

# Elder Abuse: Mandatory and Permissive Reporting For Lawyers

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# Elder Justice Toolkit

- Civil legal attorney practice kit with example documents, instructions, tips, and tools
- Financial Exploitation of Older Adults: A Guide for Civil Legal Aid Attorneys
  - Customizable, state-specific attorney practice guide
  - Request template: [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov)
- [Elder Justice Compendium](#)
  - Curated national resource collection with commentary

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

1. Mandatory reporting is designed to overcome reluctance to get involved and preserve the safety of vulnerable adults.
2. For lawyers, the ethics rules guide behavior, and a careful analysis of reporting laws and legal ethics rules is necessary to determine the best course of action.
3. The benefits and burdens of reporting should be weighed.
4. Permissive reporting may open the door for programs and services.
5. Other professionals should examine professional ethics rules.

# Mandatory and Permissive Reporting of Abuse, Neglect, or Exploitation

- The goal of reporting is to allow for help at the first signs of abuse, neglect, or exploitation.
- To preserve the safety & dignity of older adults.
- Mandatory reporting is designed to overcome the reluctance to “Get Involved.”
- Permissive Reporting may open the door for help.

# Poll #1

If you are a lawyer, have you ever filed a report with Adult Protective Services?

- A: Yes
- B: No



# Cornerstones of Legal Ethics

- The client decides the objective of representation
- Communicating with the client
- Confidentiality
- Avoiding conflicts
- Maintaining a “Normal Attorney Client Relationship”

# The Goal of Legal Ethics

- To protect clients
- We hear the deepest personal and family secrets
  - Disclosure requires discretion
  - And to use that information only as directed by the client, or for the benefit of the client

# Dynamics of Abuse, Neglect, and Exploitation

- The abuser is often a family member or caregiver
- People are embarrassed by:
  - Being hurt by someone they trusted
  - By living conditions
  - By their appearances
- People fear that reporting will result in
  - A loss of autonomy
  - A loss of family or caregivers
  - Punishment of persons they have a relationship with

# For a Lawyer

- We must balance the wishes and autonomy of the client against our ethical obligations to the client.
- Or, if the client is unable to understand the challenges, the best interest of the client.

# Discussion Case

Jack has early stage dementia. He lives independently, with help from family and neighbors. He is somewhat forgetful, and has some minor struggles with finding the right words. He went to legal aid with a question about his car insurance. He discovered that his son had transferred his car to his grandson's name using a power of attorney.

Jack says, he didn't authorize his son to do that, and the power of attorney does not include the authority to make gifts.

When the legal aid lawyer suggested filing a report with APS, Jack said, "No, I don't drive anymore, it will save me the insurance premiums. I just wish my son had asked me, I would have told him it was fine to do this."

# Poll #2

- Should legal aid report to APS?

A: No, it sounds like Jack understands and is not vulnerable.

B: No, because Jack asked legal aid not to report.

C: Yes, if Jack calls back the next day, complaining that someone stole his car and he wants it back, and whoever took it is arrested.

D: Yes, if they believe that Jack is unable to understand what has happened, and doing so might result in the return of a valuable asset.

# State Reporting Laws

- All states have mandatory reporting laws
- The laws vary widely
- Know the law in your state

# Analysis: 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.



<b>STATE-PERSONS ELIGIBLE</b>	<b>STATUTORY PROVISION(S) REGARDING AGE</b>	<b>65+</b>	<b>60+</b>	<b>18-64</b>	<b>18-59</b>	<b>18+</b>	<b>EMANCIPATED MINOR*</b>	<b>MINOR</b>
<i>-Elderly person</i>	sixty years of age or older		X					
<b>Delaware</b>								
<i>-Infirm adult</i>	18 years or over					X		
<i>-Incapacitated person</i>	Adult (by reference to authorization)					X		
<b>District of Columbia</b>								
<i>-Adult in need of protective services</i>	aged 18 or older					X		
<b>Florida</b>								
<i>-Vulnerable adult</i>	18 years of age or older					X		
<b>Georgia</b>								
<i>-Elder person</i>	65 years of age or older	X						
<i>-Disabled adult</i>	18 years of age or older					X		
<b>Guam</b>								
<i>-Elderly</i>	sixty (60) years of age or older		X					
<i>-Disabled adult who has a physical or mental impairment...</i>	over the age of eighteen (18) years					X		
<i>-Disabled adult who has a history of or has been classified as having an impairment</i>	over the age of eighteen (18) years					X		

# Analysis: 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.

STATE- PERSONS ELIGIBLE	STATUTORY PROVISION(S) REGARDING CONDITION	ACCIDENT	ADVANCED AGE	BRAIN DAMAGE	DEMENTIA	DEVELOPMENTAL DISABILITY	EMOTIONAL IMPAIRMENT	IMMINENT RISK OF DEATH OR HARM	IMPAIRMENT/DISABILITY	MENTAL ILLNESS	MENTAL IMPAIRMENT	MENTAL RETARDATION	PHYSICAL ILLNESS	PHYSICAL IMPAIRMENT	SUBSTANCE ABUSE
<i>home care provider</i>															
<i>-Vulnerable adult</i>	regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction						X				X			X	

Example: Elenore is 92 years old, lives independently, meeting all of her ADLs, tutors reading and public speaking, and plays tennis three afternoons a week. If she is being abused by her older sister, is she covered under this statute?

# Analysis: 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, got to step 4.

# MASSACHUSETTES

<u>Statutes &amp; Case Law</u>	<u>Who Has to Report? (Mandated Reporters)</u>	<u>When to Report</u>	<u>How to Report (&amp; Other Resources)</u>
<p>Mass. Gen. Laws Ch.19A § 15</p>	<p>Any physician, physician assistant, medical intern, dentist, nurse, family counselor, probation officer, social worker, policeman, firefighter, emergency medical technician, licensed psychologist, coroner, registered physical therapist, registered occupational therapist, osteopath, podiatrist, director of a council on aging, outreach worker employed by a council on aging, executive director of a licensed home health agency or executive director of a homemaker service agency or manager of an assisted living residence. Any other person may make such a report.</p>	<p>Any person required by statute who has reasonable cause to believe that an elderly person is suffering from or has died as a result of abuse.</p>	<p>Verbal reports shall be made immediately to the Department of Elder Affairs or its designated agency and a written report shall be made within forty-eight,48, hours. See Form 19A below.</p> <p>Massachusetts Elder Affairs Elder Abuse Hotline: 800-922-2275</p> <p><a href="http://www.mass.gov/elders/service-orgs-advocates/protective-services-program.html">http://www.mass.gov/elders/service-orgs-advocates/protective-services-program.html</a></p> <p>Form 19A: Elder Abuse Mandated Reporter Form</p>

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# Analysis: 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.

# Analysis: Step 5:

**Is reporting in the best interest of the client, 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.
- If no, is there a legal or ethical reason for you to avoid reporting?

# Analysis: 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.



# Burdens and Benefits of Reporting

- APS may investigate
- If they believe the allegation, at a minimum they are going to call or show up at the door
- Disclosure
- Possible criminal prosecution
- Possible removal of caregivers or family
- Address the whole needs of the person
- Access to APS programs and services
  - Emergency food, shelter, clothing, medical care
  - Social supports and counseling

# Case Study

Joyce has late stage dementia and is being cared for at home. Larry, her long time lawyer, visits with her to see if there is anything he can help with.

He observes that Joyce is unclean. He observes sores on the bottoms of her legs that smell like rotting flesh.

The caregiver brushes it off as Joyce being unable to get around much anymore. Joyce seems unaware of what is happening, and she is unresponsive to questions Larry asks her.

# Poll #3

Why should Larry call APS and report?

A: The conditions are potentially life threatening.

B: He believes that if Joyce were able to respond to his questions, she would beg him to get help for her.

C: The loss of her current caregiver would be a benefit to Joyce.

# Model Rules of Professional Conduct

- States modify or edit the rules when they adopt them. These are the current model rules.
- Check your state's version!

# MRPC Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

- A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

# MRPC Rule 1.4: Communications

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

# MRPC Rule 1.6: Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

# MRPC Rule 1.6 Continued

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) (3) (talks about the client committing crimes)
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.



# Unsure what to do?

- Review ethics opinions in your state.
- Ask for an advisory opinion from the ethics body in your state.

# MRPC Rule 1.14: Client with Diminished Capacity

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

# MRPC Rule 1.14 Continued

- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

# MRPC Rule 1.14 (b). Comment 7

- *“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.”*

# MRPC Rule 1.14 Comment 5

- *“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.”*

# MRPC Rule 1.16: Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
  - (1) the representation will result in violation of the rules of professional conduct or other law;
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

# MRPC Rule 1.1: Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- This includes an obligation to explain mandatory reporting to clients, who might tell their story to other mandated reporters.

# Ethics for Other Professionals

- Many professions have ethical standards.
- Apply the rules of your profession.
- Be aware that different professions are guided by differing ethical rules.
- Cross train on ethics with Social Workers, Law Enforcement, APS, Health Care, Financial Services Providers.



# Discussion Example

Lucy, a lawyer, has been asked to help Clare, the client, 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 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 Lucy Lawyer 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?

# Final Case Study

Under the rules of her state, Linda, a lawyer, is a mandated reporter. In the course of representing Monty she discovers that his son is having him sign checks payable to the son for hundreds of thousands of dollars.

Monty will soon be penniless.

Monty is covered under the state APS laws, because he uses a wheelchair to move around.

Linda explains to Monty what is happening and that she is obligated to report. Monty pleads with her not to report, as he would sooner be broke than lose his son as a caregiver.

# Poll #4

With the conflict between the mandatory reporting law and a direct instruction from her client, Linda should:

A: Explain to Monty who is a mandatory reporter in her state.

B: Explain to Monty the services that would be available with help from APS and that he deserves better treatment, to encourage him to allow reporting.

C: Withdraw from representing Monty.

D: All of the above

# Questions?



Type your questions in the question box on the webinar interface.

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# Case Consultations

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