ETHICAL & PROFESSIONAL RESPONSIBILITY CHALLENGES

IN

DEALING WITH ELDER FINANCIAL ABUSE

Mary F. Radford
Marjorie Fine Knowles Professor of Fiduciary Law
Georgia State University College of Law
Atlanta, Georgia

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 who represent 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.

This outline begins with a general discussion of the ethical and professional responsibility questions involved when a lawyer is representing a client whose capacity is diminishing. The next section explores ways in which lawyers can prepare their clients in advance for the possible onset of incapacity. The outline then proceeds to a focus on the ethical and professional responsibility questions that arise when the lawyer suspects that the client is the victim of elder financial abuse. The next section of the outline explores the opposite end of the spectrum – that is, what are the lawyer's ethical and professional responsibilities when the client is not the victim of suspected abuse but in fact a possible perpetrator of that abuse? The final section of the outline reminds the reader that, sadly, sometimes it is the client's own lawyer who is perpetrating the abuse and describes illustrative cases in which courts and state bar disciplinary authorities have dealt with these lawyers.

Resources

The primary resource for resolving ethical and professional responsibility issues is the Code of Professional Responsibility of the state in which the lawyer is practicing. This outline will use as a framework the ABA Model Rules of Professional Conduct and accompanying Comments, with the caveat that many states have varied the terms of their own rules. Additional resources used in this outline include:

1. ABA Opinions interpreting the Model Rules and earlier codes of professional conduct
2. ACTEC Commentaries on the Model Rules of Professional Conduct (5th ed.)
3. Formal and informal ethical opinions from state bars
4. State court opinions in malpractice, breach of fiduciary duty, and disciplinary cases

5. NAELA Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries (2d ed.)
6. ACTEC *Engagement Letters: A Guide for Practitioners* (3d ed. 2017)
7. American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*
8. Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA 2013)
9. AARP, *Protecting Older Investors: The Challenge of Diminished Capacity* (2011)

I. Ethical and Professional Responsibility Guidance for Dealing with Clients with Diminishing Capacity: *Model Rule of Professional Conduct 1.14*

A. Maintaining the Norm:

1. *MRPC 1.14(a)*: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *normal* client-lawyer relationship with the client."

    a) MRPC 1.14 seems to presume continued representation even when a current client loses capacity.

    b) *ACTEC Commentaries to MRPC 1.14: Person With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary.* "A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her."

    c) *ABA Op. 96-404*: The obligation to maintain a normal attorney-client relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

2. *MRPC 1.2*: Client directs the representation

a) *MRPC 1.2, Comment 4*: "[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."

b) *ABA Op. 96-404*: "A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment."

c) *MRPC 1.14 Comment 4*: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."

3. *MRPC 1.4*: Maintaining communication

a) *MRPC 1.14 Comment 2*: "Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."

4. *MRPC 1.6:* Lawyer maintains client confidences

a) *MRPC 1.14(c)*: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6…"

B. Assessing Client Capacity

1. Does an attorney have a duty to assess client capacity?

Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, 135 Cal. Rptr. 2d 888 (2003): Children of testator sued law firm that assisted the testator in altering his estate planning documents, alleging that the lawyers should have realized that the testator's capacity was questionable due to pain, illness and medications. Although recognizing that in some cases an attorney does owe a duty to non-clients, the court held that "an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client." Court said that a holding to the contrary could compromise the lawyer's duty of loyalty to his client. "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator.* In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." See also, Chang v. Lederman, 90 Cal. Rptr. 3d 758 (2009)

Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): Heir of testator successfully challenged the will based on lack of testamentary capacity. Heir then sued the lawyer who drafted the will, alleging that the lawyer's negligence had resulted in the heir incurring counsel fees and other expenses in the will contest. The court held that while the lawyer owed a duty to his client to make a reasonable inquiry into the client's capacity, the lawyer owed no duty to the heirs of the testator.

2. How does an attorney assess client capacity?
    a) Common-sense approach – "I know it when I see it."
        i. Avoid stereotype of "ageism": Would you reach a different conclusion if your client were age 35 instead of 85?
        ii. Avoid value judgments: Bad judgment is not the same as lack of judgment
    b) *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."
    c) Observable signs of possible diminished capacity: American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, pp. 14-18; "Capacity Worksheet for Lawyers," pp. 23-26).
        i. Should lawyers use common capacity-measuring tests such as the Mini-Mental State Exam?
            a. American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:A Handbook for Lawyers*, pp. 21-22 lists several reasons why lawyers should <u>not</u> use these instruments: lack of training; limited yield of information; over-reliance; false negatives and positives; lack of specificity to legal incapacity
    d) Consultations with family members and others:
        i. *ABA Op. 96-404*: "There may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of

how to proceed. Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.

e) Private lawyer consultation with an evaluator: client is not identified so client consent is not necessary; lawyer usually pays for this as it is a service to the lawyer

f) Suggest that client have a complete medical exam

g) Formal forensic capacity evaluation:

i. Disadvantages: trauma, expense, time; difficulty in convincing client or family members of the necessity

ii. Advantage: strong evidence if later needed to defend a transaction (e.g., defend against an attack on testamentary capacity)

iii. HIPPA requires that the clinician get the client's consent to share the results with the lawyer

iv. Lawyer's referral letter: see sample in American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, Appendix 2

v. Remember that the assessment of "legal capacity" still ultimately rests with the lawyer

C. On the Other End of the Spectrum: Emergency situations: Exploitations, Scams, Elder Abuse

1. *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…."

a. Note that in some states, the "may" is a "shall":

TX Disciplinary Rule of Professional Conduct 1.02:
"(g) A lawyer *shall* take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

2. What is "reasonably necessary protective action"?

a. In the Matter of Clark, 202 N.C. App. 151 (2010): The guardian of a woman who had suffered severe brain injury as the result of an accident hired lawyers to represent the woman in her lawsuit against those who caused the accident and to aid in setting up a Special Needs Trust with any recovered funds. The parties settled the accident litigation, but then the husband of the woman sought to have her guardianship terminated or, alternatively, to have him appointed to replace the current guardian. One of the lawyers had cause to believe that the husband's motive in urging his wife to terminate the guardianship was to allow himself access to the settlement funds. The lawyer objected to the termination of the guardianship but withdrew his objection when the parties agreed that the bulk of the settlement funds would be placed into an irrevocable Special Needs Trust. The husband and wife then objected to the fees the lawyer had charged and sought to have the lawyer sanctioned because he had failed to maintain a "normal attorney-client relationship" with the woman. The court refused to sanction the lawyer, citing subsection (b) of Rule 1.14. The appellate court noted that the trial court had found "as a fact that [the lawyer] genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored… As long as Ms. Clark's competency had not been restored, [the lawyer] had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did."

b. *MRPC 1.14 Comment 5*: "… consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate

decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."

c. *ABA Legal Formal Ethics Opinion 96-404* (examining an earlier 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."

3. What are "less restrictive actions"?

a. Participants in the 1994 Fordham "Conference on Ethical Issues in Representing Older Clients" compiled this list:

1. Involve family members;
2. Use of durable Powers of Attorney;
3. Use of revocable trusts;
4. Use of a "time out" to allow for cooling off, clarification, or improvement of the situation, or improvement of circumstances;
5. Referral to private case management;
6. Referral to long-term care ombudsman;
7. Use of church or other care and support systems;

8. Referral to disability support groups;
9. Referral to social services or other governmental agencies, such as consumer protection agencies (keeping in mind the risk that this may trigger investigation and intervention)

4. Should the attorney ever seek the appointment of a guardian for the client?

a. *MRPC 1.14 Comment 7*: "If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."

b. *ABA Op. 96-404* (examining an earlier version of MRPC 1.14) made these pronouncements:

i. Consider seeking a limited guardianship or conservatorship "allowing the client to continue managing his personal affairs."

ii. The lawyer herself may file the petition for guardianship. However, "a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client." (This would create a conflict of interest prohibited by MRPC 1.7.)

"We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such

circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation." (ABA Op. 96-404)

iii. The lawyer may recommend or support the appointment of a particular person as guardian without violating Rule 1.7:

> "A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward." (ABA Op. 96-404)

iv. The lawyer may represent the person whom the lawyer supported to be guardian after the guardianship is established:

> "Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian." (ABA Op. 96-404)

v. The lawyer should rarely seek to have herself appointed as guardian:

> "[T]he Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of

circumstances, that is, where immediate and irreparable harm will result from the slightest delay." (ABA Op. 96-404)

II. Taking Pro-Active Steps in Advance to Protect Clients

A. Both the ACTEC Commentaries (Commentary to Rule 1.14) and the NAELA Aspirational Standards (Standard A(6)) recommend that lawyers anticipate in advance the possibility of the client's later incapacity or some later abuse of an elderly or vulnerable client. The lawyer should take steps at the beginning of the relationship to protect the client.

1. *ACTEC Commentary to MRPC 1.14:*

"As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA."

2. *Comment to NAELA Aspirational Standard A(6):*

"The elder law and special needs law attorney is often confronted with issues of financial exploitation, physical and emotional abuse and neglect when the person whose interests are served in the legal representation has diminished capacity or has a disability. Attorneys should make an effort to be educated and trained in detecting and preventing exploitation, abuse and neglect. Attorneys should recommend to the client the use of planning measures into the representation that

will minimize the risk of exploitation, abuse and neglect, including but not limited to the education of the client and family members on the risks. Attorneys might consider encouraging clients to: 1) sign a written pre-consent form authorizing the attorney to take protective action if the attorney discovers exploitation, abuse or neglect; 2) encourage the client to place the client's assets into a living trust; 3) give a trustworthy family member access to the client's bank account in order for such trusted party to be able to act as a protector by checking on expenditures (see sample authorized disclosure form below) (also see Standard #4-#7 Section G Client Capacity) which discusses the obligations of an attorney to take protective action when a client has diminished capacity.)"

B. Steps to Take at the Beginning of the Client-Attorney Relationship

1. Identify the client

a. A general rule of thumb is that the true client is the individual whose welfare, safety, and/or property are the subject of the representation.

b. *Comment to NAELA Aspirational Standard B(1):*

"In elder law and special needs law, identifying the client is challenging because the individual whose welfare and interests are to be protected in the proposed representation may not be present or may be accompanied by family members, appointed fiduciaries, or other trusted third parties. Usually, the client is the individual whose property and interests are to be protected. Alternatively, a family member, fiduciary, or other person seeking to protect or assist another person can be the client."

2. Ensure that the client has the capacity to enter into the attorney-client relationship.

a. It is possible that a fiduciary who is acting for an individual who lacks that capacity (e,g., the individual's guardian, conservator, or agent under a power of attorney) may engage the attorney on the individual's behalf.

3. Communicate to the other parties

a. Make sure that all others involved understand that the lawyer's duties of confidentiality, competence, diligence, loyalty and care flow only to that client.

4. Meet with the client alone

a. It is important to make sure that the wishes that the lawyer is putting into effect are those of the client and not of one of the other parties involved.

i) A lawyer should not draft documents that involve the welfare of an individual with whom the lawyer has not met.

b. The presence of third parties during the attorney-client consultation may destroy any privilege that communications made during that meeting would otherwise enjoy.

c. *MRPC 1.14 Comment 3***:** "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege."

i. Note that no case examining the attorney-client *evidentiary privilege* has confirmed this MRPC statement.

ii. Lawyer's file should reflect why the family member's participation is "necessary" and that lawyer made this determination prior to allowing the family member to participate

5. Have An Engagement Letter

a. A well-crafted engagement letter clearly identifies who is (and, in some cases, who is not) the client and the scope of the representation.

b. See ACTEC *Engagement Letters: A Guide for Practitioners* (3d ed. 2017)

c. See *NAELA Aspirational Standard C(1):* The Elder Law and Special Needs Law Attorney: "1. Utilizes an engagement agreement, letter, or other writing(s) that will:

a) Identify the client(s);
b) Describe the scope and objectives of the representation;
c) Disclose potential material conflicts between the attorney and client;
d) Explain the lawyer's obligation of confidentiality;
e) Confirm, when there are joint clients, that the lawyer will share information and confidences among them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree how to proceed;
f) Disclose potential material conflicts among joint clients;
g) Address (and possibly waive) non-material conflicts between joint clients;
h) Confirm, when representing a fiduciary, the fiduciary's

obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not timely take corrective action;

i) Set out fee arrangements (hourly, fixed fee, or contingent); and

j) Explain when and how the attorney-client relationship may end.

6. Beware of the Potential for Conflicts of Interest

a. Caretaker may also be the client's major beneficiary

(Of special importance with Medicaid planning)

b. With "blended families," the attorney should have a heightened awareness of the potential for emotional conflict, particularly relating to:

i) Health-care decision making

ii) Long-term care

iii) Retirement distributions

iv) The "two-trust Will"

a. Who will be the trustee of the QTIP trust? (Second spouse, who is also the stepmother of the children who are the remainder beneficiaries? One of those children?)

c. A family member may seek to be appointed as guardian or conservator for the elder client

7. Understand the Rules Relating to Allowing Another Person to Pay the Client's Legal Fees

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."

Comment 11: "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)."

> *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."

III. When the Client is a Suspected Victim of Elder Abuse

A. Reporting Elder Abuse

1. *ACTEC Commentary on MRPC 1.14* (new in 2016 edition):

"*Reporting Elder Abuse*. Elder abuse has been labeled "the crime of the 21st century," Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014), and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.,*Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.*, Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. 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. *See* NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation."

2. Mandatory Reporting by Attorneys Regardless of Whether Information is Confidential:
   TEX. HUM. RES. CODE ANN. § 48.051(a)–(b) (West, Westlaw through 2015 Reg. Sess.). "(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....

   (c) 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."

3. Mandatory Reporting by Attorneys: Overlap with Confidentiality Rules:
   a. 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…."

BUT SEE: *State Bar of AZ Ethics Opinion 01-02 (2001)*
"If the inquiring attorney concludes, based on information acquired during the course of representing an incapacitated or vulnerable adult, or a person who owes fiduciary duties to an incapacitated or vulnerable adult, that she is required to make a report under A.R.S. § 46-454, the Ethical Rules do not prohibit her from disclosing information to state authorities.[footnote omitted] The extent to which the inquiring attorney is required to make such a report, and whether other provisions of law, such as the attorney-client privilege, preclude her from doing so, are questions of law beyond the scope of this Committee's jurisdiction.

The inquiring attorney is not, however, ethically obligated to make such a report. As the Committee recognized in Ariz. Op. 87-3, divulging confidential information when disclosure is "required by law" is permissive, rather than mandatory, and there may be other legal considerations that lead the attorney to conclude that he may not divulge that information. Ariz. Op. 87-3 at 3. Ethical Rule 1.14, which permits a lawyer to take protective actions for a client who cannot act in his or her own interest, also may provide an ethical basis for reporting.

If the inquiring attorney decides to report under Section 46-454, she should inform her client. *See* ER 1.4; Ariz. Op. 87-3 at 4.

The inquiring attorney should also disclose, at the outset of her representation of an incapacitated or vulnerable adult or a person who owes fiduciary duties to an incapacitated or vulnerable adult, that circumstances may develop during the course of the representation that would require the inquiring attorney to make a report under Section 46-454 regardless of the client's wishes. *See* ER 1.2(a) and (c)."

b. Note that one state's professional responsibility rules (Washington RPC 1.6) require the attorney to report abuse or neglect if it results in physical harm:

Wash. RPC 1.6: "(b) A lawyer to the extent the lawyer reasonably believes necessary: (1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

4. Mandatory Reporting by Attorneys Except Where the Information is Privileged or Confidential:
    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."
    See also, OHIO REV. CODE ANN. § 5101.61(A); MONT. CODE ANN. § 52-3-811 (West, Westlaw through 2015 Sess.) ("*unless the attorney acquired knowledge of the facts required to be reported from a client and the attorney-client privilege applies*").

5. "Other law" Exception to MRPC 1.6:
    a. *MRPC 1.6(b)*: "(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;

    b. *Comment to MRPC 1.6 (relating to the "or other law" exception):*
    [12] "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,

paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law."

c. Note that some state Rules (e.g. Wash. RPC 1.6) do not contain this "other law" exception.

6. Attorneys as "Permissive Reporters"
    a. Sometimes attorneys are named specifically (e.g., Wash. 74.34.020(17)) but more often fall under a general category (e.g., OCGA 30-5-4(a)(2): " Any other person having a reasonable cause to believe that a disabled adult or elder person is in need of protective services, or has been the victim of abuse, neglect, or exploitation…."
    b. Some states extend their protection for reporters to attorneys even if disclosure would otherwise warrant disciplinary action. See, e.g., 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."

7. Remain aware that an attorney's consultation with an outside professional (e.g., a physician) may trigger a mandatory report
    a. *N.H. Ethics Committee Advisory Op. #2014-15/5: Client with diminished capacity*: "More important, if the client or lawyer discusses ongoing elder abuse during consultations with an outside specialist, the information may trigger a reporting obligation that does not apply to the attorney. A report to law enforcement, of course, may be a consequence that the client vehemently opposes. It may also result in an involuntary change in living arrangements, guardianship and even the arrest and prosecution of a close family member. These steps may protect the client, but there may also be less draconian measures that provide similar protection with less disruption. *Before bringing third parties into the situation, therefore, the attorney should attempt to determine whether reporting obligations will be triggered, or whether the attorney-client privilege will be waived.*"

8. Overlap of MRPC 1.6 and MRPC 1.14:

a. *MRPC 1.14(b)*: **"…** the lawyer may take reasonably 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.

b. *MRPC 1.14(c)*: "…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."

9. The "Substantial Harm" Exception to MRPC 1.6

a. Even if the client's capacity is not diminished, *MRPC 1.6(b)* provides**: "**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;*"

b. While this exception would not be sufficient to cover financial abuse, some states have expanded this exception:

a. *Georgia RPC 1.6(b)(1)*: **"**A lawyer may reveal information covered by paragraph (a) which 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;…."

10. Confidentiality Duty if a Suspected Perpetrator Has Convinced the Client to Hire a New Attorney

a. *Mass. Bar Ethics Op. 04-1 (2004)*: "A lawyer discharged by a client should normally turn over the client's file to a new attorney when requested to do so. When circumstances indicate that the client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes. Moreover, if the lawyer concludes that the client did not have such capacity and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may consult with family members in order to protect the client's interests and may disclose confidential information of the client to family members, but only to the extent necessary to protect client's interests."

IV. When the Client is the Suspected Perpetrator of Elder Abuse

A. *MRPC 1.2*: "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

B. *MRPC 1.6: "*(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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;…."

C. *ACTEC Commentary to MRPC 1.6:*

"Disclosures by Lawyer for Fiduciary. The duties of the lawyer for a fiduciary are affected by the nature of the client and the objectives of the representation. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). Special care must be exercised by the lawyer if the lawyer represents the fiduciary generally and also represents one or more of the beneficiaries of the fiduciary estate.

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer

to make disclosures in order to protect the interests of the beneficiaries. It should be noted that the evidentiary attorney-client privilege is in some jurisdictions subject to the so-called fiduciary exception, which provides generally that a trustee cannot withhold attorney-client communications from the beneficiaries of the trust if the communications related to exercise of fiduciary duties. *See United States v.Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011); Restatement (Third) of the Law Governing Lawyers §84 (2000).

In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(c) (Candor Toward the Tribunal), which requires disclosure to the court "even if compliance requires disclosure of information otherwise protected by MRPC 1.6." In addition, the lawyer may not knowingly provide the beneficiaries or others with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communication with Person Represented by Counsel; and Dealing with Unrepresented Person)."

"*Disclosure of a Fiduciary's Commission of, or Intent to, Commit a Fraud or Crime.* When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

Whether a given financial loss to a beneficiary is a "substantial injury" will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a substantial injury. In determining whether a particular loss constitutes a "substantial injury," lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary's misconduct had or could have on the beneficiary.

In the course of representing a fiduciary, the lawyer may be required to disclose the fiduciary's misconduct under the substantive law of the jurisdiction in which the misconduct is occurring. For example, the elder abuse laws of some states require a lawyer who discovers the lawyer's conservator/client has embezzled money from an elderly, protected person to disclose that information to state agencies, even though the lawyer's services were not used in conjunction with the embezzlement. Under such circumstances, MRPC 1.6(b)(6) ("to comply with other law") would authorize that disclosure."

V. The Lawyer as the Perpetrator of Elder Abuse: Illustrative Cases

A. 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."

B. 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.

C. *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."