

Practical Solutions to Elder Financial Abuse and Fiduciary Theft

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A. Introduction

Elder abuse is becoming a well-known and recognized crime. The media is quick to cover many of the horrifying, heinous cases of elder abuse each year. Cases of elder financial abuse and fiduciary theft, however, rarely garner the same attention. Most of these cases are committed by family members, and relatively few cases of financial abuse

and fiduciary theft are ever reported to law enforcement. Further, these types of abuse come in a variety of guises, which makes identifying actual instances of financial abuse and fiduciary theft more challenging. When a client first meets with you to discuss suspected abuse, or if you happen upon a situation that appears questionable, the options

available vary widely, depending on the situation. The following focuses on the practical steps practitioners, and others, may take to investigate and address possible elder financial abuse when presented with those situations.

B. Background Information

Definitions

To identify potential elder abuse, it is important for practitioners to understand what elder

abuse looks like. There are several types of abuse of older people that are generally recognized as being elder abuse, including:

- Physical: e.g., hitting, punching, slapping, burning, pushing, kicking, restraining, false imprisonment/confinement, or giving excessive or improper medication.
- Psychological/Emotional: e.g., shouting, swearing, frightening, or humiliating a person. A common theme is a perpetrator who identifies something that matters to an older person and then uses it to coerce an older adult into a particular action. It may take verbal forms such as name-calling, ridiculing, constantly criticizing, accusations, blaming, and general disrespect, or nonverbal forms such as ignoring silence or shunning.
- Financial abuse/exploitation: e.g., illegal, or unauthorized use of a person's property, money, pension, or other valuables, including changing a will to name the perpetrator as heir. Financial perpetrators may act by deception, coercion, misrepresentation, undue influence, or theft. This includes fraudulently obtaining or use of a power of attorney. Other forms include deprivation of money or other property, or eviction from their own home.
- Scam by Strangers: e.g., worthless "sweepstakes" that elderly persons must pay in advance to collect supposed winnings, fraudulent investment schemes, predatory lending, and lottery scams.
- Sexual abuse: e.g., forcing a person to take part in any sexual activity without

his or her consent, including forcing an older adult to participate in conversations of a sexual nature against their will. Sexual abuse may also include situations where a person can no longer give consent, such as in cases of dementia.

- Neglect: e.g., depriving a person of food, heat, clothing, comfort or essential medication and depriving a person of needed services to force certain kinds of actions, financial and otherwise. The deprivation may be intentional (active neglect) or happen out of lack of knowledge or resources (passive neglect). Additionally, some state laws also recognize the following as elder abuse:
 - Rights abuse: denying the civil and Constitutional rights of a person who is old, but not declared by a court to be mentally incapacitated. This is an increasingly recognized aspect of elder abuse.
 - Self-neglect: elderly persons neglecting themselves by not caring about their own health or safety. Self-neglect (harm by self) is treated as conceptually different than abuse (harm by others).
 - Abandonment: deserting a dependent person with the intent to abandon them or leave them unattended at a place for such a time as may be likely to endanger their health or welfare.

Statistics

Colorado Adult Protective Services' Data Summary: State Fiscal Year 2008-2009 indicates that 10,999 referrals to Adult Protective Services were made. 14% of those referrals were for financial exploitation – 1,540 people. 60% were female, 66% were white, 41% lived alone, and 23% lived with adult children. APS classified 36% of the financial exploitation referrals as frail or elderly, while 12% had some form of dementia, and another 10% had a mental illness or emotional issue. Interestingly, 61% were considered competent when reported. Not surprisingly, 76% of all financial exploitation perpetrators were family members. Therefore, for that fiscal year, 1,170 Coloradans were victimized by a family member. That figure is just from the reported cases, and it is widely believed that many cases of elder abuse are unreported, as mentioned below. National studies show that as a person ages, the likelihood of victimization increases. In fact, a National Elder Abuse Incidence Study found that persons aged 80 and older are abused and neglected two to three times their proportion of the elderly population.¹ To make matters worse, other statistics show that as much as 84% of elder abuse cases went unreported each year, and only 16% of those who suffered from elderly abuse lodged a complaint with authorities. According to the best available estimates, up to two million Americans aged 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care and protection. Current estimates put the overall reporting of financial exploitation at only 1 in 25 cases, suggesting there may be at least 5 million financial abuse victims each year. These statistics, coupled with the fact that the over-65 population in Colorado will increase by 72% in the next decade, evidence the growing need to be able to promptly identify, and combat potential exploitation.

C. Tips for Preventing Abuse by an Agent under a Power of Attorney

A Power of Attorney is an important and necessary part of any estate plan. A Power of Attorney naming the wrong person as agent, however, only increases the potential for abuse. Yet, with thoughtful execution by both attorney and client, a Power of Attorney

can be a crucial method of preventing abuse. First, practitioners should discuss the importance of choosing the best agent by explaining the powers the potential agent will receive and the important characteristics an agent should possess. If the principal is at all uncomfortable with the thought of a person having broad authority to act on their behalf, then that person should not be chosen. These discussions should include exploring all possible options, including both family members, trusted friends, and professional alternatives. The client (principal) and the potential agent should understand the duties and responsibilities of an agent, as well as the rights of the client, how to document, report, and avoid self-dealing. It also is important to have discussions on whether reasonable fees are allowed. The agent also should be warned against commingling funds and the importance of establishing fiduciary accounts rather than jointly owned bank accounts. There are several provisions the practitioner can include in the Power of Attorney document, to further prevent fiduciary abuse. The first of these is to include a provision that requires an accounting, both annually and after revocation or termination. Additionally, requiring the agent to communicate with the client about the status and nature of their financial affairs offers further protection. Limits may be put on gifts, transactions, or charitable donations. If desired, the client can require third party approval for the agent to carry out major transactions, including real estate transactions, beneficiary changes, and other large transfers. Encouraging multiple party involvements, rather than allowing the agent to act in isolation requires the agent to be accountable to parties other than the client, who may be easily influenced by loved ones. Co-agent agreements can also provide this protection, but also increase the likelihood of litigation down the road if the co-agents cannot agree. As a final precaution, principals may request that their agents and fiduciaries submit to a credit check and criminal background check, although such a request may be uncomfortable for a principal to ask a family member.

D. Initial Factors to Consider

When a new (or former) client comes into your office alleging he/she, or another is being financially exploited by another, it is imperative to assess the situation immediately. There are several factors a prudent practitioner should consider. Beyond the more obvious factors like the identities of the client, the purported victim, the alleged perpetrator(s), and any other individuals concerned with the welfare of the purported victim, other important facts to obtain include the severity level of the alleged financial abuse, the size of the purported victim's estate, family dynamics, and of utmost importance: the immediacy of the risk. When considering the level of risk, an important factor is whether the alleged perpetrator is a fiduciary to the purported victim, (e.g., an agent under a Power of Attorney, guardian, conservator, trustee, etc.) and whether the alleged perpetrator is likely to retaliate. Additionally, practitioners should consider the purported victim's capacity and ability to consent to transactions, as well as the purported victim's history of gifting to, or support of, the alleged perpetrator. If the purported victim has capacity, and a long history of giving money to the alleged perpetrator, the supposed exploitation may be nothing more than a gift. Thus, the potential for retaliation by the alleged victim (e.g., by disinheriting the accuser or the loss of the relationship) and the accuser's tolerance for assuming that risk should be discussed. Similarly, it is also important to consider the credibility and possible motives of the person alleging the abuse, including whether the person raising the alarm appears

motivated to stop the abuse and protect the alleged victim's welfare; or whether the reporting person may be more interested in taking over control for their own nefarious reasons. Other factors to consider include: whether civil or criminal proceedings have been initiated; The ability and willingness of the party to pay for legal and other services to address the potential abuse; The willingness of the attorney to take on a *pro bono* case, or a case that may become *pro bono* at some point; and the obligations of the attorney under Colorado Rule of Professional Conduct 1.14, if the client is the alleged victim and has diminished capacity.

E. Potential Solutions

After considering the verifiable facts and assessing the other factors discussed above, practitioners have a variety of options to address the situation. Each has advantages and disadvantages, as well as differing levels of complexity and expense.

General Solutions

First, and perhaps least complex, is to simply talk to the alleged victim about any questionable circumstances. As discussed above, many factors go into determining if exploitation occurred at all. Speaking with the alleged victim may provide a quick solution to alleged abuse and educate the alleged victim on possible vulnerabilities. If necessary, the practitioner could also encourage the alleged victim to seek a medical evaluation. This could determine the competency of the alleged victim, and assist in determining what level of protection, if any, the alleged victim needs. If appropriate, refer the matter to Adult Protective Services and/or law enforcement officials.

Ordering an ownership and encumbrances (O&E) report for any real estate owned by the alleged victims is a second potential solution relatively low on the complexity and expense scale. Order and O&E report may uncover real estate transfers and/or suspicious encumbrances. Several other solutions depend on gaining access to the alleged victim's financial and medical records or providers. If the practitioner has access legitimately, he or she can search bank statements for questionable transactions and recently executed estate planning documents, as well as medical information to help ascertain whether the alleged victim has diminished capacity. Further, the practitioner may alert the alleged victim's banks and other financial institutions, advisors, and/or attorney of the suspected abuse. If the suspected perpetrator is acting under a power of attorney, the alleged victim may revoke the power of attorney, and notify the financial institutions, the agent, and record the revocation in any county in which the victim owns real estate. Finally, it may be necessary to confront the alleged perpetrator, either without attorneys involved, or through counsel. Arranging a family meeting to discuss the problems and possible solutions, with or without lawyers, may also lead to a potential resolution. These interventions may be used to implement a system of checks and balances, and to encourage transparency regarding any future transactions.

Mediation, either with or without lawyers, is another viable option.

Specific Solutions with Relevant Legal Authority

There are several, specific actions practitioners can take to prevent, or impede potential abuse and/or exploitation. The following outlines these options, as well as the relevant legal authority.

If a power of attorney is involved, a person report to the Court to investigate the situation pursuant to C.R.S. §15-14-716, which allows a broad group of persons (including a "person that demonstrates sufficient interest in the

principal's welfare") to petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief.

- Protective proceedings (guardianships and conservatorships)
- If the alleged victim has or may have diminished capacity, initiate a conservatorship, guardianship, or other protective order under C.R.S. Title 15, Article 14. However, practitioners should be careful when initiating protective proceedings because they sometimes may spin out of control and incur substantial legal fees.
- Practitioners also should be wary in advising their clients about recouping attorney's fees from the estate of a respondent. Although there is legal authority⁶ that may allow some or all the attorney's fees to be recovered, there are no guarantees, particularly in contested protective proceedings when attorneys' fees and costs may be tens of thousands of dollars and multiple parties may claim their actions benefited the respondent's estate.
- An emergency guardian and special conservator can also be sought and notice to the respondent and other parties is not required.⁷ However, it is good practice for practitioners to attempt to give notice to affected parties unless a legitimate concern exists, for example, a concern that financial exploitation is occurring and giving notice may encourage the perpetrator to drain the alleged victim's funds and flee. Practitioners should not fail to give notice of emergency proceedings solely to make it easier to obtain emergency orders without a contested hearing.
- If a fiduciary is involved and there is an open estate, report the situation to the Court under the Fiduciary Oversight Act, C.R.S. §15-10-501, *et seq.* This C.R.S. §15-10-601, *et seq.* (Compensation and Cost Recovery Act)
⁷C.R.S. §§ 15-14-312 and 406(7) relatively recent statute allows the Court to address suspected fiduciary abuse and grant relief.
- If there is an open probate or conservatorship estate, seek a citation pursuant to C.R.S. §15-12-723. Under this statute if a party complains to the court in writing that a person, *inter alia*, is "suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the deceased or protected person" then the "court may cite such suspected person to appear before it and may examine him on oath upon the matter of such complaint."⁸ A petition is filed with the court and the court may issue a citation to appear to the alleged perpetrator. If the cited party fails to appear, the court even has authority to issue a bench warrant. At the citation hearing, testimony can be elicited under oath and may become critical evidence in a subsequent civil and/or criminal proceeding.
- If the client has or obtains requisite standing, seek a civil protection order pursuant to C.R.S. §13-14-101, *et seq.*, which may be sought to "prevent emotional abuse of the elderly or of an at-risk adult."⁹
- If the client has or obtains requisite standing, file a civil action against the purported perpetrator alleging civil causes of action, such as breach of fiduciary duty, breach of confidential relationship, conversion, and/or unjust enrichment. Seeking the legal remedies of a constructive trust and/or a resulting trust may also be necessary. Once

a court proceeding is initiated, the practitioner should record a *lis pendens* in any county in where the alleged victim owns real estate.

Referral of the matter to law enforcement. Police departments and district attorney's offices in many jurisdictions are making the criminal prosecution of elder abuse and exploitation a higher priority than in the past, similarly to the way in which law enforcement started viewing domestic violence several decades ago. Like domestic violence, elder abuse, and exploitation is not merely a "family matter" and many law enforcement agencies are pursing criminal charges against alleged perpetrators for the safety and welfare of the elderly population and the obvious public policy considerations.

F. Conclusion

Elder abuse and exploitation are a serious issue facing older adults, and will become more

prevalent as the overall population ages. The number and variety of types of abuse, coupled with the fact that most cases of abuse are committed by family members make identification of abuse difficult for police, practitioners, and professionals. Fortunately, there are steps legal practitioners can take to identify instances of elder abuse and exploitation. With an appropriate investigation by considering several important factors, practitioners have a myriad of potential solutions available, to combat potential elder abuse and potentially help curb its growth.