

THE LAWYER'S ROLE IN COMBATING THE HIDDEN CRIME OF ELDER ABUSE

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Elder abuse, the much ignored and often hidden assault on the elderly population, remains a troubling reality. While attorneys have a unique opportunity to identify victims of elder abuse, they often fail to report it. Sarah S. Sandusky explores the ethical dilemmas faced by attorneys who deal with abused clients. She concludes that the duty of confidentiality imposed on attorneys greatly hinders their ability to disclose abuse. Further, she concludes that protective actions that do comport with the ethical duties, such as the institution of guardianship proceedings, infringe too greatly on elderly individuals' autonomy. In the case of competent clients, Ms. Sandusky recommends that attorneys use the "gradual counseling" process to convince clients to consent to disclosure. When attorneys suspect a client may be incompetent, she recommends that they employ a "contextual approach" to determine capacity, combined with gradual counseling techniques. Finally, Ms. Sandusky maintains that educating lawyers on elder abuse in law school and beyond will contribute to a lasting solution.

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I. Introduction

“I don’t want him to leave me; I just want him to be like he was before he went to Vietnam. He’s my only son, and I love him.”¹ One would expect a loving father to express such feelings about his son. However, this father was describing his abusive, alcoholic son.²

“We loved him. He was such a handsome boy.”³ This father, with tears in his eyes, was describing his “boy” who had attempted to murder him with a hatchet.⁴ The father, who did not want to press charges, was astonished that his son had bought a new hatchet “to do a job on [him].”⁵

What should lawyers do when their elderly clients appear to be victims of abuse? Should they report it immediately? Do the ethical rules permit such disclosure? What if the client refuses help? Is the client competent to make such a decision? How can lawyers determine competency of elderly clients? This note attempts to present solutions to these dilemmas and addresses how lawyers can combat the tragic problem of elder abuse within the bounds of their ethical duties.

Part II of this note describes elder abuse and its prevalence in the United States. Part III first discusses the ethical dilemmas confronting a lawyer representing a competent client who refuses to consent to disclosure of the abuse. Part III then discusses the ethical dilemmas surrounding a possibly incompetent, abused client, and the proper actions a lawyer should take in that case. Part IV presents recommendations to lawyers on how to handle these difficult elder abuse issues through proper client counseling.

II. Background

A. Definitions of Elder Abuse and Neglect

There are four main types of elder mistreatment: physical abuse, psychological abuse, financial exploitation, and neglect.⁶ Given the

1. Kay Dundorf & Pat Brownell, *When the Victim Is Elderly*, FAM. ADVOC., Winter 1995, at 81, 83.

2. *Id.*

3. Bella English, *It’s Society’s Secret Crime*, BOSTON GLOBE, Aug. 2, 1989, at 17.

4. *See id.*

5. *Id.*

6. Seymour H. Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 196 (2001). The current federal definition of

scope of elder abuse, this note only covers nonmonetary abuse of the elderly. "Physical abuse is violent conduct resulting in pain and/or bodily injury."⁷ Conduct covered under this category includes hitting, beating, pinching, slapping, use of physical restraints, and sexual abuse.⁸ An example of physical abuse is a daughter torturing her eighty-one-year-old father by chaining him to a toilet and beating him with a hammer while he slept.⁹ Psychological abuse covers "behavior that induces significant mental anguish and may consist of threats to harm, institutionalize, or isolate the elder adult."¹⁰ One example of psychological abuse is a son creeping up behind his mother and yelling, "I could make you have a heart attack!"¹¹ The effects of such abuse include depression, fearfulness, and suicide.¹² Neglect is refusal or failure of a caretaker to fulfill an obligation "necessary to maintain the elder's physical and mental well-being."¹³ Neglect includes conduct like refusing to provide the elder with food, water, personal hy-

elder abuse found in the Older Americans Act is "the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness." 42 U.S.C. § 3002(13) (2000). Exploitation includes "illegal or improper act or process of an individual, including a caregiver using the resources of an older individual for monetary or personal benefit, profit, or gain." *Id.* § 3002(24). Neglect includes the "failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide the goods or services." *Id.* § 3002(34).

7. Moskowitz, *supra* note 6, at 197; *see also* 42 U.S.C. § 3002(36) (defining physical harm as "bodily injury, impairment, or disease").

8. NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUMAN SERVS. ASS'N, NATIONAL ELDER ABUSE INCIDENCE STUDY 3-1, http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/AbuseReport_Full.pdf (Sept. 1998) [hereinafter NATIONAL ELDER ABUSE INCIDENCE STUDY]; *see also* Moskowitz, *supra* note 6, at 196.

9. HOUSE SELECT COMM. ON AGING, ELDER ABUSE (AN EXAMINATION OF A HIDDEN PROBLEM), H.R. REP. NO. 97-277, at 4 (1981) [hereinafter EXAMINATION OF A HIDDEN PROBLEM]; *see also* SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, ELDER ABUSE: A DECADE OF SHAME AND INACTION, H.R. REP. NO. 101-752, at 1-11 (1990) [hereinafter DECADE OF SHAME AND INACTION] (documenting numerous other cases of physical abuse against the elderly).

10. Moskowitz, *supra* note 6, at 197; *see also* NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 3-3 (defining psychological abuse as "the infliction of anguish, emotional pain, or distress" including such behavior as verbal assaults, threats, intimidation, treating the elder as an infant, and isolating the elder).

11. Moskowitz, *supra* note 6, at 197 (quoting DECADE OF SHAME AND INACTION, *supra* note 9, at 17); *see also* EXAMINATION OF A HIDDEN PROBLEM, *supra* note 9, at 24-26 (documenting other cases of neglect).

12. Moskowitz, *supra* note 6, at 197.

13. *Id.* at 198; *see also* NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 3-3 (defining neglect as "the refusal or failure to fulfill any part of a person's obligations or duties to an elder").

giene, medicine, or other life necessities.¹⁴ An example of neglect is the case of a fifty-year-old daughter leaving her elderly father to lay in a urine-soaked, feces-covered bed.¹⁵

B. Congressional Findings and Response

In 1981, the U.S. House of Representatives addressed the issue of elder abuse for the first time.¹⁶ The report, promulgated by the Select Committee on Aging, estimated that one in twenty-five Americans would be victims of elder abuse.¹⁷ This meant that an estimated one million elderly people were victims of noninstitutional abuse.¹⁸ The report recommended passage of the Prevention, Identification, and Treatment of Elder Abuse Act, modeled after the 1974 Child Abuse Prevention Act.¹⁹ This proposed act would have provided financial assistance to state programs for prevention, identification, and treatment of elder abuse.²⁰

In 1990, the House Select Committee on Aging revisited the issue of elder abuse in its report, *Elder Abuse: A Decade of Shame and Inaction*.²¹ As evident by its title, not much progress had been made since 1981.²² In 1990, five hundred thousand more instances of elder abuse occurred than in 1981, increasing the number of abused to 1.5 million.²³ Despite new state mandatory reporting and adult protective services laws, only one out of eight cases of elder abuse was being reported, compared to the one in five cases being reported in 1980.²⁴ The report once again recommended the passage of a national elder abuse program, which had not been enacted since the initial recommendation made in the 1979–1980 session of Congress.²⁵

In 1996, the National Center on Elder Abuse, as directed by Congress through the Family Violence Prevention and Services Act of 1992, conducted the *National Elder Abuse Incidence Study*.²⁶ This study

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14. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 3-3.
 15. DECADE OF SHAME AND INACTION, *supra* note 9, at 8.
 16. *See generally* EXAMINATION OF A HIDDEN PROBLEM, *supra* note 9.
 17. *Id.* at xiv–xv.
 18. *Id.* at xv.
 19. *Id.* at xvii, 125.
 20. *Id.* at xvii.
 21. DECADE OF SHAME AND INACTION, *supra* note 9.
 22. *Id.* at v.
 23. *Id.* at xi.
 24. *Id.*
 25. *Id.* at 66–67, 72.
 26. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8.

was the first to estimate national incidence rates of elder abuse.²⁷ The study focused only on abuse in the noninstitutionalized setting.²⁸ It also studied elder abuse "incidences," meaning the number of *new* cases occurring during the year.²⁹ Therefore, any on-going abuse cases were not included in the numbers of the study. Some of its key findings were:

- (1) The best national estimate of incidences of elder abuse, neglect, and/or self-neglect was 551,001.
- (2) Only 21% of cases were reported.
- (3) Almost 90% of the perpetrators were a family member of the victim.
- (4) Two-thirds of the perpetrators were adult children or spouses of the victim.
- (5) The oldest elders (eighty years and over) were abused and neglected at two to three times the proportion of the elderly population.
- (6) Women are two-thirds of the victims of elder abuse, even though they only represent 58% of the elder population.³⁰

Despite these disturbing numbers and the urges for national elder abuse legislation, Congress has failed to pass adequate legislation to address the issue of elder abuse.³¹ On September 12, 2002, Senators John Breaux, Chairman of the Senate Special Committee on Aging, and Orrin Hatch, ranking member of the Senate Judiciary, introduced the Elder Justice Act.³² This bill proposed to "elevate elder abuse, neglect, and exploitation to the national stage in a lasting way."³³ The bill's findings show that elder abuse remains a national problem.³⁴ The findings indicate that anywhere between 500,000 and 5,000,000 elders are maltreated each year.³⁵ Because the bill was in-

27. *Id.* at 3.

28. *Id.* at 2.

29. *Id.*

30. *Id.* at 4-7.

31. Elder Justice Act, S. 333, 108th Cong. § 2(8) (2003); Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 809 (2000).

32. Elder Justice Act, S. 2933, 107th Cong. (2002).

33. *Elder Justice Coalition*, NAT'L CENTER ON ELDER ABUSE NEWSL. (Nat'l Ctr. on Elder Abuse, Washington, D.C.), Nov. 2002, at 1 (quoting Senator Breaux), http://www.elderabusecenter.org/newsletter_021101.pdf; see also S. 333, § 3 (describing in detail the ten purposes of the bill).

34. S. 333, § 2.

35. *Id.* § 2(2); see also AM. PSYCHOLOGICAL ASS'N, ELDER ABUSE AND NEGLECT: IN SEARCH OF SOLUTIONS, at <http://www.apa.org/pi/aging/eldabuse.html> (last visited Aug. 18, 2003) (stating that an estimated 2.1 million older Americans are victims of elder abuse each year).

roduced so late in the legislative session, the bill did not become law in 2002.³⁶ The bill was reintroduced on February 10, 2003.³⁷

C. Federal Funding of Elder Abuse Programs

State adult protective services are the principal public source of response to reports of elder abuse.³⁸ These programs accept and investigate reports of elder abuse.³⁹ The Social Services Block Grants (SSBG)⁴⁰ and the Older Americans Act (OAA)⁴¹ are the primary sources of federal funds for these programs.⁴² In 1975, Title XX was added to the Social Security Act to authorize funding of state social services programs.⁴³ Federal funding of SSBG decreased dramatically during the 1980s.⁴⁴ From 1981 to 1990, the SSBG had been cut by nearly one-third.⁴⁵ In 1990, the House Select Committee on Aging described federal funding of state adult protective services as “woefully inadequate.”⁴⁶ In 1989, states, on average, were only spending \$3.80 per elder resident for adult protective services, compared to \$45 per child resident for child protective services.⁴⁷ Ten states spent less than one dollar per elder resident on adult protective services.⁴⁸ Yet, Congress continued to reduce appropriations for SSBG throughout the 1990s.⁴⁹ From 1995 to 2000, appropriations were reduced from \$2.8 billion to \$1.775 billion, a decline of 37%.⁵⁰ Congress further reduced

36. See *Elder Justice Act of 2002 Introduced in Senate*, NAT'L CENTER ON ELDER ABUSE NEWSL. (Nat'l Ctr. on Elder Abuse, Washington, D.C.), Sept./Oct. 2002, at 1, <http://www.elderabusecenter.org/newsletter/news51.pdf>.

37. S. 333.

38. NAT'L ASS'N OF ADULT PROTECTIVE SERVS. ADM'RS., REPORT ON PROBLEMS FACING STATE ADULT PROTECTIVE SERVICES PROGRAMS AND THE RESOURCES NEEDED TO RESOLVE THEM 2, <http://www.elderabusecenter.org/publication/NAAPSA7.pdf> (Jan. 2003).

39. *Id.*

40. 42 U.S.C. § 1397 (2000).

41. *Id.* § 3058i.

42. S. REP. NO. 160-229 (I), at 309 (2000).

43. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., SSBG HELPING STATES SERVE THE NEED OF AMERICA'S FAMILIES, ADULTS, AND CHILDREN, at <http://www.acf.dhhs.gov/programs/ocs/ssbg/docs/ch100.htm> (last visited Aug. 18, 2003) [hereinafter SSBG].

44. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 84 (1998).

45. DECADE OF SHAME AND INACTION, *supra* note 9, at xiv.

46. *Id.* at 69.

47. *Id.* at xiii.

48. *Id.*

49. SSBG, *supra* note 43.

50. *Id.*

appropriations in 2001 to \$1.7 billion.⁵¹ The amount remained the same in 2002.⁵² The Senate has recommended increasing SSBG funding to \$1.975 billion for 2003 and \$2.8 billion for 2004, but neither increase has yet been approved.⁵³ SSBG money not only funds adult protective services, but also numerous other services.⁵⁴ In 2000, states spent, on average, only 5% of SSBG funds or \$136.54 million on adult protective services.⁵⁵ According to a 2003 report on the problems facing adult protective services programs, the lack of federal funding for adult protective services was a serious obstacle to program operation.⁵⁶

The OAA is the other primary source of federal funding of adult protective services.⁵⁷ The 1992 amendments to the OAA allot funds for states to develop and enhance elder abuse prevention programs.⁵⁸ In 2003, Congress earmarked \$5.2 million for elder abuse prevention.⁵⁹ This figure has remained relatively constant since 1996.⁶⁰ However, appropriations for the prevention of institutional abuse of the elderly have steadily increased, rising from \$4.449 million in 1996⁶¹ to over \$13 million in 2003,⁶² even though most incidents of elder abuse do

51. S. REP. NO. 108-11, at 70 (2003).

52. *Id.*

53. *Id.* at 71.

54. SSBG, *supra* note 43. There are twenty-nine services funded by SSBG: adoption services, case management, congregate meals, counseling services, adult day care, child day care, education/training, employment services, family planning services, adult foster care services, foster care services, health-related services, home-based services, home-delivered meals, housing services, independent living, information and referral, legal services, pregnancy and parenting, prevention/intervention, adult protective services, child protective services, recreation services, youth special services, disabled special services, transportation, and other services. *Id.*

55. *Id.* Over \$300 million was spent on child protective services. *Id.*

56. NAT'L ASS'N OF ADULT PROTECTIVE SERVS. ADM'RS., *supra* note 38, at 3, 5.

57. S. REP. NO. 106-229(I), at 309 (2000).

58. 42 U.S.C. § 3058(i) (Supp. 1992) (documenting the addition of chapter 35 to title 42 of the *United States Code*).

59. *Highlights of the FY '03 Budget*, NAT'L CENTER ON ELDER ABUSE NEWSL. (Nat'l Ctr. on Elder Abuse, Washington, D.C.), Mar. 2003, at 1, 1, http://www.elderabusecenter.org/newsletter/newsletter_030325.pdf.

60. *Id.* In 1996, \$4.732 million was appropriated for prevention of elder abuse. ADMIN. ON AGING, OLDER AMERICANS ACT APPROPRIATION INFORMATION, at <http://www.aoa.gov/oa/980aaapp.html> (last visited Mar. 27, 2003).

61. ADMIN. ON AGING, *supra* note 60.

62. *Highlights of the FY '03 Budget*, *supra* note 59, at 1.

not happen in nursing homes.⁶³ In fact, only 4% of elders live in nursing homes.⁶⁴

D. The “Graying” of the U.S. Population⁶⁵ and Elder Abuse

Persons over sixty-five are the fastest growing segment of the U.S. population.⁶⁶ In 2000, there were 35 million people sixty-five years or older in the United States.⁶⁷ This number represented 12.4% of the U.S. population, or about one in every eight Americans.⁶⁸ This is an increase of 3.7 million or 12% since 1990.⁶⁹ The number of Americans aged forty-five to sixty-four, who will reach sixty-five during the next twenty years, has increased by 34% since 1990.⁷⁰ Thus, by 2030, it is projected that the elderly population will double to approximately 70 million and represent 20% of the U.S. population.⁷¹ Further, it is projected that the number of Americans aged over eighty-five will increase from 4.2 million in 2000 to 8.9 million in 2030.⁷² This foreshadows a future rise in elder abuse given that those aged eighty and over are abused at a rate of two to three times more than their proportion to the elderly population.⁷³ Also, there are 6.2 million more older women than older men.⁷⁴ Because women are more commonly victims of elder abuse,⁷⁵ this also shows a likely rise in elder abuse. Overall, these demographic trends indicate that elder abuse is not going to disappear, but only increase as the number of potential abuse victims continues to rise.⁷⁶

63. AM. PSYCHOLOGICAL ASS'N, *supra* note 35.

64. *Id.*

65. This trend has been dubbed the “graying of America” by the popular press. William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 *ELDER L.J.* 1, 1 (1994) (citing Allan J. Mayer et al., *The Graying of America*, *NEWSWEEK*, Feb. 28, 1977, at 50).

66. Moskowitz, *supra* note 6, at 192.

67. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2002, at 1, <http://www.aoa.gov/aoa/statistics/profile/2002/2002profile.pdf> (last visited Aug. 18, 2003) [hereinafter PROFILE OF OLDER AMERICANS].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 1.

74. PROFILE OF OLDER AMERICANS, *supra* note 67, at 1.

75. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 1.

76. NAT'L ASS'N OF ADULT PROTECTIVE SERVS. ADM'RS., *supra* note 38, at 1-2.

E. Reasons Behind Elder Abuse

It is hard to imagine that children could strike their own frail, helpless parents. However, as the numbers show, the problem is not rare.⁷⁷ To better combat the problem, one needs to understand its roots. Experts cite many reasons for the phenomenon of domestic elder abuse.⁷⁸ First, there is family stress.⁷⁹ When an older parent moves in with a family member, the family often does not comprehend the “staggering” lifestyle adjustments it has to make.⁸⁰ Frequently, the family hastily decides to allow the elderly relative to move in without much knowledge or understanding of the weight of the obligation involved with caring for an elderly person.⁸¹ The family will probably have no training or education in elder care.⁸² The entrance of the elderly parent carries with it all of the unresolved tensions from childhood.⁸³ Further, the elderly parent adds a financial drain on family members, who may already have been struggling, but could not bring themselves to turn away their own parent.⁸⁴ Because the elderly are living longer,⁸⁵ these stays, which may have only been a few years in the past, can continue on for many, many years.⁸⁶ The older the person becomes, the more his or her health deteriorates.⁸⁷ The family can become frustrated because it perceives that the elder is not pulling his or her weight in the household, and thus the elder is an easy target for abuse.⁸⁸

Another contributing factor to elder abuse is caregiver stress.⁸⁹ The caregiver may have a mental or emotional illness, an addiction to drugs, or other outside personal stress unrelated to the elder.⁹⁰ These caregivers are especially prone to abusing an elder because they al-

77. See, e.g., AM. PSYCHOLOGICAL ASS'N, *supra* note 35.

78. *Id.*

79. *Id.*

80. *Id.*

81. HOUSE SELECT COMM. ON AGING, 96TH CONG., BRIEFING ON ELDER ABUSE: THE HIDDEN PROBLEM 9 (Boston, Mass. 1979) [hereinafter BRIEFING ON ELDER ABUSE].

82. *Id.*

83. *Id.*

84. *Id.* at 11.

85. PROFILE OF OLDER AMERICANS, *supra* note 67, at 1 (stating that a person aged sixty-five can expect to live an additional 17.9 years).

86. BRIEFING ON ELDER ABUSE, *supra* note 81, at 8.

87. *Id.*

88. *Id.* at 11.

89. AM. PSYCHOLOGICAL ASS'N, *supra* note 35.

90. *Id.*

ready have problems balancing the stresses in their own lives.⁹¹ The added stress of an elder living with them leads to intense frustration and possible abusive conduct.⁹² Often they have no skills for managing their own behavior, and they resort to physical force against the elder because they know of no other way to cope with their stress.⁹³

Elder abuse could also be a result of “domestic violence grown old,” and thus be completely unrelated to caregiver stress.⁹⁴ In these cases, the fundamental motivation of the abuser is power and control.⁹⁵ These abusers believe they are entitled to do and get whatever they want.⁹⁶ Elder abuse may also be a case of “battered child grown old.”⁹⁷ A child who was mistreated during his or her childhood might retaliate against his or her parent for all of the years of abuse.⁹⁸

F. Reasons Behind Nonreporting of Elder Abuse

1. FAMILY CONSIDERATIONS

Elderly victims are reluctant to report domestic abuse because they feel ashamed and embarrassed that such behavior is occurring in their own homes.⁹⁹ Our society views family life as a very private aspect of our lives, and thus it is hard to expose all the intimate details of that family life to the public eye.¹⁰⁰ Elders believe that domestic abuse is a private problem that should be dealt with privately.¹⁰¹ Therefore, they never report it to an agency that can provide them and the family with the help they need.

Further, the abuser is most often a spouse or an adult child.¹⁰² Frequently, victims do not want to turn in their own spouse or child to

91. *Id.*

92. *Id.*

93. *Id.*

94. Kate Speltz & Jane Raymond, *Elder Abuse, Including Domestic Violence in Later Life*, WIS. LAW., Sept. 2000, at 10, 11.

95. *Id.* at 12.

96. *Id.*

97. EXAMINATION OF A HIDDEN PROBLEM, *supra* note 9, at 59.

98. *Id.* Children battered during their childhood have a one in two chance of abusing their parents. *Id.* Children who were not battered have a 1 in 400 chance of abusing their parents. *Id.*

99. AM. PSYCHOLOGICAL ASS'N, *supra* note 35.

100. *Id.*

101. Speltz & Raymond, *supra* note 94, at 10.

102. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 4-28.

the authorities.¹⁰³ “[T]hey do not want to get anyone into trouble.”¹⁰⁴ Victims would rather keep the family together, avoid any commotion, and just live out the rest of their lives with their families.¹⁰⁵ Unfortunately, the rest of their lives with these families will be full of abuse, many times leading to death.¹⁰⁶

The privacy of home life also deters outsiders from reporting abuse they suspect or see in another family's home.¹⁰⁷ People do not want to interfere with another family's private life.¹⁰⁸ They believe “it's none of their business” to question how another family chooses to lead their lives.¹⁰⁹ They also fear that they may only be “misinterpreting a private quarrel.”¹¹⁰

2. ISOLATION AND HELPLESSNESS

Frequently, elderly victims are completely isolated and dependent on their abuser for basic life necessities.¹¹¹ By reporting the abuse, victims will either be left alone and unable to care for themselves, or they will be placed in a nursing home.¹¹² The latter, which is the most likely outcome, is not a preferred option for most seniors.¹¹³ They

103. Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165, 174 (1995).

104. *Id.*

105. Speltz & Raymond, *supra* note 94, at 10.

106. See, e.g., DECADE OF SHAME AND INACTION, *supra* note 9, at 3. A sixty-nine-year-old woman was found lying on the ground naked with ants crawling on her. *Id.* The woman was paralyzed on one side from a stroke and also had heart problems. *Id.* On a previous occasion, a home health care worker found the woman lying on the ground nude, covered with urine and feces. *Id.* The woman's daughter, who was drunk at the time, refused to allow the aide to clean her mother up. *Id.* At a later time, a social worker came to visit and found the woman tied to her wheelchair with an electrical cord. *Id.* The woman was finally taken to the hospital for treatment. *Id.* Upon release, the woman insisted that she return to her home with her daughter. *Id.* She died a month later from the extreme neglect as her daughter sat in the next room drinking with her friends. *Id.*

107. AM. PSYCHOLOGICAL ASS'N, *supra* note 35.

108. *Id.*

109. *Id.*

110. *Id.*

111. See Kimberly A. Madden, *Mainstream Legal Responses to Domestic Violence vs. Real Needs of Diverse Communities*, 29 FORDHAM URB. L.J. 13, 35 (2001).

112. *Id.*

113. See, e.g., Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 297-98 (2000). A seventy-eight-year-old woman lives alone with her son. *Id.* at 297. She has lived in her home for forty-seven years. *Id.* She used to be active in her church and community, but now is afraid to drive and stays at home. *Id.* Her son forces her to sign over her Social Security checks and slaps her when she argues with him about it. *Id.* at 297-98. The woman has not reported the abuse because she does not want to end up in a nursing home. *Id.* at 298.

would rather bear the abuse than be removed from their home and placed into a sterile, unfamiliar nursing home.¹¹⁴ Victims also fear retaliation from their abuser.¹¹⁵ If the abuser discovers that a report has been made, the violence may escalate.¹¹⁶ Further, victims frequently do not have the ability to escape the violent situation because an elderly person, unlike a younger domestic violence victim, may not be physically able to leave the house to run to safety.¹¹⁷ Even if the elderly victim were able to leave the house, the victim probably does not have anywhere to go.¹¹⁸ Most domestic violence shelters are geared towards serving young mothers with children.¹¹⁹ Elderly victims, who have tried to stay at such places, end up leaving rapidly, usually within three days.¹²⁰

Isolation also prevents outsiders from discovering and reporting abuse.¹²¹ Unlike child abuse, where the child has to leave the home to go to school, a community may never see the elderly victim.¹²² “[E]lder abuse thrives on total isolation—it is a secret crime.”¹²³

3. FEAR OF THE LEGAL SYSTEM

Another deterrent from reporting elder abuse is the victim’s fear of the legal system.¹²⁴ Courts are not designed to accommodate the needs of the elderly.¹²⁵ They may have to wait for hours, with no seats.¹²⁶ It may take a long period of time to just walk down a hallway to the courtroom.¹²⁷ For them, all the stress and physical challenges make it unlikely that they would want to go through the process.¹²⁸

114. Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What’s an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101, 1151 (1994).

115. Brandl & Meuer, *supra* note 113, at 308.

116. *Id.*

117. *See generally* Madden, *supra* note 111, at 37.

118. *Id.*

119. *Id.*

120. Nicole Bode, *Safe Haven for Elderly*, N.Y. *DAILY NEWS*, July 21, 2002, at 1.

121. Velick, *supra* note 103, at 174.

122. *Id.*

123. *Id.*

124. Adams & Morgan, *supra* note 65, at 25.

125. *See* Madden, *supra* note 111, at 36.

126. *See, e.g., id.*

127. *Id.*

128. *Id.*

4. INEFFICIENCY OF MANDATORY REPORTING LAWS

Despite state mandatory reporting laws, mandatory reporters of abuse, which usually include social workers, physicians, and nurses, are not reporting it.¹²⁹ This is due in part to the client-professional relationship and the risks of breaching trust and confidentiality by reporting the abuse.¹³⁰ Mandatory reporting laws also deter some abused elders from seeking help, thus exacerbating their isolation and injury, because they know the professional will be required to report the abuse.¹³¹

III. Analysis

As is evident from the foregoing discussion, elder abuse is truly a national epidemic that our country has failed to cure for over twenty years. Lawyers are in a special position to help combat this “hidden crime.” If a client is a victim of abuse, the lawyer may be the only contact the victim has other than with the abuser.¹³² However, such a situation presents challenging ethical dilemmas. The following hypothetical situations illustrate the ethical challenges lawyers face when confronted with an abused, elderly client.

A. Hypothetical #1: The Competent Client

Assume that the attorney's practice area is in estates and trusts. The attorney has a new client coming in who wants help constructing her will. The elderly woman arrives, and the attorney notices that she is quite skinny, has bruises on her arms, and is very soft-spoken. During the consultation, the woman admits that her adult son does “put his hands on her” sometimes, but never really slaps or hits her. She informs the attorney that her son is her only relative and that she loves him dearly. The attorney suggests reporting the abuse, but the client adamantly refuses. She loves her son, does not want him arrested, and wants to remain at home. There is no question that the client is competent. Can the lawyer report the abuse and still maintain his duty of confidentiality?

129. *Id.* at 33.

130. Eloise Rathbone-McCuan, *Elder Abuse Within the Context of Intimate Violence*, 60 U.M.K.C. L. REV. 215, 219 (2000).

131. Madden, *supra* note 111, at 33.

132. See Velick, *supra* note 103, at 174.

1. ETHICAL DUTY OF CONFIDENTIALITY

The American Bar Association (ABA) first attempted to define the scope of confidentiality in its Canons of Professional Ethics (Canons).¹³³ Canons 37 and 41 allowed an attorney to disclose a client's confidence to prevent the client from committing a crime and to prevent a client's fraud and/or deception.¹³⁴ In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility (Model Code).¹³⁵ Disciplinary Rule (DR) 4-101 broadened the scope of an attorney's duty of confidentiality to include client "secrets."¹³⁶ Therefore, unlike under the Canons where only client confidences (information protected by the attorney-client privilege) are covered, the Model Code extends coverage to any information the attorney gains during the professional relationship that the client requests to be kept confidential or would be embarrassing or detrimental to the client.¹³⁷ DR 4-101 allows disclosure if: (1) the client consents; (2) disclosure is required by law; (3) the client intends on committing a crime and disclosure is necessary to prevent the crime; or (4) disclosure is necessary to establish or collect attorney's fees or to defend a suit brought against the lawyer.¹³⁸ Six states have retained DR 4-101 as their ethical rule on confidentiality.¹³⁹

If the hypothetical lawyer were in a Model Code jurisdiction, he would likely not be able to reveal the abuse. The client's disclosure is a confidence and a secret, both protected by DR 4-101.¹⁴⁰ His client's disclosure of the abuse is a confidence because it is protected by the attorney-client privilege.¹⁴¹ The four elements required to invoke coverage of the attorney-client privilege are: (1) a communication; (2) made between privileged people; (3) in confidence; (4) for the purpose

133. Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 959 (2002). Canons 1-32 were adopted in 1908. *Id.* at 979 n.16. However, the two Canons on confidentiality were not adopted until 1928. *Id.*

134. *Id.* at 959-60. A client's confidence refers to information covered under the attorney-client privilege. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983).

135. Zalesky, *supra* note 133, at 960.

136. *Id.* (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983)).

137. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983).

138. *Id.*

139. Zalesky, *supra* note 133, at 962. The six states are Iowa, Nebraska, New York, Ohio, Oregon, and Tennessee. *Id.* at 962 n.34.

140. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983).

141. *Id.*

of obtaining legal assistance.¹⁴² The client's disclosure was a communication because she conveyed information to her lawyer.¹⁴³ The communication was made between privileged people, namely a lawyer and his client.¹⁴⁴ It was made in confidence because no other party was present, and the client reasonably believed no one else would learn the contents of the communication.¹⁴⁵ Here, the client actually insisted on secrecy. Lastly, the client did disclose the information in order to aid her lawyer in giving legal advice.¹⁴⁶ Her relationship with her son will have a bearing on the construction of her will. Further, the client's disclosure is also a "secret" because the client has requested nondisclosure, and a disclosure would probably be embarrassing to the client.¹⁴⁷

It is likely that none of the exceptions to the duty of confidentiality apply. Exception number one does not apply because the client has not consented to disclosure.¹⁴⁸ Under exception number two, a lawyer may disclose information if required by law.¹⁴⁹ Of the six states retaining DR 4-101, Ohio and Tennessee require all people to report suspected cases of elder abuse, without mentioning whether or not this law abrogates the attorney-client privilege.¹⁵⁰ It is unclear how this mandate interplays with the ethical duty of confidentiality.¹⁵¹ The lawyer is put in an ethical dilemma, forced to choose between a professional responsibility and an apparent legal obligation.¹⁵² If the lawyer is in one of the remaining Model Code states, he cannot report the abuse because it is not mandated by law.¹⁵³ The third exception only allows for disclosure to prevent the *client* from committing a crime, not to prevent a third party from committing a crime.¹⁵⁴ There-

142. GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 222-23 (2d ed. 1994).

143. *Id.* at 223.

144. *Id.*

145. *Id.* at 224.

146. *Id.*

147. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983).

148. *Id.*

149. *Id.*

150. OHIO REV. CODE ANN. § 5101.61(C) (Anderson 2000); TENN. CODE ANN. § 71-6-103 (1995 & Supp. 2002).

151. Brandl & Meuer, *supra* note 113, at 313. Oregon, on the other hand, which also requires all people to report suspected elder abuse, specifically excludes mandatory reports if the information is covered by the attorney-client privilege. OR. REV. STAT. § 430.765 (2001).

152. Brandl & Meuer, *supra* note 113, at 313.

153. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1983).

154. *Id.*

fore, the lawyer cannot report the abuse because the client's son, not the client, is committing the crime. The last exception is also inapplicable because the lawyer is neither establishing a claim for fees, nor defending his conduct in a lawsuit.¹⁵⁵ Thus, the lawyer most likely has a duty to keep the abuse confidential, no matter how morally bound he feels to report the abuse.¹⁵⁶

In 1983, the ABA promulgated the Model Rules of Professional Conduct (Model Rules).¹⁵⁷ The interpretation of confidentiality is stricter in the Model Rules than it is in the Model Code.¹⁵⁸ First, under the Model Rules, a lawyer must not reveal "information relat[ing] to representation of a client."¹⁵⁹ The Model Rules go further than the Model Code by protecting *any* information relating to the representation, not just information the client requests to keep secret or information the lawyer thinks may be embarrassing or detrimental to the client.¹⁶⁰ Second, the Model Rules allow for permissive disclosure in order to "prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."¹⁶¹ This exception is narrower than the Model Code's disclosure provision because it requires that the lawyer believe that the client's criminal act will likely result in *imminent death or substantial bodily harm*. Model Rule 1.6 retains the other three exceptions to the duty of confidentiality found in the Model Code.¹⁶² Forty-three states have adopted the format of the Model Rules.¹⁶³ However, many of them have adopted their own variation of Model Rule 1.6.¹⁶⁴ For example, eleven states *mandate* disclosure when the lawyer reasonably believes the client's criminal act will result in death or substantial bodily harm.¹⁶⁵

Under a Model Rule jurisdiction, no matter its variation of Model Rule 1.6, the hypothetical lawyer would probably not be allowed to reveal the abuse against his client's consent. First, most

155. *Id.*

156. *See id.*

157. Zalesky, *supra* note 133, at 961.

158. *See id.* at 962.

159. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001).

160. *Id.* R. 1.6 cmt. 5.

161. *Id.* R. 1.6.

162. *Id.* (allowing for disclosure if the client consents, if the lawyer needs to establish a claim or a defense, or if required by law).

163. Nancy J. Moore, *Revisions, Not Revolution*, A.B.A. J., Dec. 2002, 48, at 48.

164. Zalesky, *supra* note 133, at 962.

165. *Id.*

Model Rule states do not require lawyers to report elder abuse.¹⁶⁶ Therefore, in most states, the hypothetical lawyers could not make an exception to the duty of loyalty because the law required them to report the abuse. If the lawyer were in one of the states requiring all people to report abuse, he would be in the difficult position of choosing between his professional responsibility and his apparent legal obligation. However, Montana and New Hampshire specifically state that the mandatory reporting law does not abrogate the attorney-client privilege.¹⁶⁷ None of the other three exceptions under Model Rule 1.6 apply. His client has not consented to disclosure.¹⁶⁸ The lawyer is not trying to establish or defend a claim brought against him.¹⁶⁹ Lastly, his client is not intending to commit any criminal act.¹⁷⁰ Therefore, although the Model Rules' strict interpretation of confidentiality is meant to encourage clients to communicate with their lawyers and to reveal embarrassing information,¹⁷¹ the shield of confidentiality is not protecting the client in the hypothetical case. Instead, the Model Rules place the lawyer in a moral dilemma.

In 2002, the ABA House of Delegates ratified a revised set of Model Rules of Professional Responsibility (revised Model Rules).¹⁷² Revised Model Rule 1.6 "sought to make [the rule] more amenable to the states' interest in the public welfare and the lawyer's interest in alleviating a vexing conscience."¹⁷³ The ABA recognized that "the

166. Of the forty-three Model Rule states, only Florida, Indiana, Kentucky, Louisiana, Mississippi, Montana, New Hampshire, New Mexico, Oklahoma, Rhode Island, Texas, Utah, and Wyoming require all people to report suspected elder abuse. FLA. STAT. ANN. § 415.1034(1) (West 1998); IND. CODE ANN. § 12-10-3-9 (West 2001); KY. REV. STAT. ANN. § 209.030(2) (Michie 1999); LA. REV. STAT. ANN. § 14:403.2 (West 1986 & Supp. 2003); MISS. CODE ANN. § 43-47-7(1)(a) (Supp. 2002); MONT. CODE ANN. § 52-3-811(3)(f) (2001) (requiring only certain professionals and other persons to report any abuse); N.H. REV. STAT. ANN. § 161-F:46 (2002); N.M. STAT. ANN. § 27-7-30(A) (Michie Supp. 2003); OKLA. STAT. ANN. tit. 43A, § 10-104 (West 2001); R.I. GEN. LAWS § 42-66-8 (1999); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2001 & Supp. 2003); UTAH CODE ANN. § 62A-3-302 (2000); WYO. STAT. ANN. § 35-20-103 (Michie 2003).

167. MONT. CODE ANN. § 52-3-811(3)(f); N.H. REV. STAT. ANN. § 161-F:48.

168. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001).

169. *Id.*

170. *Id.*

171. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2001).

172. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ETHICS 2000 COMMISSION, at <http://www.abanet.org/cpr/ethics2k.html> (last visited Sept. 7, 2003). The revision process began in 1997 with the appointment of the ABA Commission on Evaluation of the Rules of Professional Conduct, commonly known as the Ethics 2000 Commission. Zalesky, *supra* note 133, at 958.

173. Zalesky, *supra* note 133, at 963.

[1983] rule conflicted with public policy.”¹⁷⁴ Therefore, the ABA did expand the exceptions to the duty of confidentiality. The revised Model Rule 1.6 permits disclosure when the lawyer believes disclosure is necessary to “prevent reasonably certain death or substantial bodily harm.”¹⁷⁵ The revised Model Rules no longer confine permissive disclosure to situations where the client intends to commit a criminal act.¹⁷⁶ In fact, the revised Model Rules have discarded the criminal act requirement entirely.¹⁷⁷ Also, the revised Model Rules have eliminated the imminent requirement.¹⁷⁸ The death or substantial bodily harm must now only be “reasonably certain.”¹⁷⁹ Because the revised Model Rules are so new, no states have yet adopted them. However, forty-three states are in the process of reviewing the revised rules to decide whether or not to adopt any of the ABA’s recommendations.¹⁸⁰

It is unclear whether the hypothetical attorney could report the abuse under the revised Model Rules. He could argue that the son’s abuse will result in “reasonably certain death or substantial bodily harm.”¹⁸¹ However, the evidence of bruised arms probably does not rise to the level of harm required by the revised Model Rules to permit disclosure. Comment 6 to the revised Model Rules states:

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. [Model Rule 1.6] recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently 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. Thus, a lawyer who knows that a client had accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a

174. *Id.*

175. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. James Podgers, *Lawyers Ethics in a State of Flux: Revisions in the ABA Model Rules of Professional Conduct May Soon Be Adopted in Your State*, A.B.A. J., Dec. 2002, 46, at 47.

181. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.¹⁸²

Although the comment recognizes the importance of human life, it also stresses that there are only limited exceptions to the duty of confidentiality.¹⁸³ The toxic waste spill, for example, must result in a "life-threatening or debilitating disease," in order to rise to the requisite level of substantial harm to warrant disclosure.¹⁸⁴ By default, a less severe disease, or one that only possibly causes death or serious harm, would not permit a lawyer to breach his or her duty of confidentiality. Because it appears that the abused woman is not facing reasonably certain death or substantial bodily harm, the lawyer is likely bound to his duty of confidentiality. There may be some instances where a lawyer confronts a severely abused elderly client, where the limited exception to confidentiality would apply. However that would be a rare occurrence.¹⁸⁵

Therefore, whether under the Model Code, the Model Rules, or the revised Model Rules, the hypothetical lawyer, who is in the perfect situation to report the abuse, is ethically bound to keep the abuse a secret. Thus, the abused woman will likely remain a "hidden victim" of elder abuse.

2. THE WITHDRAWAL POSSIBILITY

The lawyer, who is put in this uncomfortable moral dilemma, has the option of withdrawal. Under the Model Code, a lawyer may withdraw if the client's "conduct renders it unreasonably difficult for the lawyers to carry out his employment effectively."¹⁸⁶ The lawyer could argue that the on-going unreported abuse makes it unreasonably difficult for him to continue representation. Under Model Rule 1.16, a lawyer can withdraw if his or her client is pursuing an objective that the lawyer finds repugnant or imprudent.¹⁸⁷ Further, the rule provides a general provision of permissive withdrawal for any "other good cause."¹⁸⁸ The lawyer could argue that he finds his client's deci-

182. *Id.* R. 1.6 cmt. 6.

183. *Id.*

184. *Id.*

185. NATIONAL ELDER ABUSE INCIDENCE STUDY, *supra* note 8, at 4-7. Physical abuse constitutes only 25.6% of all substantiated cases of elder abuse. *Id.*

186. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110 (1983).

187. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2001).

188. *Id.*

sion to be imprudent or unwise, and therefore, can no longer represent her. He could also argue that he has good cause to withdraw because he will always be distracted by the fact his client is being abused. Also, if he is drafting a will for the abused woman, there could be future conflicts over whether to put the son in the will. The lawyer may find it repugnant for the abused woman to want to leave her son anything. The lawyer's option under the revised Model Rules is clearer. The lawyer may withdraw if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."¹⁸⁹ Because the lawyer most likely disagrees with not reporting the abuse, he could withdraw because of this fundamental disagreement.¹⁹⁰

However, withdrawing will not relieve the lawyer of his moral dilemma or stop the abuse. By withdrawing, he still knows that an elderly, frail woman is being abused, and he cannot do anything about it. Also, the elderly woman is left to find a new lawyer. Given the fact that the elderly are reluctant to seek legal advice in the first place,¹⁹¹ it is likely that the woman will not seek another lawyer's advice. Now, the abuse will continue and her other legal needs, like her will, are also neglected.

3. BREACH THE DUTY OF CONFIDENTIALITY AND REPORT THE ABUSE

The lawyer could breach his duty of confidentiality and report the abuse. However, it is possible that his report will do no good or even worsen the abusive situation. The victim has a right to refuse any help offered by adult protective services.¹⁹² The report could also escalate the violence in the home.¹⁹³ The abuser may find out about the report, blame the victim, and the report could lead to even more tragic results.¹⁹⁴ Lastly, more than likely, the victim will sever her relationship with the lawyer after the victim discovers the lawyer has violated the "sacred duty" of confidentiality. The elderly already harbor feelings of "attorney avoidance," and are reluctant to talk with

189. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

190. *Id.*

191. Adams & Morgan, *supra* note 65, at 23.

192. ADMIN. ON AGING, ELDER ABUSE PREVENTION, at <http://www.aoa.dhhs.gov/Factsheets/abuse.html> (last visited Aug. 18, 2003).

193. Brandl & Meuer, *supra* note 113, at 308.

194. *See id.*

strangers about private matters.¹⁹⁵ This lawyer has now confirmed both these beliefs and has left the woman feeling alone, bitter, and violated. Yet, the abuse goes on.

In conclusion, the ethical duty of confidentiality under the Model Code and the Model Rules prevents the lawyer from reporting elder abuse when the client refuses to consent to disclosure, unless he is in a state that requires attorneys to report the abuse. Even then, it is unclear whether these mandates abrogate the attorney-client privilege. Under the revised Model Rules, lawyers could only disclose the most egregious cases of elder abuse. Unfortunately, none of the ethical rules give guidance to lawyers on how to treat and counsel an abused client. Lawyers are left to allow the abuse to continue and pretend that it does not exist or withdraw from the representation. Neither are desirable outcomes, and in either case, the abuse continues.

B. Hypothetical #2: The Incompetent Client

Assume the same facts from the first hypothetical, but now the woman appears disheveled and confused during the interview. She has problems recalling events and dates when the attorney questions her about the abuse. Frequently, she appears to be just gazing out the window and living in her own separate world. Assume, as before, that the client says she does not want the lawyer to report the abuse. The lawyer is now confronted with different challenges. Does the client have the capacity to make this decision? How should the lawyer determine a client's competence? If he determines that she is incompetent, what actions can he take?

1. DETERMINING CAPACITY—"THE BLACK HOLE OF LEGAL ETHICS"¹⁹⁶

Neither the Model Code nor the Model Rules provide a clear definition of capacity.¹⁹⁷ Commentators have described the Model Code and Model Rules as being "delphic" in making capacity tests.¹⁹⁸ They "fail to offer adequate guidance for the lawyer in the 'unavoid-

195. Adams & Morgan, *supra* note 65, at 23.

196. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073, 1082 (1994).

197. See, e.g., Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 *J. CONTEMP. L.* 61, 77-78 (1988).

198. Margulies, *supra* note 196, at 1082.

ably difficult . . . position' of representing a client whose competence is in doubt."¹⁹⁹ The Model Code does not even contain a disciplinary rule on dealing with a questionably competent client.²⁰⁰ Ethical Consideration (EC) 7-12 states that a "mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer."²⁰¹ EC 7-12 continues on to state that a client may be legally disqualified from performing certain acts, but still may be able to understand and contribute to other matters.²⁰² If that is the case, "the lawyer should obtain from [the client] all possible aid."²⁰³ The Model Code never defines or guides the attorney on determining capacity.²⁰⁴ The hypothetical lawyer, who has just met his client, is left to determine whether: (1) his client has some physical or mental condition, although the lawyer has no medical or psychiatric training; and (2) that condition renders the client incapable of making a considered decision.²⁰⁵ Here, the lawyer, based on these vague standards, could determine that his client has some disorder or condition, as evident by her forgetfulness and inattentiveness. He could then believe that, because of this condition, she is making an irrational decision to not report the abuse. In the lawyer's mind, he cannot imagine why a rational, mentally competent person would choose to live with an abusive person. Therefore, under the competency "standards" of the Model Code, the lawyer could determine, based on one interview, that his client is incompetent.

The Model Rules give slightly more guidance, but still leave lawyers with no working definition of capacity.²⁰⁶ Model Rule 1.14(a) requires that a lawyer must, "as far as reasonably possible, maintain a normal client-lawyer relationship" with a client whose "ability to

199. Smith, *supra* note 197, at 73 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5 (1993)).

200. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 46 (2001). Only the Disciplinary Rules are mandatory in nature. MODEL CODE OF PROF'L RESPONSIBILITY Preamble and Preliminary Statement (1983). "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.*

201. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1983).

202. *Id.*

203. *Id.*

204. Smith, *supra* note 197, at 78.

205. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1983).

206. Margulies, *supra* note 196, at 1082.

make adequately considered decisions . . . is impaired.”²⁰⁷ As with the Model Code, a comment to the Model Rules explains that a client may not be competent to perform some acts, but still may have the ability to “reach conclusions about matter[s] affecting the client’s own well-being.”²⁰⁸ Therefore, this comment seems to indicate that the elderly client may have the ability to decide whether to live with her abusive son, even though appearing incompetent to make a decision about her will. However, the lawyer may still feel that the client is incapable of deciding whether to stay with her son, because the decision seems so irrational in the lawyer’s eyes. Even though it is a decision bearing on the client’s well-being, the lawyer could still believe that it is not “adequately considered” and not in the “client’s best interest.”²⁰⁹ Lawyers are “left to their own lights” when making such capacity decisions.²¹⁰

The Model Rules do allow lawyers to seek guidance from diagnosticians to help decide whether a client is competent or not.²¹¹ However, this provision presents significant problems. First, the Model Rules do not define who is an “appropriate diagnostician.”²¹² Secondly, confidentiality and loyalty issues arise. Although an ABA Formal Ethics Opinion stated that lawyers could consult with diagnosticians without breaching confidentiality,²¹³ special concerns arise with elder abuse cases. Most professionals, including doctors and mental health professionals, are required to report abuse under state mandatory reporting laws.²¹⁴ Thus, by seeking a consultation, the lawyer could essentially be reporting the abuse against his client’s wishes before a determination of capacity is even made. Even if the client agrees to meet with a diagnostician, the Model Rules do not specify who should bear the cost of the diagnosis.²¹⁵ Lawyers may forego seeking outside guidance because their clients cannot afford it.

207. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2001).

208. *Id.* R. 1.14 cmt. 1.

209. *Id.* R. 1.14.

210. Margulies, *supra* note 196, at 1082.

211. MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 5 (2001).

212. Rein, *supra* note 114, at 1147.

213. Edward D. Spurgeon & Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 STETSON L. REV. 791, 807–08 (2002) (discussing ABA Formal Ethics Opinion 96-404).

214. Moskowitz, *supra* note 44, at 94.

215. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2001).

That could potentially lead lawyers to determine capacity on their own simply to avoid extra costs for their clients.

The revised Model Rules do not provide much more guidance on the capacity issue than the Model Code and Model Rules do. Although revised Model Rule 1.14 has the new title of “client with diminished capacity,” as opposed to “client with disability,” the new rule still lacks a clear definition of capacity.²¹⁶ Like Model Rule 1.14, revised Model Rule 1.14 insists upon lawyers maintaining a normal relationship with diminished capacity clients when possible.²¹⁷ It also suggests that clients with diminished capacity have the ability to “reach conclusions about matters affecting [their] own well-being.”²¹⁸ A comment to the Rule does suggest lawyers consider the following factors when assessing capacity: (1) client’s ability to articulate reasoning leading to a decision; (2) variability of state of mind and ability to appreciate consequences of a decision; (3) the substantive fairness of a decision; and (4) the consistency of a decision with the long-term commitments and values of the client.²¹⁹ This is a helpful starting point for lawyers and should be part of the capacity analysis. The main text of the Rule, however, still allows lawyers to take protective action when the lawyer believes that the client cannot act in his own best interest.²²⁰ Given that the elderly woman wants to remain at home with her abusive son, it would be easy for her lawyer to assume that she is not acting in her own best interest and conclude that he does not even have to conduct the balancing test laid out in the comment. The best interest test provides too much leeway for lawyers to substitute their own values upon clients and never ascertain if the client’s actions can be explained by the *client’s* own values and concerns.

The revised Model Rules also allow lawyers to “seek guidance from an appropriate diagnostician” when determining the competence of a client.²²¹ Here, the rule explicitly makes an exception to the lawyer’s duty of confidentiality.²²² However, while disclosing the condition to the diagnostician is not a breach of confidentiality, the di-

216. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.14 (2001).

217. MODEL RULES OF PROF’L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.14 (2001).

218. MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 1 (2002).

219. *Id.* R. 1.14 cmt. 6.

220. *Id.* R. 1.14.

221. *Id.* R. 1.14 cmt. 6.

222. *Id.* R. 1.14.

agnostician most likely still has a duty to report the abuse.²²³ Thus, it is essentially like the lawyer is reporting the abuse himself to adult protective services. Therefore, while the revised Model Rules do provide a little more guidance on the issue of capacity, the hypothetical lawyer will probably assume that no rational person could want to live with an abusive person and summarily deem his client to be incompetent.

As the foregoing analysis indicates, the ethical rules allow lawyers wide discretion to determine capacity. This discretion is disturbing because an incompetency determination usurps a client's freedom of action and his or her individual autonomy.²²⁴ Sometimes people act contrary to what another believes is best.²²⁵ However, the ethical rules tell lawyers that a client is incompetent when the *lawyer* reasonably believes the client cannot act in his or her own best interest.²²⁶ Thus, if a lawyer personally believes his or her client is not acting in the "best" way, the lawyer can deem him or her to be incompetent, even though the client could be acting in his or her own personal best interest. One should not fault lawyers for using this test of determining capacity. The medical profession's traditional method of assessing capacity is to determine if the client is making the "wrong" decision.²²⁷ However, just because a decision causes harm or risk does not mean the client is incompetent.²²⁸ It is difficult, though, for lawyers to divorce their personal values from the values of their clients, especially when the lawyer is young and/or unfamiliar with handling elderly clients.²²⁹ This wide discretion given by the ethical rules also feeds upon the natural paternalistic instincts lawyers may have towards elderly clients.²³⁰ Further, lawyers simply are unqualified to make competency decisions.²³¹ Dr. Leonard Hellman, doctor and attorney, said: "I cannot imagine an attorney, no matter his background, in a legal office trying

223. Moskowitz, *supra* note 44, at 94.

224. Margulies, *supra* note 196, at 1073.

225. *Id.*

226. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

227. Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. REV. 54, 70 (1991).

228. *Id.*

229. See Smith, *supra* note 197, at 91.

230. *Id.* at 61.

231. Rein, *supra* note 114, at 1120.

to determine competence.²³² Many things, such as medication, depression, and poor hearing and eyesight, can make a client appear incompetent.²³³ Unfortunately, lawyers are commonly faced with competency decisions,²³⁴ and the ethical rules provide little help in making this difficult determination.

2. A LAWYER'S PROTECTIVE ACTION

Once a lawyer determines that a client is "incompetent," the ethical rules allow the lawyer to take protective action on behalf of the client. The most drastic action the lawyer can take is to seek appointment of a guardian.²³⁵ The Model Rules and the revised Model Rules permit a lawyer to seek a guardianship when "the client cannot adequately act in the client's own interest."²³⁶ The lawyer is again given wide discretion to determine what is in the client's best interest because the rules do not define how a lawyer should determine the client's best interest or explain when a guardianship is appropriate. For example, comment 3 to Model Rule 1.14 leaves it up to the lawyer's "professional judgment" to appoint the guardian when it is in the client's best interest.²³⁷ The revised Model Rule 1.14 maintains essentially the same language.²³⁸

The little guidance and wide discretion given to a lawyer to appoint a guardian is quite disturbing. One ward described:

I cannot tell you how much worse my mental condition is since I have been a "thing" of the court's without rights. I want to die. I pray to die. There is no happiness in life—my life is over. I would prefer death to living as a guardianship zombie the rest of my life.²³⁹

Lawyers have wide latitude to completely usurp their clients' autonomy by simply determining that a guardianship is in the clients' best

232. *Id.* at 1121. Ms. Rein describes in detail the long, complicated process of a psychiatric evaluation to determine capacity. *Id.* at 1123–25.

233. *Id.* at 1121.

234. Falk, *supra* note 227, at 73.

235. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

236. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

237. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2001).

238. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 7 (2002). "[T]he lawyer should consider whether appointment of a guardian . . . is necessary to protect the client's interests. . . . Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer." *Id.*

239. Rein, *supra* note 114, at 1151.

interest.²⁴⁰ The lawyer is left with little guidance on how to determine what is in the client's best interest.²⁴¹ The lawyer also could be biased because guardianships are a "safe option" because the lawyer does not open himself or herself to any liabilities by personally making decisions on behalf of the client.²⁴² Therefore, a lawyer, who is wholly unqualified and unguided as to determining capacity and who quite easily can misdiagnose a client, has the power to completely remove an elder's autonomy. Therefore, in the hypothetical, the lawyer does not know what is causing the woman's forgetfulness and inattentiveness. She could be on medication. She may not be able to hear her lawyer. However, the lawyer could construe this to be incompetency and appoint a guardian for her. Apart from stripping her of her autonomy, she may be removed from her home.²⁴³ If clients know about this possibility, they may never reveal the abuse in the first place.²⁴⁴ The abuse may then never be revealed. While it is good that the lawyer wants to seek help for his abused client, it appears that a guardianship will cause more harm than good, especially because the woman has stressed the importance of living at home.

The Model Rules allow the lawyer to act as a de facto guardian, meaning the lawyer can temporarily make decisions on behalf of the client.²⁴⁵ There are many benefits of de facto guardianships. They are less intrusive and temporary in length.²⁴⁶ They are good in emergency situations when action must be taken immediately.²⁴⁷ However, there are many downfalls. De facto guardian is a "loaded" term giving ex-

240. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

241. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002); MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

242. Margulies, *supra* note 196, at 1094.

243. Rein, *supra* note 114, at 1151.

Even greater than the fear of guardianship is the fear of institutionalization: "Our elders desperately want to remain in their own homes, stay out of the nursing home, and keep their independence. . . . They do not view the nursing home as a place to get better; they view it as a harbinger of death—a dismal way station from which there is no escape but death."

Id. (quoting Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1860–61 (1992)).

244. *See id.*

245. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 2 (2001).

246. Margulies, *supra* note 196, at 1094.

247. *Id.* at 1095.

trème power to the lawyer.²⁴⁸ As with competency and guardianship determinations, the lawyer has no standards on how to decide what is in the best interest of the client, and, thus, it is very easy for a lawyer to be paternalistic when dealing with a “less capable” person.²⁴⁹ In the hypothetical, if the lawyer decides to act as a de facto guardian and report the abuse, the disclosure could do more harm than good. As already discussed, a report and visit by adult protective services could anger the abusive son and escalate the violence. The woman may deny the abuse and refuse help. Adult protective services may remove the woman from her home and have her son arrested. Is the lawyer really acting in the client’s best interest by simply reporting the abuse without the client’s consent?

In conclusion, the ethical rules do not provide enough guidance for lawyers on how to determine capacity. Lawyers are commonly faced with questionably competent clients and need more structured guidelines on making these difficult capacity decisions. The available protective actions of guardianships and de facto guardianships strip the abused client of his or her autonomy and freedom of action. The client could also be removed from his or her home and institutionalized. A report to the authorities may cause more damage, stress, and trauma than already is occurring in the current situation.

IV. Recommendations

A. The Competent Client

Lawyers should strive to gain consent from their clients to report the abuse or to take other protective action. Therefore, lawyers can avoid the moral and ethical dilemmas created by the professional rules of responsibility and help combat elder abuse. An initial rejection of disclosure should not be the end of the lawyer’s attempt to gain consent.²⁵⁰ Lawyers need to continuously assert that the violence is unacceptable.²⁵¹ Frequently, elderly victims feel helpless and rejected because other professionals have discounted their stories of

248. *Id.* at 1094.

249. Rein, *supra* note 114, at 1162 (citing Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 519, 576).

250. See Brandl & Meuer, *supra* note 113, at 306.

251. *Id.* at 307.

abuse.²⁵² A lawyer's supportive and kind words could be beneficial at a later date.²⁵³ Victims often remember these words, even if they do not take immediate action.²⁵⁴

Most importantly, lawyers need to discover why abused clients do not want to report the abuse. Lawyers can use a modified version of the process of "gradual counseling" to better understand the rationale behind the client's decision.²⁵⁵ Although Professor Linda Smith introduced gradual counseling as a tool for lawyers to assist clients of questionable capacity, this process also allows lawyers to elicit and understand client goals and values behind decisions.²⁵⁶ The process begins with the lawyer stating the client's problem and the goals the client wants to achieve.²⁵⁷ If an abused client is refusing to consent to disclosure, his or her initial stated goal may be to keep the abuse a secret. Next, the lawyer needs to identify the client's values and motives behind the decision.²⁵⁸ The lawyer should ask probing questions into motivations behind nondisclosure. For instance, does the victim fear institutionalization if the abuse is reported? Does the victim want to protect the abuser and keep the family together? Does the victim fear going to court? Once the lawyer has determined the client's dominant values and motivations, the lawyer needs to address these fears and present options to the abused client on how she can escape the abuse without those fears becoming a reality. For example, an abused client has refused to disclose the abuse. The lawyer discovers that the client fears being placed in a nursing home. The lawyer could then suggest the possibility of moving into alternative housing, instead of just recommending reporting the abuse. The client may now change her goal from staying in the abusive relationship to wishing to escape the abuse. It is essential that lawyers address their abused clients' fears and inform them about alternative options that are available to them. In order to do that, lawyers must educate themselves on elder abuse programs in their areas, like elder abuse shelters, hotlines, alternative housing options, and family counseling services. Through this counseling process, a lawyer does not merely give up after his or

252. *Id.*

253. *Id.*

254. *Id.*

255. Smith, *supra* note 197, at 92.

256. *Id.*

257. *Id.*

258. *Id.* at 93.

her client refuses to report abuse. Lawyers need to take the time to understand the rationales behind their clients' decisions and present escape options that comport with the clients' overall goals and values. By doing so, clients will be much more likely to consent to disclosure of abuse.

B. The Incompetent Client

Lawyers must resist the temptation of assuming that clients are incompetent simply because they do not want to report the abuse. The client may have many good reasons for not wanting to report the abuse. Lawyers should begin with the contextual approach to determining capacity, as described by Peter Margulies and found in comment 6 of revised Model Rule 1.14, to avoid any rash determinations of capacity.²⁵⁹ Under this approach, lawyers consider the following factors when determining a client's capacity:

(1) Ability to articulate reasoning behind the decision.²⁶⁰ If there is no basis behind the client's decision, then the client may truly be lacking the capacity to make the decision.²⁶¹ When confronting an abused client, before assuming the client lacks capacity, the lawyer needs to ask why the client wants to stay in the abusive situation. This step involves the second step in the gradual counseling process, where the lawyer works to understand the values and motivations behind a client's decision. If the client's only rationale behind nondisclosure is "because I feel like it," that is not a sufficient reason.²⁶² However, if the client lists reasons like fear of institutionalization, fear of court, or fear of breaking up the family, these are all sound reasons behind not wanting to report the abuse. At this stage, the lawyer can address the client's fears and present possible solutions to the client on how to escape the abusive situation.

(2) Variability of state of mind.²⁶³ The lawyer must determine how much the elder's level of alertness fluctuates.²⁶⁴ The lawyer may have to try interviewing the client at different times of the day.²⁶⁵ If

259. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2002); Margulies, *supra* note 196, *passim*.

260. Margulies, *supra* note 196, at 1085-86.

261. *Id.* at 1086.

262. *See id.*

263. *Id.*

264. *Id.*

265. *Id.* at 1092.

the client is hard of hearing, he or she may appear to be nonresponsive or confused, because he or she cannot hear or understand what the lawyer is saying.²⁶⁶ The lawyer should be sure to speak slowly and interview the client in a quiet room, in order to avoid background noise.²⁶⁷ The lawyer should also determine if the variability of state of mind is the side effect of any medication the client is on.²⁶⁸

(3) Appreciation of consequences of decision.²⁶⁹ The attorney must determine that the client understands that by not reporting the abuse, he or she will continue to become injured. If the victim believes that the abuse will just stop, that could be a sign that he or she does not understand the true consequences of the decision. However, in the context of abuse, this may not be a true sign of incompetency, but merely a sign of unrealistic hope.

(4) Consistency with lifetime commitments.²⁷⁰ Lawyers must lay their own values aside and look at what the client really wants. It may be hard to understand why the abused client does not want to report the abuse, but it may be consistent with a lifetime commitment, like remaining at home or keeping the family together. This also ties in with the second step of gradual counseling, in that lawyers must come to understand the client's overriding values behind a decision of nondisclosure.

Lawyers should take this contextual approach, combining with it some of the techniques from gradual counseling. This combination of gradual counseling and contextual approach to capacity provides lawyers with a clearer standard of capacity than provided by the professional rules of responsibility, which only require lawyers to take protective action when they reasonably believe the client cannot act in his or her own best interests. Comment 6 to the revised Model Rules, which provides a bare outline of the contextual approach to capacity, is a step in the right direction for providing proper guidance to lawyers when determining capacity, but does not explain the type or depth of counseling needed before a lawyer makes a capacity determination.

Because the ethical rules provide little guidance, lawyers need to take affirmative steps to educate themselves on elder abuse. A survey

266. Smith, *supra* note 197, at 63.

267. *Id.*

268. Adams & Morgan, *supra* note 65, at 19.

269. Margulies, *supra* note 196, at 1087.

270. *Id.* at 1085.

of eight family law textbooks revealed that not a single one of them presented any material on elder abuse, yet featured domestic violence and child abuse prominently.²⁷¹ Some law schools do offer specialized courses in elder law, and students should take advantage of that opportunity. Professors should also strive to incorporate elder abuse issues into their general curriculum classes. For example, a criminal law class could discuss elder abuse in the context of assault and battery, murder, or rape.²⁷² Elder abuse encompasses numerous complex issues of confidentiality and capacity that would enhance a professional responsibility class.²⁷³ A discussion of elder abuse in family law would also complement the study of domestic violence and child abuse, which are already afforded a significant amount of time.²⁷⁴ Reaching out in these general curriculum courses is especially important, because it will at least expose future lawyers to the horrific problem of elder abuse. Hopefully, after graduation, the young lawyers will be more apt to recognize and handle a case of elder abuse. More importantly, they will be armed with knowledge in order to effectively fight our nation's "epidemic" of elder abuse.

Practicing lawyers should also educate themselves on elder abuse by attending continuing legal education classes on the subject. Bar associations should offer classes on how to effectively counsel an elderly client and discuss the unique ethical dilemmas that arise when that client is a victim of abuse. Lawyers should also learn about what elder abuse programs their communities offer, so that they will be ready to help an elderly abused client. Such information can be invaluable when persuading a client to leave the abusive situation.

V. Conclusion

Elder abuse is a pervasive problem throughout the United States. For over twenty years, Congress has recommended passage of national legislation to address this problem, yet elder abuse still remains our national disgrace. Lawyers are left with little guidance from the professional rules of responsibility on how to handle elder abuse. The duty of confidentiality most likely forbids a lawyer to disclose the abuse, unless the client consents. Even if the lawyer is in a

271. Moskowitz, *supra* note 6, at 191-92.

272. *Id.* at 206.

273. *Id.* at 221.

274. *Id.* at 225.

state that requires lawyers to report abuse, it is unclear whether these mandatory reporting laws abrogate a lawyer's duty of confidentiality. When confronted with an abused client, it can be quite easy for a lawyer to summarily declare the client to be incompetent if he or she refused disclosure. However, lawyers need to undertake a more thorough counseling process in order to fully understand a client's reasoning. By understanding a client's motivation, the lawyer may not only avoid mistakenly labeling a client as incompetent, but will also be able to allay some of the fears the client may have if he or she reports the abuse. By addressing these fears and presenting the client with alternative options, the lawyer will be able to obtain help for the abused client and eliminate at least that one person from the hidden crime of elder abuse.