AT WHAT COST? A COMMENTARY ON PROTECTIVE ACTION UNDER MODEL RULE 1.14(B)

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I. INTRODUCTION

The elderly and disabled are susceptible to, neglect, and exploitation, the most common form being financial exploitation.[1] Given the rising elder population, the financial exploitation epidemic is likely to surge.[2] Despite the frequency of financial exploitation, most cases go unreported.[3] To address the needs of victims, many professionals are stepping up to intervene when they perceive signs of elder abuse.[4] Lawyers occupy an important role in their client's lives, one that allows them to identify instances of financial exploitation and assist a victim-client. Under the Model Rules of Professional Conduct (Model Rules), lawyers are permitted to take protective action over a client who is a victim of abuse or exploitation but is unwilling or unable to advocate for herself. However, the Model Rules give broad discretion to lawyers who evoke the protective action provision and provide little guidance about maintaining the client's autonomy.

This article will argue that, while lawyers can play an important role in redressing financial exploitation for their clients, the protective action provision of the Model Rules gives lawyers excessive discretion that may be harmful to victim-clients. Part II of this article will provide background information about the prevalence of financial exploitation and its victims

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[1] National Council on Aging, *Elder Abuse Facts*, https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last visited April 1, 2019).

[2] Roberta K. Flowers, *In Fear of Suits: The Attorney's Role in Financial Exploitation*, 10 NAT'L ACADEMY OF ELDER L. ATTORNEYS J. 175, 177-78 (2014).

[3] STEPHEN DEANE, U.S. SECURITIES & EXCHANGE COMMISSION, OFFICE OF THE INVESTOR ADVOCATE, ELDER FINANCIAL EXPLOITATION 5 (2018), https://www.sec.gov/files/elder-financial-exploitation.pdf.

[4] *See, e.g.* Roger Fouton, *How The Senior Safe Act Could Curb Elder Financial Abuse*, FORBES (May 8, 2018, 12:12 pm), https://www.forbes.com/sites/nextavenue/2018/05/08/how-the-senior-safe-act-could-curb-elder-financial-abuse/#45504dbc4bee (discussing how bankers can contribute to preventing financial exploitation);

and perpetrators. Part III will introduce the protective action provision under the Model Rules. Part IV will analyze the ethicality of protective action, balancing the interest in preventing or remedying financial exploitation with the interest against paternalism. The first section will focus on the value that lawyers add to preventing and remedying financial exploitation, while the second section will highlight the areas that the protective action provision fails to provide adequate safeguards to maintain the victim-client's autonomy. Finally, Part V will conclude that the Model Rules should be revised to reflect the framework introduced in this paper.

II. BACKGROUND

A. FINANCIAL EXPLOITATION: THE CRIME OF THE CENTURY

Financial exploitation is, unexaggeratedly, the most common form of abuse against older adults in the United States. Financial exploitation can be broadly defined as the fraudulent or unauthorized

> act or process of an individual . . . that uses the resources of an older individual for monetary or personal benefit, profit, or gain, that results in depriving the older individual of rightful access to, or use of, benefits, resources belongings, or assets.[5]

It can take many forms, including Medicaid fraud, scams and internet "phishing," identify theft, undue influence by family, failure to fulfill contracted health care services, and abuse of powers of attorney and guardianship.[6]

Seniors are particularly vulnerable to financial exploitation due to the health-related effects of aging, such as memory loss or disability.[7] Unsurprisingly, seniors may depend on

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[5] 42 U.S.C.A. § 3002(18)(A) (2012).

6 *Elder Financial Exploitation*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, http://www.napsa-now.org/policy-advocacy/exploitation/ (last visited April 2, 2019).

[7] DEANE, *supra* note 3, at 5. As the population of seniors grows, so does the prevalence of cognitive decline due to diseases like Alzheimer's and dementia. *See* ADMINISTRATION FOR COMMUNITY LIVING, 2017 PROFILE OF OLDER AMERICANS 3 (2017),

others for their health and support needs and as a result live with aides, caregivers or in nursing facilities. Dependency and financial exploitation are linked because the perpetrator, such as an aide or caregiver, has greater access to the older person's finances.[8] In fact, some studies have found a correlation between the number of household members and risk of abuse.[9] Seniors may also be targeted due to the perceived wealth of older generations.[10] However, low-income seniors are actually at a greater risk of financial exploitation than their high-income counterparts.[11] While there are several possible explanations for this surprising phenomenon, one finding is true across the board – that victims in poverty are less able to protect themselves from financial exploitation.[12]

Perpetrators of financial exploitation run the gamut. They range from complete strangers, contracted workers of the senior, or even family.[13] Frequently, the perpetrators are "trusted helpers" of the senior, such as caretakers, nursing home administrator, bank employee,

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https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf; ALZHEIMER'S ASSOCIATION, 2018 ALZHEIMER'S DISEASE FACTS AND FIGURES 19 (2018), https://www.alz.org/media/Documents/facts-and-figures-2018-r.pdf. Accordingly, this author believes that the financial exploitation among the elderly will not only continue but is likely get worse.

[8] Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, J. GENERAL INTERNAL MEDICINE (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4242880/.

[9] DEANE, *supra* note 3, at 6.

[10] *Id.* at 1.

[11] *Id.* at 6.

[12] *Id.*

[13] A victim of a 2008 scam described her experience of being contacted by a stranger claiming to be her granddaughter who did a very convincing impersonation. METLIFE MATURE MARKET INSTITUTE ET AL., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICAN'S ELDERS 9 (2011), https://ltcombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf.

handyman, or even their attorney.[14] Perpetrators may disguise themselves as new friends or sweethearts of the elder victim.[15] Studies suggest that most exploiters are at-home caregivers, followed closely by relatives.[16] Although perpetrators can be anyone, a common theme is that they are often in a relationship of trust with the elder victim.[17]

The gravity of financial exploitation is best demonstrated by the numbers. Anywhere between 2.7% and 6.6% of seniors are financially exploited.[18] These numbers, however, are likely a gross underestimate because the majority of cases are unreported.[19] For every documented case of elder financial exploitation, almost forty-four are unreported.[20] The prevalence of financial exploitation correlates with tremendous financial losses. For example, in

[14] *See id.*; NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, THE NEW YORK STATE COST OF FINANCIAL EXPLOITATION STUDY 19 (2016), https://ocfs.ny.gov/main/reports/Cost%20of%20Financial%20Exploitation%20Study%20FINAL%20May%202016.pdf.

[15] CHARLES P. SABATINO, LEGAL BASICS: ELDER FINANCIAL EXPLOITATION 2, 4 (2018), https://ncler.acl.gov/pdf/Legal%20Basics-Elder_Financial_Exploitation_Chapter_Summary.pdf.

[16] *Id*. at 14.

[17] *Id.* at 3.

[18] Deane, *supra* note 3, at 8.

[19] *Id.* at 9.

[20] *Id. But see* METLIFE MATURE MARKET INSTITUTE ET AL,, BROKEN TRUST: ELDERS, FAMILY, AND FINANCES 7 (2009), https://www.giaging.org/documents/mmi-study-broken-trust-elders-family-finances.pdf [hereing after "METLIFE ARTICLE"] (indicating that the ratio of unreported and reported case is only one to five).

New York alone the estimated loss to victims grosses at $1.5 billion annually.[21] The monetary loss is also often permanent.[22]

The harm from financial exploitation is not limited to monetary losses. Victims may be left unable to afford critical medication or even housing. Moreover, the experience of financial exploitation undoubtedly leads to emotional and psychological effects for the victims;[23] in addition to money, exploitation results in a loss of rights and dignity. Finally, while there is little data about the actual cost borne by the public, the cost of case investigation, interventions, prosecutions, and remedies to the victim are felt by all.[24]

If financial exploitation is Goliath, the existing remedies are David without his sling. Although some mechanisms exist to remedy or prevent financial exploitation, they are severely underutilized. The Older Americans Act, for example, requires states using federal funds to develop and enhance programs that address elder financial exploitation.[25] Additionally, some state statutes criminalize financial exploitation and impose criminal charges or civil liability.[26] Hand in hand with these remedies are Adult Protective Services (APS), state agencies that receive reports of elder abuse and conduct independent investigations. Under state statutes,

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[21] New York State Office of Children and Family Services, The New York State Cost of Financial Exploitation Study 12 (2016), https://ocfs.ny.gov/main/reports/Cost%20of%20Financial%20Exploitation%20Study%20FINAL%20May%202016.pdf. *See also* METLIFE ARTICLE, *supra* note 20, at 7 (suggesting that the total annual loss might be as high as $2.6 billion).

[22] Christopher Hollenback, *Keeping an eye on what's right…and wrong*, SUPERLAWYERS (December 2008), https://www.superlawyers.com/wisconsin/article/keeping-an-eye-on-whats-right-…-and-wrong/9abbcf41-cd8e-4b97-800b-c69144f6f452.html.

[23] *See, e.g.* Hollenback, *supra* note 22 (noting that two victims of Kenneth Hackbarth, a Wisconsin financial scammer, committed suicide).

[24] DEANE, *supra* note 3, at 13.

[25] 42 U.S.C. § 3058i(b) (2012).

[26] *E.g.* CAL. PENAL CODE § 9-368(E) (2016).

certain professionals like doctors and social workers are mandatory reporters[27] – meaning they are required to report suspicions of elder exploitation to APS – yet attorneys are almost never mandatory reporters.

B. MODEL RULES OF PROFESSIONAL CONDUCT 1.14(B) – PROTECTIVE ACTION

The American Bar Association's Model Rules of Professional Conduct Rule 1.14(b) (Rule 1.14(b)) permits attorneys to take protective action over clients with diminished capacity.[28] Rule 1.14(b) states that

> [w]hen 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.[29]

In addition to those listed in Rule 1.14(b), the comments to the rule provide some examples of what constitutes protective action, such as consulting with the clients family, using

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[27] *See, e.g.*, FLA. STAT. § XXX.415.1034(1) (2018) (listing professionals such as physicians, mental health professionals, nursing home staff, and bank employees, and mandatory reporters); D.C. CODE § 7-1903(a)(1) (2018) (listing conservators, court-appointed mental retardation advocates, guardians, police officers, bank managers, and social workers as mandatory reporters).

[28] Most states have adopted the Model Rules with respect to protective action. *See* AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14: CLIENTS WITH DIMINISHED CAPACITY (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.pdf [hereinafter "VARIATIONS OF THE MODEL RULES"]; *e.g.*, N.Y RULES OF PROF'L RESPONSIBILITY r 1.14(b); D.C. RULES OF PROF'L RESPONSIBILITY r 1.14(b). Interestingly, some states have not adopted the comments to this Model Rule. *E.g.*, N.J. RULES OF PROF'L RESPONSIBILITY r 1.14; VA. RULES OF PROF'L RESPONSIBILITY r 1.14. Only one state, Texas, has not adopted Model Rule 1.14. *See* VARIATION OF THE MODEL RULES, *supra* note 28, at 5. While this paper will focus on the American Bar Association's Model Rules, it this presents an interesting question: Do attorneys in states without the comments approach protective action differently?

[29] MODEL RULES OF PROF'L CONDUCT r. 1.14(b).

voluntary surrogate decision-making tools, and reporting to adult protective agencies or other agencies.[30] To assist in determining which, if any, of these types of protective actions to take, the comment guides the lawyer to consider the

> wishes and values of the client to the extent known, the client's best interest and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.[31]

State jurisprudence and ethics opinions provide guidelines for attorneys contemplating protective action over a client. As a preliminary matter, the attorney must make a determination about the client's capacity as the protective action provision only applies to clients with diminished capacity.[32] In an attempt to define this elusive concept, the comments to Rule 1.14(b) encourage the lawyer to consider factors like the client's ability to articulate her reasoning, her state of mind, the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client.[33] This step revolves around the idea that the lawyer's perception of the client's poor judgement alone is not enough to warrant protective action.[34]

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[30] r. 1.14(b), cmt [5]. Other examples include "using a reconsideration period to permit clarification or improvement of circumstances, using . . . durable powers of attorney or consulting with support groups, professionals services, . . . other individuals that have the ability to protect the client." *Id.*

[31] *Id.*

[32] *See In re Brantley*, 920 P.2d 433 (Kan. 1996) (finding that the lawyer acted improperly by filing for involuntary conservatorship without meeting the client in person to determine the client's capacity); Or. Ethics Op. 2005-159 (2005) ("[lawyers should] examine whether the client can give direction on the decisions that the lawyer must ethically defer to the client). Attorneys may also seek help from others to make the capacity determination. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Ethics Op. 96-404 (1996) [hereinafter "ABA Formal Ethics Op."] (suggesting that attorneys consult with diagnosticians, client's family, and other interested persons).

[33] r. 1.14(b), cmt. 6.

[34] ABA Formal Ethics Op., *supra* note 32.

Second, the attorney must evaluate the spectrum of available protective measures. Rule 1.14(b) and comment [5] provide several suggestions, ranging from guardianship to consulting with family members.[35] The rule mandates that attorneys take only those protective measures that are "reasonably necessary" to protect the client's interest.[36] Although not explicit, "reasonably necessary" refers to the least restrictive protective measure under the circumstances.[37]

Finally, the attorney is permitted to disclose client secrets for the purpose of carrying out the protective action.[38] Generally, Model Rule 1.6 forbids attorneys to reveal a client's confidential information.[39] While this rule still applies to clients with diminished capacity, there is a rather large caveat – attorneys may reveal confidential information when taking protective action.[40] Rule 1.14(b) qualifies this exception by limiting the extent of information that can be revealed to only what is "reasonably necessary to protect the client's interest."[41]

[35] r. 1.14(b); *id.* cmt. 5

[36] r. 1.14(b).

[37] ABA Formal Ethics Op., *supra* note 32. Among these options, is withdrawal from representation, although it is disfavored. *Id.*

[38] r. 1.14(c).

[39] r. 1.6.

[40] r. 1.14(c).

[41] r. 1.14(c).

III. BALANCING THE INTERESTS

A. THE LAWYER AS A SOLUTION TO THE EPIDEMIC OF FINANCIAL EXPLOITATION

Unlike the portrayal of lawyers on television, the real-life practice of law requires lawyers to wear many hats to fully understand their client's problems.[42] Vulnerable clients in particular often face a gamut of problems,[43] some of which are quasi legal[44] or not legal at all. As such, a zealous attorney will take the time to learn about each of these problems and explore solutions with the client.[45]

Of particular concern to this paper, is a client who, in addition to the problem she sought a legal advice for, is a victim of financial exploitation. The attorney who discovers, or reasonably suspects, such exploitation may feel a moral obligation to help a client who seems to be unable to help herself. If the lawyer is well-informed on the subject of elder abuse, he may

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[42] Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U.J.L. & POL'Y 131, 131 (2001) (stating that legal issues are inseparable from social, medical, and economic problems). Even the Model Rules acknowledge that an attorney can act as an advisor, advocate, negotiator, and even a third-party neutral. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble: a Lawyer's Responsibilities, [2]-[3].

[43] In her article, Professor Galowitz discusses a client at the Civil Legal Services clinic at NYU Law School whose issues went beyond the housing problem he initially discussed with his lawyer, but also included termination of food stamps due to his immigration status and a utility problem due to unpaid bills. Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of Their Relationship*, 67 FORDHAM L.R. 2123, 2123-24 (1999). Professor Galowitz's experience is not unique; the Disability Rights Law Clinic at AUWCL often sees clients who have problems with their housing, getting Medicaid services, and accessing special education services for their children.

[44] *See generally* NAT'L CTR. FOR MEDICAL LEGAL PARTNERSHIP, https://medical-legalpartnership.org (last visited April 3, 2019) (providing information about Medical-Legal partnerships which aspire to provide legal solutions to issues that re traditionally considered purely medical).

[45] *See* Galowitz, *supra* note 43, at 2124-25 (indicating that lawyers sometimes need to collaborate with mental professionals and social workers).

recognize that financial exploitation is a rampant problem that is often unreported.[46] The attorney may feel that it is his civic duty, not just to this client, but to the public, to take action when he perceives such harm.[47] Rule 1.14(b) unambiguously permits the attorney to intervene in order to protect the interests of the client.[48]

The very factors that make people targets for financial exploitation make them less likely to be able to protect themselves against it. People with Alzheimer's, dementia, or other cognitive deficits are not only less likely to self-report financial exploitation, but are also less likely to even recognize that they are a victim.[49] Victims of financial abuse are sometimes isolated, meaning they have few advocates and little support at home.[50] Often the perpetrators are the very people one would suspect to protect the client, such as family members or caretakers.[51] Because victims of financial exploitation are unlikely to self-report and their relatives may even

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[46] *See* SABATINO, *supra* note 15, at 9.

[47] In a 2014 study, 460 of 657 surveyed attorneys responded that they were "very willing" to contact law enforcement for an elderly client who is the victim of financial exploitation "[a]ssuming it was ethically permissible to do so." AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING ET AL., INVESTMENT FRAUD AND FINANCIAL EXPLOITATION OF OLDER AMERICANS: WHAT DO LAWYERS KNOW AND HOW CAN THEY HELP? (2014), http://www.investorprotection.org/downloads/IPT-IPI-ABA_EIFFE_Legal_Survey_Report_07-29-14.pdf [hereinafter ABA SURVEY].

[48] So long as the attorney "reasonably believes" the client is at a substantial risk of harm and takes only those protective measures that are "reasonably necessary." MODEL RULES OF PROF'L CONDUCT r. 1.14(b).

[49] *See* DEANE, *supra* note 3, at 3 (suggesting that older adults are credulous and vulnerable to deception).

[50] John Wasik, *4 Risk Factors for Elder Financial Abuse*, FORBES (February 12, 2017, 2:29 PM), https://www.forbes.com/sites/johnwasik/2017/02/12/4-risk-factors-for-elder-financial-abuse/#44087f5d5f93.

[51] DEANE, *supra* note 3, at 6.

be the source of exploitation,[52] the burden to resolve this pervasive issue falls on the professionals who interact with the victim.[53]

Social workers are usually most likely to first discover financial abuse,[54] but professionals from other fields that are not traditionally involved in this realm are beginning to step up. For example, bankers and brokers are increasingly acting as the first line of defense in instances of financial exploitation.[55] The American Bar Association (ABA) in conjunction with the Department of Justice has taken steps to educate criminal justice professionals about signs of elder abuse and exploitation.[56] State adult protective statutes often mandate that certain professionals must report suspicions of abuse, neglect or exploitation, such as guardians or health

[52] Marc J. Lane & Amanda Paige Lane, *How To Recognize Eider Abuse and Project Its Victims*, 14-JAN CBAR 28, 39 (2000) (noting that an elderly victim is likely to deny allegations of abuse).

[53] American Bar Association Comm'n on Law & Aging, *Elder Investment Fraud and Financial Exploitation Prevention Program—Legal*, 35 Bifocal 175, 176 (2014), https://www.americanbar.org/content/dam/aba/publications/bifocal/BIFOCALJuly-August2014.pdf [hereinafter ABA Prevention Program] ("Front-line professionals who deal everyday with older Americans are ideally positioned to spot the impaired mental capacity that leaves seniors vulnerable to financial abuse.").

[54] Elizabeth M. Felton & Carolyn I. Palowy, *Social Workers and Elder Abuse*, NATIONAL ASSOCIATION OF SOCIAL WORKERS ALABAMA CHAPTER, https://www.naswal.org/page/ElderAbuse (last visited March 25, 2019). Physicians are in a particularly good position to identify physical abuse and physical neglect because they can conduct physical examinations and laboratory or imaging results. Daniel L. Swagerty et al., *Elder Mistreatment*, 15 American Family Physician (1999), https://www.aafp.org/afp/1999/0515/p2804.html.

[55] Just last year, the Senior Safe Act was passed to encourage reporting. Senior Safe Act of 2017, H.R. 3758, 115-424 (eliminating liability for financial institutions who reveal confidential information when reporting financial exploitation); *see also* Fouton, *supra* note 4.

[56] Lori A. Steigel, Legal Issues Related to Elder Abuse A Pocket Guide for Law Enforcement (2014), https://www.bja.gov/publications/aba-elderabuseguide.pdf. 23,790 copies of the Pocket Guide were distributed.

professionals.[57] Considering the pervasiveness of financial exploitation and extreme lack of reporting, it is clear that more professionals need to assist victims of financial exploitation.[58]

Lawyers are well-positioned to not only recognize financial exploitation, but to effectively prevent or remedy it when necessary. The majority of lawyers already interact with or may interact with victims of financial exploitation.[59] This experience is not unique to attorneys who specialize in elder law; the issue of financial exploitation can come up for any legal practitioner, for example, a business lawyer advising his client about selling his company.[60]

The attorney-client relationship equips lawyers to determine client's capacity, status as a victim of exploitation, and ability to adequately protect her own interests. During client interviews, lawyers learn about the client's lifestyle, medical and family history, short and long-term goals, and financial situation. Access to this information means that lawyers can identify whether a client might have diminished capacity and whether they possess the risk factors for abuse.[61] Attorneys also have the opportunity to interview clients without others present, particularly caregivers or relatives that might be the source of exploitation.[62] Some attorneys

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[57] *See, e.g.*, District of Columbia Code § 7-1903(a)(1).

[58] ABA Commission on Law and Aging, *supra* note 53, at 176.

[59] ABA SURVEY, *supra* note 35 (finding that 75.7% of surveyed attorneys were aware that they are or may be dealing with elderly victims of investment fraud or financial exploitation).

[60] ABA Prevention Program, *supra* note at 53, at 176. Some areas of law may handle matters involving clients with diminished capacity more than others, for example estate planners. Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735, 744 (2001)..

[61] Waskin, *supra* note 50.

[62] This allows the attorney to ask questions such as: "Is your caregiver taking good care of you?" *See* Swagerty, *supra* note 54 (recommending that physicians interview patients without caregivers present and to ask patients about the nature of the relationship with caregivers).

have the added advantage of knowing a client for an extended period of time, meaning they can recognize deviations from their previously expressed wishes.[63]

Attorneys have a variety of tools available to protect a victim-client's interest. They can use their legal expertise to assist the client, for example by revoking decisionmaking authority from others[64] or creating safeguards for the victim-client.[65] An attorney can recommend that the victim-client pursue legal action against her abuser. Depending on the context of the financial exploitation, the victim-client may have the option to sue for breach of fiduciary duty, fraud, or even under a private right of action for elder abuse.[66]

Lawyers can also pursue non-legal methods to assist clients who are victims of financial exploitation.[67] Every state has an Adult Protective Services (APS) agency, a program that receives reports of suspected elder abuse and investigates these reports.[68] Although lawyers are not mandatory reporters to APS, they receive the same protection that all voluntary and mandatory reporters do – they are exempt from liability and professional disciplinary action.[69]

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[63] Fleming, *supra* note 60, at 746.

[64] Such as rescinding powers of attorney or assisting with divorce from the abuser. *See* SABATINO, *supra* note 15, at 6.

[65] Such as petitioning for injunctions or protective orders. *See id.*

[66] *See* SABATINO, *supra* note 15, at 6.

[67] Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction [article]*, CLINICAL L.R. 281, 292 (2003).

[68] *Get Help*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, http://www.napsa-now.org/get-help/help-in-your-area/ (last visited April 2, 2019). If the agency's investigation shows signs of illegal abuse, it will go on to report to law enforcement. *Abuse Case Studies*, NAT'L ADULT PROTECTIVE SERVS. ASS'N, http://www.napsa-now.org/about-napsa/success/abuse-case-study/ (last visited April 2, 2019). Depending on the outcome of the assessment, the assigned investigator may recommend other interventions, such as in-home care or counseling. Lane, *supra* note 40, at 30.

[69] Lane, *supra* note 52, at 30.

Alternatively, the attorney could inform law enforcement directly. In addition to protecting an individual client's interest, lawyers can contribute information about financial exploitation by documenting and reporting signs of abuse.[70] It is clear that an attorney *may* pursue protective action, but the real question is whether the attorney *should*?

B. A CRITIQUE OF THE PROTECTIVE ACTION PROVISION

1. DETERMINING CLIENT CAPACITY AND IDENTIFYING SUBSTANTIAL RISK OF HARM

An attorney must first determine his client's capacity before taking protective action.[71] Rule 1.14(b) obligates the attorney to "reasonably believe that the client . . . is at risk of substantial physical, financial or other harm . . . and cannot adequately act in the client's own interest . . . ."[72] This element requires the attorney to distinguish between a substantial risk of harm that the client *cannot* adequately address and risk that the client, for some reason, *does not wish to* address.[73]

Determining a client's capacity and ability to act in her own interest hinges on the notion that a client's poor judgement does not equate to incapacity, and thus should not be the sole basis for protective action.[74] Conceptually, this might seem straightforward – an attorney should not

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[70] Elder financial exploitation is largely a black box due to the lack of data about the signs. As a result, there has been little success in developing policy or programming to solve the nationwide problem. *See* DEANE, *supra* note 3, at 15.

[71] MODEL RULES OF PROF'L CONDUCT r. 1.1.4; *see, e.g., In re Brantley*, 920 P.2d 43; Ind. Ethics Op. 2001-2 (2001).

[72] r. 1.14(b).

[73] The law allows us to make any number of so-called "bad decisions," such as smoking or overeating, or even making imprudent purchases or unwise financial investments. Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S. DAKOTA L.R. 54, 70 (date). The right to make such "bad decisions" is not eliminated just because a person has diminished capacity. *Id.*

[74] ABA Formal Ethics Op, *supra* note 32 ("Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's

substitute his decisions for the client's merely because the attorney disagrees with the client's decision. For example, an attorney may strongly disagree with his elderly client's decision to invest her retirement savings in her grandson's start-up business, but this does not necessarily mean that the client is being financially exploited. It is easy to imagine any number of reasons that a client would make this decision, many of which are sentimental and familial – values that the neutral attorney may not fully understand.[75] Most importantly, capacity is a fluid concept; a person may have varying degrees of capacity throughout their life (and even throughout the day) or may have capacity to make some decisions but not others.[76]

This author agrees this concept in the abstract, urging that professionals avoid imposing their ideas of the client's "best interest" on the client and make every effort to determine the client's "expressed values." In practice, however, the Model Rules may open the floodgates for potential misuse of protective action. An attorney should not conclude that a client has diminished capacity merely because the client has a disability and makes decisions with which the attorney disagrees.[77] The client may have personal values – religious, cultural or otherwise – that lead to her making an uncommon decision.[78] Alternatively, the client may make her

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best interest"); Falk, *supra* note 73, at 69-70 ("[S]imply because a personal decision 'causes harm or risk, or . . . is otherwise ill-advised,' does not mean that the person making the decision lacks competency.").

[75] What if the client had previously told the lawyer that she does not trust her grandson to make good decisions, for example when they were discussing who could serve as her power-of-attorney? Would that rise to the standard of "reasonably believes that the client. . . cannot adequately act in the client's own interest"?

[76] Fleming, *supra* note 60, at 742.

[77] ABA Formal Ethics Op., *supra* note 32 ("Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest.").

[78] *See, e.g.* Aly Anderson, *The 1977 Execution of Gary Gilmore,* Utah Commc'n History Encyclopedia (2010) (telling the story of a client who did not want to appeal his capital punishment sentence because he believed he would be reincarnated); Kristopher T. Starr, *The*

decision based on factors that are unknown to the attorney.[79] In each of these scenarios, the client makes a decision that the attorney perceives to be a poor choice; but the same can be said of any adult without a disability.[80] Ideally, an attorney would rule out each of these possibilities before proceeding to take protective measures. In reality, however, attorneys may not be capable of differentiating between a client with poor judgement and client who lacks capacity to make decisions.[81] What may result is that the attorney wrongly concludes that a client with a disability cannot act in her own interest, whereas the reality may be that the client understands her options and is choosing to act in such a manner.[82]

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curious case of the cultural or religious "no" to standard medical care, Nursing.2019 (2015), https://journals.lww.com/nursing/Fulltext/2015/11000/The_curious_case_of_the_cultural_or_religious__no_.3.aspx (explaining that patients generally have a right to refuse standard medicine due to cultural beliefs).

[79] For example, in her article, Sarah Sandusky discusses a hypothetical client who may be a victim of physical abuse by her son but denies the abuse because she wants to remain living in her home. Sarah S. Sandusky, *The Lawyer's Role In Combating the Hidden Crime of Elder Abuse*, 11 ELDER L.J. 459 (2003); *see also* Dinerstein, *supra* note **Error! Bookmark not defined.**, at 292 ("the lawyer also needs to work to understand and respect the ways that the client exists within a framework of relationships that can affect the ways the client views the world, her own situation, and the choices she has.").

[80] When a person without a disability makes what others consider to be a "bad choice," we rarely label the person as incapacitated and seek to intervene in his life. Autistic Self Advocacy Network, *The Right to Make a Choice*, https://autisticadvocacy.org/wp-content/uploads/2016/02/Easy-Read-OSF-For-Families-v3.pdf (pointing out that adults without disabilities often take freedom of choice for granted).

[81] The Model Rules permit the attorney to consult with a diagnostician to aid in determining a client's capacity. MODEL RULES OF PROF'L CONDUCT r. 1.14(b). However, they do not explain the qualifications of an appropriate diagnostician or even provide examples to guide the attorney. *Id.* Consulting with a diagnostician creates another layer of complexity to the issue: Most healthcare professionals are mandatory reporters to adult protective services agencies; if, in their examination of the client, diagnostician suspects abuse or neglect, he is required to report it. By seeking the aid of another professional, the lawyer may practically be reporting the abuse while ignoring other canons of protective action and professional responsibility. *See* Sandusky, *supra* note 79, at 482-83.

[82] It might be a futile effort to attempt to distinguish between a voluntary choice and a coerced one. In his article, David Owen tells the story of his elderly mother who was the victim of a phone scam. David Owen, *My Mother and Her* Scammer, THE NEW YORKER (July 20, 2018),

In a poor attempt to guide attorneys, Rule 1.14(b) and its comments make reference to both "best interest" and the "known values of the client."[83] These concepts are arguably actually contrary to each other. The known values of a client can be determined by exploring the decision through the client's lens, such as discovering the client's expressed wishes, previous decisions, cultural associations, and lifestyle.[84] The best interest model, however, asks the attorney to determine the most normative course of action and apply it to the client's situation. The norm is not necessarily the client's preferred outcome, nor does it necessarily protect the client's interest.[85] An attorney guided only by the best interest model is likely to look to his own life and culture to determine the norm, forgetting that the client will be the one to feel the consequences.[86] It is likely that the attorney's life will vary greatly from the life of a client with

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https://www.newyorker.com/culture/personal-history/my-mother-and-her-scammer. Even after David and his sibling intervened and informed her that she was a victim of a scam, David's mother continued to call her scammer and cooperate with his instructions. *Id.* ("My mother herself has said that the person she was when she was dealing with [her scammer] now seems like someone else.")

[83] r. 1.14, cmt. 5. Courts use the "best interest" model when the client's decision cannot be ascertained. *See In re M.R.*, 638 A.2d 1274, 1280 (Supreme Court of N.J. 994).

[84] This is similar to the "substituted judgement" standard used in medical and research bioethics contexts. *See* Alexia M. Torke et al., *Substituted Judgement: The Limitations of Autonomy in Surrogate Decision Making*, 23 J. GEN. INTERNAL MED. (2008). Under this standard, the goal is to make the decision that the patient or research subject *would have made* had she been able to do so. *Id.* In the medical and research realms, the person may have previously made an advance directive documenting their preferences prior to loss of capacity. *Id.* Advance Directives do not have a counterpart in the financial context, and so surrogate decisionmakers (and, as discussed in this paper, attorneys) may have to get creative in identifying the person's wishes for how to use their money.

[85] Sandusky, *supra* note 79, at 482.

[86] *See generally* Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1369-71 (1998) (recounting the author's experience in substituting her perception of a mentally-ill client's best interest in a criminal trial and discussing the dangers of that action in hindsight).

diminished capacity – for example, low income seniors are most vulnerable to financial exploitation, yet many lawyers have high incomes.[87] Moreover, the best interests model encourages the attorney to act paternalistically because it asks the attorney to protect the client with little regard to the real-life outcomes the client will have to live with. The Model Rules recognize that it is impermissible for an attorney to act paternalistically towards an adult client, even one with a disability,[88] yet the protective action provision implies that this general rule can be ignored if the attorney feels that his client is not acting in accordance with the norm.[89]

A lawyer's obligations when representing a client with diminished capacity are not only governed by Rule 1.14.[90] A lawyer must still follow the mandate of Rule 1.2(a) to abide by the client's objectives.[91] Matters involving the elderly, such as estate planning, can prove to be complicated in terms of correctly identifying the client and adhering to her wishes.[92] Family members or caregivers of the elder client may want to be involved with the estate planning

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[87] *See How Much Does a Lawyer Make*, U.S. NEWS, https://money.usnews.com/careers/best-jobs/lawyer/salary (last visited April 1, 2019) (noting that the median salary for a lawyer was $119,250 in 2017).

[88] r. 1.14(a).

[89] While Model Rule 1.14(b) impose limits on when an attorney may take such protective measures, these limits are arguably meaningless. An attorney's decision to take protective action is not formally reviewed *before* he takes such action. If the attorney's decision turns out to be unsupported, the client has no remedy until she has already felt the intrusive consequences. *See generally* r. 8.5 (providing that disciplinary actions will depend on the jurisdiction that the attorney is admitted to practice). Considering the characteristics of the most vulnerable clients – low income, diminished capacity – it seems unlikely that the client would pursue disciplinary matters.

[90] Rule 1.14(a) even requires the lawyer to treat a client with diminished capacity as he would any other client. r. 1.14(a).

[91] Flowers, *supra* note 2, at 189-90. This rule is not absolute, however. *See In re M.R.*, 638 A.2d 1274 (Supreme Court of N.J. 994) ("Her attorney's role should be to advocate [the client's] choices, *as long as it does not pose unreasonable risks for her health, safety, and welfare*.") (emphasis added).

[92] *Id.*

process, sometimes hoping to exert their influence in the outcome. An attorney would typically avoid consulting with a client's relatives if it would result in divided loyalty.[93] If the client has diminished capacity, however, Rule 1.14(b) gives the attorney the flexibility to meet with the family members – the people most likely to be the perpetrators of financial exploitation.[94]

2. LEAST RESTRICTIVE PROTECTIVE MEASURES

After determining lack of client capacity, the attorney should next consider the range of available protective measures and choose the least restrictive one.[95] Again, this element is logical in the abstract[96] but this creates the potential for misuse of the protective action permission. While the Rule 1.14(b) and its comments do list several examples of protective measures, they do little to inform attorneys which of the options is the least restrictive or how to explore other options not listed.[97]

For example, the Rule 1.14(b) lists power of attorney as a potential protective measure for a victim of financial exploitation.[98] However, powers of attorney confer very broad decisionmaking powers and are unsupervised, making them particularly susceptible to abuse.[99]

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[93] Flowers, *supra* note 2, at 193. *See, e.g.* r. 1.7.

[94] r. 1.14(b), cmt. 5.

[95] ABA Formal Ethics Op., *supra* note 32.

[96] In fact, the concept of "least restrictive" is mirrored in other areas of disability law. *See, e.g.* Individuals with Disabilities Education Act, 34 C.F.R. § 300.114-300.120 (2018) (requiring that students with disabilities receive educational services in the "least restrictive environment"); 28 C.F.R. § 35.130(d) (2018) (requiring public entities to administer services in the "most integrated setting appropriate").

[97] *See In re M.R.*, 638 A.2d 1274, 1285 (N.J. 1994) ("An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interest.").

[98] r. 1.14, cmt. 5.

[99] SABATINO, *supra* note 15, at 5.

An uninformed attorney could be placing an already vulnerable client in even further harm if he does not take the time to draft a power of attorney with important safeguards.[100] In fact, the Model Rules show favoritism for seeking appointment of substitute decisionmakers, such as guardians or conservators. Yet a client who is a victim of financial abuse may actually benefit from opposition, limitation, or even termination of a substitute decisionmaker.[101]

Furthermore, the Model Rules fail to recognize the types of protective measures that lawyers are particularly trained to take. For example, a client who is the victim of financial or other abuse by a spouse would benefit from a separation or divorce.[102] A client-victim may even benefit from, or at least prefer to pursue, civil action against the perpetrator of financial abuse, which will open the possibility of redress.[103] Rule 1.14(b) on its face encourages the attorney to either hand the problem off to another professional or to report it to an enforcement agency, without fully considering the attorney's own role. Rule 1.14(b) and its comments also encourage the attorney to convene with the client's family, but family members are likely to be the people from which the client needs to be protected.[104]

Modern notions of client-centered lawyering encourage the attorney to view choices from the client's perspective. A zealous lawyer would consider the short- and long-term effects of all options on the client and determine if those are in line with the client's goals and lifestyle. However, a lawyer who is prepared to take protective action may fail to consider how and to

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[100] *See id.* (listing examples of safeguards, including requiring annual accountings and requiring a third signatory for large transactions).

[101] SABATINO, *supra* note 15, at 6.

[102] SABATINO, *supra* note 15, at 6.

[103] SABATINO, *supra* note 15, at 6 (listing examples of civil action including seeking an accounting, voiding documents due to fraud, and breach of contract).

[104] Flowers, *supra* note 2, at 188.

what degree the intervention will impact other areas of the client's life.[105] For example, a report to an adult protective services agency might escalate violence by the abuser or might lead to the elder client being placed in an institution.[106]

Most troubling is that the Model Rules repeatedly list guardianship as an option, even though many consider guardianship to be an extreme measure.[107] Unfortunately, many attorneys still view guardianship as a useful, even preferred, method of protecting clients' interests.[108] The ABA has recognized the seriousness of choosing guardianship,[109] yet many state bars still recommend the practice.[110] Guardianship is one of the most serious deprivation of rights permissible under modern law.[111] A guardian is a substitute decisionmaker; once a person is determined to lack capacity and a guardian is appointed, that guardian has broad decision making

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[105] Comment [5] to Model Rule 1.14 states the lawyer "should be guided" by the client's wishes and values and the goal of maximizing the client's capacities. MODEL RULES OF PROF'L CONDUCT r. 1.14(b), cmt. 5.

[106] Sandusky, *supra* note 79, at 486.

[107] *See generally* Ann Brenoff, *The System of Court-Appointed Guardians Continues to Fail the Elderly*, HUFFPOST (October 10, 2017 6:01 AM), https://www.huffpost.com/entry/court-appointed-guardian-system-failing-elderly_n_59d3f70be4b06226e3f44d4e (urging that guardianship is a gateway for elder abuse).

[108] For example, in a recent ethics class at Washington College of Law, this author learned that many of her colleagues would opt for guardianship as the first method of protective action.

[109] ABA Formal Ethics Op., *supra* note 32 ("[appointment of guardianship] serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available.").

[110] *See, e.g.*, Conn. Informal Ethics Op. 97-19 (1997); Ill. Ethics Op. 12-10 (2012); Or. Ethics Op. 2005-159 (2005); *see also* Cheney v. Wells, 877 N.Y.S.2d 605, 611 (N.Y. Surrogate's Ct. 2008) (concluding that there was no ethical impediment to seeking limited guardianship over a client with psychiatric problems). However, the District of Columbia asserts that, while there is no "clear answer" to the question of guardianship, Rule 1.14 provides a workable framework to make the decision. *See* D.C. Ethics Op. 353 (2010).

[111] *See* Rachel Aviv, *How the Elderly Lose Their Rights*, The New Yorker (2017), https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights (describing a widespread guardianship scheme in Nevada that forced seniors into institutions against their wishes and deprived them off their finances).

authority.[112] Yet guardians are not necessarily better trained to ascertain the persons wishes or values, and unfortunately often act contrary to the person's interest.[113] In guardianship proceedings, the lawyer is more likely to address the question of *who* should be the guardian, rather than the critical question of *whether* the subject needs a guardian.[114]

Additionally, guardianship is an inherently adverse proceeding.[115] Generally, a person seeking guardianship over another must file a petition;[116] at the hearing, the petitioner must demonstrate that the subject of the petition is incapacitated and the subject must rebut that evidence if he is to escape guardianship.[117] Due to the adversarial nature of the proceeding, many agree that an attorney should not represent a third party in a guardianship petition over the attorney's existing client.[118] However, some states permit attorneys to do so if they feel it would be in the client's best interest.[119] And nearly all states permit attorneys to seek guardianship over their own client if they believe the client is at risk of substantial harm, regardless of the client's

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[112] These can be decisions about healthcare, finances, property, and even decisions to commit the person to a nursing or group home. *Guardianship Basics*, FINDLAW, https://family.findlaw.com/guardianship/guardianship-basics.html (last visited April 3, 2019).

[113] Aviv, *supra* note 111. *But see* D.C. Ethics Op. 353 (2010) ("the lawyer should realize the guardian is no more capable of ascertaining the person's best interests than is the lawyer, *but neither is he any less able to do so.*").

[114] Fleming, *supra* note 60, at 745.

[115] Flowers, *supra* note 2, at 194 ("A conflict can also arise when an attorney represents a client through fiduciary.").

[116] *See, e.g.*, D.C. Code § 21-2003 (2018).

[117] *Id.* § 21-2011; *Guardianship*, NEW YORK CITY BAR LEGAL REFERRAL SERVICE, https://www.nycbar.org/get-legal-help/article/wills-trusts-and-elder-law/guardianship-proceedings/ (last updated March 2016). In some cases the guardianship petitioner is not contentious; however, the nature of the proceeding is still adversarial.

[118] ABA Formal Ethics Op., *supra* note 32.

[119] R.I. Ethics Op. 2004-1 (2004). Some states even require it. State Bar of Ariz. Ethics Op., 90-12: Confidentiality of Information; Conflict of Interest; Client Under Disability (October 1990).

objections.[120] In effect, there is no difference between an attorney who assists a third party gain guardianship over his client and an attorney who seeks a guardian for his client. The outcome is the same in both scenarios – the client will be the subject of a guardianship that she did not initiate.

V. CONCLUSION: NEXT STEPS TO IMPROVE THE PROTECTIVE ACTION PROVISION

The use of protective action raises an important question: What is a lawyer's role?[121] It is clear that the attorney is not the client's physician or social worker or accountant – a lawyer is neither trained for that role, nor is that the work he is hired to perform. Yet any lawyer will indubitably face situations where his client requires assistance that is not purely legal in nature.[122] Particularly troublesome in cases with vulnerable clients, is that the client may not have the capacity to protect themselves against exploitation or even recognize that they are being exploited. In these situations, the lawyer should not simply avoid the problem,[123] neither should he seek to insert himself into a role for which he is unprepared. Rather, the Rule 1.14(b) and its comments should be revised to provide better guidance about taking protective action in a manner that respects the client's rights and autonomy.

Rule 1.14(b) permits lawyers to take protective measures, however, it provides little useful information on how an attorney should proceed. Rule 1.14(b) and its comments can be

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[120] ABA Formal Ethics Op., *supra* note 32; *e.g.*, *In re S.H.*, 987 P.2d 735 (Alaska 1999) ("If the requirements of Rule 1.14 are met, a lawyer may seek a guardian to protect the client's interests despite the client's disapproval.").

[121] *See generally* Galowitz, *supra* note 43, at 2125 (describing her experience confronting "the question of where lawyering ends and social work begins.").

[122] Gaolowitz, *supra* note 31.

[123] ABA Formal Ethics Op., *supra* note 32 (withdrawal may leave a client vulnerable at the time that the client is in the greatest need of assistance).

improved in many areas, including (1) improved guidance on differentiating between a client who cannot advocate for herself and one who does not want to advocate for herself, (2) information about avoiding substituting the lawyers' notion of "best interests" and determining the clients "expressed wishes," and (3) expressly stating that the lawyer should evaluate all available protective measures and opt for the least restrictive.[124] For example, a rephrased version of Rule 1.14(b) might read as follows:

> 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~~ **after exploring all options and choosing the least restrictive measure appropriate for the client**.

The following language could be added to comment [6]:

> **The lawyer should make every effort to determine the client's expressed values based on the following factors, in order: her current statements, previously stated interests, and values and associations. The lawyer should be guided by the client's wishes and lifestyle, rather than the lawyer's notions of the client's best interest.**

Additionally, more guidance documents and training can help attorneys re-orient themselves to take protective action while keeping the client's personal interest in mind. Guidance documents that are specific a state would be especially helpful for attorneys to identify resources and protective measures available in that jurisdiction.

[124] Of course, any revisions to the Model Rules should be mirrored in state ethics laws to have a binding effect. Regardless, alterations to the Model Rules and nationwide guidance documents are an appropriate starting point.