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## Middle-Class Lawyering in the Age of Alzheimer's: The Lawyer's Duties in Representing a Fiduciary

### Cover Page Footnote

William Augustus Bootle Professor of Ethics and Professionalism in the Practice of Law, Walter F. George School of Law, Mercer University. A.B., Washington University, 1979; M.A. University of Sussex, 1980; J.D., University of Chicago, 1983. I wish to express my thanks to Professor Bruce Green for his invitation to contribute to this volume and my special thanks to Gretchen Longan for helping me, as always, to see through the technicalities of legal ethics to the values that should underlie them.

# MIDDLE-CLASS LAWYERING IN THE AGE OF ALZHEIMER'S: THE LAWYER'S DUTIES IN REPRESENTING A FIDUCIARY

*Patrick Emery Longan\**

## I. INTRODUCTION AND LEGAL BACKGROUND

More Americans are living longer. In part, the growing number of elderly people is a matter of demographics as the baby boom generation ages. It is also a consequence of medical technology. Diseases that were once fatal in old age are now treatable, leaving a larger population for other age-related diseases.<sup>1</sup> Among these is Alzheimer's, a degenerative disease that gradually robs its victims of their abilities to remember, think, reason, and judge.<sup>2</sup> It eventually results in dementia, with the result that someone else must make decisions for the patient with advanced Alzheimer's.<sup>3</sup> The decision maker frequently is an adult child of the parent who either holds a power of attorney or has been appointed by a court as the parent's guardian. This caretaker frequently employs a lawyer to help with the decisions that must be made for the patient.

The lawyers who perform this function are not only those who represent the wealthy. Alzheimer's does not know socioeconomic boundaries. Perhaps because of Medicare, the medical innovations that have enabled people to live longer have trickled down to other strata of the population. The chances of becoming an Alzheimer's victim increases exponentially with age, and the number of victims is expected to rise rapidly in coming years.<sup>4</sup> Among these victims will be

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1. See Richard A. Posner, *Aging and Old Age* 17-25, 47 (1995) (explaining the aging process and its effect on the population).

2. For a general discussion of Alzheimer's, see Peter V. Rabins, *Dementia and Alzheimer's Disease: An Overview*, 35 Ga. L. Rev. 451 (2001). For more information, visit the Alzheimer's Association web page at <http://www.alz.org>.

3. See Rabins, *supra* note 2.

4. Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 Ga. L. Rev. 785, 788 (2001).

many members of the middle class who will need guardians or other caretakers.<sup>5</sup> The caretakers in turn need the help of lawyers because they may have to be formally appointed as guardian for the older person. They may also need legal counsel because they may find themselves dealing with substantial sums of money. The middle-class victim of Alzheimer's today is likely to have grown up in the Depression and, as a result, to have lived more frugally than those who followed them. Their children are likely to be surprised when they become caretakers and learn how much their parents have saved over a lifetime.<sup>6</sup> With that surprise will come the realization that they need legal counsel.

With that surprise also may come temptation. If the caretaker yields to temptation, the lawyer will encounter some difficult ethical issues.<sup>7</sup> The lawyer's ethical dilemmas may arise from either hope or fear. The lawyer may hope that he or she will be able to prevent or rectify harmful actions by a caretaker and may fear liability if he or she does not do so. Lawyers need clear guidance on their options and their duties.

The existing authorities send mixed messages to the lawyer. Comment 4 to Rule 1.14 of the Model Rules of Professional Conduct, which deals with the lawyer's duties to a client under a disability, states that "[i]f the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d)."<sup>8</sup> This appears to be a clear directive, but elsewhere the Rules seem to forbid any such action. First, the reference in this Comment to Rule 1.2(d) is odd, since that Rule only forbids the lawyer from assisting or counseling a client to commit a crime or a fraud; it does not impose any general duty to prevent or rectify a client's actions.<sup>9</sup> Furthermore, there is no permission under the Rules to divulge the caretaker's confidences to prevent or rectify financial harm to the older person.<sup>10</sup> The ABA

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5. For a discussion of duties to fiduciary clients in the context of wards with moderate wealth, see A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997).

6. One author estimates that the World War II generation will transfer \$11 trillion dollars to the next generation. See Wood, *supra* note 4, at 793 (citing Diane G. Armstrong, *The Retirement Nightmare: How to Save Yourself From Your Heirs and Protectors—Involuntary Conservatorships and Guardianships* 10 (2000)).

7. For an excellent and thorough exploration of a range of issues that might arise, see Robert B. Fleming and Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735 (2001). Another indispensable resource is the Special Issue, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961 (1994).

8. Model Rules of Prof'l Conduct R 1.14 cmt. 4 (2001); see also R 1.2(d).

9. R. 1.2(d).

10. Model Rule of Professional Conduct 1.6 states:

removed any doubt on this point in Formal Opinion 94-380, by concluding that a lawyer representing a fiduciary is bound strictly by all the Rules of Professional Conduct, especially Rule 1.6's prohibitions on revealing confidential information.<sup>11</sup> How can a lawyer prevent or rectify misconduct without telling someone about it? The Model Rules thus leave the lawyer relatively sure he has no ethical option to prevent or rectify misconduct by the guardian, but scratching his head about the Comment to 1.14 that says he may have such a duty after all.

The new Restatement (Third) of the Law Governing Lawyers is at least clearer, although it may strike fear into the hearts of lawyers for guardians. Section 51(4) states that a lawyer can have a duty of care to nonclients under certain circumstances, including when:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the nonclient is not reasonably able to protect its rights; and

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(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

R 1.6.

11. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 94-380 (1994).

The opinion begins as follows:

A lawyer who represents the fiduciary in a trust or estate matter is subject to the same limitations imposed by the Model Rules of Professional Conduct as are all other lawyers. The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer's obligation to preserve the client's confidences under Rule 1.6 is not altered by the circumstances that the client is a fiduciary.

*Id.*

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.<sup>12</sup>

The Restatement makes it clear that lawyers in jurisdictions that prevent the revelation of confidential information about a client are not expected to choose between violation of that professional duty and liability under this section. If the lawyer cannot disclose, then the lawyer cannot be held liable.<sup>13</sup> Yet many jurisdictions reject the strict model rule version of 1.6 and permit lawyers to reveal confidential information to prevent harm, including financial harm.<sup>14</sup> One concern for a lawyer in these jurisdictions must be whether, if the Restatement view is adopted, the lawyer who has the *option* to prevent harm may be *required* to do so or face liability to a nonclient. A related worry is the possibility of a court imposing liability even if a lawyer does not know of the malfeasance by a guardian but, in the court's hindsight, the lawyer should have known about it and should have tried to prevent it.<sup>15</sup>

What should the lawyer's role be when the guardian is misbehaving? To answer this question requires first some discussion of why elderly wards might need extra protection from financial abuse and why existing safeguards are insufficient. If the elderly are in special danger, and they cannot otherwise be protected, special rules to enable or require lawyers to protect them may be necessary.

## II. THE VULNERABILITY OF THE ELDERLY WARD

In general, lawyers do not owe special duties to people who are not clients. Lawyers are permitted and expected to represent their clients within the bounds of the law, while others whose interests are affected are expected to retain their own counsel to represent them. Why, then, should we consider the imposition of special duties for lawyers who assist guardians and other caretakers for the elderly? It may be easier to see why elderly wards need special protection by examining a typical scenario.

Suppose that Maxine Bowman is an eighty-year-old widowed mother of four boys and one girl. Her four sons live in distant states. Her daughter, Jane, lives nearby and for several years has assumed full responsibility for caring for Mrs. Bowman. All of Mrs. Bowman's close friends have either died or are in nursing homes. Mrs. Bowman herself is no longer able to drive and has started to become forgetful. Mrs. Bowman is frail but not in immediate need of full-time care. She

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12. Restatement (Third) of the Law Governing Lawyers § 51(4) (1998).

13. See *id.* § 51 cmt. a.

14. See, e.g., Ga. Rules of Prof'l Conduct R.1.6(b) (2001).

15. See *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976) (holding that a lawyer is liable to ward for not discovering a practice of misappropriation of assets by guardian). For a case to the contrary, see *Great Am. Ins. Co. v. Perry*, 1994 Minn. App., No. C6-93-1573, 1994 WL 101991 (Mn. Ct. App. Mar. 29, 1994).

had a stroke five years ago but seems gradually to have recovered her mental capacity.

Although Mrs. Bowman occasionally will not be able to remember the precise word she wants to use, she usually laughs off this difficulty. She has some circulatory problems that make it difficult to walk, but she seems content to be in her house most of the time. She spends her days reading (although she requires glasses and large-print reading material) and watching television. Jane brings her mother groceries and takes her to the public library. She takes her mother to doctors' appointments, fills her prescriptions, and ensures that she takes her medicine.

Caring for her mother has put an enormous strain on Jane physically, emotionally, and financially. Just when Jane's own children have reached ages where they can take care of themselves, Jane finds herself caring for her increasingly dependent mother. Jane loves her mother, but resents the burden and resents her brothers for leaving the care of their mother to her.<sup>16</sup>

In recent months, Mrs. Bowman appears to have become neglectful of some of her financial affairs. Jane found several pension checks on the kitchen table unopened, and she noticed what appeared to be late notices for several household bills. When Jane asked her mother about them, Mrs. Bowman replied that she thought she had taken care of them and that she would "see to them" right away.<sup>17</sup> Jane became concerned and went to her mother's bank. With her mother's permission, the Bank permitted Jane to inspect her mother's account information. To her amazement, Jane found that her mother had a balance in her checking account of \$25,000 and had a passbook savings account with another \$75,000 in it. She also learned that her mother had four certificates of deposit of \$100,000 each. Jane already knew that her mother's house is worth \$100,000 and is owned free and clear.

If her mother has Alzheimer's or another form of progressive senile dementia, Jane may soon find herself in charge of her mother's affairs, either through a power of attorney or as a court-appointed guardian.<sup>18</sup> She loves her mother. Why should we be especially concerned about protecting Mrs. Bowman from her own daughter? One reason is that Mrs. Bowman is especially vulnerable to financial abuse by Jane, if

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16. It is usually a daughter or daughter-in-law who bears the burden as primary caretaker for an elderly person. Posner, *supra* note 1, at 285.

17. Victims of Alzheimer's in the early stages of the disease often experience little or no decline in their cognitive capacity. Forgetfulness that begins to interfere with the older person's daily life, and his or her ability to live independently, is a symptom of the onset of Alzheimer's. See Rabins, *supra* note 2, at 458.

18. See, e.g., Ga. Code Ann. § 29-5-2 (2001) (listing in order of preference for appointment of a guardian in Georgia, a person selected by the ward before his or her incapacity, the ward's spouse, and the ward's child).

Jane is so inclined.<sup>19</sup> Those who intend to steal target the elderly for the same reason John Dillinger robbed banks: it is where the money is. They are tempting targets not only because they have money but also because they are often less able to make wise decisions about money.<sup>20</sup> This is particularly true in the case of an older person who has a guardian or other caretaker. By definition, this person no longer has either the interest or the capacity to monitor his or her financial interests.

The older person's isolation also contributes to this vulnerability. With fewer people for the elderly to talk to, it is less likely that anyone would learn of and question the financial decisions made by the caretaker. The isolated elderly person may also be utterly dependent upon the caretaker for transportation and other types of care and may fear to question financial decisions that seem questionable.<sup>21</sup> There may also be some natural disinclination to believe that a grown child would do anything wrong. For all these reasons, the elderly are sitting ducks for financial abuse.

The problem goes deeper, however, than the older person's vulnerability to a larcenous caregiver. If financial abuse of the elderly occurred only when the adult child happened to be a scoundrel, then we would have a shameful but isolated problem. Most people are not scoundrels. However, caretakers who in all other contexts would consider themselves to be honest people may not hesitate to take advantage of an elderly parent in their care. Jane probably feels some sense of entitlement to her mother's resources because, after all, it is Jane who is bearing the burden of caring for her mother. Her brothers are far away and doing nothing to help, so why shouldn't Jane get some "compensation" for the burden. Jane might therefore be able to convince herself that it is alright to "borrow" some of her mother's money for a new business venture, or use her mother's money to pay for an addition to her house so that her mother "will be comfortable" when she has to stay with Jane. People in Jane's position are just as vulnerable to rationalizing misbehavior as the wards are to being victimized. Some way of protecting the Mrs. Bowmans of the world needs to be found.

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19. For a general discussion of the vulnerabilities of the elderly, see Seymour Moskowitz, *Saving Granny From the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 Conn. L. Rev. 77 (1998).

20. It is worth remembering in this context that there are special criminal laws for financial scams that target the elderly. These statutes recognize that the elderly have money and are too easily parted from it. See, e.g., Fla. Stat. Ann. § 825.103 (West 2000).

21. For example, in *Albright v. Burns*, an elderly person expressed some concern about the sale of one of his principal assets but was convinced to let it go ahead. *Albright v. Burns*, 503 A.2d 386, 388 (N.J. Super. Ct. App. Div. 1986)

One response to these concerns is that existing laws forbid taking advantage of the elderly.<sup>22</sup> The problem, however, is one of detection. Mrs. Bowman is unable or unwilling to look after herself. Her husband is dead, all her friends are dead or in nursing homes, and her sons live far away and pay little attention to her. She interacts only with her daughter and those her daughter permits her to see. The civil and criminal laws designed to protect the elderly will only work in the unlikely event that someone detects the misbehavior.

That someone may be the lawyer for the guardian. Lawyers who help the guardians or other caretakers are in a special position to detect financial abuse.<sup>23</sup> Many of the transactions that a guardian or other caretaker undertakes will require the service of a lawyer. For example, the older person's bank may call to ask about the power of attorney under which the caretaker is purporting to act. A court may require a guardian to render periodic accountings for which a lawyer may be necessary. The purchase or sale of real property, or the documentation of loans or other financial transactions, may also involve the lawyer. The lawyer is best situated to notice if a fiduciary to an older person is engaging in financial abuse. We require health care professionals to report cases of suspected child abuse because they are in a unique position to notice if a child, who is otherwise vulnerable to adults, is being abused. Similarly, a lawyer should have to take steps to protect an older person who is being abused financially.

The elderly are, thus, particularly subject to financial abuse, and lawyers who represent their guardians may be uniquely situated to observe the abuse. Given these facts, what should we enable lawyers to do, and what should we expect of them?

### III. OPTIONS FOR ATTORNEY PREVENTION OF FINANCIAL ABUSE BY A FIDUCIARY

#### A. *Counseling Without the Right to Disclose*

The previous section used the analogy of the doctor who observes a child who appears to have been abused. The analogy, however, is not a perfect one. Child abusers do not generally consult with doctors about the abuse ahead of time. They do not present themselves before the damage is done and give the doctor a chance to dissuade them. Lawyers, on the other hand, are often consulted ahead of time and given the chance to talk their clients out of behaving badly. As one veteran lawyer described it, "half the practice of a decent lawyer

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22. See *supra* note 20 (explaining that Florida, for example, has special criminal laws for financial scams that target the elderly).

23. For another discussion of this point, see Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. Ill. L. Rev. 889, 936-37.

consists in telling would-be clients that they are damned fools and should stop" what they are doing.<sup>24</sup>

What can we expect of a counseling session between a lawyer and a guardian who reveals an intention to abuse his or her position? The lawyer cannot assist a client who is planning a crime or a fraud, but the lawyer is expected to discuss the proposed course of action with the client.<sup>25</sup> Presumably the lawyer will explain to the client what is wrong with the proposal. It might be a breach of fiduciary duty, a fraud, a crime, or all three. The lawyer would explain to the client the civil and criminal consequences of doing the wrong thing. In the particular context of a guardian of an elderly parent, one would expect the lawyer to go further. Under the Model Rules of Professional Conduct, a lawyer who is counseling a client could "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>26</sup> If Jane, the daughter, is the client, the lawyer might be able to appeal to the better part of her nature and dissuade her from improper action.

Sometimes the counseling will work, and no other action by the lawyer will be necessary. The counseling may be effective because the client feels free to share her plans with the lawyer. One inference might be that lawyers should be forbidden from sharing the confidential plans of their client-fiduciary in order to promote communication and give the counseling a better chance to work. Any rule of disclosure or liability that would drive fiduciaries underground and away from their lawyers eliminates the opportunities for preventive lawyering. Resolution of the lawyer's ethical dilemma in this situation must be sensitive to this risk.

However, as discussed above, many of the shenanigans in which the guardian would like to engage will require the services of a lawyer. A transfer of title to a house or the documentation of a loan to the guardian's business would need to go through the lawyer's hands. A periodic report to the court usually involves a lawyer.<sup>27</sup> Although confidentiality might at the margin promote communication, most of the plans will be disclosed anyway. With or without an assurance of confidentiality, lawyers will have the chance to counsel their clients and talk them out of wrongful conduct. Sometimes they will succeed. But what if they do not?

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24. This statement is attributed to Elihu Root, who served as Secretary of War, Secretary of State, and as a United States Senator. See Sol M. Linowitz, *The Betrayed Profession* 4 (1994).

25. See Model Rules of Prof'l Conduct R. 1.2(d) (2001).

26. R. 2.1.

27. See, e.g., Ga. Code Ann. § 29-2-44 (2001) (requiring annual accounting by guardians in Georgia).

## B. *Withdrawal as a Way to Prevent Financial Abuse*

### 1. Quiet Withdrawal

If the counseling does not do the job, the lawyer might try to solve the problem by withdrawing from the representation of the guardian. Suppose Jane came to the lawyer with a plan to spend her mother's money on an addition to Jane's house (a criminal and fraudulent misappropriation of funds). What is the lawyer to do? One thing is certain: he must withdraw from representing Jane. He has no choice but to withdraw if continued representation would result in a violation of the Rules of Professional Conduct, and to help Jane here would be to assist her with a fraudulent scheme.<sup>28</sup>

The question remains, however, what good this does for Mrs. Bowman. If the lawyer withdraws quietly and does nothing more, then he has made matters worse, at least temporarily. The elderly ward is left at the mercy of a corrupt fiduciary, without even the lawyer's voice of reason to slow down the misappropriation. Withdrawal serves only the lawyer and not the older person who is the victim of the caretaker. As we have seen, the lawyer for the caretaker of an older person is in a unique position to monitor financial abuse. If the lawyer merely runs quietly away when he sees such abuse, then the caretaker is much more likely to get away with the scheme. Jane can milk her mother's estate with impunity if the worst she has to fear is that the lawyer will resign. Jane's reaction is predictable: good riddance. She probably can find a new lawyer dumb enough or corrupt enough to help her. Unless something more can be done, the mandatory withdrawal of the lawyer in this situation leaves the elderly ward worse off.

### 2. Noisy Withdrawal as a Solution

Another possibility would be to permit or require the lawyer for the caretaker to make a "noisy withdrawal." Under ABA Formal Opinion 92-366, a lawyer must withdraw from a representation if he knows that a client is using his services to perpetrate a fraud, and the lawyer may do so "noisily."<sup>29</sup> To effect a "noisy" withdrawal means that the lawyer may notify anyone who may be relying on the lawyer's work product that the lawyer is withdrawing and disavowing the work product (such as an opinion letter). The lawyer can make this noise even if it requires the disclosure of information otherwise protected under Rule 1.6. The noisy withdrawal theoretically prevents the

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28. R. 1.16(a) (explaining when mandatory withdrawal is required); R. 1.2(d) (forbidding a lawyer to assist a client in fraudulent scheme).

29. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

perpetration of the fraud because the other parties to the transaction know that something is seriously wrong.

A noisy withdrawal might help protect the elderly ward. If the lawyer were permitted, for example, to notify Jane's brothers of the fact of his withdrawal, they would be sure to ask why. The lawyer could be careful not to reveal Jane's confidential information and at the same time not give legal advice to the brothers, who are non-clients. The lawyer would be permitted only to say to the brothers that they should seek counsel of their own.<sup>30</sup> They probably would recognize then that something was wrong.

As a general solution to the risk of financial abuse, however, a noisy withdrawal is insufficient. First, it supposes that notice could go to someone like a sibling, even though that person is "relying" on the attorney's work product only in the general sense that the sibling relies on the lawyer to see that the mother is well cared for. Second, it assumes the existence and accessibility of someone to tell. There will not always be another close relative, nor will the client necessarily share with the lawyer the existence and location of the relatives. Withdrawal does some good for the lawyer. It does little for the elderly person who is being victimized.<sup>31</sup> Something more must be possible.

### C. *Optional Disclosure of Guardian's Malfeasance*

The next possibility is to give the lawyer for the guardian the option to disclose the plans of the guardian. As discussed in the Introduction, Model Rule 1.6, especially as interpreted by the ABA, forbids disclosure.<sup>32</sup> Many jurisdictions, however, have declined to adopt Model Rule 1.6 and instead permit lawyers to reveal confidential information to prevent their clients from causing harm to others.<sup>33</sup> Even Model Rule 1.6 could be re-interpreted to allow for disclosure under these circumstances. Disclosures under Model Rule 1.6 are permitted if those disclosures are "impliedly authorized" to carry out the representation. The purpose of the representation of the guardian is the welfare of the ward, and any disclosure of planned wrongdoing by the guardian would serve that purpose.

Regardless of its textual basis, the question remains whether giving lawyers the option to tell is a good idea. Professor Robert Tuttle, in an exhaustive discussion of the ethical issues raised by representation of many different types of fiduciaries, concludes that optional disclosure is preferable:

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30. See R. 4.3 cmt. 1.

31. See R. 1.14 annot. (stating similarly that withdrawal from representation of an incompetent client helps the lawyer solve the lawyer's problem but leaves the client worse off).

32. See *supra* note 10 and accompanying text.

33. See, e.g., Ga. Rules of Prof'l Conduct R. 1.6(b) (2001).

The fiduciary's moral and legal entitlement to protection of his confidences weakens when he hides behind that protection in order to injure the beneficiary—the one the fiduciary should protect. As the fiduciary's moral claim weakens, the beneficiary's moral—if not legal—claim to the attorney's protection strengthens, given the fiduciary-client's "identity" and the attorney's capacity to protect the beneficiary from fiduciary overreaching. Given the relative balance between these competing moral obligations, the rules of legal ethics should be changed to permit explicitly (rather than by implication) the lawyer's discretion to disclose a fiduciary-client's intended or ongoing breach of trust.<sup>34</sup>

Professor Tuttle is correct that the benefit of permitting disclosure outweighs the cost. If in our example Jane decides to take advantage of her control over her mother's financial affairs, her mother is at her mercy, unless the lawyer can disclose the scam to people who can stop it. The cost is that Jane may be reluctant to tell her lawyer about her plans, and if she does not then the lawyer never has the chance to stop her. The practical fact, however, is that for many transactions Jane will have no choice but to seek the assistance of a lawyer. The lawyer will have the chance to dissuade her and, in fact, is much more likely to be able to dissuade her if he can threaten disclosure. If the threat fails, he will have the power to blow the whistle on the scheme whether she likes it or not. Given the vulnerabilities of the elderly client, that power serves an important purpose.

It does not, however, go far enough. If the lawyer can choose whether or not to tell, then some will not. Some will succumb to the instinct not to get involved in what almost certainly could become a nasty dispute, with the lawyer in the unfamiliar and uncomfortable situation of testifying against a former client. But every time that happens, a lawyer will sleep easier at the expense of economic abuse of an elderly person. The obligation to protect the vulnerable should be part of the obligation the lawyer assumes in representing a caretaker. If the lawyer does not stop the malefactor, probably no one will.

Furthermore, if the best way to handle a breach of a fiduciary duty is to stop it before it causes harm, then a rule of mandatory disclosure puts a powerful weapon in the hands of the lawyer. In counseling the caretaker to behave, the lawyer can truthfully say, "if you do this I will be required to report it." Surely most larcenous caretakers will be cowed by the inevitability of disclosure. Mandatory disclosure, backed by the prospect of civil liability, is the best protection the elderly person may have.<sup>35</sup>

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34. See Tuttle, *supra* note 23, at 941-42 (footnotes omitted).

35. See *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976) (en banc) (holding that a cause of action exists against psychotherapists who know of a patient's dangerousness and fail to warn the potential victim). *But see*

#### D. *Mandatory Disclosure*

In Section 51(4), the Restatement (Third) of the Law Governing Lawyers goes part of the way to putting a rule of mandatory disclosure in place. Recall that the Restatement would permit the elderly person to sue the caretaker's lawyer if the Rules of Professional Conduct permitted disclosure and if the specified conditions are met.<sup>36</sup>

If a reasonable lawyer would disclose the intentions of the guardian in order to prevent the harm, then a lawyer who fails to do so faces liability to the ward. The lawyer is in a unique position to protect someone who is vulnerable, and this section would make it part of the lawyer's job to provide that protection. It is a proper response to the problem of financial abuse of the elderly.

The Restatement does not, however, go far enough. At least two of the qualifications in this section dilute its protections too much. First, breaches of fiduciary duty that are not crimes or frauds can be just as devastating to the elderly. In our example, if Jane loans the money to herself for a business that fails, she has engaged in self-dealing and thereby breached her fiduciary duty to her mother. Even if Jane has not perpetrated a crime or fraud, she has breached a fiduciary duty to her mother, leaving her mother just as destitute as if Jane took the money to Vegas. The ward needs the lawyer's protection just as much.

Second, the lawyer should have an affirmative duty to prevent the client's malfeasance even if the lawyer has not assisted and is not assisting in the activity. The obligation to disclose would not exist to protect the elderly wards from the activities of the lawyers. Nor would it exist merely to protect lawyers from having their skills turned to evil purposes. The obligation would exist to protect the elderly from the vulnerabilities that are inherent in their situation, and it is imposed on lawyers because they are in a unique position to observe and prevent abuses. To require lawyer involvement as a trigger for the duty to disclose would, in part, defeat the protective purpose the rule is designed to serve.

#### E. *A Duty to Discover*

The final, most extreme possibility would require lawyers who represent guardians to investigate and discover wrongdoing by their clients or face liability to the ward for the failure to do so. Only one case, decided by an intermediate court of appeals twenty-five years

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Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979) (finding that no cause of action exists against a lawyer who knew client was dangerous but still helped client to be released from jail, after which the client assaulted his mother).

36. See *supra* note 12 and accompanying text.

ago, has imposed such an obligation.<sup>37</sup> The duty to investigate would provide the most protection for the elderly, but in fact it would be counter-productive. Lawyers are not accustomed to investigating their own clients and affirmatively seeking to blow the whistle on them. At best, it would make for an uncomfortable and unpleasant attorney-client relationship. At worst, such representation would be so fraught with the peril of malpractice that lawyers would avoid representing guardians. Only the lawyers who could not find work that was more pleasant and less risky would be left to do the work. The elderly themselves would not be served by reducing the number, and presumably the quality, of the lawyers willing to represent guardians. Fees would certainly rise, and quality might well suffer. Placing a duty to discover a guardian's misconduct would go too far.

### CONCLUSION

Our population is growing older, and the incidence of incapacity among the elderly is growing. Elderly people who have others looking after their finances are especially vulnerable to financial abuse. Because many of the mechanisms of financial abuse require legal assistance, lawyers are routinely hired by guardians and other caretakers and are therefore in a unique position to observe the caretaker's actions. Where caretakers decide to take advantage of their position, the best defense may be the lawyer. A lawyer who can honestly tell that caretaker that he will expose his or her scheme if it goes forward is a powerful deterrent. To permit but not require lawyers for guardians and other caretakers to fulfill this role would empower too many caretakers to abuse their position. Only a rule of mandatory disclosure of planned malfeasance, backed up by the threat of civil liability for keeping quiet, will enable the legal profession to render an admittedly difficult but necessary service to our aging population.

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37. See *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976).

*Notes & Observations*