” scams:

(1) “advance fee scams”: the lottery winnings or other prizes that can be collected only upon the prepayments of certain sums for “taxes.” (The scammers tell the victims not to reveal this to anyone else so that it will be a “surprise” to their families when the money arrives.)

(a) The “Spanish Prisoner” scam

(b) The “Nigerian Prince” (“419”) scam (“Yahoo boys”)

(c) JOLT (Jamaican Operations Linked to Telemarketing)

(d) The scammers use “Sweepstakes Lead Lists” to find targets: ideally people over age 65, female, living alone who have entered other sweepstakes.

(i) “Lead lists” are lists of victims and potential victims that are shared among scammers.

- (ii) One area code for Jamaica – 876 – resembles a US area code.
- (e) If the victim stops sending money she then is bombarded with phone calls from “government agencies” (such as Homeland Security, the FBI and local law enforcement).
- (2) the phony call from the IRS or the Medicare authorities asking for Social Security numbers and other identifying information (Identity Theft);
 - (a) Caller ID “spoofing”
 - (b) Advise your clients not to engage in conversation with the caller as these scammers often record the victim’s voice.
 - (c) 2018 FTC interviews with EFA victims revealed that “the fact that the scammers presented themselves as representing a federal agency made a difference in how the consumers reacted. The consumers said they believed they were less likely to be scammed by a person from a government source as opposed to a company.”
- (3) phony call “from” the Social Security Administration telling the target that someone is using her Social Security card to commit crimes and she needs to give the caller her SSN and other personal information in order to clear herself
- (4) phony call “from” the IRS claiming past taxes are due
- (5) Tax identity theft: someone who has obtained personal information about a target files a tax return (usually very early) in her name and receives a refund. (The target does not know she has been victimized until she tries to file her own return.)
- (6) the website that advertises cheap prescription drugs or supplements that are in fact contaminated or contain the wrong ingredients or simply have not been proven to do what they are said to do;
 - (a) In 2018, the FTC settled a multi-million dollar judgement against a company that advertised a product that had been “clinically proven to improve memory, increase focus, increase IQ, and prevent memory loss.”
 - (b) “Healing products” and “healing coaches” currently have turned to using social media (Facebook, YouTube, etc.) to hock their wares, which makes it extraordinarily difficult for the FTC to monitor them

(c) Many “cures” and “vaccines” for COVID 19 appeared beginning in March, 2020:

- (i) Silver Solution
- (ii) “U.S. government vaccine”
- (iii) “Miracle Mineral Solution” (drinking chlorine dioxide, an industrial bleach)
- (iv) “virus buster” cards
- (v) virus “zappers”
- (vi) supplements and IV infusions

(7) the fake charity solicitation done by phone, often after a disaster hits (how many elders still have land lines, compared to their younger counterparts?);

(a) Post-disaster scams are common (e.g., Man in firefighters’ uniform soliciting door-to-door in Australia in December 2019)

(b) Charities benefitting veterans: A caller claims to be raising money for disabled veterans or veterans with cancer. But often, the so-called charity is not registered with the government or uses most of the money to raise more funds and pay their own salaries.

(c) Use of real victims’ photos on crowdfunding sites such as GoFundMe

(d) Use of similar names to confuse donors: “Red Cross of America” (imitating the American Red Cross);

(8) the purported creditor who calls the grieving widow (after reading the obituary) to claim that her deceased husband owed him money;

(9) the warning that pops up on the computer screen offering “tech support” to cure a non-existent virus

(a) Individuals age 60+ are five times more likely to fall victim to these scams (FTC, “Protecting Older Consumers 2018-19 Report”)

(b) At least 2/3 of the individuals who filed tech support complaints in 2020 were age 60+ (FBI report, 2021)

(10) the “Grandparent Scam”

(a) Clients might consider creating a family “code word” to help verify whether the caller’s story is true.

(11) the “Sweetheart Scam” (“Sweetheart + Military Scam”)

(12) “Cures” for Alzheimer’s disease:

- (a) drug company making false claims that its dietary supplement can prevent or cure Alzheimer's Disease
- (b) company selling an expensive "procedure" in which infusion of plasma from young blood donors is claimed to fight memory loss & Alzheimer's disease and Parkinson's disease & heart disease
- (c) In 2018, the FTC settled a \$3.31 judgment against a doctor and his company for deceptive advertising of the curative benefits of "amniotic stem cell therapy."
- (13) "Work at home" schemes: pay for training and products
- (14) scammer using a Medicare beneficiary's information to file for (e.g.) an electric wheelchair and then the beneficiary actually needs an electric wheelchair but cannot get one
 - (a) booths at "health care fairs" where scammers ask for beneficiary's Medicare information in return for (e.g.) a free blood pressure check
- (16) the worker who shows up and offers to "blacktop the driveway" or "fix the roof" (for an exorbitant fee)
- (17) the Jury Duty scam
- (18) "Money Mule": target is sent a check, asked to deposit it and then wire money (or buy gift cards) and send most of it on to someone else, keeping a "commission"
- (19) Bitcoin blackmail: In April, 2020, the FTC reported a spike in emails telling recipients that they had hacked in the recipient's computer and recorded him or her visiting adult websites. They threaten to send the video to friends and family unless the recipient pays into the blackmailer's email account. FTC hypothesizes that the blackmailers got the email addresses and, in some cases passwords, through a data breach.
- (20) "Elder trafficking" ("Benefits warehousing"): Elders and disabled persons are convinced to turn over their Social Security and other government benefits in exchange for food and shelter in a "personal care home." The owners also fill the victim's drug prescriptions and then sell the drugs.

4. Who are the perpetrators of EFA?

- a. Although "stranger scams" receive the bulk of publicity, some studies show that as much as 60-66% of EFA is perpetrated by a family member (most often an adult child of the victim)

(1) One study showed that 60% of perpetrators are male family members.

(a) Substance abuse, financial dependence on the elder, mental illness, unemployment, gambling addiction, and poor health of the perpetrators are all contributing factors.

b. Many of these family members do not view themselves as committing a crime:

(1) “I am helping Grandma with all these chores so I deserve a little compensation.”

(2) “I will inherit Dad’s money eventually so this is just an ‘advance’ on what I will receive.”

(3) “I am just borrowing this money until I get another job. I will pay it back.”

5. Who are the victims of EFA?

a. The typical victim of EFA was described in the seminal 2011 MetLife Study as “between the ages of 70 and 89, white, female, frail and cognitively impaired. She is trusting of others and may be lonely or isolated.”

b. However, not all victims fit this description. Some are the so-called “high achievers” who are suffering some cognitive impairment.

(1) “High achievers” achievements have brought them great wealth.

(2) It may be less apparent to the outside world when a high achiever has become vulnerable or susceptible to exploitation because high achievers often exhibit something called “reserved capacity.” In other words, they can still operate at a reasonable level when they become cognitively impaired—often at a level that masks the true severity of their impairment.

(3) High achievers are proud individuals who reject the notion that they may be helpless and thus refuse to let family members or other professionals intervene when there is suspected abuse.

(3) A 2017 study (Wood & Lichtenberg) described the “perfect victim” of EFA as a pre-dementia, mildly cognitive impaired individual who still retains control of his or her assets but who is still operating freely in the community because his or her impairments have not yet been recognized.”

(i) A 2019 study (Gresenz et al.) observed significant negative economic effects in households where an

individual is in the early, pre-diagnosis stage of Alzheimer's disease.

6. Why are seniors so often targeted?

a. "Because that is where the money is." (Attributed to bank robber Willie Sutton when asked why he robbed banks.)

(1) Due to the shift away from defined benefit ("pension") plans, retired individuals have greater access to and control over their retirement accounts.

(a) 2021: \$11 trillion in IRAs and \$6.2 trillion in 401(k) plans

(b) Even some participants in defined benefit plans are finding themselves handling lump-sum payouts: IRS Notice 2019-18 (Mar. 2019) indicated that IRS would not prohibit employers from offering retirees who are receiving annuity payments to convert to a one-time lump-sum payout.

(2) Retirees are managing their own accounts in an era of increasingly complex and confusing financial products.

(a) In 2007, the MN Attorney General prosecuted annuity companies that violated the "suitability rule" by selling, for example, deferred annuities to elders (a 15-yr deferred annuity to a 75-year-old) that included heavy penalties for early withdrawal

(b) Insurance salespersons are trained at "Annuity University" to target seniors: "They thrive on fear, anger and greed." "Show them their finances are all screwed up so they think, 'Oh no, I've done it all wrong.'" "Treat them like blind 12-year-olds." "Tell them it's like a CD – it's safe, it's guaranteed." "Tell them you can protect their life savings from nursing home and Medicaid seizure of assets. They don't know what this is but it sounds scary. It's about putting a pitchfork in their chest." (WSJ 2019)

b. Elders are often dependent on others for care.

c. Cognitive and decision-making impairment. "AGE-RELATED FINANCIAL VULNERABILITY"

(1) “Financial literacy” (knowledge of the basic concepts essential to make effective and sound financial choices) declines on average 1-2% per year after an individual reaches age 60.

(i) However, “financial confidence” (confidence in one’s ability to make effective choices) does not decline with age and, in some individuals, it rises.)

(ii) Test your own vulnerability:

Lichtenberg “Financial Vulnerability Survey” (Wayne State University)

(2) 2021 Johns Hopkins study found that persons living alone who were later diagnosed with dementia were far more likely than their healthy counterparts to have missed credit card payments up to 6 years prior to diagnosis and lower-than-average credit ratings up to 2 ½ years prior to diagnosis

d. Studies show that people become more trusting of others as they age.

(1) One study isolated an age-related drop in the anterior insula, a brain region that appears to play a role in assessing trust and risk.

e. Elders are often isolated and without a social support group.

f. Elders tend to be less sophisticated about technology.

g. Perpetrators know that prosecutions will be less likely if the victim is older (e.g., expected to die soon) or losing the capacity to report and to appear at trial.

7. Why does EFA go unreported? (The 2018-19 FTC Report stated that “older adults were still the least likely of any age group to report losing money to fraud, but their individual median dollar losses remained higher than for younger adults”).

a. The senior victims are embarrassed and ashamed.

1) 2018 FTC interviews of elder victims revealed: “Many reported feeling a loss to their self-image as competent people with a lifetime of experience that would help them avoid being fooled. Some reported seeing this as proof that they were now too old to be handling their own money. This type of self-doubt was alarming to numerous consumers, and independent of the monetary loss they also suffered.”

- b. They do not trust their own judgment (“Did I just forget that I told Sonny he could borrow that money?”)
- c. They feel some guilt related to their parenting. (“I was not there for Sally as much as I should have been when she was little.”)
- d. They don’t want to get a family member “in trouble.”
- e. They are dependent upon the perpetrator and fear that he will abandon them.
- f. They fear the perpetrator might physically injure them.
- g. They fear that, once they have admitted to being victimized, other family members will take measures (such as petitioning for a conservatorship or trying to institutionalize the elder) that will severely limit the reporting individual’s autonomy.

8. What are the most common “red flags” of EFA?

- a. Unusual investment activity; e.g., liquidating a portfolio; changing investments (e.g., unsuitable annuities);
- b. Unpaid service or tax bills;
- c. Unusual activity in bank accounts, e.g., sudden withdrawals or transfers of large sums, withdrawals from automated banking machines when the elder is homebound, online transactions if senior has no computer;
- d. New relationships expressing interest in the client’s financial situation;
- e. Change of beneficiary status on investment accounts or life insurance policies;
- f. New will or change in documents, such as the creating powers of attorney for finances or property transfers when person lacks capacity to make decisions;
- g. Suspicious signatures;
- h. Caregiver or provider who tries to isolate elder from other relationships;
- i. Unusual or unreasonable favoritism for one family member or turning over complete control to one family member
- j. New financial, legal or accounting advisors with no explanation of why the change is being made or without any change in circumstance that would justify switching longstanding advisors;
- k. Payments to individuals, businesses or charities that are “out of character” compared to the elder’s previous spending habits;

1. Financial arrangements or transactions that seem “too good to be true”

C. Reporting EFA: Ethical and Professional Responsibility Concerns

1. Lawyers and Other Professionals in some states are “Mandatory Reporters” of EFA Regardless of Whether the Information is Confidential, *See, e.g.:*

a. Tex. Hum. Res. Code Ann. § 48.051: “(a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department....

The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental health professional.”

b. Ariz. Rev. Stat. Ann. § 46-454(B) (2015):“B. An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of a vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that exploitation of the adult's property has occurred or that abuse or neglect of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer, to a protective services worker or to the public fiduciary of the county in which the vulnerable adult resides....”

2. Lawyers and Other Professionals in some states are “Mandatory Reporters” Except Where the Information is Privileged or Confidential, *See, e.g.:*

- a. Ore. Rev. Stat. 124.060: “Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065. Nothing contained in ORS 40.225 to 40.295 affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.”
- b. *See also*, Mont. Rev. Code Ann. § 52-3-811 (“unless the attorney acquired knowledge of the facts required to be reported from a client and the attorney-client privilege applies”).

3. Lawyers and Other Professionals in most states are “Permissive Reporters”

- a. Sometimes attorneys, accountants, etc. are named specifically as persons who “may report” (e.g., Wash. 74.34.020(17)) but more often fall under a general category:
 - (1) W.Va. Stat. §9-6-9(b): “In addition to those persons and officials specifically required to report situations involving suspected abuse or neglect of an incapacitated adult or facility resident or the existence of an emergency situation, any other person may make such a report.”
 - (2) OCGA 30-5-4(a)(2): “ Any other person having a reasonable cause to believe [Note: a few states require “proof”] that a disabled adult or elder person is in need of protective services, or has been the victim of abuse, neglect, or exploitation....”
- b. The reporting statutes offer protection from civil or criminal liability for persons who report:
 - (1) O.C.G.A. §30-5-4: “(c) Anyone who makes a report pursuant to this chapter, who testifies in any judicial proceeding arising from the report, who provides protective services, who

participates in a required investigation, or who participates on an Adult Abuse, Neglect, and Exploitation Multidisciplinary Team under the provisions of this chapter shall be immune from any civil liability or criminal prosecution on account of such report or testimony or participation, unless such person acted in bad faith, with a malicious purpose, or was a party to such crime or fraud.”

c. Illinois offers protection from disciplinary action for attorneys and other professionals who report: 320 Ill. Compiled Stats. 20/4(a-7): “A person making a report under this Act in the belief that it is in the alleged victim's best interest shall be immune from criminal or civil liability or professional disciplinary action on account of making the report, notwithstanding any requirements concerning the confidentiality of information with respect to such eligible adult which might otherwise be applicable.”

4. Reporting Rules and Confidentiality

a. Many codes of professional conduct, as well as state and federal laws require professionals to keep confidential information learned in the course of representing clients.

(1) *MRPC 1.6*: “(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).”

(2) AICPA Rule 1.700.001.01: “A member in public practice shall not disclose any confidential client information without the specific consent of the client.”

(3) Gramm-Leach-Bliley Act, Sec. 50: “[A] financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, ...”

b. Exceptions to confidentiality rule for lawyers:

(1) *MRPC 1.6*: “(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:.... (6) to comply with other law or a court order.”

(2) *MRPC 1.14*:” (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial

physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.”

(3) GA RPC 1.6 exception: “(b)(1) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary... (i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;”

(4) The Bar Association of the State Bar of New Hampshire issued an ethics opinion, *N.H. Bar Ass'n Ethics Comm., Op. 2014-15/5*, that discusses whether a lawyer, over the client's objection, may disclose confidential information in the case of suspected elder abuse. The opinion pointed out that Rule 1.14 relaxes the confidentiality rules when a client is suffering from diminished capacity and is at risk of substantial physical, financial or other harm unless action is taken. The opinion also pointed out that, even if the client is not suffering from diminished capacity, Rule 1.6 allows a client to disclose confidential information “to prevent reasonably certain death or substantial bodily harm.” Citing ethics opinions from other states that dealt with a client's threat to commit suicide, the New Hampshire opinion concluded that a lawyer who has made the proper determination of risk can engage in limited disclosure of client information even over the client's objection. The opinion pointed out, however, that “[m]ere suspicion that elder abuse or other forms of harm might be occurring is not adequate to trigger” an exception to the confidentiality rule. The opinion also strongly urged lawyers to consider the

consequences of a disclosure of information to a third party. For example, if the information about the suspected abuse is reported to an outsider, that information might require the outsider to report the suspected action to Adult Protective Services, or some similar agency. The APS investigation, in turn, might lead to the initiation of guardianship proceedings, a change in living arrangements, or even incarceration of a member of the client's family, all of which outcomes the client may not want. The opinion cautioned lawyers to consider carefully the ramifications of triggering a reporting requirement and always to consider less draconian measures.

(5) The 5th Edition of the ACTEC Commentaries addresses the confidentiality issue in part as follows:

“...In states where there is no mandatory reporting duty of lawyers, a lawyer's ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client.”

c. Exceptions to confidentiality for employees of financial institutions:

(1) The institution may file a Suspicious Activity Report: Financial Crimes Enforcement Network (FinCEN): “It is important to note that the potential victim of elder financial exploitation should not be reported as the subject of the SAR.

Rather, all available information on the victim should be included in the narrative portion of the SAR.”

(2) Federal regulatory agencies (Fed. Reserve, CFTC, CFPB, FDIC, FTC, NCUA, OCC & SEC) have issued interagency guidance that reporting suspected elder financial abuse did not, in fact, violate the privacy provisions included in Gramm-Leach-Bliley.

d .Exceptions to confidentiality rules for brokers:

(1) In 2017 FINRA enacted rules to: 1) encourage brokers to get the name of a “trusted contact”; and 2) temporarily suspend disbursements if financial exploitation is suspected. After investigation (which includes notifying the client and the trusted contact), the broker may refer the matter to adult protective services or law enforcement.

e. Exceptions to confidentiality rules for accountants?

D. Steps Professionals Can Take

1. Familiarize yourself with the varieties and indicators of EFA. Numerous resources are available from AARP, AICPA, American Bar Association Commission on Aging, American Bankers Association, Consumer Financial Protection Bureau, Elder Investment Fraud and Financial Exploitation Prevention Program, Investor Protection Trust, FINRA, SEC, to name a few.

2. Understand your own responsibilities as a mandatory or permissive reporter of EFA and how these responsibilities coincide with the mandates of your code of professional conduct. Explain these to your client.

3. For lawyers, be clear from the outset of the relationship who your client is (and who is not your client) and the professional responsibility rules if someone else is paying you for the client’s legal services.

a. *MRPC 1.8(f)* “A lawyer shall not accept compensation for representing 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.”

(1) *Comment 11 to MRPC 1.8*: “Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).”

(2) *MRPC 5.4(c)* “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”

b. If approached by a fiduciary for an elderly individual (guardian, conservator, trustee, agent) to perform a service for that individual (e.g., set up a trust, transfer property by deed):

(1) verify that the fiduciary in fact has the authority to direct the action (e.g., the “conservatorship” may be only a limited conservatorship);

(2) make it clear that you are representing the client in his or her fiduciary capacity and that the best interest of the protected person will be your guidepost;

(3) Be wary of a fiduciary who insists on broad exculpatory clauses indemnifying him or her from actions performed in his or her capacity as fiduciary.

4. Information Gathering and Screening:

a. As vulnerability to EFA and diminished capacity are so often intertwined, consider using screening tools if diminishing capacity is suspected. See ABA and American Psychological Association, *Assessment of Older Adults with Diminished Capacities: A Handbook*

for Lawyers (2d ed. 2021) (available on the ABA website), which contains a 4-page worksheet for capacity screening.

b. If diminishing capacity is suspected:

(1) Make an assessment using these criteria (suggested in the *ACTEC Commentaries to MRPC 1.14*): “In determining whether a client’s capacity is diminished, a lawyer may consider: i. the client’s overall circumstances and abilities, including the client’s ability to express the reasons leading to a decision; ii. the ability to understand the consequences of a decision; iii. the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client’s values, long-term goals, and commitments.”

(2) Suggest that your client have a complete medical exam. (Sometimes what appears to be “dementia” may be related to a physical cause, such as reactions to medication, urinary tract infections, etc.)

(3) Without revealing the client’s name, discuss your observations with a geriatric specialist.

(4) Suggest that your client undergo a formal forensic capacity evaluation.

c. Screen client for possible indications of financial abuse. *Elder Investment Fraud and Financial Exploitation: Checklist for Lawyers* (ABA Commission on Aging & Investor Protection Trust) suggests the following questions:

(1) Who makes decisions about your money and property? How is that going?

(2) How do you get cash when you need it? Any problems with that?

(3) Does anyone have access to your bank account? How is that going?

(4) Have you noticed any suspicious or unusual items on your bills?

(5) Have you noticed money missing from your bank accounts or checks missing from your checkbook?

(6) Are any of your belongings missing from your home?

(7) Have you signed documents that you did not understand or want to sign because someone encouraged, forced, or deceived you?

(8) If you have a power of attorney, does your agent do things that you do not want your agent to do?

(9) Does your paid caregiver make you pay extra for things that the caregiver is supposed to do or get for you anyway?

(10) Did you want that person to come with you to this appointment? Did that person insist that you come see me? Did that person take you to see other lawyers before me?

(11) Do you live with anyone? When did that person move in? Why? Whose name is on the title (lease)? Does that person pay a share of your mortgage (rent) and household expenses?

5. Educating and Counseling:

a. Offer your client (and maybe one or more family members) a “free” one-hour discussion about elder financial exploitation.

b. If your relationship with the client is a continuing one, send out information about new scams when you learn of them.

(Resources can be found on the FTC’s *Pass It On* website.)

c. If a fiduciary (agent, trustee guardian, conservator) plays a role in your client’s life, meet with the fiduciary or, at the very least, suggest that the client give the fiduciary one of the “Managing Someone Else’s Money” guides (free download) prepared by the Consumer Financial Protection Bureau.

d. If the client has already been targeted, suggest that the client change her phone number: but be aware: sometimes a persistent scammer will, in the guise of a concerned family member, send an APS worker or even someone a plumber to the home. When the target expresses confusion, the worker either calls the “reporter” who then continues to threaten the target or, alternatively, if the worker uses the target’s phone to call the reporter, the reporter can re-establish contact with the new number.

6. Monitoring:

a. Encourage clients to explore the use of firms (such as EverSafe) that monitor bank accounts, investment accounts, and credit data and send alerts to the client and a “trusted advocate.”

- b. Educate clients about Daily Money Managers (services that take care of paying bills). Some of these (such as SilverBills) specialize in caring for seniors.
- c. Explore with your client whether bank statements, etc. should be sent to a trusted family member in addition to the client.
- d. For accountants and other allied professionals, if appropriate for your relationship with the client, consider offering a monitoring service yourself:
 - (1) “Adding services such as bill paying, tax preparation and long-term-care planning can help CPAs better serve their senior clients.” Shenkman, Sullivan, & Wolverton, *Elder Financial Abuse: How CPAs Can Help – Part 3*, AICPA

7. Familiarize yourself with reputable professionals in your area (Geriatric Care Managers, Daily Money Managers, etc.) who specialize in counseling and protecting seniors.

8. Explore in advance with your client ways in which you will be able to intervene appropriately if you suspect diminishing capacity or EFA:
- a. Ask your client to give you permission in your engagement letter to contact certain family members or even outside authorities if you suspect EFA
 - b. Build safeguards into documents, such as:
 - (1) Requiring an inventory of the principal’s assets before an agent is allowed to act under a power of attorney;
 - (2) Restricting an agent’s power to make gift, change beneficiary designations, etc.;
 - (3) Require some form of periodic accounting by agents and trustees to someone in addition to the client.

9. When providing “protective action” for a client whose capacity has been diminished, examine “less restrictive alternatives.”
- a. ABA Legal Formal Ethics Op. 96-404 (examining a prior version of MRPC 1.14) “Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is

reasonably viewed as the least restrictive action under the circumstances.”

“The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation.”

b. “Supported Decision Making:” A concept that arose in the disability rights sector, supported decision making allows the vulnerable adult to choose a team of supporters who will help the adult make and facilitate decisions about his or her own care, finances, etc.

c. “Other Protective Arrangements:” Article 5 of the 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act is devoted to allow a court to enter an order that an alternative that is less restrictive than a full-blown guardianship or conservatorship and that is tailored specifically to the adult’s current needs. For example, Sec. 503(d) provides as follows:

(d) After the hearing on a petition under Section 501(a)(2) or (c), whether or not the court makes the findings under subsection (a) or (b), the court may issue an order to restrict access to the respondent or the respondent's property by a specified person that the court finds by clear-and-convincing evidence:

(1) through fraud, coercion, duress, or the use of deception and control caused or attempted to cause an action that would have resulted in financial harm to the respondent or the respondent's property; and

(2) poses a serious risk of substantial financial harm to the respondent or the respondent's property.

10. Beware of “compassionate ageism”:

a. As described in Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 *Gerontologist* 398, 398 (1979). “The message of the New Ageism seems to be that “we” understand how badly you are being treated . . . and that if you adhere to our program, “we” will make your life considerably better. You are poor, lonely, weak, incompetent, ineffectual, and no longer terribly bright. You are sick, in need of better housing and transportation and nutrition, and “we”--the nonelderly and those elderly who align themselves with us and work with us--are finally going to turn our attention to you, the deserving elderly, and relieve your suffering from ageism.”

E. “Professionals Behaving Badly”

1. In Re: Reginald J. Rogers, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 440390) (No. 04-BG-1444, 6/22/06)” “When Hattie Goode’s husband died, their tax attorney, Rogers, took over her affairs, performing both legal and nonlegal services for her. Six years into this relationship (when Ms. Goode was in her late 80s), Ms. Goode made him her agent under a general financial POA. Rogers paid himself for his legal services from Ms. Goode’s funds without asking her and without giving any written basis for the amounts he charged. In addition, he then redeemed bonds the couple had owned (valued at over \$150,000) and used the cash for his own purposes. When Ms. Goode’s nieces found her in the hospital, emaciated and frail, and found her home in complete disarray, they demanded an explanation from Rogers. Soon thereafter, he went to the bank and withdrew the rest of the money in Ms. Goode’s account (about \$6000). Eventually he was found to have embezzled more than \$260,000 of Ms. Goode’s funds. He was disbarred with reinstatement contingent upon his restoration to her of the funds he had misappropriated. An FBI investigation uncovered four other clients whom he had taken funds. He was convicted in 2009 and sentenced to 57 months in prison.”

2. Delbert Joe Modlin, disbarred in CA in 2016 after pleading guilty to forgery charges. Earlier he was suspended for elder fraud: “The new case against Modlin revolves around the attorney’s treatment last year of a 90-year-old former North Highlands man and his daughter, then 66, who lives in Elk Grove. According to court papers, Modlin already was acquainted with the family when he became their estate planner last year following a coincidental meeting. He advised the elderly man to liquidate all his investments, and he persuaded the daughter to invest \$120,000 in a new cat litter box Modlin allegedly had invented, documents

show.” Marjie Lundstrom, “Sacramento elder law attorney charged with financial elder abuse,” *Sacramento Bee*, Aug, 28, 2014.

3. *Wood v. Jamison*, 167 Cal. App. 4th 156 (2008): McComb befriended Peterson, a 78-year-old woman whose son had recently died and whose husband had recently entered an Alzheimer’s facility. McComb told Peterson he was her nephew even though he was not. McComb convinced Peterson to transfer \$174,000 to him in a series of transactions. He also talked Peterson into taking out a loan for \$250,000 to help him open a nightclub. The loan was to be secured by her personal residence. Jamison represented McComb and he also represented Peterson in a variety of matters. “The services included meeting with Peterson and McComb in his office to discuss financing of the night club; locating the lender for Peterson's loan; advising Peterson about various lenders; selecting the lender; gathering documents necessary to close the loan; completing the loan application; transmitting documents under cover of his letterhead; communicating with the lender and title company; reviewing loan documents; and attending the loan escrow closing with Peterson.” Jamison took a referral fee for the loan and \$10,000 of the loan proceeds were paid to him by McComb to satisfy an earlier loan that Jamison had made to him. McComb took the rest of the loan proceeds for himself and did not open a nightclub. “Jamison was aware that Peterson was elderly, and that her husband was incompetent. Jamison did not advise Peterson of the risks of the night club investment or that the loan terms were inappropriate for her. He did not refer her to an accountant or financial advisor.” Peterson defaulted on the loan and then died. The appellate court found: “The evidence of malpractice and breach of fiduciary duty is overwhelming. Jamison failed to advise Peterson of a conflict of interest; failed to advise Peterson the investment was not appropriate for her, or at least to refer her to an independent investment advisor; and obtained an undisclosed profit from the transaction.” Jamison argued that he had not committed elder financial abuse in that he had not “knowingly assisted” McComb in taking the loan proceeds. The appellate court responded that, in addition to taking the referral fee, “Jamison knew what the loan proceeds would be used for. Any attorney would know it was an inappropriate use of Peterson's funds.”

4.. *In the Matter of John Kelvin Conner*, (S. Ct. Pa. Mar. 2019): Attorney temporarily suspended by Pennsylvania Supreme Court after being convicted of 19 counts of wire fraud and one count of making a false statement to a federal agent. Mr. Conner was named agent under his client’s Power of Attorney. The client was an 85-year-old woman who was supported solely by a monthly pension. Mr. Conner used the POA to liquidate her life annuity policy, place the money in her bank account and then proceeded to use the money to support his habit of gambling at casinos. In less than a year he made 176 ATM withdrawals

totaling over \$95,000. Meanwhile, he did not pay her bills so she lost basic services (heating, water, etc.) as well as the care of her paid caregivers. His excuse when questioned by FBI agents was that his client had given him permission to use her money to gamble at casinos.

5. On April 1, 2019, David Land Whigham, a Tampa trusts and estates attorney, was sentenced to 15 years in prison after pleading guilty to multiple counts of stealing money (about \$2.2 million) from clients, many of whom were physically or mentally disabled.

6. S. Meyerow, “Elder Abuse Case Leads Accountant to Prison:” “Barry Palczewski is going to state prison for two-to-six years for stealing more than \$1.2 million from a 95-year-old woman who escaped Nazi-controlled Austria in the late 1930s. Palczewski previously pleaded guilty in N.Y. State Supreme Court to Grand Larceny in the First Degree....According to his guilty plea and documents filed in court, Palczewski was a fiduciary accountant at the law firm that had been entrusted to handle the victim’s finances. As such, he oversaw the victim’s bank accounts and had access to her personal checks. From 2008 through 2010, he stole more than 100 checks from the victim’s personal checking account, forged in the name of the victim’s attorney, and made them payable to himself. The proceeds of the theft were used to pay Palczewski’s rent, fund his consulting business, and pay for hot tub repairs, and were deposited into his personal checking account. In total, Palczewski stole approximately \$1.2 million.”

7. *In re Matter of Ledingham*, Disc. Rev. Bd., N.J. S. Ct. (Mar. 2019): An 88-year-old widow hired Ledingham to represent her as Executor of her husband’s estate, at a rate of \$175 per hour. Over time he charged her over \$120,000.00, claiming he had worked 674 hours on her case. The widow paid him about \$88,000.00, which he accepted. Ledingham testified that the estate involved a complex tax matter. An expert witness, who himself had over 45 years of experience as a trusts and estates lawyer, testified that the work described should not have taken more than 30 billable hours. The expert stated that, had he done the work, he would have charged \$400 per hour but that the total fee would have been about \$12,000.00. The Disciplinary Review Board concluded that Ledingham had violated New Jersey Rule of Professional Conduct 1.5 and 8.4 and recommended disbarment. The Board stated: “We find that the magnitude of [Ledingham’s] overreaching is overwhelming on its own. In addition, we consider that the victim of his misdeeds was a recently widowed eighty-eight-year-old who should have been enjoying that money in her twilight years.

8. *North Carolina State Bar v. Erickson*, 850 S.E.2d 622 (2020) (unpublished disposition), Erika Erickson was disbarred following a series of professional conduct rule violations, including:

1. She notarized a deed even though she had not personally witnessed the signing;

2. She allowed a client's purported "son" to sign a consent to sale which she then recorded. She later discovered that the man was not really the client's son but never notified the court.

3. After a mother had revoked her power of attorney that appointed her son as agent because she thought the son was stealing from her, the lawyer accompanied the son to the mother's home and, without identifying herself as the son's attorney, convinced the mother to reinstate the power of attorney.

4. She represented two sisters who sought to gain control over their father's financial affairs. She accompanied the daughters to the father's home, bringing with her a notary and blank powers of attorney. The lawyer did not disclose to the father that she was representing his daughters. After a "contentious discussion" in which the daughters threatened to report the father's caregiver for exploitation, the father signed the power of attorney in order to ensure that his care would continue. The next day, the lawyer filed a petition to have the father declared incapacitated and the daughters appointed as his guardians. The lawyer then told the father that the powers of attorney were invalid and that she had shredded them. Nevertheless, following on representations made to them by the lawyer, the daughters used the powers of attorney to freeze the father's accounts.

F. One Professional Behaving Well (or at least trying to)

1. *Dunn v. Patterson*, 919 N.E.2d 404 (Ill. App. 2009): Charles and Charlotte hired attorney Patterson to prepare estate planning documents for them. Each document contained a "qualified amendment and revocation provision" that stated that the documents could only be amended with the written consent of Patterson or "by order of the court." Patterson stated that he routinely inserted such a provision in his documents to prevent elder abuse. (He called it a "Peace of Mind Estate Plan.") Five months after signing the documents, Charles and Charlotte went to a different lawyer who wrote to Patterson to tell him that Charles and Charlotte no longer wanted their ability to amend their documents to be dependent upon Patterson's consent. Patterson insisted on a personal meeting with Charles and Charlotte. He also pointed out that Charles and Charlotte could petition a court for leave to amend their documents. After several months of the lawyers exchanging letters (and no communication with Patterson), Charles and Charlotte sought a declaratory judgment stating that they had an absolute right to amend their documents and that Patterson had violated Illinois Rule of Professional Conduct 1.2(a) by not abiding by their directions. Patterson cited Rule 1.14 in his defense. The trial court held that the qualified amendment provision was contrary to public

policy. Disciplinary proceedings were then commenced against Patterson and a suspension from the practice of law was recommended. The appellate court reversed the holding of the trial court. The appellate court, citing the Restatement (3d) of Trusts stated first that third-party consent provisions are legal in Illinois. In response to the argument that it was patently improper for a lawyer to make himself the third party whose consent was required, the appellate court responded as follows:

Out here in the cornfields of Illinois and, we suspect, sometimes in the large metropolitan areas of Illinois, one's lawyer is often his or her most trusted friend and advisor with respect to major life decisions. Where, as here, the lawyer is given no financial stake in an estate by virtue of his capacity as a fiduciary, we see no reason why the family lawyer cannot act in such capacity simply because he is drafting a trust document. Plaintiffs argue that a lawyer should not be able to limit how his clients spend their money or distribute their assets as long as it is not illegal. First of all, these documents do not give the fiduciary such broad powers. Secondly, every time a lawyer drafts an irrevocable trust for a client, he is limiting his client's future decisions regarding the distribution of his or her estate. However, this is done with the client's permission.

The appellate court held that the qualified amendment provisions did not violate public policy or the Rules of Professional Conduct. The court concluded: "We know of no cases that would hold that the Rules of Professional Conduct require an attorney to follow self-destructive directions of an incompetent client. The court noted also that "Patterson has put himself in a tough and expensive position here.

On appeal of the disciplinary decision (and after the decision of the appellate court was issued), the recommendation for suspension was overturned.

Professor Emerita Mary F. Radford

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