

# AN ETHICAL DILEMMA: ATTORNEYS' DUTIES NOT TO REVEAL ELDER ABUSE IN WASHINGTON STATE

Margaret Sholian

*Abstract:* Elder abuse is a growing social issue in the United States. As a result of increasing awareness of elder abuse, every state has enacted mandatory or voluntary reporting laws to encourage public oversight of this vulnerable population. While mandatory and voluntary reporting statutes list a wide variety of professionals, such as physicians, social workers, and caretakers, as mandatory reporters, few of these statutes require attorneys to report elder abuse. Arguably, attorneys are in the best position to discover abuse of their elderly clients, as attorneys are advisors, counselors, and protectors of their clients' affairs. However, in many circumstances, an elderly client may be reluctant to report the abuse and insist there be no report made. In this situation, attorneys are bound by ethical rules against disclosing confidential client information without the client's consent. In Washington State, this prohibition effectively bars an attorney from reporting emotional or financial abuse of her elderly client without the client's consent, even if such abuse threatens the client's health or to drain the elder's financial resources. While the protection of client confidences is a fundamental cornerstone of the attorney-client relationship, Washington State should recognize that all forms of elder abuse result in an increased risk of mortality, and consider amending its Rules of Professional Conduct to permit voluntary attorney disclosure of elder abuse.

## INTRODUCTION

As the American population ages, the problem of elder abuse has received serious attention. Despite widespread criminalization of elder abuse<sup>1</sup> and state enactment of mandatory reporting laws,<sup>2</sup> elder abuse continues to be vastly unreported.<sup>3</sup> With the majority of wealth concentrated among individuals aged sixty-five and older,<sup>4</sup> elders are particularly vulnerable to predators.<sup>5</sup> Take Bea Bergman, a recently

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1. See generally Nina Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1 (2012).

2. See Molly D. Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165, 170-71 (1995).

3. See NAT'L CTR. ON ELDER ABUSE AT THE AM. PUB. HUMAN SERVS. ASS'N, NATIONAL ELDER ABUSE INCIDENCE STUDY 5-10 (1998) [hereinafter NEAIS], available at [http://aoa.gov/AoA\\_Programs/Elder\\_Rights/Elder\\_Abuse/docs/ABuseReport\\_Full.pdf](http://aoa.gov/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf).

4. See MARINAL VORNOVITSKY ET AL., U.S. CENSUS BUREAU, DISTRIBUTION OF HOUSEHOLD WEALTH IN THE U.S.: 2000 TO 2011 (2011), available at <http://www.census.gov/people/wealth/files/Wealth%20distribution%202000%20to%202011.pdf>.

5. Bryan J. Kemp & Laura A. Mosqueda, *Elder Financial Abuse: An Evaluation Framework and Supporting Evidence*, 53 J. AM. GERIATRICS SOC'Y 1123, 1123 (2005) (noting that elder financial

widowed elderly woman with assets valued in the millions.<sup>6</sup> Bea had recently lost her husband, and after his death she became confused, as she had exclusively relied on her late husband to handle financial decisions and for transportation.<sup>7</sup> Bea required emergency medical assistance for bouts of serious anxiety, and was prescribed medication for her comfort.<sup>8</sup> Following her husband's death Bea contacted Maxon Moving Company to donate her husband's personal items to the Salvation Army.<sup>9</sup> Bea stated her intention to give the Maxons a marble table, and upon the move, gave Ron Maxon a thank you card with a \$2000 check.<sup>10</sup>

Shortly after their encounter, Joyce Maxon befriended Bea, taking her shopping, to church, and accompanying Bea to doctor's appointments.<sup>11</sup> Bea began staying with the Maxons and was "progressively integrated into the Maxon family."<sup>12</sup> After gaining Bea's trust and friendship, Joyce Maxon and the rest of the Maxon family methodically began exploiting Bea's vulnerability.<sup>13</sup> Bea "began writing checks to and purchasing property for the various Maxon family members."<sup>14</sup> Over an eight-month "feeding frenzy," Bea paid more than \$600,000 "to or for the benefit of the Maxons."<sup>15</sup> It was not until Christmas-time that Bea ended her relationship with the Maxons, which was "precipitated by the Maxons' Christmas gifts to Bea, which she considered to be miserly responses to her Christmas gifts to them of \$25,000 checks."<sup>16</sup> Evidence showed that Bea had bipolar disorder,<sup>17</sup> and it was during periods of mania that the family members requested gifts. Specifically, "Joyce orchestrated the transfers [for alternating family members], timing the gift requests to coincide with Bea's manic or 'giving' periods and decid[ed] who would be the next recipient of Bea's bounty."<sup>18</sup>

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abuse is one of the most common forms of elder mistreatment).

6. *State v. Maxon*, 79 P.3d 202, 205 (Kan. Ct. App. 2003).

7. *Id.* at 204–05.

8. *Id.* at 205.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 206.

18. *Id.* at 207.

Bea's story is not uncommon. Financial exploitation is one of the most common forms of elder abuse.<sup>19</sup> Attorneys, particularly those with older clients, are in a unique position to identify victims of elder abuse, yet often fail to report it.<sup>20</sup> This Comment explores the reasons for attorney non-reporting of elder abuse, even in the face of mandatory or permissive reporting statutes. Specifically, attorneys are bound by the rules of confidentiality to a client, and are not allowed to report a client's secrets without the client's consent.<sup>21</sup> Notwithstanding the prohibition against revealing confidences, attorneys may disclose a client's confidential information without the client's consent in very limited circumstances.<sup>22</sup> Consequently, in all but the most egregious instances of elder abuse, an attorney may not alert the proper authority that an elderly client is experiencing abuse.<sup>23</sup>

This Comment analyzes the lawyer's ethical duty to report, or not report, elder abuse in five parts. Part I of this Comment identifies and describes elder abuse and aims to provide an understanding of why elder abuse is largely unreported. Additionally, Part I contemplates the attorney's role in combating elder abuse.<sup>24</sup> Part II discusses mandatory reporting laws, and this Comment specifically analyzes states' laws that make attorneys mandatory reporters of elder abuse. Part III identifies ethical barriers to attorney reporting of elder abuse, specifically under the American Bar Association's Model Rules of Professional Conduct (Model Rules). Part IV argues that Washington's Rules of Professional Conduct (RPC), which prevent attorneys from reporting elder abuse when it would amount to a breach of the attorney's duty of confidentiality, override the state's designation of attorneys as permissive reporters and essentially nullify the statute. Lastly, Part V suggests that attorneys need clear standards about their ethical duty when faced with a client who refuses to consent to attorney disclosure of elder abuse.

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19. See Kemp & Mosqueda, *supra* note 5, at 1123.

20. See Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 ELDER L.J. 459, 459 (2003).

21. See WASH. RULES OF PROF'L CONDUCT R. 1.6 (2006).

22. See *id.* R. 1.6(b)(1) (allowing a lawyer to reveal information about a client "to prevent reasonably certain death or substantial bodily harm").

23. See *infra* Part III.B.

24. See *infra* Part I.C.

## I. ELDER ABUSE: A GROWING PROBLEM FOR LEGAL PROFESSIONALS

The aging of the baby boom generation and the extension of life through medical advances have led to a dramatic shift in the age structure of America.<sup>25</sup> Both men and women are living longer than ever before,<sup>26</sup> and life expectancy continues to improve.<sup>27</sup> By the year 2050, it is expected that people aged sixty-five and older will comprise twenty percent of the total U.S. population, with the “fastest growing segment” consisting of those who are eighty-five years of age or older.<sup>28</sup> While there were 5.8 million people aged eighty-five or older in the year 2010, the United States Census Bureau projects that there will be 19 million people in this age group by the year 2050.<sup>29</sup> As the number of older Americans grows, incidences of elder abuse will only continue to increase.

### A. *Elder Abuse: Definition and Prevalence*

Legally defining elder abuse is the first step in recognizing it as a widespread problem that requires the legal community’s attention. The definition of elder abuse can encompass a broad range of abusive behaviors that specifically target older adults. Typically, states target abusive behaviors and neglect committed by primary caretakers within the elder’s family.<sup>30</sup> However, state statutes may also impose a mandatory reporting requirement for elder abuse that occurs in an institutional setting.<sup>31</sup> Due to massive underreporting of elder abuse,<sup>32</sup>

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25. See generally S. Jay Olshansky et al., *Aging in America in the Twenty-First Century: Demographic Forecasts from the MacArthur Foundation Research Network on an Aging Society*, 87 MILBANK Q. 842 (2009).

26. 2012 *National Population Projections: Summary Tables—Table 10. Projected Life Expectancy at Birth by Sex, Race, and Hispanic Origin for the United States: 2015 to 2060*, U.S. CENSUS BUREAU (2012), available at <http://www.census.gov/population/projections/data/national/2012/summarytables.html>.

27. See James Lubitz et al., *Health, Life Expectancy, and Health Care Spending Among the Elderly*, 349 NEW ENG. J. MED. 1048 (2003).

28. See *Statistics/Data*, NAT’L CENTER ON ELDER ABUSE ADMIN. ON AGING, <http://www.ncea.aoa.gov/Library/Data/index.aspx> (last visited Aug. 12, 2015).

29. Econ. & Statistics Admin., U.S. Dep’t of Commerce, *Statistical Brief: Sixty-Five Plus in the United States*, U.S. CENSUS BUREAU (May 1995), <http://www.census.gov/population/socdemo/statbriefs/agebrief.html>.

30. See Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 72 (1982).

31. See, e.g., WASH. REV. CODE ANN. § 74.34.020(21) (West, Westlaw through 2015 Reg., 1st,

states have elected to impose mandatory reporting requirements<sup>33</sup> in order to protect this vulnerable population under its police power.<sup>34</sup> As lawyers frequently work with aging clients and may be privy to confidential information, such as suspected elder abuse, the lawyer's role in combatting elder abuse is more pronounced. However, lawyers

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2d, & 3d Sess.) (defining a vulnerable adult to include any person admitted to a facility or receiving services from care agencies licensed by the state).

32. See NEAIS, *supra* note 3, at 5-10 (estimating that, for every one case of elder abuse reported and substantiated, five more go unreported).

33. See ALA. CODE § 38-9-8 (2015); ALASKA STAT. ANN. § 47.24.010 (West, Westlaw through 2015 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 46-454 (2015); ARK. CODE ANN. § 12-12-1708 (West, Westlaw through 2015 Reg. Sess.); CAL. WELF. & INST. CODE § 15630 (West, Westlaw through 2015 Reg. Sess.); COLO. REV. STAT. ANN. § 18-6.5-108 (West, Westlaw through 2015 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 17b-451 (West, Westlaw through 2015 Reg. & Spec. Sess.); DEL. CODE ANN. tit. 31, § 3910 (West, Westlaw through 2015); D.C. CODE § 7-1903 (2015); FLA. STAT. ANN. § 415.1034 (West, Westlaw through 2015 1st Reg. & Sp. A Sess.); GA. CODE ANN. § 30-5-4 (West, Westlaw through 2015 Reg. Sess.); HAW. REV. STAT. § 346-224 (West, Westlaw through 2015 Reg. Sess.); IDAHO CODE ANN. § 39-5303 (West, Westlaw through 2015 1st Reg. & 1st Extraordinary Sess.); 320 ILL. COMP. STAT. ANN. 20/2 (West, Westlaw through 2015 Reg. Sess.); IND. CODE ANN. § 12-10-3-9 (West, Westlaw through 2015 1st Reg. Sess.); IOWA CODE ANN. § 235B.3 (West, Westlaw through 2015 Reg. Sess.); KAN. STAT. ANN. § 39-1431 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 209.030 (West, Westlaw through 2015 Reg. Sess.); LA. REV. STAT. ANN. § 15:1404 (2014); ME. REV. STAT. ANN. tit. 22, § 3477 (2015); MD. CODE ANN., FAM. LAW § 14-302 (West, Westlaw through 2015 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 19A, § 15 (West, Westlaw through 2015 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 400.11a (West, Westlaw through 2015 Reg. Sess.); MINN. STAT. ANN. § 626.5572 (West, Westlaw through 2015 1st Reg. & Spec. Sess.); MISS. CODE ANN. § 43-47-7 (West, Westlaw through 2015 Reg. Sess.); MO. ANN. STAT. § 565.188 (West, Westlaw through 2015 Veto Sess.); MONT. CODE ANN. § 52-3-811 (West, Westlaw through 2015 Sess.); NEB. REV. STAT. ANN. § 28-372 (West, Westlaw through 2015 1st Reg. Sess.); NEV. REV. STAT. ANN. § 200.5093 (West, Westlaw through 2015); N.H. REV. STAT. ANN. § 161-F:46 (2015); N.J. STAT. ANN. § 52:27G-7.1 (West, Westlaw through 2015); N.M. STAT. ANN. § 27-7-30 (West, Westlaw through 2015 1st Spec. Sess.); N.Y. PUB. HEALTH LAW § 2803-d (McKinney, Westlaw through 2015); N.C. GEN. STAT. ANN. § 108A-102 (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE ANN. § 50-25.2-03 (West, Westlaw through 2013); OHIO REV. CODE ANN. § 5101.61 (West, Westlaw through 2015); OKLA. STAT. ANN. tit. 43A, § 10-104 (West, Westlaw through 2015 1st Reg. Sess.); OR. REV. STAT. ANN. § 124.060 (West, Westlaw through 2015 Reg. Sess.); 35 PA. CONS. STAT. ANN. § 10225.701 (West, Westlaw through 2015 Reg. Sess.); R.I. GEN. LAWS ANN. § 42-66-8 (West, Westlaw through 2015 Sess.); S.C. CODE ANN. § 43-35-25 (2015); S.D. CODIFIED LAWS § 22-46-7 (2015); TENN. CODE ANN. § 71-6-103 (West, Westlaw through 2015 1st Reg. Sess.); TEX. HUM. RES. CODE ANN. § 48.051 (West, Westlaw through 2015 Reg. Sess.); UTAH CODE ANN. § 62A-3-305 (West, Westlaw through 2015 1st Spec. Sess.); VT. STAT. ANN. tit. 33, § 6903 (West, Westlaw through 2015 1st Sess.); VA. CODE ANN. § 63.2-1606 (West, Westlaw through 2015 Reg. Sess.); WASH. REV. CODE ANN. § 74.34.020 (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.); W. VA. CODE ANN. § 9-6-9 (West, Westlaw through 2015 Reg. Sess.); WIS. STAT. ANN. § 46.90 (West, Westlaw through 2015); WYO. STAT. ANN. § 35-20-103 (West, Westlaw through 2016 General Sess.).

34. See Marie-Therese Connolly, *Where Elder Abuse and the Justice System Collide: Police Power, Parens Patriae, and 12 Recommendations*, 22 J. ELDER ABUSE & NEGLECT 37, 39 (2010) ("In the context of elder abuse, a state acts under its police power when prosecutors, police, or other governmental investigative entities pursue an elder abuse case . . .").

often find themselves on shaky ethical grounds when confronted with the possibility of reporting the elder abuse of a client.

### 1. *Legal Definition of Elder Abuse*

Elder abuse is defined broadly, and encompasses many different types of abuse.<sup>35</sup> Generally, elder abuse is “any action or any lack of appropriate action that causes harm, intentionally or unintentionally, to an elderly person.”<sup>36</sup> This definition has two components: (1) the elder has “suffered an injury or deprivation or has been exposed to unnecessary danger,” and (2) there is an individual responsible for the elder’s situation.<sup>37</sup> The United States Department of Health and Human Services’ Administration on Aging (AoA), which has provided guidance for states in identifying the problem of elder abuse, further categorizes elder abuse into distinct categories: physical abuse,<sup>38</sup> sexual abuse,<sup>39</sup> neglect,<sup>40</sup> exploitation,<sup>41</sup> emotional abuse,<sup>42</sup> abandonment,<sup>43</sup> and self-neglect.<sup>44</sup> Studies show that there are distinct risk factors for each type of abuse, such as race, ethnicity, gender, age, income level, self-care ability, confusion, and depression.<sup>45</sup>

Each state has some variation of an Adult Protective Service (APS) statute defining elder abuse, and each state definition is unique.<sup>46</sup> These

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35. See *Administration on Aging (AoA): What Is Elder Abuse?*, ADMIN. FOR COMMUNITY LIVING, [http://www.aoa.gov/AoA\\_programs/Elder\\_Rights/EA\\_Prevention/whatIsEA.aspx](http://www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/whatIsEA.aspx) (last visited Aug. 12, 2015) [hereinafter *What is Elder Abuse?*].

36. Josep Garre-Olmo et al., *Prevalence and Risk Factors of Suspected Elder Abuse Subtypes in People Aged 75 and Older*, 57 J. AM. GERIATRICS SOC’Y 815, 815 (2009) (citation omitted).

37. *Id.*

38. *What Is Elder Abuse?*, *supra* note 35 (broadly defining physical abuse as “inflicting physical pain or injury on a senior”).

39. *Id.* (describing sexual abuse as “non-consensual sexual contact of any kind”).

40. *Id.* (designating neglect as “the failure by those responsible to provide food, shelter, health care, or protection for a vulnerable adult”).

41. *Id.* (defining exploitation as “the illegal taking, misuse, or concealment of funds, property, or assets of a senior for someone else’s benefit”).

42. *Id.* (explaining that emotional abuse can be characterized by “inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts”).

43. *Id.* (specifying abandonment as the “desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person”).

44. *Id.* (characterizing self-neglect as “the failure of a person to perform essential, self-care tasks and that such failure threatens his/her own health or safety”); see also Garre-Olmo et al., *supra* note 36, at 815.

45. See NEAIS, *supra* note 3, at 4-13 to -21.

46. South Dakota is the only state that does not have a specific APS statute, but rather the state’s APS program is authorized by state law. See S.D. CODIFIED LAWS § 28-1-44 (2015) (“The

statutes closely track the AoA's definition of elder abuse, and every state with an APS statute defines elder abuse as including physical abuse, financial exploitation, and neglect.<sup>47</sup> Furthermore, every state, with the exception of Nebraska, Oregon, and West Virginia, includes psychological, emotional, mental, and verbal abuse in its APS statute either as a stand-alone provision or as part of another category.<sup>48</sup> While the great majority of states include sexual abuse and self-neglect in their APS statutes, only a minority of states include abandonment.<sup>49</sup> The consequence of the variation among these statutes is that different states afford elders more or less protection against their abusers.

Washington's Vulnerable Adult Statute<sup>50</sup> defines abuse as "the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult."<sup>51</sup> RCW 74.34.020(2) states that "[a]buse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult." Where the abuse is of a vulnerable adult "who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish."<sup>52</sup> RCW 74.34.020 further defines each subcategory of abuse of a vulnerable adult, and explicitly includes financial exploitation as a form of elder abuse.<sup>53</sup>

## 2. *Prevalence of Elder Abuse*

Since many elder abuse cases go unreported, national figures on the prevalence of elder abuse are difficult to quantify accurately. In 1996,

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Department of Social Services may establish a program of services for adults and the elderly to promote the development, coordination, and utilization of resources to meet the long-term needs of adults and the elderly and to provide services to assist them in their social and health problems.").

47. See Am. Bar Ass'n Comm'n on Law & Aging, *Types of Abuse: Comparison Chart of Provisions in Adult Protective Services Laws, By State* (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/Abuse\\_Types\\_by\\_State\\_and\\_Category\\_Chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/Abuse_Types_by_State_and_Category_Chart.authcheckdam.pdf).

48. *Id.*

49. *Id.*

50. WASH. REV. CODE ANN. §§ 74.34.005–.902 (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

51. *Id.* § 74.34.020(2).

52. *Id.*

53. See *id.* § 74.34.020(7). Financial exploitation "means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage." *Id.* The statute enumerates several different types of financial exploitation, which is significant for mandatory and permissive reporting rules. See *id.*

the National Center on Elder Abuse, at the direction of Congress, conducted the National Elder Abuse Incidence Study (NEAIS).<sup>54</sup> The study determined the best national estimate was that 449,924 elders aged sixty and over experienced abuse and/or neglect in a non-institutional setting.<sup>55</sup> Of this total, APS received and substantiated reports in only sixteen percent of these cases.<sup>56</sup> Further, approximately 551,011 elders aged sixty and over experienced abuse, neglect, and/or self-neglect, with only twenty-one percent of the reported cases substantiated by APS agencies.<sup>57</sup> More recent studies demonstrate that the risk of elder abuse may be elevated as an individual ages.<sup>58</sup> The difficulty of accurately assessing the number of incidences of elder abuse and the variance among sociodemographic groups also contribute to the underestimation of prevalence rates.<sup>59</sup>

### 3. *Financial Abuse: The Crime of the Twenty-First Century*

Elder financial abuse “is one of the more common forms of abuse perpetrated against older people”<sup>60</sup> and has been deemed “the crime of the 21st century.”<sup>61</sup> Elder financial abuse accounts for approximately twenty percent of substantiated reports of elder abuse perpetrated by others.<sup>62</sup> This rate may be grossly underestimated because “for every known case of elder financial abuse, four to five go unreported.”<sup>63</sup> As the American population is rapidly aging, researchers expect that instances of financial elder abuse will increase because older Americans “own a disproportionately large share of the wealth in the United States.”<sup>64</sup> Vulnerability to financial abuse increases with age due to the higher prevalence of mental, physical, and social problems associated with aging, and “the variety, complexity, and creativeness of ways to

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54. See NEAIS, *supra* note 3.

55. *Id.* at 4-3.

56. *Id.*

57. *Id.*

58. See Garre-Olmo et al., *supra* note 36, at 818.

59. See NEAIS, *supra* note 3, at 5-10 (discussing the iceberg theory of underreporting).

60. See Kemp & Mosqueda, *supra* note 5, at 1123.

61. *Top 10 Scams Targeting Seniors*, NAT'L COUNCIL ON AGING, <http://www.ncoa.org/enhance-economic-security/economic-security-Initiative/savvy-saving-seniors/top-10-scams-targeting.html> (last visited Jan. 14, 2015).

62. See Kemp & Mosqueda, *supra* note 5, at 1123.

63. See *id.*

64. *Id.*



take financial advantage of older people are also increasing.”<sup>65</sup>

Despite publicity over financial scams that target older adults,<sup>66</sup> elder financial abuse is not limited to financial scams instigated by strangers that target senior citizens.<sup>67</sup> More generally, elder financial abuse “is the illegal or improper use of an elder’s funds, property, or assets.”<sup>68</sup> This may include “cashing checks without authorization or permission; forging an older person’s signature; misusing or stealing an older person’s money or possessions; coercing or deceiving an older person into signing a document (e.g., contracts or a will); and the improper use of a conservatorship, guardianship, or power of attorney.”<sup>69</sup> Elder financial abuse not only results in decimation of financial assets, but can also have severe social effects on senior citizens.<sup>70</sup> Financial abuse of the elderly can be financially devastating, and “often causes extreme emotional distress or depression, increased dependence on others, a change in residence, decreased resources for medicines and health care, and a diminished quality of life.”<sup>71</sup> Consequently, elder financial abuse can lead to a decreased life expectancy and quality of life.<sup>72</sup>

Even though family members are most frequently the perpetrators of elder abuse, the abuse can also be perpetrated by those outside the family but known to the elder: caregivers, friends, neighbors, attorneys, accountants, or others “who are usually motivated to gain a larger share of the assets for themselves.”<sup>73</sup> However, the largest category of abusers by far is the adult children of victims, accounting for approximately

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65. *Id.*

66. *See, e.g.,* Todd Shields, *Elder Care Lawyer Warns Seniors of Rising Financial Scams*, CHI. TRIB. (Mar. 9, 2015), <http://www.chicagotribune.com/suburbs/glenview/news/ct-gla-finances-tl-0312-20150309-story.html>.

67. *See Top 10 Scams Targeting Seniors, supra* note 61. The National Council on Aging (NCOA) identified the top ten financial scams targeting seniors, which include: health care/Medicare/health insurance fraud; counterfeit prescription drugs; funeral and cemetery scams; fraudulent anti-aging products; telemarketing (i.e., “[t]he fake accident ploy”); internet fraud; investment schemes; homeowner/reverse mortgage scams; sweepstakes and lottery scams; and “[t]he grandparent scam.” *Id.* These scams are usually considered “low-risk” crimes for perpetrators because they are difficult to prosecute and often go unreported. *Id.* Nonetheless, this type of elder financial abuse can have a “devastating” impact on senior citizens and “can leave them in a very vulnerable position with little time to recoup their losses.” *Id.*

68. *See* NEAIS, *supra* note 3, at 3-3.

69. *Id.*

70. *See* Kemp & Mosqueda, *supra* note 5, at 1123.

71. *Id.*

72. *Id.*

73. *See id.*; NEAIS, *supra* note 3, at 3-4 (mentioning “[a] caregiver’s refusal to allow visitors to see an elder alone” as a sign or symptom of physical abuse).

forty-seven percent of all substantiated incidents of elder abuse.<sup>74</sup> Spouses were the next largest category of abusers at nineteen percent,<sup>75</sup> with other relatives making up twenty-four percent of all abusers.<sup>76</sup> Some of the major theories on why the majority of elder abuse perpetrators are family members include: “physical and mental impairment of the patient; increased stress in caring for a disabled family member; family history of domestic violence; and the pathological behavior of the abuser.”<sup>77</sup> Regardless of the reason, elder abuse at the hands of a family member contributes to underreporting.<sup>78</sup>

## B. *Elder Abuse Is Traditionally Underreported*

The NEAIS concluded that for every case of elder abuse and neglect reported to and substantiated by APS, there were at least five additional unreported cases of elder abuse.<sup>79</sup> At the conclusion of the study, the NEAIS confirmed the validity of the “iceberg” theory of elder abuse.<sup>80</sup> This theory postulates that official reporting sources (e.g., Adult Protective Services) “receive reports about the most visible types of abuse and neglect, but a large number of other incidents are unidentified and underreported,” or below the surface.<sup>81</sup> Often, elders do not report incidents of less obvious abuse and neglect to APS or another official agency for a variety of reasons.

### 1. *Elder Abuse Is Underreported Because It Is Difficult to Detect*

Elder abuse can be a difficult crime to detect, often much more difficult than child abuse.<sup>82</sup> Social isolation of many elders “may increase both the risk of maltreatment itself and the difficulty of identifying that maltreatment.”<sup>83</sup> Among both men and women, the

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74. See NEAIS, *supra* note 3, at 4-28.

75. *Id.*

76. *Id.*

77. Jeffrey S. Jones et al., *Elder Abuse and Neglect: Understanding the Causes and Potential Risk Factors*, 15 AM. J. EMERGENCY MED. 579, 579 (1997).

78. “It is also estimated that, for every known case of elder financial abuse, four to five go unreported,” and the rates of underreporting may be significantly higher due to lack of data. Kemp & Mosqueda, *supra* note 5, at 1123.

79. See NEAIS, *supra* note 3, at 5-10.

80. *Id.* at 5-1.

81. *Id.*

82. *Id.* at 5-3 (stating social isolation of elders makes the detection of elder abuse much more difficult than detection of child abuse).

83. *Id.*

likelihood of living alone increases with age, with approximately thirty-two percent of women and thirteen percent of men aged sixty-five to seventy-four years, and fifty-seven percent of women and twenty-nine percent of men aged eighty-five years or older living alone in 1995.<sup>84</sup> Even elders that do not live alone may only “interact primarily with family members and see very few outsiders.”<sup>85</sup> As a result, older adults who are experiencing elder abuse and are isolated from the larger community may not receive adequate protection against their abusers.

2. *Elder Abuse Is Underreported Because Reporting Family Members Can Cause Shame*

Many elders may be reluctant to report abuse inflicted by their own children or family members. According to the NEAIS, approximately ninety percent of all abusers are related to their victims, with adult children being the largest category of abusers.<sup>86</sup> Frequently, family members are the “primary caregivers for elderly relatives in domestic settings,” and may be a source of trust and support for an elderly individual.<sup>87</sup> It is common, especially in a family setting, for the perpetrator and victim to downplay or deny the abuse for many reasons.<sup>88</sup> One scholar summarizes some of the considerations victims of elder abuse face when contemplating reporting a family member for maltreatment:

First, the parent may believe the problem is a family affair and should remain within its domain. The elderly parent may be embarrassed or ashamed at the lack of respect and the abuse behavior of a child. There may be a fear of reprisals by the abusing child, or fearful anticipation that reporting the abuse (to either persons outside the family or to other family members) might result in legal or criminal action against the abusing child. An elderly parent may feel guilty for being dependent, or causing family tensions and pressures (e.g., economic, psychological, or physical space). Accordingly, the parent may feel he is the culprit.<sup>89</sup>

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84. Econ. & Statistics Admin., U.S. Dep’t of Commerce, *Statistical Brief: Sixty-Five Plus in the United States*, U.S. CENSUS BUREAU (May 1995), <http://www.census.gov/population/socdemo/statbriefs/agebrief.html>.

85. See NEAIS, *supra* note 3, at 5-3.

86. *Id.* at 5-6.

87. *Id.*

88. See C. Madden, *Elder Abuse in the United States*, 2 J. CLINICAL FORENSIC MED. 1, 3 (1995).

89. *Id.* at 2 (citation omitted). While this explanation specifies a parent-child abusive relationship,

Not only may the victim feel embarrassed by the situation or fearful for further repercussions, but the victim might also lack knowledge about where to seek help.<sup>90</sup> The elder may fear that other family members will withdraw their support if the elder discloses the abuse.<sup>91</sup>

3. *Inability and Unwillingness of Professionals and Police to Appropriately Address Elder Abuse Contributes to Underreporting*

Even when a victim consults a professional about abuse, “less obvious” incidents may not be readily apparent to a professional who, unlike a doctor or a social worker, is not trained to know the signs of elder abuse.<sup>92</sup> Similarly, many “[p]rofessionals often minimise [sic] complaints of elder abuse because of disbelief, fear of accusing the perpetrator, or lack of awareness of the extent of the problem.”<sup>93</sup> Just as many professionals may be trained improperly, a survey of police chiefs indicated that only 14% of police chiefs believed that law enforcement officers were receiving adequate training in the area of elder abuse, compared to 7.1% of ombudsmen.<sup>94</sup> While a minority of police chiefs believed that elder abuse is more of a problem than other crimes, 76.3% believed that crimes committed against older citizens should be a primary concern of law enforcement agencies.<sup>95</sup> These findings suggest that there is a serious lack of training among law enforcement officers, who are likely to encounter elder abuse during their careers.<sup>96</sup> It is partially this lack of awareness and infrastructure that has led to a widespread legal response and enactment of state legislation aimed at combating elder abuse.<sup>97</sup>

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it could apply with equal force to other family relationships (i.e., spouse, sibling, niece or nephew).

90. *See id.*

91. *See id.*

92. *See NEAIS, supra* note 3, at 5-1.

93. *See Madden, supra* note 88, at 2.

94. Brian K. Payne & Bruce L. Berg, *Perceptions About the Criminalization of Elder Abuse Among Police Chiefs and Ombudsmen*, 49 *CRIME & DELINQ.* 439, 451 (2003). An ombudsman is an “official appointed to receive, investigate, and report on private citizens’ complaints about the government.” *BLACK’S LAW DICTIONARY* 1260 (10th ed. 2014).

95. Payne & Berg, *supra* note 95, at 451.

96. *See id.*

97. *See Velick, supra* note 2, at 166.

C. *The Attorney's Role in Combating Elder Abuse*

“Lawyers are in a special position” to detect abuse of their older clients.<sup>98</sup> Victims of elder abuse may inform their attorney of the abuse experienced, or the abuse may become apparent during the course of representation.<sup>99</sup> It is not uncommon for an attorney to suspect a family member or close friend is abusing an elder client.<sup>100</sup> Despite the apparent abuse, a client may nonetheless refuse to consent to disclosure for a variety of reasons.<sup>101</sup>

Because attorney-client privilege protects much of this information, the number of incidents where attorneys discover abuse of their elder clients is hard to estimate. A survey by the Investor Protection Trust, Investor Protection Institute, and American Bar Association regarding lawyer encounters with financial exploitation of their elderly clients may shed light on the scope of this issue.<sup>102</sup> Lawyers generally agree that the problem of elder financial abuse is a somewhat serious or very serious issue. Sixteen percent of respondents stated they may be dealing with victims on a monthly basis, and 18.4% on a daily or weekly basis.<sup>103</sup> Also, children frequently approached lawyers due to concerns about elder abuse of their parents.<sup>104</sup> Approximately 15.2% of respondents interact with children of elder victims on a monthly basis, and 12.1% on a daily or weekly basis.<sup>105</sup>

Not only is there wide consensus that elder financial abuse and exploitation is a major concern, but seventy percent of lawyers stated they would be very willing to contact a law enforcement agency or securities regulator for help when working with a client with diminished capacity,<sup>106</sup> assuming it was ethically permissible to do so.<sup>107</sup> Despite the

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98. See Sandusky, *supra* note 20, at 471.

99. See, e.g., *Murphy v. Lint (In re Estate of Lint)*, 135 Wash. 2d 518, 957 P.2d 755 (1998).

100. See *id.* at 521–30, 957 P.2d at 757–61 (attorney suspected undue influence and financial abuse of elderly client, who had terminal cancer and alleged capacity issues, when her young boyfriend asked attorney to draw up (1) a financial power of attorney naming boyfriend as elderly client’s attorney-in-fact and (2) a will disinheriting family and leaving the client’s estate to the new boyfriend).

101. See *supra* Part I.B.

102. INVESTOR PROT. TRUST, INVESTOR PROT. INST. & AM. BAR ASS’N, ELDER INVESTMENT FRAUD/FINANCIAL EXPLOITATION SURVEY (2014), [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2014\\_IPTIABAEIFFELegalsurveyrepor.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_IPTIABAEIFFELegalsurveyrepor.authcheckdam.pdf) [hereinafter ELDER FINANCIAL EXPLOITATION SURVEY].

103. *Id.*

104. See *id.*

105. *Id.*

106. *Id.* The term diminished capacity is not well defined. See James D. Gallagher & Cara M.

potential ability to detect elder abuse, attorneys might be prohibited by the ethical rules of legal practice from reporting such abuse without the client's consent.<sup>108</sup>

## II. MANDATORY REPORTING AS A LEGAL RESPONSE TO ELDER ABUSE

Once researchers empirically acknowledged widespread underreporting of elder abuse,<sup>109</sup> state legislatures sought to address elder abuse in a comprehensive manner. Due to the public acceptance of mandatory child abuse reporting statutes, many states implemented similar reporting requirements for elder abuse.<sup>110</sup> Although questions arise regarding the efficacy of elder abuse reporting statutes,<sup>111</sup> states continue to keep these laws on the books.<sup>112</sup> Recognizing that lawyers frequently interact with elder clients, some states require attorneys to report elder abuse, with or without considering the implications of the lawyer's ethical duty to his or her client.<sup>113</sup> Other states, such as Washington, permit, but do not require, attorneys to report elder abuse.<sup>114</sup> These reporting statutes are considered in this Comment.

### A. *Every State Has Some Form of Elder Abuse Reporting Statute*

States began reacting to elder abuse, with varying rates of success, in

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Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 601 (2003) ("Model Rule 1.14 provides no guidance in determining which characteristics render a person possessing seriously diminished capacity . . ."). However, attorneys should consider the following factors to determine whether a client has diminished mental capacity: "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (1983).

107. See ELDER FINANCIAL EXPLOITATION SURVEY, *supra* note 102.

108. See MODEL RULES OF PROF'L CONDUCT R. 1.6.

109. See NEAIS, *supra* note 3, at 5-10 (estimating that for every reported case of elder abuse substantiated by APS, there are more than five cases of elder abuse that are not reported).

110. See Velick, *supra* note 2, at 166.

111. See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-91-74, ELDER ABUSE: EFFECTIVENESS OF REPORTING LAWS AND OTHER FACTORS 2 (1991).

112. See *supra* note 33.

113. See, e.g., TEX. HUM. RES. CODE ANN. § 48.051(a)-(c) (West, Westlaw through 2015 Reg. Sess.).

114. See WASH. REV. CODE ANN. § 74.34.020(16) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

the late 1980s and early 1990s.<sup>115</sup> However, the laws pertaining to elder abuse at that time substantially varied from state to state, with great differentials between mandatory and voluntary elder abuse reporting statutes.<sup>116</sup> In 1991, the General Accounting Office (GAO) published its study on the effectiveness of elder abuse reporting laws.<sup>117</sup> The report concluded that, while instrumental for identifying abuse, the state officials perceived reporting laws to be substantially less effective than public and professional awareness of elder abuse and its consequences.<sup>118</sup> Further, in-home services, which include “home health care, meals-on-wheels, and homemaker and chore services,” are one of the most important factors for preventing elder abuse, specifically neglect and self-neglect.<sup>119</sup> Ultimately, the study determined that mandatory and voluntary state reporting laws were only relatively effective,<sup>120</sup> and other factors, such as “public awareness campaigns, interagency coordination, and in-home services and respite care,” were more likely to result in improvement of elder abuse programs.<sup>121</sup>

Despite the GAO’s skepticism, all states currently have some variation of elder abuse reporting laws,<sup>122</sup> and almost every state statute contains mandatory reporting provisions.<sup>123</sup> Typically, these statutes classify caretakers,<sup>124</sup> physicians and other health providers,<sup>125</sup> mental

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115. See Jill C. Skabronski, *Elder Abuse: Washington’s Response to a Growing Epidemic*, 31 GONZ. L. REV. 627, 633 (1996); Velick, *supra* note 2, at 165–66 (discussing the legislative history of mandatory and voluntary elder abuse reporting statutes).

116. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 111, at 2.

117. *Id.*

118. See *id.* at 7.

119. See *id.* at 7–8.

120. Elder abuse reporting laws that require state involvement against an elder’s consent “undermine an elder’s autonomy and may ultimately perpetuate the cycle of abuse, this time with the state assuming the role of batterer.” Jennifer B. Glick, *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*, 12 VA. J. SOC. POL’Y & L. 714, 715 (2005) (emphasis in original).

121. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 111, at 11.

122. See Lori Stiegel & Ellen Klem, *Reporting Requirements: Provisions and Citations in Adult Protective Services Laws, by State*, AM. BAR ASS’N COMMISSION L. & AGING (2007), <http://www.americanbar.org/content/dam/aba/migrated/aging/docs/MandatoryReportingProvisionsChart.authcheckdam.pdf>.

123. See *supra* note 33.

124. See, e.g., KY. REV. STAT. ANN. § 209.030 (West, Westlaw through 2015 Reg. Sess.) (caretaker); N.J. STAT. ANN. § 52:27G-7.1 (West, Westlaw through 2015) (same).

125. See, e.g., FLA. STAT. ANN. § 415.1034 (West, Westlaw through 2015 1st Reg. & Sp. A Sess.) (“[p]hysician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of vulnerable adults”); MASS. GEN. LAWS ANN. ch. 19A, § 15

health professionals,<sup>126</sup> guardians and court-appointed advocates,<sup>127</sup> law enforcement officers,<sup>128</sup> and employees of residential facilities<sup>129</sup> as mandatory reporters.<sup>130</sup> If a mandatory reporter fails to make a report, states generally impose sanctions, which vary depending on the laws of the jurisdiction.<sup>131</sup> Some states also list persons who may, but are not required to, make a report of suspected elder abuse.<sup>132</sup> Voluntary reporters, however, are under no obligation to make a report.<sup>133</sup>

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(West, Westlaw through 2015 1st Ann. Sess.) (physician, physician assistant, medical intern, dentist, nurse).

126. *See, e.g.*, COLO. REV. STAT. ANN. § 18-6.5-108 (West, Westlaw through 2015 1st Reg. Sess.) (psychologists and other mental health professionals); S.C. CODE ANN. § 43-35-25 (2015) (mental health or allied health professional).

127. *See, e.g.*, ALASKA STAT. ANN. § 47.24.010 (West, Westlaw through 2015 1st Reg. Sess.) (guardian or conservator); ME. REV. STAT. ANN. tit. 22, § 3477 (2015) (court-appointed guardian or conservator).

128. *See, e.g.*, CAL. WELF. & INST. CODE § 15630 (West, Westlaw through 2015 Reg. Sess.) (employee of a local law enforcement agency); WASH. REV. CODE ANN. § 74.34.020 (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.) (law enforcement officer).

129. *See, e.g.*, OHIO REV. CODE ANN. § 5101.61 (West, Westlaw through 2015) (employee of a hospital, residential facility, nursing home, or community mental health facility); OKLA. STAT. ANN. tit. 43A, § 10-104 (West, Westlaw through 2015 1st Reg. Sess.) (long-term care facility personnel); W. VA. CODE ANN. § 9-6-9 (West, Westlaw through 2015 Reg. Sess.) (employee of any nursing home or other residential facility).

130. While these are some of the typically mandated reporters, statutes impose a duty on a wide variety of professionals and some even go so far as to require “any person” to report suspected elder abuse. *See, e.g.*, N.H. REV. STAT. ANN. § 161-F:46 (2015) (“Any person, including, but not limited to, physicians, other health care professionals, social workers, clergy, and law enforcement officials, suspecting or believing in good faith that any adult who is or who is suspected to be incapacitated has been subjected to abuse, neglect, self-neglect, or exploitation or is living in hazardous conditions shall report or cause a report to be made . . . .”); OKLA. STAT. ANN. tit. 43A, § 10-104 (“Any person having reasonable cause to believe that a vulnerable adult is suffering from abuse . . . shall make a report . . . as soon as the person is aware of the situation.”).

131. *See, e.g.*, GA. CODE ANN. § 30-5-8 (West, Westlaw through 2015 Reg. Sess.) (providing that a mandatory reporter who knowingly and willfully fails to make a report shall be guilty of a misdemeanor); DEL. CODE ANN. tit. 16, § 1132 (West, Westlaw through 2015) (providing that any person who is required to make a report but fails to do so will be subject to a \$1000 fine or up to fifteen days imprisonment, or both).

132. *See, e.g.*, CONN. GEN. STAT. ANN. § 17b-451(c) (West, Westlaw through 2015 Reg. & Spec. Sess.) (“Any other person having reasonable cause to suspect or believe that an elderly person is being, or has been, abused . . . may report such information in any reasonable manner to the commissioner or the commissioner’s designee.”); WASH. REV. CODE ANN. § 74.34.020 (defining voluntary reporters as “any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults”).

133. *See, e.g.*, WASH. REV. CODE § 74.34.050(1) (2014) (“The making of permissive reports as allowed in this chapter does not create any duty to report and no civil liability shall attach for any failure to make a permissive report as allowed under this chapter.”).



*B. States Vary as to Whether Attorneys Are Mandatory Reporters*

While all states have legislation addressing elder abuse, only five explicitly make attorneys mandatory reporters.<sup>134</sup> Of these states, the laws differ on whether an attorney must disclose suspected abuse when attorney-client privilege applies, and under what circumstances a lawyer is required to report.

A few of these states specify attorneys as mandatory reporters, but do not explicitly address the implications of confidentiality and attorney-client privilege in their statutes.<sup>135</sup> For example, in Arizona, an attorney “who has responsibility for preparing the tax records of a vulnerable adult . . . [or] any other action concerning the use or preservation of the vulnerable adult’s property,” has a duty to make a report to adult protective services or the proper agency.<sup>136</sup> An attorney who, in fulfilling his responsibility to the vulnerable adult, “discovers a reasonable basis to believe that exploitation,” or abuse or neglect has occurred, “shall immediately report” the suspected abuse.<sup>137</sup> Similarly, Mississippi and Ohio require an attorney who has reasonable cause to believe someone is abusing a vulnerable adult to immediately make a report to the Department of Human Services.<sup>138</sup> But neither the Arizona nor the Mississippi statute explicitly contemplates the issue of attorney-client privilege or confidentiality in its language.

As an example of a comprehensive approach, Texas requires any person with cause to believe someone is abusing an elderly or disabled person to report the information to the state department of human services or appropriate agency.<sup>139</sup> The statute further elaborates that the duty to report “applies without exception to a person whose knowledge concerning possible abuse . . . is obtained during the scope of the person’s employment or whose professional communications are generally confidential, including an attorney.”<sup>140</sup> There is no exception to the reporting duty as it applies to attorneys disclosing confidential information. In these circumstances, confidentiality is considered

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134. See ARIZ. REV. STAT. ANN. § 46-454(B) (2015); MISS. CODE ANN. § 43-47-7(1)(a)(i) (West, Westlaw through 2015 Reg. Sess.); MONT. CODE ANN. § 52-3-811 (West, Westlaw through 2015 Sess.); OHIO REV. CODE ANN. § 5101.61(A); TEX. HUM. RES. CODE ANN. § 48.051(a)–(b) (West, Westlaw through 2015 Reg. Sess.).

135. See OHIO REV. CODE ANN. § 5101.61(A); MISS. CODE ANN. § 43-47-7(1)(a)(i).

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

137. *Id.*

138. OHIO REV. CODE ANN. § 5101.61(A); MISS. CODE ANN. § 43-47-7(1)(a)(i).

139. See TEX. HUM. RES. CODE ANN. § 48.051(a)–(b).

140. *Id.* § 48.051(c).

waived, and “although people are rarely prosecuted for failing to report elder abuse, the law is nonetheless enforceable and in effect.”<sup>141</sup> Although the courts have not addressed whether an attorney may be subject to discipline under the state bar association’s ethics code, the statute appears to not only permit, but also require, an attorney potentially to disclose a client’s confidences against his or her will.<sup>142</sup>

Lastly, Montana exempts attorneys as mandatory reporters when the attorney-client privilege protects the information.<sup>143</sup> Montana’s statute provides that an attorney is required to report suspected abuse “unless the attorney acquired knowledge of the facts required to be reported from a client and the attorney-client privilege applies.”<sup>144</sup> This language suggests that if an attorney learns of abuse of her elderly client during the course of representation, the attorney cannot report the client’s abuse without the client’s consent.

C. *Washington’s Vulnerable Adult Statute Lists Attorneys as “Permissive Reporters”*

Washington has likewise adopted legislation that implements mandatory and permissive reporting requirements. Recognizing that “some adults are vulnerable and may be subjected to abuse . . . by a family member, care provider, or other person who has a relationship with the vulnerable adult,”<sup>145</sup> the Washington State Legislature enacted its Abuse of Vulnerable Adults Act (Vulnerable Adult Statute).<sup>146</sup> Washington’s Vulnerable Adult Statute defines a vulnerable adult as a person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under chapter 11.88 RCW; or

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141. See Hon. Georgia Akers, *Elder Abuse and Exploitation: The Ethical Duty of the Attorney*, 47 HOUS. LAW. 10, 11 (2009).

142. Under the Texas RPC, a lawyer can reveal confidential information “when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(c)(4), reprinted in TEX. GOV’T CODE ANN. § 9 (West, Westlaw through 2015). This suggests that under the Texas RPC, a lawyer may ethically disclose confidential information in order to comply with the reporting duty.

143. See MONT. CODE ANN. § 52-3-811(3)(f) (West, Westlaw through 2015 Sess.).

144. *Id.*

145. WASH. REV. CODE § 74.34.005(1) (2014).

146. WASH. REV. CODE ANN. §§ 74.34.005–.902 (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

- (c) Who has a developmental disability defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider; or
- (g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.<sup>147</sup>

By its definition, the Vulnerable Adult Statute does not apply to competent elders who experience elder abuse or those residing as patients in state-run facilities.<sup>148</sup> In this way, the Vulnerable Adult Statute limits its scope to those individuals whom the Legislature has deemed truly “vulnerable.”

Washington’s Vulnerable Adult Statute creates a system of mandated and permissive reporting for the abuse of vulnerable adults.<sup>149</sup> The statute defines a mandatory reporter as:

[A]n employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.<sup>150</sup>

When one of these professionals has reasonable cause to believe that elder abuse<sup>151</sup> has occurred, as a mandatory reporter, he or she must immediately report to the State’s Department of Social and Health Services or the appropriate law enforcement agency.<sup>152</sup> If a mandatory reporter knowingly fails to make a required report, he or she may be

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147. *Id.* § 74.34.020.

148. *See* WASH. REV. CODE §§ 70.124.010–100 (governing the abuse of patients residing in state hospitals, including state-run nursing homes).

149. *See id.* § 74.34.035; WASH. REV. CODE ANN. § 74.34.020.

150. WASH. REV. CODE ANN. § 74.34.020(11).

151. Elder abuse includes abandonment, abuse, financial exploitation, neglect, sexual assault, and physical assault. Mandatory reporters who have reasonable cause to believe that an act has caused fear of imminent harm to an elder must likewise make a report. WASH. REV. CODE § 74.34.035(1)–(3).

152. *Id.* § 74.34.035(3)(a)–(b).

guilty of a gross misdemeanor.<sup>153</sup> The Vulnerable Adult Statute also grants mandatory reporters immunity from liability resulting from the report or testimony if made in good faith.<sup>154</sup>

Alternatively, permissive reporters “*may* report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected.”<sup>155</sup> Under the statute, a permissive reporter is “any person, including, but not limited to, an employee of a financial institution, *attorney*, or volunteer in a facility or program providing services for vulnerable adults.”<sup>156</sup> Consequently, any person who has reasonable cause to believe a vulnerable adult is being abused, including the elder client’s attorney, may report the abuse without fear of liability “resulting from the report or testimony,” so long as the report is made in good faith.<sup>157</sup> Permissive reporters are under no duty to report suspected elder abuse and no civil liability will attach for failure to make a report.<sup>158</sup>

### III. ETHICAL BARRIERS TO REPORTING ELDER ABUSE: AMERICAN BAR ASSOCIATION MODEL RULE FRAMEWORK

Along with statutory mandatory reporting requirements, lawyers are also subject to ethical rules of the profession, which are promulgated by the highest court in each state.<sup>159</sup> All lawyers must abide by the ethical rules or be subject to disciplinary action.<sup>160</sup> Every state has strict ethical rules on maintaining client confidences, with limited exceptions.<sup>161</sup> These ethics rules generally prohibit attorneys from disclosing, without

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153. *Id.* § 74.34.053(1).

154. *Id.* § 74.34.050.

155. *Id.* § 74.34.035(6) (emphasis added).

156. WASH. REV. CODE ANN. § 74.34.020(16) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.) (emphasis added).

157. WASH. REV. CODE § 74.34.050(1).

158. *Id.*

159. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 22 (Vicki Been et al. eds., 3d ed. 2012).

160. *See, e.g.*, WASH. STATE CT. R., RULES FOR ENFORCEMENT OF LAWYER CONDUCT 13.1 (“Upon a finding that a lawyer has committed an act of misconduct, one or more of the following may be imposed: (a) Sanctions. (1) Disbarment (2) Suspension under rule 13.3; or (3) Reprimand. (b) Admonition. An admonition under rule 13.5.”).

161. *See* SUSAN R. MARTYN ET AL., THE LAW GOVERNING LAWYERS: MODEL RULES, STANDARDS, STATUTES, AND STATE LAWYER RULES OF PROFESSIONAL CONDUCT 116–23 (Vicki Been et al. eds., 2014–2015 ed. 2014).

the client's consent, any information relating to the representation of the client.<sup>162</sup>

The Model Rules serve as model standards for “professional competence and ethical conduct.”<sup>163</sup> Most states have adopted similar rules in their respective jurisdictions.<sup>164</sup> From the moment a lawyer takes on a client, the lawyer “shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”<sup>165</sup> Consequently, when a lawyer discovers that an elderly client is a victim of abuse, he must abide by that client's wishes, including the decision not to disclose, unless another Rule provides for mandatory or permissive disclosure.<sup>166</sup>

Model Rule 1.6 may provide an avenue for attorneys to report elder abuse when disclosure is against the client's wishes. Model Rule 1.6 concerns a lawyer's duty of confidentiality with respect to information relating to the representation of the client.<sup>167</sup> Under Model Rule 1.6(a), “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”<sup>168</sup> However, Model Rule 1.6(b) creates a permissive disclosure scheme for attorneys in certain instances. For example, “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 . . . [or] (6) to comply with other law or a court order.”<sup>169</sup>

A. *The Model Rules Permit Disclosure to Prevent Death or Substantial Bodily Harm*

Model Rule 1.6(b)(1) contemplates a situation where an attorney discloses confidential information in order to protect the client against substantial harm or possible death. Many forms of elder abuse result in the risk of substantial bodily harm or death of the client.<sup>170</sup> Certain types

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162. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

163. *Id.* at xi (2015) (preface to the Model Rules).

164. See LERMAN & SCHRAG, *supra* note 159, at 48.

165. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

166. See, e.g., *id.* R. 1.6.

167. *Id.*

168. *Id.* R. 1.6(a).

169. See *id.* R. 1.6(b).

170. See, e.g., *Cummings v. Guardianship Servs. of Seattle*, 128 Wash. App. 742, 110 P.3d 796 (2005) (holding caregivers liable under Washington's Vulnerable Adult Statute when a ninety-three year old woman died after falling from the window of her third floor condominium); Amanda

of abuse, such as physical abuse or neglect<sup>171</sup> by a caretaker can result in the death of an elderly victim.<sup>172</sup>

Substantial bodily harm and death are possible consequences of elder abuse. *When* such abuse triggers Model Rule 1.6(b)(1), however, is not clear. In one case, Cynthia Thoresen, an elderly woman with dementia, sustained an injury from a fall, after which she struggled to care for herself.<sup>173</sup> Her daughter, Marguerite, assumed a caretaking role and moved in with her mother.<sup>174</sup> After a second fall, which left Cynthia with a broken leg, Marguerite failed to call an ambulance, and in the following weeks, blatantly neglected to care for her mother.<sup>175</sup> Cynthia's broken leg became apparent only when she began screaming when Marguerite attempted to move her from the bed three weeks later.<sup>176</sup> At the hospital, doctors were startled at Cynthia's condition. "Her chafed skin was covered in bedsores and feces. Her toenails were overgrown and curling, her right foot was riddled with infections, and she had no teeth or dentures. She was dehydrated and malnourished, and couldn't speak."<sup>177</sup> Further, her broken leg was nearly four inches shorter than the other, and the break appeared to be between three and twelve weeks old.<sup>178</sup> Marguerite did not visit the hospital for the first three days of Cynthia's stay.<sup>179</sup> Cynthia died in the hospital shortly thereafter.<sup>180</sup>

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Kelley, *Update: Guilty Verdict in Neglect Case*, THE NEWS STATION (Aug. 14, 2015, 5:51 PM), <http://wnep.com/2015/08/14/jury-deliberating-in-elder-abuse-death-case> (describing couple in Pennsylvania "found guilty of third degree murder, theft, criminal conspiracy, and tampering with evidence" after stealing from an elder, leaving her in "deplorable living conditions," and trying "to cover it up").

171. Under Washington's Vulnerable Adult Statute, neglect is defined as:

(a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety.

WASH. REV. CODE ANN. § 74.34.020(15) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

172. See, e.g., *Australian Woman's Death Reveals Horrors of Elder Abuse*, USA TODAY (Oct. 20, 2013), <http://www.usatoday.com/story/news/world/2013/10/20/australian-womans-horrors-elder-abuse/3091013/> [hereinafter *Australian Woman's Death*].

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

In situations where the abuse is likely to result in death or substantial bodily harm to the client, Model Rule 1.6(b)(1) would allow an attorney to reveal confidential information about the abuse “to the extent the lawyer reasonably believes necessary.”<sup>181</sup> However, it is possible in cases like Cynthia Thoresen’s that no one would ever discover this type of severe neglect and abuse, as neighbors reported surprise upon learning of the incident since they did not even know Cynthia lived in the house.<sup>182</sup> As a result, Model Rule 1.6(b)(1) may be of little use in many cases of elder abuse.

In cases where the abuse is not likely to result in death or substantial bodily harm to the client, such as emotional or financial abuse, Model Rule 1.6(b) does not impliedly authorize the attorney to report the abuse against the clients consent. As discussed previously, financial abuse is estimated to be one of the most common forms of elder abuse.<sup>183</sup> If a lawyer discovers that an elderly client is being abused, but the abuse does not constitute a threat of death or substantial bodily harm, then the attorney “shall not reveal” the information “unless the client gives informed consent” under Model Rule 1.6.<sup>184</sup> These situations directly implicate the conflict between mandatory reporting laws and the rules of ethical conduct that govern lawyers.

*B. The Model Rules Permit Disclosure to Comply with Other Law or a Court Order*

A more controversial permissive disclosure provision is Model Rule 1.6(b)(6), which allows permissive disclosure by an attorney when the disclosure is necessary to comply with federal or state law.<sup>185</sup> On its face, Model Rule 1.6(b)(6) would allow attorneys to disclose client confidences against the consent of the client under state mandatory reporting statutes in order to comply with state law. However, the American Bar Association has advised that where other law appears to require disclosure of information about a client, the issue of “[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”<sup>186</sup> Where a state statute requires disclosure of client

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181. MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (1983).

182. See *Australian Woman’s Death*, *supra* note 172.

183. See *Kemp & Mosqueda*, *supra* note 5, at 1123.

184. MODEL RULES OF PROF’L CONDUCT R. 1.6.

185. *Id.* R. 1.6(b)(6) (allowing permissive disclosure when necessary “to comply with other law or a court order”).

186. *Id.* R. 1.6 cmt. 12.

confidences (i.e., an elder abuse statute), “the lawyer must discuss the matter with the client to the extent required by Rule 1.4.”<sup>187</sup> Further, where other law supersedes the Rule and requires disclosure, Model Rule 1.6(b)(6) allows permissive disclosure as required by law.<sup>188</sup> However, even the Model Rules are not dispositive on the issue of whether an attorney can disclose suspected elder abuse of a client without their consent.

#### IV. WASHINGTON’S MANDATORY REPORTING STATUTE AND ETHICS RULES DO NOT PERMIT ATTORNEY REPORTING OF ELDER ABUSE WHEN THE CLIENT WITHHOLDS CONSENT

While attorneys are designated permissive reporters under Washington’s Vulnerable Adult Statute, they are also subject to professional ethics rules governing lawyers.<sup>189</sup> Sometimes, there may be a conflict between a lawyer’s obligation under statutory law and his or her ethical obligation under Washington’s RPC.<sup>190</sup> While the state’s reporting laws permit an attorney to make a report,<sup>191</sup> she may nevertheless be prohibited from doing so by the RPC confidentiality rules.

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187. *Id.* Model Rule 1.4 states that:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*Id.* R. 1.4.

188. *Id.* R. 1.6 cmt. 12.

189. *See* WASH. REV. CODE ANN. § 74.34.020(16) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.); LERMAN & SCHRAG, *supra* note 159, at 49.

190. *See* ROBERTA K. FLOWERS & REBECCA C. MORGAN, *ETHICS IN THE PRACTICE OF ELDER LAW* 216–22 (2013).

191. *See, e.g.*, WASH. REV. CODE ANN. § 74.34.020(16).



A. *Washington's Vulnerable Adult Statute Should Be Read in Conjunction with the RPC*

Washington's RPC prescribe a standard of conduct that attorneys must comply with and may be subject to discipline for violating.<sup>192</sup> However, state statutes also regulate attorney conduct. Washington's Vulnerable Adult Statute states that attorneys may make reports of suspected elder abuse, but are not required to do so.<sup>193</sup> Nonetheless, an attorney may feel compelled to make a report in order to protect a client from further harm. When the RPC impose conflicting obligations, the role of the Vulnerable Adult Statute is unclear. It is possible that the RPC will supersede any statutory obligations placed on an attorney because the RPC governs attorney disclosure of client confidences. This is far from obvious, however, as jurisdictions differ on their treatment of whether statutorily imposed responsibilities abridge attorneys' professional ethical obligations.<sup>194</sup>

1. *Washington's RPC Vary from the Model Rules*

Washington's RPC slightly differ from the Model Rules, and this difference may have an impact on how a Washington court would interpret an attorney's ethical obligations in light of the Vulnerable Adult Statute. As stated previously, Washington's Vulnerable Adult Statute makes attorneys "permissive reporters": while they are not required to report elder abuse, they may do so without fear of civil liability.<sup>195</sup> While the statute does provide that complying with the reporting statute "shall not be deemed a violation of any confidential communication privilege,"<sup>196</sup> the RPC may serve as a barrier to attorneys reporting suspected elder abuse of their clients.

Washington's RPC do not authorize disclosure of information relating to representation without client consent in order for an attorney to "comply with other law."<sup>197</sup> The RPC impliedly authorize—and actually

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192. See WASH. RULES OF PROF'L CONDUCT R. 8.5 (2010).

193. See WASH. REV. CODE § 74.34.035(16) (2014).

194. Part II.B., *supra*, of this Comment discussed this phenomenon. See also OR. REV. STAT. ANN. § 124.060 (West, Westlaw through 2015 Reg. Sess.); Amber Hollister, *Lawyers' New Mandatory Abuse Reporting Requirement*, 75 OR. ST. BAR BULL. 9, 12 (2015); cf. 01-02: *Confidentiality; Disabled Clients; Communication with Clients; Disclosure*, ST. BAR ARIZ. (Feb. 2001), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=270> [hereinafter *Ariz. Op. 01-02*].

195. See WASH. REV. CODE ANN. § 74.34.020(16); WASH. REV. CODE §§ 74.34.035(6), .050.

196. WASH. REV. CODE § 74.34.050(2).

197. See WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 24 (2006).

require—the lawyer to disclose confidential information, such as the discovery of elder abuse, “to prevent reasonably certain death or substantial bodily harm.”<sup>198</sup> However, this may not be the case with abuse that does not threaten death or severe physical injury.<sup>199</sup> Washington’s deviation from the Model Rule on this issue may be a potential barrier for an attorney who feels the need to report the abuse to the proper authorities.

## 2. *Reporting Statutes Should Be Evaluated in Light of Ethical Obligations*

While statutory law in Washington allows attorneys to report elder abuse, the attorney’s obligations are of less than ideal clarity. There have been no reported decisions regarding attorney disclosure of elder abuse under RCW 74.34, and the Washington State Bar Association (WSBA) has not provided guidance to attorneys regarding their ethical obligations under the RPC. Other states have advised lawyers regarding statutory reporting requirements and ethical obligations to clients.<sup>200</sup>

The Oregon State Bar Association has directly advised that even if the lawyer has reasonable cause to believe that abuse is occurring, “the lawyer still must examine whether the exceptions to reporting for client confidentiality apply.”<sup>201</sup> Lawyers are not required to report elder abuse “if doing so would reveal attorney-client privileged information or would reveal information learned while representing a client that would be detrimental to the client if disclosed.”<sup>202</sup> However, Oregon’s mandatory reporting law requires “[a]ny public or private official” to report elder abuse, and explicitly states that attorneys are not required to report if such information is privileged or communicated to the attorney in the course of representing a client.<sup>203</sup> Since the statute directs attorneys to comply with their professional ethical obligations first, it explicitly contemplates the reporting statute will be read in light of the state’s RPC.

The Arizona State Bar Association has likewise advised attorneys on

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198. *Id.* R. 1.6(b)(1).

199. *See id.* R. 1.6 cmt. 24 (noting the Washington State Bar Association’s concern about other law requiring lawyers to breach the duty of confidentiality to client, without the client’s informed consent).

200. *See generally* Hollister, *supra* note 194.

201. *Id.* at 12.

202. *Id.*

203. *See* OR. REV. STAT. ANN. § 124.060 (West, Westlaw through 2015 Reg. Sess.).

their ethical duties in relation to the state's mandatory reporting laws. Arizona's Vulnerable Adult Statute<sup>204</sup> requires "[a]n attorney[,] . . . who has responsibility for preparing the tax records of an incapacitated or vulnerable adult," or any person, "who has responsibility for any other action concerning the use or preservation of the incapacitated or vulnerable adult's property," to report suspected abuse, neglect or exploitation of the vulnerable adult victim to the proper authorities.<sup>205</sup> This mandatory reporting provision should be read in conjunction with Arizona's ethical rules regarding client confidentiality to determine whether disclosing elder abuse without consent is ethically permitted.<sup>206</sup> Like the Model Rules, Arizona instructs a lawyer that she "may" reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to comply with other law."<sup>207</sup>

In 2001, the State Bar of Arizona issued an ethics opinion stating an attorney could, but was not required, to comply with the state's mandatory reporting statute.<sup>208</sup> The opinion addressed whether an attorney may simultaneously comply with the state's mandatory reporting statute and its ethics rules about confidentiality.<sup>209</sup> The State Bar analyzed the various provisions relating to disclosure of confidential information without the client's consent and noted that in some circumstances, the Ethics Rules require a lawyer to disclose information relating to the representation.<sup>210</sup> Additionally, the State Bar recognized that the Comment to Ethics Rule 1.6 states, "a lawyer may be obligated or permitted by other provisions of law to give information about a client."<sup>211</sup> Based on these provisions and comments, the State Bar, in line with a previous opinion, found that:

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.<sup>212</sup>

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204. ARIZ. REV. STAT. ANN. § 46-454(B) (2015).

205. *Id.*

206. *See* Ariz. Op. 01-02, *supra* note 194.

207. ARIZ. RULES OF PROF'L CONDUCT ER 1.6(d)(5) (2010).

208. *See* Ariz. Op. 01-02, *supra* note 194.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

However, the State Bar did not address whether other provisions of law, including attorney-client privilege, would prohibit compliance with the mandatory reporting statute. Furthermore, the Bar stated that while the lawyer may make the report, she is not ethically obligated to do so, as “divulging confidential information when disclosure is ‘required by law’ is permissive, rather than mandatory.”<sup>213</sup> If the attorney does decide to make the report she should inform her client of that report.<sup>214</sup> While its decision was limited, the State Bar clearly advised that Ethics Rule 1.6 does not prohibit an attorney from disclosing, against the client’s wishes, information acquired during the course of representation in order to comply with mandatory reporting requirements.

At this point, it is unclear whether Washington’s RPC would supersede Washington’s Vulnerable Adult Statute and impose stricter duties to preserve client confidentiality in light of suspected elder abuse. However, the Oregon and Arizona approaches can be informative, and Washington’s Vulnerable Adult Statute should likewise be read in conjunction with the RPC.

*B. Washington’s Vulnerable Adult Statute Is Likely Null as It Applies to Attorneys*

For lawyers wishing to report elder abuse under RCW 74.34, they must first consider their professional ethical duties relating to client confidences. Although Washington’s Vulnerable Adult Statute attempted to provide an outlet for attorneys to report elder abuse of their clients, Washington’s RPC essentially supersede any permissive reporting requirement allowed by RCW 74.32. Since under RCW 74.34.020 attorneys are “permissive reporter[s],”<sup>215</sup> lawyers in Washington have no duty to report the abuse.<sup>216</sup> Since Washington attorneys are first and foremost bound by the RPC,<sup>217</sup> the RPC will supersede any contrary state law.<sup>218</sup>

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213. *Id.*

214. *Id.*

215. WASH. REV. CODE ANN. § 74.34.020(16) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

216. *See* WASH. REV. CODE § 74.34.050 (2014).

217. *See* LERMAN & SCHRAG, *supra* note 159, at 49. (“Every lawyer admitted to practice in a state must comply with the ethics code of that state.”).

218. Washington does not have a provision like the Model Rules that allows lawyers to disclose confidential information in order to comply with other law. This was a conscious decision, designed to address situations like the conflict between the reporting requirements of the Vulnerable Adult Statute and contrary RPC. *See* WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 24 (2006)

C. *The Attorneys' Ethical Obligations Are Evaluated in Light of Washington's RPC*

Washington's RPC, while similar to the Model Rules, have minor, yet significant, variations. First, Washington lawyers are required to reveal client confidential information in order to prevent "reasonably certain death or substantial bodily harm."<sup>219</sup> Second, Washington's RPC do not allow a lawyer to disclose information relating to the representation if required in order to comply with other law.<sup>220</sup> The absence of this provision may have implications for Washington's Vulnerable Adult Statute's reporting laws. Lastly, Washington's RPC allow a lawyer to reveal client confidences in order to prevent a breach of fiduciary duty by a client.<sup>221</sup>

1. *The Discovery of Elder Abuse Is Protected by the Lawyer's Duty of Confidentiality to His or Her Client*

Attorneys may discover elder abuse of their clients in a variety of ways. For example, an attorney preparing a will or estate plan for an individual may suspect undue influence being exerted on the elder by a third party, and uncover abuse or exploitation after further inquiry.<sup>222</sup> An

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("Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by 'other law,' . . . . The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer . . . . Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court.")

219. *Id.* R. 1.6(b)(1).

220. *Id.* R. 1.6 cmt. 24.

221. *See id.* R. 1.6(7).

222. *See, e.g.,* *Murphy v. Lint (In re Estate of Lint)*, 135 Wash. 2d 518, 957 P.2d 755 (1998). Estelle Lint was an elderly woman living with cancer. *Id.* at 522, 957 P.2d at 757. After her husband died, Estelle met Christian, who was eighteen years her junior. *Id.* Christian took Estelle to her long-time attorney, Jim Treadwell, to discuss drafting a financial power of attorney to allow Christian management power over Estelle's affairs. *Id.* at 524, 957 P.2d at 758. Treadwell insisted on naming a co-financial power of attorney in order to prevent Christian from having sole control over Estelle's finances. *Id.* After learning that Christian took Estelle to Mexico to get married in a private ceremony, Treadwell notified Estelle that "Christian would take a 75 percent share of her estate as an omitted spouse" under her will, and that she should have her will modified to reflect her previous estate plan. *Id.* at 527-28, 957 P.2d at 760. Estelle, at Christian's behest, asked another attorney, Kearney Hammer, to draw up a will naming Christian the primary beneficiary and a letter to Treadwell dismissing him as her attorney. *Id.* at 528, 957 P.2d at 760. Treadwell refused, questioning Estelle's competence, and was promptly fired. *Id.* Treadwell, along with Estelle's relative, instituted a guardianship proceeding to protect Estelle from Christian's continued exploitation of Estelle, who was dying from terminal cancer at the time. *Id.* at 529, 957 P.2d at 760. Ultimately, the court found Christian had procured the will by undue influence and voided the

attorney may also suspect elder abuse where the client exhibits unexplainable bruises and lacerations, or has bizarre or vague explanations of the source of a physical injury.<sup>223</sup> Further, an elder may also simply disclose the abuse to the attorney. If the attorney detects this abuse in the course of representation, it will almost certainly be subject to the state's ethics rule on confidentiality.<sup>224</sup>

In Washington, a lawyer is not permitted to reveal information "relating to the representation of a client" without the client's consent, unless one of the exceptions to the Rule applies.<sup>225</sup> The scope of "information" protected under RPC 1.6 is very broad, and applies not only to confidential information divulged for the purpose of advising, but also to "secrets" the client has disclosed to the attorney.<sup>226</sup> The commentary to RPC 1.6 develops this concept, stating:

The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.<sup>227</sup>

Therefore, RPC 1.6 protects secrets and other information related to the representation that the client has requested remain confidential.<sup>228</sup>

Information relating to representation encompasses more than information learned through communication. The definition of confidential information includes any information, "whether in oral, documentary, electronic, photographic, or other forms."<sup>229</sup> It also covers information learned from lawyer observation.<sup>230</sup> The information does not have to come directly from the client, but it can include "information

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marriage for "fraud of the grossest kind." *Id.* at 521–22, 957 P.2d at 757.

223. See Jeffrey M. Levine, *Elder Neglect and Abuse: A Primer for Primary Care Physicians*, 58 GERIATRICS 37, 42 (2003) (describing the warning signs practitioners, particularly medical doctors and health professionals, should look for in detecting possible elder abuse).

224. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983) ("A lawyer shall not reveal information relating to the representation of a client . . .").

225. See WASH. RULES OF PROF'L CONDUCT R. 1.6.

226. *Id.*

227. *Id.*

228. *Id.*

229. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b (2000).

230. See LERMAN & SCHRAG, *supra* note 159, at 161.

gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege,”<sup>231</sup> which would include friends, neighbors, or family members of the elder.

The revelation of elder abuse during the course of representation would almost certainly constitute a “secret” because the disclosure against client consent has potentially serious consequences to the client.<sup>232</sup> It is inconsequential how the attorney discovers the abuse,<sup>233</sup> and if the client withholds consent to disclosure, for whatever reason, the attorney should respect that decision. However, there may be certain situations where RPC 1.6(b) authorizes disclosure.

## 2. *Washington’s RPC Permit Disclosure in Limited Circumstances*

Although Washington’s Vulnerable Adult Statute will not provide a mechanism for attorneys wishing to disclose elder abuse without the client’s consent, the RPC do allow, and sometimes require, an attorney to report the abuse in limited circumstances. While RPC 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client, it permits disclosure if a client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by subsection (b).<sup>234</sup> Subsection (b) provides scenarios where a lawyer may or must reveal confidential information to the extent the lawyer believes necessary.<sup>235</sup> These limited exceptions will apply to certain types of elder abuse and must be analyzed on a case-by-case basis.

### a. *The RPC Require Disclosure to Prevent Reasonably Certain Death or Substantial Bodily Harm*

Like the Model Rules, Washington’s RPC require a lawyer to “abide by a client’s decisions concerning the objectives of representation.”<sup>236</sup> While a Washington attorney shall not “reveal information relating to the representation” without the client’s informed consent, the RPC impliedly authorizes her to reveal the information under certain

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231. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b.

232. There are many reasons why an individual would not want to report elder abuse. For example, the elder may fear retaliation from his abuser if the conduct is reported, he may not want to get the abuser in trouble, or the elder may rely on the abuser for assistance with daily living activities. *See Statistics/Data, supra* note 28.

233. *See* WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2011).

234. *Id.* R. 1.6(a) (2006).

235. *Id.* R. 1.6(b).

236. *Id.* R. 1.2(a) (2011).

conditions.<sup>237</sup> In a deviation from the Model Rules, the attorney “shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm.”<sup>238</sup> This disclosure requirement is mandatory for attorneys in Washington. Despite commanding disclosure, the limited language of this subsection appears to discount any negative psychological impact that abuse may have on a victim of elder abuse. Older victims of abuse may experience severe adverse psychological effects, such as distress and lower perceived self-efficacy than those who have not been victimized.<sup>239</sup> From the plain language of the Rule, an attorney could not report abuse that merely has a negative psychological impact on the victim.<sup>240</sup>

Although the WSBA has not explicitly informed Washington lawyers of their duty to report elder abuse, other states have addressed the burden of proof required to trigger the reporting requirement when the lawyer suspects death or substantial bodily harm. For example, the New Hampshire Bar Association has stated that although the “mere suspicion that elder abuse or other forms of harm might be occurring” is inadequate to trigger the exception to an attorney’s duty of confidentiality, the lawyer may nonetheless report elder abuse against the client’s consent as long as the lawyer has a “reasonable belief” that this harm is occurring.<sup>241</sup> Typically this will mean that the lawyer must have a subjective belief that abuse is present, and perform an objective inquiry into the circumstances, including an analysis of the factual situation. Further, the lawyer’s belief that the abuse is occurring must be “reasonable.”<sup>242</sup> As a result, “there must be sufficient evidence (bruises, personality change, manifestations of fear or trepidation, eye witness statements or statements by the client)” for the lawyer to reasonably conclude that the client is being abused or that the threat of abuse is real.<sup>243</sup> After forming a reasonable belief, the attorney must then seek

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237. *Id.* R. 1.6(a) (2006).

238. *Id.* R. 1.6(b) (emphasis added).

239. *See Statistics/Data*, *supra* note 28.

240. *See* WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (providing that a lawyer “shall reveal information relating to the representation of a client to prevent reasonably certain *death* or substantial *bodily* harm” (emphasis added)).

241. *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*, N.H. BAR ASS’N (2014), [https://www.nhbar.org/legal-links/Ethics-Opinion-2014-15\\_05.asp](https://www.nhbar.org/legal-links/Ethics-Opinion-2014-15_05.asp) [hereinafter N.H. Op. 15/5].

242. *Id.*

243. *Id.*



consent from the client to disclose the abuse.<sup>244</sup> If the client continues to object to disclosure of the abuse, the attorney may then make a judgment call about whether disclosure is proper absent the client's consent.<sup>245</sup> However, in New Hampshire, a lawyer is not required to disclose confidential information to prevent reasonably certain death or substantial bodily injury as in Washington.<sup>246</sup> Rather, New Hampshire adopted a voluntary reporting standard for attorneys faced with this dilemma.<sup>247</sup>

Whether a lawyer can properly disclose under Washington RPC 1.6(b)(1) will likely be a fact-specific inquiry, depending on the circumstances of each case. RPC 1.6(b)(1) is an exception to the confidentiality rule that recognizes the "overriding value of life and physical integrity."<sup>248</sup> Thus, a lawyer is required to report in order to prevent reasonably certain death or substantial bodily harm.<sup>249</sup> Whether such harm is reasonably certain to occur depends on whether "it will be suffered immediately," or if there is a "present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat."<sup>250</sup>

*i. Disclosure Is Required Where There Is an Immediate Threat of Death or Bodily Harm*

When the immediate risk of death or substantial bodily injury is readily apparent, the lawyer *must* disclose the abuse, even if the elderly client withholds consent.<sup>251</sup> When an elderly client is in deplorable physical condition and has been rapidly declining in health, an attorney might be required to disclose the suspected abuse if she reasonably suspects an immediate threat of death or injury.<sup>252</sup> Physical signs such as unusual weight loss, bed sores, poor hygiene, bruises, broken bones and

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244. *Id.*

245. *Id.*

246. *See* WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006).

247. *See* N.H. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2004) (stating that "a lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary" (emphasis added)).

248. WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

249. *See id.* R. 1.6(b)(1).

250. *Id.*

251. *Id.*

252. *See id.* Although not trained health professionals, attorneys should be aware of some of the warning signs of elder abuse. Some warning signs include: injuries in various stages of healing, poor oral hygiene, weight loss, malnutrition, inattention to nutrition or hygiene, unexplained bruises, and particularly implausible explanations of an existing injury. *See Levine, supra* note 223, at 42.

unmet medical needs may be manifestations of abuse.<sup>253</sup> Although a person in this condition may be unable to visit her attorney, the attorney would nevertheless have an obligation to report the suspected abuse under RPC 1.6(b)(1).

ii. *Disclosure Is Required Where There Is a Future Threat of Death or Bodily Harm*

More generally, an attorney must report elder abuse of a client against the client's consent if it is likely that harm will occur later if the lawyer fails to take protective action.<sup>254</sup> Researchers link elder abuse to an increased risk of death,<sup>255</sup> and elderly victims of abuse experience a 300% higher risk of death compared to those who have not been abused.<sup>256</sup> Victims of elder abuse also have elevated health problems compared to other older adults, including bone and joint diseases, digestive irregularities, chronic pain, cardiovascular issues, and depression or anxiety.<sup>257</sup> Whether these heightened risks of death and substantial bodily injury from elder abuse require a lawyer to take action is unclear. Many older individuals have preexisting health issues, such as arthritis, heart disease, cancer, and hypertension, all of which could independently increase the risk of death.<sup>258</sup>

Unfortunately, it is often difficult to determine whether physical abuse is actually occurring, or whether death was the result of other

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253. See *What Is Elder Abuse?*, *supra* note 35. For example, Maryann was living with her great grandson and his wife who secluded Maryann in their shared home for several months. When she finally arrived at the hospital, Maryann exhibited signs of dehydration, renal insufficiency, malnourishment, and severe infection from bed sores. Maryann was incoherent, had recently dropped from 162 to 130 pounds, and her body temperature was down to ninety-two degrees. She died soon after arriving at the hospital. *Two Plead Guilty in Elder Abuse Case*, EDWARDSVILLE INTELLIGENCER (Jan. 31, 2015), [http://www.theintelligencer.com/local\\_news/article\\_43fd9f6e-a958-11e4-a325-f39fd884242.html](http://www.theintelligencer.com/local_news/article_43fd9f6e-a958-11e4-a325-f39fd884242.html).

254. Cf. WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

255. See Xinqi Dong et al., *Elder Self-Neglect and Abuse and Mortality Risk in a Community-Dwelling Population*, 302 JAMA 517, 518 (2010).

256. *Id.* at 522 (discussing the effects of elder self-neglect, which can be defined as the failure of a person to perform essential, self-care tasks and that such failure threatens the person's health or safety); see also Garre-Olmo et al., *supra* note 36, at 815. Washington's vulnerable adult statute does include self-neglect in its definition of elder abuse. WASH. REV. CODE ANN. § 74.34.020(2) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.) (defining abuse as "the willful action or inaction that inflicts injury") (emphasis added).

257. See *Statistics/Data*, *supra* note 28.

258. See *Administration on Aging (AoA): Health & Health Care*, ADMIN. FOR COMMUNITY LIVING, [http://www.aoa.acl.gov/Aging\\_Statistics/Profile/2013/14.aspx](http://www.aoa.acl.gov/Aging_Statistics/Profile/2013/14.aspx) (last visited Aug. 12, 2015).

causes unrelated to the abuse.<sup>259</sup> For example, bruises on an older person's body may be from abuse, but it might also be a result of some medications, such as blood thinners, which may result in higher rates of bruising.<sup>260</sup> It may be risky for an attorney, who is uncertain that abuse is occurring, to report potential abuse to authorities, especially if the client denies the abuse or will not consent to disclosure. This is because an attorney who wrongly discloses confidences may be subject to discipline.<sup>261</sup> However, if the lawyer reasonably determines that the threat of death or substantial bodily injury is immediate or likely to occur in the future if the lawyer does not act, she is required to disclose the confidential information under Washington's RPC.<sup>262</sup>

*b. Disclosure Is Permitted Where There Is a Breach of Fiduciary Duty by a Client*

Unlike the Model Rules, Washington's RPC also state that a lawyer "may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver."<sup>263</sup> This provision permits, but does not require, disclosure of information relating to the representation of the client when the lawyer becomes aware of a breach of fiduciary duty on the part of his client, a court-appointed representative.<sup>264</sup> While there are no reported decisions dealing with this provision of the RPC,<sup>265</sup> Rule 1.6(b)(7) is only intended to apply in situations where an attorney learns of breach of fiduciary duty on the part of his own client, a court-appointed fiduciary.<sup>266</sup>

Washington also permits an attorney to disclose confidential information, such as elder abuse, "to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed

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259. See Nancy Weaver Teichert, *Report on Elder Abuse Deaths—Reviewers Find Few Unknown Suspicious Cases in the County*, GLOBAL ACTION ON AGING (Nov. 23, 2004), <http://www.globalaging.org/elderrights/us/2004/report.htm>.

260. *Id.*

261. See WASH. RULES OF PROF'L CONDUCT R. 8.4 (2015) ("It is professional misconduct for a lawyer to: (a) violate . . . the Rules of Professional Conduct."); *id.* R. 8.4 cmt. 1 ("Lawyers are subject to discipline when they violate . . . the Rules of Professional Conduct . . .").

262. *Id.* R. 1.6(b)(1) cmt. 6 (2006).

263. *Id.* R. 1.6(b)(7).

264. See *id.* R. 1.6 cmt. 15.

265. As of January 29, 2015.

266. See WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(7).

fiduciary.”<sup>267</sup> This provision would provide an avenue for an attorney to report elder abuse by a client; however, the application of this provision would be severely limited because the lawyer has no duty to report.<sup>268</sup> If the lawyer does wish to make a report under in this situation, he would only be able to do so in court.<sup>269</sup>

c. *The Model Rules’ Provision Allowing Disclosure “to Comply with Other Law” Is Noticeably Absent from Washington’s RPC*

Disclosure obligations are more ambiguous in cases where the abuse will not reasonably result in death or substantial bodily harm. Washington has not adopted the portion of Model Rule 1.6(b)(6), which permits the lawyer to reveal information related to representation of a client to comply with other law.<sup>270</sup> The RPC only permit an attorney to disclose confidential information to comply with a court order.<sup>271</sup> The WSBA explained its decision in its Comment to the Rule:

Washington’s omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by “other law,” even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client’s lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client’s interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of “other law” from this Rule.<sup>272</sup>

The WSBA’s omission of this provision was clearly intentional.

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267. *Id.*

268. *See id.* (“may” reveal). This is offered hypothetically as the author’s research did not reveal any instances in which RPC 1.6(b)(7) had been invoked by an attorney.

269. Rule 1.6(b)(7) of Washington’s RPC only permits the lawyer to disclose the confidential information to the “tribunal,” which would likely prohibit making a report under Washington’s Vulnerable Adult Statute, where reports are to be made to the Department of Social and Health Services or a law enforcement agency. *Id.*; WASH. REV. CODE § 74.34.035(6) (2014).

270. Washington’s RPC permit a lawyer to reveal information relating to the representation of a client “to comply with a court order,” however, the Rule deleted the portion of the Model Rule that allows disclosure to comply with “other law.” *See* WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 24.

271. *Id.*

272. *Id.*

Considering that the Washington State Supreme Court has emphasized that the general rule relating to representation of a client “should not be carelessly invoked,”<sup>273</sup> it follows that the informed consent of the client is a major concern.

*d. Certain Types of Abuse Are Less Amenable to Disclosure Under Washington RPC 1.6*

Certain forms of abuse are not likely to result in death or substantial bodily harm, but can have a devastating impact on the life of an elder. The more difficult situation is when an attorney discovers financial or emotional abuse of an elderly client who does not consent to disclosure.

*i. Attorneys Must Keep Emotional Abuse of a Client Confidential*

Emotional abuse is a common form of abuse that is not always likely to lead to death or substantial bodily injury.<sup>274</sup> In Washington, mental abuse includes emotional and verbal abuse, such as “a willful verbal or nonverbal action that threatens, humiliates, harasses, coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult. Mental abuse may include ridiculing, yelling, or swearing.”<sup>275</sup> This sort of emotional abuse has serious psychological and behavioral consequences for victims. Victims of elder abuse typically have more psychological distress than non-victims, as well as “[l]ow feelings of mastery and a negative perception of self-efficacy.”<sup>276</sup> Abuse may also cause feelings of shame, fear,<sup>277</sup> anxiety, and depression.<sup>278</sup>

Mental abuse, however severe, does not always present the risk of death or substantial bodily injury. For example, Division II of the Washington State Court of Appeals allowed a suit to go forward under the Vulnerable Adult Statute for mental abuse that did not result in any serious physical injury. In *Goldsmith v. Department of Social & Health Services*,<sup>279</sup> the son of ninety-eight year old nursing home resident

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273. *In re Disciplinary Proceedings Against Boelter*, 139 Wash. 2d 81, 91, 985 P.2d 328, 334 (1999); see also WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 23.

274. There are many other types of abuse that may not give rise to a threat of death or bodily harm.

275. WASH. REV. CODE ANN. § 74.34.020(2)(c) (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.).

276. Hannie C. Comijs et al., *Psychological Distress in Victims of Elder Mistreatment: The Effects of Social Support and Coping*, 54B J. GERONTOLOGY 240, 244 (1999).

277. See Madden, *supra* note 88, at 2.

278. See *Statistics/Data*, *supra* note 28 (impact of elder abuse).

279. 169 Wash. App. 573, 280 P.3d 1173 (2012).

Thomas Goldsmith began having disagreements with his father's nursing home over the handling of his father's finances.<sup>280</sup> As a result of these disagreements, the son and Mr. Goldsmith had intense conversations about finances that "deteriorated into yelling."<sup>281</sup> After the discussions, Mr. Goldsmith would "cry, refuse to take his medication, and otherwise become noncompliant with caregiver instructions," and got to the point where the staff felt threatened by Mr. Goldsmith's actions.<sup>282</sup> Mr. Goldsmith, an otherwise calm individual, would frequently display anger and anxiety after his conversations with his son.<sup>283</sup> The Department instituted an investigation and found that the son "yelled at and harassed his father to the point where [Mr. Goldsmith] was visibly shaken and upset and that [the son] should have known his conduct was harmful."<sup>284</sup> Had Mr. Goldsmith told his attorney of the abuse, but refused to consent to disclosure, there would have been no remedial action the attorney could take under the current RPC.

*ii. Attorneys Must Keep Financial Abuse of a Client Confidential*

The line between a loved one helping an older adult with their finances and exploitation or abuse is not always easy to draw. Mickey Rooney, a famous actor who lived to be ninety-three years old, was a victim of abuse.<sup>285</sup> Although he did not disclose that someone financially exploited him for several years, he recounted the pain and frustration he felt at the hands of a family member:

... I was eventually and completely stripped of the ability to make even the most basic decisions—where we go or what do we do—decisions that everyone likes to make. Over the Course of time, my daily life became unbearable because all of this seemed to come out of nowhere. At first, it was something small, and I could control it. But, then it became something sinister that was completely out of my control. I felt trapped, scared, used, and frustrated. And, above all, when a man feels helpless, it's terrible. And I was helpless.

For years, I suffered silently. I didn't want to tell anybody. I

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280. *Id.* at 576, 280 P.3d at 1175.

281. *Id.*

282. *Id.*

283. *Id.* at 576, 280 P.3d at 1175–76.

284. *Id.* at 576, 280 P.3d at 1175.

285. *Justice for All: Ending Elder Abuse, Neglect, and Financial Exploitation: Hearing Before the S. Spec. Comm. on Aging*, 112th Cong. 5 (2011) [hereinafter *Hearing Before the S. Spec. Comm. on Aging*] (statement of Mickey Rooney).

couldn't muster the courage . . . Even when I tried to speak up, I was told to, "Shut up and be quiet. You don't know what you're talking about." It seemed that no one—no one wanted to believe me.<sup>286</sup>

In Mr. Rooney's case, there was no lawyer involved during much of the abuse.<sup>287</sup> Even though Mr. Rooney desired help, he recounted his decision to stay silent.<sup>288</sup> It is likely that no one would argue Mr. Rooney, a successful actor who appeared in films up until his death,<sup>289</sup> was at risk of death or serious physical injury. In this case, an attorney who became aware of the abuse of someone like Mr. Rooney would face an ethical dilemma: to report and face disciplinary action or to remain silent and let the abuse continue. Without consent, the lawyer would be unable to disclose the information or institute protective actions under the RPC.<sup>290</sup>

Victims of elder abuse do not wish to report the abuse for a variety of reasons.<sup>291</sup> While these types of abuse can have a devastating impact,<sup>292</sup> emotional abuse and financial exploitation in particular do not always rise to such a level that it threatens substantial bodily injury or death. Under the RPC, an attorney who learns a client has become the victim of emotional or financial abuse may not disclose that information without consent.

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286. *Id.*

287. In September 2011, Mr. Rooney's court-appointed conservator filed suit against Rooney's stepson, alleging elder abuse. The lawsuit alleged that "after Rooney let his stepson handle his personal and business affairs, the couple [(stepson and his wife)] stole Rooney's money for their own use, kept him in the dark about his own finances, used threatening and abusive language, and refused him basic necessities, such as food and medicine." Ed Gjertsen II, *The 'Double Life' of Mickey Rooney*, CNBC.COM (Apr. 10, 2014, 9:16 AM), <http://www.cnbc.com/id/101568802#>.

288. *Hearing Before the S. Spec. Comm. on Aging*, *supra* note 285, at 4, 5 (statement of Mickey Rooney).

289. *Mickey Rooney*, IMDB.COM, <http://www.imdb.com/name/nm0001682/> (last visited Feb. 7, 2015).

290. *See* WASH. RULES OF PROF'L CONDUCT R. 1.6(b) (2006); *id.* R. 1.14 (barring disclosure of financial abuse unless client has diminished capacity or such abuse is likely to lead to substantial bodily injury or death).

291. *See supra* Part I; Sandusky, *supra* note 20, at 468–71 (explaining reasons why a victim would not want to report elder abuse, including family considerations, isolation and helplessness, fear of the legal system, and inefficiency of mandatory reporting laws).

292. Some consequences of elder abuse include anger, disappointment, grief, verbal and/or physical aggression, and loss of considerable property or money. The symptoms did depend on the severity and frequency of the abuse. *See* Comijs et al., *Elder Abuse in the Community: Prevalence and Consequences*, 46 AM. GERIATRICS SOC'Y 885, 887 (1998).

iii. *An Attorney Might Disclose Elder Abuse by a Court-Appointed Guardian*

Guardianship abuse is also becoming more visible in today's society. In 2010 the United States GAO put out a report on financial exploitation, neglect, and abuse of incapacitated seniors by their guardians.<sup>293</sup> The GAO found that elders alleged physical abuse, neglect, and financial exploitation across the country, with many cases involving financial abuse.<sup>294</sup> Although guardianship abuse does not present the issue of a competent client refusing to consent to disclosure of abuse, it highlights an additional problem attorneys may face when an elderly client falls victim to his guardian abuser. In this sense, the RPC are inadequate. RPC 1.6(b)(7) only allows attorneys to disclose abuse they discover a client committing.<sup>295</sup> The RPC do not permit a lawyer to disclose confidential information when the lawyer discovers a court-appointed fiduciary (i.e. guardian) is financially exploiting his own client unless the disclosure is necessary to "prevent reasonably certain death or substantial bodily harm."<sup>296</sup> RPC 1.14, which addresses issues of clients with diminished capacity, may provide an outlet for attorney reporting.<sup>297</sup> However, how to handle issues relating to clients with

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293. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT AND ABUSE OF SENIORS 1 (2010).

294. *Id.* at 10–24. For example, in Washington, a certified professional guardian used one of her incapacitated person's (IP) estates to generate tens of thousands of dollars in unnecessary fees and failed to visit another IP for nearly eight months. The same guardian hid one IP's will from the court and his family in order to generate legal fees for herself. To aggravate matters, these legal fees typically come from the ward's own finances. While this guardian received disciplinary letters, she continues to serve as guardian for eighty-six IPs and is a representative payee for seventy-four beneficiaries. *Id.* at 15.

295. *See* WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(7).

296. *Id.* R. 1.6(b)(1).

297. Rule 1.14 provides:

(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.

(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.

*Id.* R. 1.14.



diminished capacity is outside the scope of this Comment.

3. *Lawyers in Washington Will Likely Not Report Elder Abuse if Not Clearly Authorized by the RPC*

Attorneys who feel morally obligated to help victims of elder abuse face an ethical dilemma if they want to disclose the abuse against a client's consent. The lawyer could reveal the confidential information and risk violating the RPC or retain the information as required by the state's ethics rules.<sup>298</sup> It is misconduct for a lawyer to reveal confidential information against a client's consent under RPC 1.6.<sup>299</sup> Possible disciplinary action for wrongly revealing confidential client information includes sanctions, reprimand, admonition, suspension from practice, and even disbarment.<sup>300</sup> The Washington State Supreme Court upheld the suspension of an attorney for six months when he unnecessarily revealed his client's confidences beyond the appropriate tribunal.<sup>301</sup> These repercussions might deter lawyers from disregarding the applicable RPC and reporting the abuse against the client's wishes.

V. LAWYERS IN WASHINGTON STATE NEED  
UNAMBIGUOUS STANDARDS RELATING TO THE  
REVELATION OF ELDER ABUSE AGAINST CLIENT  
CONSENT

Elder abuse is a widely underreported issue,<sup>302</sup> and for this vulnerable population, the state has taken on the responsibility for ensuring protection of senior citizens.<sup>303</sup> Mandatory and permissive reporting of elder abuse, in theory, furthers the public's goal of protecting one of society's most vulnerable populations.<sup>304</sup> Despite the questionable

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298. *See id.* R. 1.6.

299. *Id.* R. 8.4 (2015).

300. *See* WASH. STATE CT. R., RULES FOR ENFORCEMENT OF LAWYER CONDUCT 13.1 (2014).

301. *See In re* Disciplinary Proceeding Against Schafer, 149 Wash. 2d 148, 173, 66 P.3d 1036, 1048 (2003) (holding that the attorney revealed confidential information regarding a judge's misconduct to newspapers, friends, and other attorneys and was suspended for six months).

302. *See* NEAIS, *supra* note 3, at 5-10 (confirming the existence of the iceberg theory of elder abuse, and estimating that for every reported case of elder abuse substantiated by APS, there are more than five cases of elder abuse that are not reported).

303. *See generally* WASH. REV. CODE ANN. §§ 74.34.005-.310 (West, Westlaw through 2015 Reg., 1st, 2d, & 3d Sess.). In Washington, APS is run through the State Department of Social and Health Services, which is the department responsible for receiving reports and investigating potential elder abuse cases.

304. *See* Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the*

efficacy of reporting statutes,<sup>305</sup> these laws provide an avenue for individuals to report elder abuse and institute protective proceedings on the elder's behalf.<sup>306</sup>

In light of massive underreporting of elder abuse, attorney reporting may be desirable. However, the goal of reporting and minimizing the consequences of elder abuse is in direct conflict with the lawyer's duty of confidentiality toward the client.<sup>307</sup> A lawyer who discovers abuse of an elderly client may feel morally obligated to seek help on behalf of that client. Since the attorney is only authorized to disclose the abuse of an elderly client without that client's consent to prevent substantial bodily injury or death,<sup>308</sup> the attorney must remain silent or disclose non-life-threatening abuse and risk punishment by the WSBA. The ethics rules do not provide guidance to lawyers on how to adequately represent and counsel an abused elder client, and lawyers often face a difficult situation upon discovering the abuse of a client.<sup>309</sup> The legal profession must evaluate the desirability of permitting attorneys to report elder abuse of their clients against the duty of confidentiality to the client.

#### A. *Possible Options: Amending the RPC to Address Elder Abuse*

One option that would allow for permissive attorney reporting of elder abuse is to expand the circumstances in which attorneys are allowed to disclose confidential information under RPC 1.6(b). This expansion could take several forms. First, the WSBA could propose amendments to the RPC in order to allow attorneys to "comply with other law," such as the Model Rules allow.<sup>310</sup> Arizona has taken this approach, and allows, but does not require, attorneys to comply with the mandatory reporting statute.<sup>311</sup> Although the profession has consciously

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*Elderly?*, 38 AKRON L. REV. 707, 722 (2005).

305. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 111, at 2; Joseph W. Barber, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107, 120–25 (2008) (comparing elder abuse and child abuse reporting statutes and identifying issues: (1) that the elderly population is generally more socially isolated than children; (2) reporting challenges the autonomy of the older adult; (3) the difficulty in diagnosing elder abuse; and (4) elder abuse is more akin to domestic violence than child abuse).

306. See Madden, *supra* note 88, at 4.

307. See Dessin, *supra* note 304, at 721.

308. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006) (requiring lawyers to disclose confidential information in order to prevent certain death or substantial bodily injury).

309. See Sandusky, *supra* note 20, at 479.

310. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (1983).

311. See Ariz. Op. 01-02, *supra* note 194.

chosen not to allow disclosure in order to comply with other law,<sup>312</sup> there can be a limited exception for complying with abuse reporting statutes. In light of the Washington Legislature's determination that vulnerable adults may need additional assistance fighting elder abuse,<sup>313</sup> the legal profession may want to consider allowing attorneys, who may become aware of abusive situations, to make a report even against the client's consent. Including a provision that allows attorneys to disclose client confidences in order to comply with other laws potentially provides attorneys with the option to disclose elder abuse of a client under RCW 74.34.

Second, Washington could expand the definition of RPC 1.6(b)(7) in order to adequately address guardian abuse and other financial abuse of a client at the hands of a court-appointed fiduciary. As it stands, RPC 1.6(b)(7) only provides an exception to the rule of confidentiality when the lawyer's client is a court-appointed fiduciary and engages in financial abuse of a client.<sup>314</sup> By not limiting the situation to abuse *by* a client, but also to encompass abuse *of* a client, the Rules would allow an attorney to report elder abuse of their own clients, even if the clients withhold consent.

The State could also expand the situations where disclosure is required under RPC 1.6(b)(1). To expand RPC 1.6(b)(1) to require an attorney to reveal information relating to the representation of a client to prevent "reasonably certain death or substantial bodily harm" to encompass a definition of elder abuse, would essentially create a mandatory reporting scheme for attorneys. By acknowledging that all forms of elder abuse carry a heightened risk of mortality for seniors, and many types of elder abuse eventually result in death or substantial bodily harm, this type of amendment would require attorneys to act. Another possibility is to remove the word "bodily" and require disclosure where substantial harm is likely to occur. This would encompass elder financial abuse, emotional abuse, and other forms of abuse that will not necessarily result in any type of physical injury. However, in light of the continued skepticism of the efficacy of mandatory reporting laws, this option may not necessarily be in the older clients' best interests.<sup>315</sup>

Lastly, Washington could also consider adding a section to RPC

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312. See WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 23.

313. See WASH. REV. CODE § 74.34.035 (2014) (providing that mandatory reporters shall report suspected abuse to the department immediately, and also to law enforcement in specified circumstances).

314. See WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(7).

315. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 111, at 2; Barber, *supra* note 305, at 107.

1.6(b) to explicitly address the complicated issue of elder abuse and create a permissive reporting scheme for attorneys faced with this type of ethical dilemma. By following Arizona<sup>316</sup> and New Hampshire,<sup>317</sup> which advise attorneys of the permissibility of reporting elder abuse under specific circumstances, the WSBA could begin to provide guidance to lawyers who regularly work with elder clients and may face the ethical dilemma of reporting elder abuse.

*B. The WSBA Should Mandate Continuing Legal Education (CLE) Courses Addressing Elder Abuse and Reporting Requirements*

The WSBA has the option to impose mandatory CLE courses for attorneys on elder abuse and reporting requirements. The Oregon State Bar Association has recently implemented an elder abuse reporting CLE requirement, which became effective January 1, 2015.<sup>318</sup> To comply with this requirement, every three years an attorney must take either a child abuse or elder abuse reporting credit, alternating each period.<sup>319</sup> This reporting credit was made in response to the Oregon Legislature adding lawyers to the list of mandatory reporters<sup>320</sup> and requiring the Oregon State Bar to adopt rules, subject to approval by the State's Supreme Court,<sup>321</sup> "to establish minimum training requirements for all active members of the bar relating to the duties of attorneys" to report elder and child abuse as defined by Oregon state law.<sup>322</sup> Nonetheless, a CLE requirement in the state of Washington regarding attorneys' duties in this area could have positive impacts. By clarifying attorneys' role in reporting suspected elder abuse of clients, the WSBA can eliminate confusion in this area and ensure that attorneys understand disclosure requirements in the face of ethical obligations.

## CONCLUSION

Without clear directives from the RPC, lawyers in Washington may face an ethical dilemma when deciding whether to report elder abuse without the client's consent. First, the attorney could remain quiet,

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316. Ariz. Op. 01-02, *supra* note 194.

317. N.H. Op. 15/5, *supra* note 241.

318. H.R. 2205, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

319. *See id.*

320. *See* OR. REV. STAT. ANN. § 124.060 (West, Westlaw through 2015 Reg. Sess.).

321. *See id.* § 9.114.

322. *Id.*

protect his client's secret, and allow the abuse to continue. Second, if the attorney determines the abuse is so severe as to put the client at risk of certain death or substantial bodily injury, the attorney may determine that he can disclose the abuse safely, without fear of violating an ethical rule. Alternatively, the attorney could simply report the abuse to the Department of Health and Human Services, who may institute an investigation, at which point the attorney may be subject to disciplinary action from the bar association. For many attorneys, there is no good decision. As a consequence, in many situations, it is safer to remain quiet.

Accordingly, the WSBA should consider amending the RPC to allow permissive attorney reporting of elder abuse when a client withholds consent. By enacting mandatory reporting laws, and a system that punishes elder abusers, the State has made protection of vulnerable adults a priority. Attorneys play an important role identifying and combating elder abuse. Prohibiting attorneys from reporting abuse is antithetical to a strong societal interest in protecting vulnerable adults from abuse and exploitation. Attorneys who encounter abuse of their elderly clients may want to take affirmative action, rather than stand by and allow the abuse to continue. We should give attorneys this option and further the goal of providing protection to one of our most vulnerable populations.