

Elder Abuse: Mandatory and Permissive Reporting For Lawyers

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Introduction

Lawyers encounter clients who have experienced abuse, neglect, and exploitation.¹ Sometimes people come to lawyers for help with abuse, and other times the abuse is discovered while trying to help clients with something unrelated to the abuse. Some clients want help and interventions, some do not.

When working with older adults, lawyers may be faced with legal and ethical decisions about when and how to report suspected abuse. In making these decisions, lawyers must balance the ethical need to honor their client's autonomy with potential legal requirements to intervene.

This balance between autonomy and protection is multi-layered, and requires a careful awareness of the Model Rules of Professional Conduct and state reporting laws, as well as a clear grasp of the ethics of counseling clients with diminished capacity.

This Chapter Summary is intended to introduce lawyers to the concept of mandatory and permissive reporting, and provide an overview of the analysis a lawyer should take when determining how to proceed in circumstances of suspected abuse.

1) Lawyers Must Balance Client Autonomy and Protection

Family, close friends, and caregivers are most likely to be the perpetrators of elder abuse.² Many people are reluctant to involve outsiders in what they view as a family matter. Lawyers may have clients who want the abuse or theft to stop, but they are unwilling to call Adult Protective Services (APS) or seek criminal prosecution of a family member or friend.

Adults have the right to knowingly consent to activities that would be a crime without consent. The Constitutional right to privacy, and our principles of self-determination, protect this option. As a civil society, we set limits on what an adult can consent to and we protect members of society who are considered vulnerable or unable to protect themselves. The legal and ethical challenges involved require careful and thoughtful balancing of autonomy and protection. Sometimes the legal answer to report is not the ethical answer that honors the adult's choice. Sometimes the ethical answer of honoring client choice or protecting the client from unwanted intervention ignores the law.

When lawyers work with older adults who may be abused, lawyers need work with the client, within the laws and the ethics rules to determine what actions to take. Lawyers face the challenge of helping their client, while protecting the client, and honoring the client's directions regarding the objectives of the representation.³ Lawyers and advocates may find themselves faced with a mandatory reporting law and a client who does not wish to report or who may face further harm by reporting.

¹ For brevity, we will use the term "abuse" to represent reporting decisions about abuse, neglect, and exploitation.

² National Center on Elder Abuse, Report on Statistics and Data, available here: ncea.acl.gov/about-us/whatwedo/research/statistics-and-data.aspx.

³ ABA Model Rules of Professional Conduct Rule 1.2

2) State Statutes Can Guide a Lawyer in Determining When to Report

All states require the reporting of elder abuse or abuse of vulnerable adults.⁴ A careful analysis of mandatory reporting statutes requires determining 1) is the individual covered by the statute; 2) is the lawyer or advocate a mandated reporter; and 3) is reporting in the best interest of the client.

Most statutes apply a two-part test to determine if the person is covered under the law. To be covered, a person needs to be in the age group covered by the statute and then be eligible for services based on being vulnerable as defined in the statute.⁵

About half of the adult protective services statutes only cover persons above the age of 60.⁶ The states that separate 60 and above from other adults sometimes have a distinct system for abuse of adults with disabilities under the age of 60. The modern trend is that vulnerable adult statutes cover everyone over the age of 18.

Practice Tip

Step 1: Is the person covered under the statute by age group?

- Over Age 60
- Vulnerable adult age 18 or over
 - » If no, mandatory reporting does not apply.
 - » If yes, go to step 2.

Step 2: Is the client eligible for services based on age, illness, vulnerability, or disability?

- » If no, mandatory reporting does not apply.
- » If yes, go to step 3.

Step 3: Are you a mandatory reporter under state law?

- » If no, is permissive reporting in the best interest of the client and desired by the client?
- » If yes, go to step 4.

Step 4: If the client is covered under the statute, and eligible for services under the statute, and you are a mandatory reporter, what does the client want to do?

- » If the client wants to report, or is unable to make a choice, go to step 5.
- » If the client does not want to report, go to step 5.

Step 5: Is reporting in the best interest of the client when weighing the burden of reporting against the benefits? Will reporting leave the client in a better place than not reporting?

- » If yes, go to step 6.

⁴ Mandatory Reporting laws, Stetson Law, (2016), available at: stetson.edu/law/academics/elder/home/media/Mandatory-reporting-Statutes-for-elder-abuse-2016.pdf.

⁵ Condition - Threshold Eligibility For Adult Protective Services: Comparison Chart Of Criteria, By State, ABA Commission on Law and Aging, Lori Stiegel, 2007, available at: americanbar.org/content/dam/aba/administrative/law_aging/Condition_Threshold_Eligibility_Criteria_for_Adult_Protective_Services_by_State.authcheckdam.pdf.

⁶ *Id.*

- » If no, is there a legal or ethical reason for you to avoid reporting?

Step 6: Are there ethical restraints on you reporting?

- » If yes, don't report.
- » If no, explain to the client what you must do and why, and report. Help the client minimize undesirable consequences.

If the person is in a covered age group, they must also then have a condition that qualifies them as someone in need of assistance or a vulnerable adult. The modern trend is to list mental or physical conditions that make the adult vulnerable to abuse or exploitation or limit the person's ability to self-advocate.⁷ About 1 in 5 states list age alone as a condition that makes a person vulnerable.⁸

The more recent statutes generally exclude from coverage individuals who are able to self-advocate. If the client is able to knowingly say, "I understand what is happening in my life and I don't want help," mandatory reporting does not apply in many states.

3) Reporting Has an Impact on the Older Adult Client

There is a burden for the client when a report is filed. In most cases, an APS case worker (frequently a social worker, sometimes law enforcement) will visit the client. Many people find a visit from "someone from the government" disturbing. Intervention by APS or law enforcement can lead to exclusion of family members, loss of caregivers, pressure for the person to move, to pursue medical care, or to accept outside help. While all of these interventions are intended to improve the safety and quality of life of the person, they also cause a disruption in the person's life. Balancing the burden of reporting are the benefits gained by reporting. Some of the benefits of reporting could include having APS as an advocate for the individual and providing access to APS programs and services, such as emergency shelter or assistance with food, medical care, or utilities.

CASE EXAMPLE

Marty is seeking help sorting out why his property tax bill didn't arrive. You checked with the tax office and discovered that his house was now in his daughter's name. The records show that she used a power of attorney to transfer the home to herself. You explain the options for trying to get the house returned to his name, and for stopping future misuse of the power of attorney. He agrees to revoke the power of attorney and asks you to send a letter to his daughter demanding return of the property under threat of going to court for breach of fiduciary duty. You explain that a report to Adult Protective Services, would strengthen your case if you need to go to court. He says, no, please don't file a report with APS.

Do you?

- A. Follow his directions?
- B. Report over his objection?
- C. Ask for an ethics opinion on not reporting?

The answer depends on which state you are in and whether you are a lawyer or a non-lawyer. Generally, if Marty is able to understand what is happening and says, "no, I don't want to report," he is not covered under most laws. Even if he is covered and the lawyer is a mandatory reporter, reporting would breach the ethical duties of confidentiality and allowing the client to determine the goal of the representation. If the

⁷ *Id.*

⁸ *Id.*

situation was different, and Marty was unable to understand the choices he was making, and if the benefit of reporting outweighed the burden, then the lawyer should ask for an ethics opinion on not reporting.

4) Look to State Statutes For Details on “Mandatory Reporters”

Who is a mandatory reporter? Approximately 30 states require reporting only by persons specifically listed in the statute.⁹ The most common listed mandatory reporters include health care providers, human services providers, and law enforcement.¹⁰ 16 states require reporting by any person having reason to believe abuse has taken place, and 4 states specifically list lawyers as mandatory reporters.¹¹ If you, as a lawyer, are included as a mandatory reporter, you need to conduct a careful analysis to determine if your client is covered under the statute, and if so, if it is ethical for you to report.

5) Under Certain Circumstances, Permissive Reporting May Help Client Access Resources and Services

In states that do not designate mandatory reporting, or if the circumstance does not require a lawyer to report, lawyers may have the option of permissive reporting under the right circumstance. In some locations, reporting triggers access to resources, programs, and services that clients may not be able to access without working through APS. To offer clients good advice and help them weigh the pros and cons of reporting, it is necessary to know what APS can or cannot do in your community.

In many communities, APS and law enforcement work closely together. If the situation is one where criminal prosecution is desired and likely, reporting to APS may be the first step.

Permissive reporting can be done any time with a client’s consent. If the client is not able to consent, the lawyer needs to analyze if reporting is in the best interest of the client.

6) Lawyers Also Need to Balance Model Rules of Professional Conduct into Reporting Decisions

The Model Rules of Professional Conduct (MRPC) Rule 1.2 directs lawyers to let the client decide the “objectives of the representation.” Under Rule 1.2, the client should decide to report or not report. It is the duty of the lawyer under MRPC Rule 1.4 to communicate with a client in a manner that the client can understand. For an abuse case, this requires explaining to the client what will happen when a report is filed, what programs and services may be available, and the possibility of criminal charges against the abuser. If the client understands all of this and instructs the lawyer to not file a report with APS, the client is not a vulnerable adult covered by the mandatory reporting law in many states. In some states, mere age is a trigger for mandatory reporting and the lawyer needs to determine if they are going to follow the reporting law over the objection of the client or the ethics rules.

In some cases, mandatory reporting statutes can require lawyers to make difficult decisions about continuing representation. If the client knowingly asks that their lawyer not report, but the law says the lawyer must report, MRPC Rule 1.16 mandates that the lawyer withdraw if “the representation will result in violation of the rules of professional conduct or other law.” **If you are uncomfortable with the decision, you should seek an advisory ethics opinion in your state.**

7) Look to MRPC Rule 1.14 for Guidance on Counseling Clients With Diminished Capacity

⁹ Mandatory Reporting laws, Stetson Law, (2016), available at: stetson.edu/law/academics/elder/home/media/Mandatory-reporting-Statutes-for-elder-abuse-2016.pdf

¹⁰ *Id.*

¹¹ *Id.*

MRPC Rule 1.14 provides guidance for working with a client with diminished capacity and governs a lawyers' actions when the client has a limited ability to decide. The first principal of MRPC Rule 1.14 is to maintain a normal attorney-client relationship, to the extent possible, with a client who has diminished capacity. All of the usual ethical rules on the allocation of authority (MRPC Rule 1.2), confidentiality (MRPC Rule 1.6) and avoiding conflicts (MRPC Rules 1.7-1.11) apply to working with a client with diminished capacity. MRPC Rule 1.14 (b), directs the lawyer to take protective actions when, "the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest...".

There are many options for seeking protective action under MRPC Rule 1.14 (b). This excerpt from Comment 7 is particularly instructive:

"In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."

Guardianship should be seen as the last resort for helping persons with diminished capacity. In addition to the time and cost involved in a guardianship, guardianship is a significant intrusion into the civil, human and Constitutional rights of the person and can cause significant trauma. For guidance on exploring alternatives to guardianship see the [PRACTICAL Tool](#),¹² published by the ABA Commission on Law and Aging.

The comments to MRPC Rule 1.14, beginning at comment 5, anticipate the need to take protective actions. Particularly helpful is the following passage:

"Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections."

The lawyer's analysis of reporting needs to weigh the known wishes and values of the client. Does the client have a history of seeking outside help, or has the client knowingly avoided seeking help? What impact would reporting have on the client, and persons important to the client? What alternatives are available to stop the abuse? Is there a way of returning property stolen by exploitation? If a judge ordered restitution, would your client be able to collect? Are other options available to help the client short of outside involvement?

If, at the end of this, the advantages of reporting outweigh the burden, the best interest of the client will lead to the decision to report. If the burdens outweigh the benefits, the best interest of the client may be to not report.

Case Example

Lawyer Lucy has been asked to help Client Clare who is 70 years old. Clare has a medical condition that makes it impossible for him to talk. Clare is cared for at home by two of his adult children. Lucy notices

12 PRACTICAL Tool, ABA Commission on Law and Aging, (2016) americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALTool.authcheckdam.pdf

bruises on Clare's wrists, and abrasions on his face. Lucy notices one of the caregivers being unnecessarily rough with Clare and saying demeaning things to Clare. Lucy suspects abuse. Lucy explains to Clare that he deserves better treatment and suggests reporting to APS. Clare shakes his head no, and gets emotional when Lucy suggests reporting.

- Questions Lawyer Lucy should consider:
 - » Is Clare likely covered under the APS statute?
 - » Does Clare's inability to talk prevent him from making decisions about reporting?
 - » What are the burdens and benefits of reporting?
 - » What alternatives might be available?

8) In Some Circumstances, The Lawyer Must Counsel The Client on Mandatory Reporting

When the client knowingly says that they do not want to report, you need to counsel them on mandatory reporting.

Case Example

Bill comes to you for help paying his electric bill. In the course of helping him you discover that Bill's daughter took money from his account without his permission. You discuss reporting to APS or the police and Bill says, no, he will change the account so his daughter no longer has access, but he does not want to report his daughter. You should counsel him on mandatory reporters and what might happen if he discloses the exploitation to a mandated reporter.

Lawyers need to assess reporting obligations and ethical duties, and clarify the obligations with clients during initial interviews and subsequently, if necessary.

Conclusion

It is critically important to understand the APS mandatory reporting standards in your state. You need to know the client's age, and how vulnerability or eligibility for services is determined. You need to know who mandatory reporters are. You need to know what programs and services APS is able to provide in your community, both for eligible or covered persons and for ineligible clients. You should advise clients on what happens when a report is filed. If your client is unable to make a decision on reporting, you must carefully weigh the advantages and burdens of reporting and determine if you may report, must report, or if it is in your clients' best interest to report.

Additional Resources:

Mandatory Reporting Statutes and Guides:

- [Stetson Law Mandatory Reporting Statutes](#)
- [Characteristics for Mandated Reporting, ABA Commission on Law and Aging](#)

Professional Responsibility and Decision-Making Guides:

- [American Bar Association PRACTICAL Tool](#)
- [Model Rules of Professional Conduct](#)

Additional information from Elder Justice initiatives:

- [Department of Justice, Elder Justice Initiative](#)
- [Elder Justice Coordinating Council](#)
- [National Adult Protective Services Association](#)
- [National Center on Elder Abuse](#)

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Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.
