

# Practical Solutions to Elder Financial Abuse and Fiduciary Theft

by Thomas A. Rodriguez, Courtney L. Smith, and Brooke Brestel

*Elder financial abuse and fiduciary theft is on the rise and comes in many forms and the media typically cover some of the more heinous elder abuse cases each year. The available options in a particular case vary with the situation. This article focuses on practical solutions for practitioners and others to investigate and address possible elder abuse.*

**E**lder abuse is becoming a recognized and common crime. The media are quick to cover many of the horrifying and heinous cases of elder abuse each year. Cases of elder financial abuse and fiduciary theft, however, rarely garner the same attention. Most of these cases are committed by family members, and relatively few cases of financial abuse and fiduciary theft are ever reported to law enforcement. Further, these types of abuse come in a variety of guises, which makes it challenging to identify actual instances of financial abuse and fiduciary theft.

When a client first meets with an attorney to discuss suspected abuse, or if an attorney becomes aware of a situation that appears questionable, the options available vary widely, depending on the particular situation. This article focuses on the practical steps practitioners (and others) may take to investigate and address possible elder financial abuse when encountering those situations.

## Definitions

To identify potential elder abuse, it is important for practitioners to understand what elder abuse looks like. There are several types of abuse of older people that generally are recognized as “elder abuse,” including the following:

- Physical abuse: This includes hitting, punching, slapping, burning, pushing, kicking, restraining, false imprisonment/confinement, or giving excessive or improper medication.

- Psychological/emotional abuse: Psychological/emotional abuse can take the form of shouting, swearing, frightening, or humiliating a person. A common theme is a perpetrator who identifies something that matters to an older person and then uses it to coerce him or her into a particular action. It may take verbal forms, such as name-calling, ridiculing, constantly criticizing, accusations, blaming, and general disrespect; or non-verbal forms, such as ignoring, silence, or shunning.
- Financial abuse/exploitation: This includes illegal or unauthorized use of a person’s property, money, pension, or other valuables, including changing a will to name the perpetrator as heir. Financial perpetrators may act by deception, coercion, misrepresentation, undue influence, or theft. This can involve fraudulently obtaining or using a power of attorney. Other forms of financial abuse include deprivation of money or other property or eviction from the home.
- Scam by strangers: Scams may include worthless “sweepstakes” that elderly persons must pay in advance to collect supposed winnings, fraudulent investment schemes, predatory lending, and lottery scams.
- Sexual abuse: This occurs when a person is forced to take part in any sexual activity without his or her consent, including forcing an older adult to participate in conversations of a sexual nature against his or her will. Sexual abuse also may include situations where a person can no longer give consent, such as in cases of dementia.

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- **Neglect:** Neglect occurs when an older adult is deprived of food, heat, clothing, comfort, or essential medication. It also may include depriving a person of needed services to force certain kinds of actions, financial and otherwise. The deprivation may be intentional (active neglect) or result from a lack of knowledge or resources (passive neglect).

Additionally, some state laws also recognize the following as elder abuse:

- **Rights abuse:** Rights abuse occurs when one denies the civil and constitutional rights of a person who is old but has not been declared by a court to be mentally incapacitated. This is an increasingly recognized aspect of elder abuse.
- **Self-neglect:** Elderly persons can neglect themselves by not caring about their own health or safety. Self-neglect (harm by self) is treated as conceptually different from abuse by others.
- **Abandonment:** This occurs when one deserts a dependent person with the intent to abandon or leave him or her unattended at a place for such a time period as may be likely to endanger his or her health or welfare.

### Statistics

The "Adult Protective Services Data Summary Fiscal Year 2008" report<sup>1</sup> indicates that 10,999 referrals to Adult Protective Services (APS) were made in Colorado. Of those referrals, 14% (1,540 people) were for financial exploitation. Further, 60% were female, 66% were white, 41% lived alone, and 23% lived with adult children. APS classified 36% of the financial exploitation referrals as frail or elderly, while 12% had some form of dementia and

another 10% had a mental illness or emotional issue. Interestingly, 61% were considered competent when reported. Not surprisingly, 76% of all financial exploitation perpetrators were family members. Therefore, for that fiscal year, 1,170 Coloradans were victimized by a family member. That figure is just from the reported cases and it is widely believed that many cases of elder abuse are unreported, as discussed below.

National studies show that as a person ages, the likelihood of victimization increases. In fact, a National Elder Abuse Incidence Study found that persons aged 80 and older are abused and neglected at two to three times their proportion of the elderly population.<sup>2</sup> Other statistics show that as many as 84% of elder abuse cases went unreported in a given year, and only 16% of those who suffered from elder abuse lodged a complaint with authorities.<sup>3</sup> According to the best available estimates, as many as 2 million Americans aged 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care and protection.<sup>4</sup> Current estimates put the overall reporting of financial exploitation at only one in twenty-five cases, suggesting there may be at least 5 million financial abuse victims each year.<sup>5</sup> These statistics, coupled with the fact that the over-65 population in Colorado will increase by 72% in the next decade,<sup>6</sup> evidence the growing need to be able to promptly identify and combat potential exploitation.

### Tips for Preventing Abuse by an Agent Under a Power of Attorney

A power of attorney is an important and necessary part of any estate plan. A power of attorney naming the wrong person as agent, however, only increases the potential for abuse. That said, with thoughtful execution by both attorney and client, a power of attorney can be a crucial method of preventing abuse.

First, practitioners should discuss with clients the importance of choosing the best agent by explaining the powers the potential agent will have and the important characteristics an agent should possess. If the principal is at all uncomfortable with the thought of a person having broad authority to act on his or her behalf, that person should not be chosen.

The discussions should explore all possible options, including family members, trusted friends, and professional alternatives. The client (principal) and the potential agent should understand the duties and responsibilities of an agent and the rights of the client, as well as how to document, report, and avoid self-dealing. It also is important to have discussions on whether reasonable fees are allowed. The agent should be warned against commingling funds and understand the importance of establishing fiduciary accounts rather than jointly owned bank accounts.

There are several provisions the practitioner can include in the power of attorney document to prevent fiduciary abuse. A provision can be added that requires an accounting, both annually and after revocation or termination. Additionally, the power of attorney can require the agent to communicate with the client about the status and nature of his or her financial affairs. Limits may be put on gifts, transactions, or charitable donations.

If desired, the client can require third-party approval for the agent to carry out major transactions, including real estate transactions, beneficiary changes, and other large transfers. Encouraging multiple-party involvement, rather than allowing the agent to



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act in isolation, requires the agent to be accountable to parties other than the client, who may be easily influenced by loved ones. Co-agent agreements also can provide this protection, but increase the likelihood of litigation if the co-agents cannot agree. As a final precaution, principals may request that their agents and fiduciaries submit to a credit check and criminal background check, although such a request may be uncomfortable for a principal to ask a family member.

### Initial Factors to Consider

When a new (or former) client alleges that he or she or another is being financially exploited, it is imperative to immediately assess the situation. There are several factors a prudent practitioner should consider. Beyond the obvious factors like the identities of the client, the purported victim, the alleged perpetrator(s), and any other individuals concerned with the welfare of the purported victim, other important facts to obtain include the severity of the alleged financial abuse, the size of the purported victim's estate, family dynamics, and the immediacy of the risk.

When considering the level of risk, an important factor is whether the alleged perpetrator is a fiduciary to the purported victim—for example, an agent under a power of attorney, guardian, conservator, or trustee—and whether the alleged perpetrator is likely to retaliate. Additionally, practitioners should consider the purported victim's capacity to consent to transactions, as well as his or her history of gifting to or support of the alleged perpetrator. If

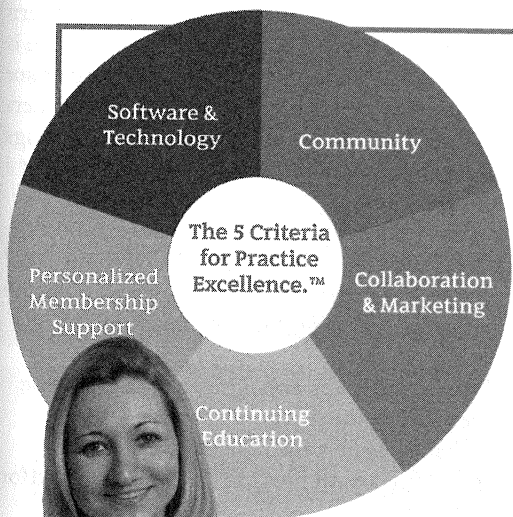
the purported victim has capacity and a long history of giving money to the alleged perpetrator, the alleged exploitation may be nothing more than a gift. Thus, the potential for retaliation by the alleged victim—for example, by disinheriting the accuser or the loss of the relationship—and the accuser's tolerance for assuming that risk should be discussed.

Similarly, it is important to consider the credibility and possible motives of the person alleging the abuse. This includes whether the person raising the alarm appears motivated to stop the abuse and protect the alleged victim's welfare, or whether the reporting person may be more interested in taking over control for his or her own nefarious reasons. Other factors to consider include:

- whether civil or criminal proceedings have been initiated
- the ability and willingness of the party to pay for legal and other services to address the potential abuse
- the willingness of the attorney to take on case that is or may become *pro bono*
- the obligations of the attorney under Colorado Rule of Professional Conduct 1.14, if the client is the alleged victim and has diminished capacity.

### Potential Solutions

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



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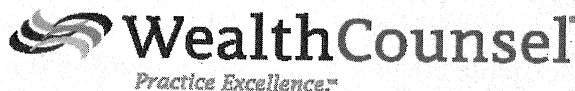
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## General Solutions

First, and perhaps least complex, is to talk to the alleged victim about any questionable circumstances. As discussed above, many factors go into determining whether exploitation has occurred. Speaking with the alleged victim may provide a quick resolution and educate the alleged victim about possible vulnerabilities. If necessary, the practitioner also could encourage the alleged victim to seek a medical evaluation. This could determine the competency of the alleged victim and assist in determining what level of protection, if any, he or she needs. If appropriate, the matter can be referred to APS or law enforcement officials. The progress with these referrals likely will depend on the jurisdiction and the responsiveness, priorities, and staffing of APS and law enforcement.

Ordering an ownership and encumbrances (O&E) report for any real estate owned by the alleged victim is a second potential solution relatively low on the complexity and expense scale. An O&E report may uncover real estate transfers or suspicious encumbrances. Generally, an O&E report can be ordered by contacting a title company.

Several other solutions depend on gaining access to the alleged victim's financial and medical records or providers. If the practitioner has access legitimately, he or she can search bank statements for questionable transactions and recently executed estate planning documents, as well as medical information to help ascertain whether the alleged victim has diminished capacity. Further, the practitioner may alert the alleged victim's banks and other financial institutions, advisors, and attorney of the suspected abuse. If the suspected perpetrator is acting under a power of attorney, the alleged victim may revoke the power of attorney and notify the financial institutions and the agent, and record the revocation in any county in which the victim owns real estate.

Finally, it may be necessary to confront the alleged perpetrator, either directly or through counsel. Arranging a family meeting to discuss the problems and possible solutions—with or without lawyers—may resolve the issue. These interventions may be used to implement a system of checks and balances, and to encourage transparency regarding any future transactions. Mediation is another viable option.

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## Specific Solutions With Relevant Legal Authority

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

- If a power of attorney is involved, a person can ask the court to investigate the situation pursuant to CRS § 15-14-716, which allows a broad group of persons (including a "person that demonstrates sufficient interest in the principal's welfare") to petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief.
- Protective proceedings (guardianships and conservatorships) may be an option.
  - If the alleged victim has or may have diminished capacity, initiate a conservatorship, guardianship, or other protective order under CRS Title 15, Article 14. Practitioners should be attentive when initiating protective proceedings; they can become complicated and may incur substantial legal fees.
  - Practitioners should be wary when advising their clients about recouping attorney fees from the estate of a respondent. Although there is legal authority<sup>7</sup> that may allow some or all attorney fees to be recovered, there are no guarantees, particularly in contested protective proceedings when attorney fees and costs may be tens of thousands of dollars and multiple parties may claim their actions benefited the respondent's estate.
  - An emergency guardian and special conservator can be sought; notice to the respondent and other parties is not required.<sup>8</sup> However, it is good practice to attempt to give notice to affected parties, unless a legitimate concern exists—for example, a concern that financial exploitation is occurring and giving notice might encourage the perpetrator to drain the alleged victim's funds and flee. Practitioners should not fail to give notice of emergency proceedings solely to make it easier to obtain emergency orders without a contested hearing.
- If a fiduciary is involved and there is an open estate, report the situation to the court under the Fiduciary Oversight Act.<sup>9</sup> This statute allows the court to address suspected fiduciary abuse and grant relief, including, but not limited to:
  - 1) surcharge of the fiduciary;
  - 2) removal of the fiduciary and appointment of a successor;
  - 3) temporary restraint of the fiduciary's powers;
  - 4) a contempt citation against the fiduciary; and
  - 5) compelling a fiduciary to provide an inventory and/or accounting.
- If there is an open probate or conservatorship estate, seek a citation pursuant to CRS § 15-12-723. Under this statute, if a party complains to the court in writing that a person, *inter alia*, is "suspected to have concealed, embezzled, carried away, or disposed of any money, goods, or chattels of the deceased or protected person," the "court may cite such suspected person to appear before it and may examine him on oath upon the matter of such complaint."<sup>10</sup> A petition is filed with the court and the court may issue a citation to appear to the alleged perpetrator. If the cited party fails to appear, the court has authority to issue a bench warrant. At the citation hearing, testimony can be elicited under oath and may become critical evidence in a subsequent civil or criminal proceeding.

- If the client has or obtains requisite standing, a civil protection order pursuant to CRS §§ 13-14-101 *et seq.* may be sought to “prevent emotional abuse of the elderly or of an at-risk adult.”<sup>11</sup>
- If the client has or obtains requisite standing, a civil action can be filed against the purported perpetrator alleging causes of action, including but not limited to breach of fiduciary duty, breach of confidential relationship, conversion, and/or unjust enrichment. Seeking the legal remedies of a constructive trust or a resulting trust may be necessary. Once a court proceeding is initiated, the practitioner should record a *lis pendens* in any county in where the alleged victim owns real estate.
- Referral of the matter to law enforcement may be an option. Police departments and district attorney offices in many jurisdictions are making the criminal prosecution of elder abuse and exploitation a higher priority than in the past, similar to law enforcement’s regard of domestic violence several decades ago. Like domestic violence, elder abuse and exploitation is not merely a “family matter” and many law enforcement agencies pursue criminal charges against alleged perpetrators for the safety and welfare of the elderly population, and because of public policy considerations.
- Additionally, probate judges have authority to issue writs of assistance, which allow law enforcement to intervene in certain situations. Executing a writ can be useful for protecting a purported victim. For example, in cases where the alleged abuser lives with the purported victim and no landlord-tenant relationship exists, a writ of assistance allows law enforcement to remove the abuser from the home without forcing the purported victim—who already is vulnerable—to assume the eviction responsibilities. This typically arises when a relative is freeloading and financially exploiting the victim, and simply will not leave.

Writs of assistance also are useful when the purported victim’s health and welfare are in jeopardy and the victim refuses to seek the necessary care or rejects offers of assistance. In these instances, the probate court first must issue a guardianship or conservatorship, placing the victim under the jurisdiction of the court. Then, if the protected person continues to refuse to cooperate with the appointed guardian’s care plan, the guardian may request the court to issue a writ, which allows law enforcement to compel the protected person to move to a skilled care facility, hospital, or evaluative facility to get the necessary assistance, care, and treatment as determined by the guardian.<sup>12</sup> Often, in situations dire enough to require writs, emergency guardianships are necessary to quickly prevent imminent harm and to ensure the protected person receives needed care.<sup>13</sup>

Further, these writs may be used by law enforcement to compel the purported victim to return to a nursing home or visit a hospital or evaluative facility. Here, the purported victim must be a protected person under the jurisdiction of the probate court. If the purported victim’s welfare is in immediate jeopardy, or if

the purported victim likely will not cooperate, the appointed guardian may ask the court for the writ to force the victim to get the needed assistance or treatment.

Although obtaining a writ of assistance is an option, it is one that may have mixed results. Involving law enforcement and essentially forcing someone who already was victimized to act against his or her will (albeit in his or her best interest), are rather drastic measures, and should be considered only in certain situations.

## Conclusion

Elder abuse and exploitation is a serious issue facing older adults, and may become more prevalent as the overall population ages. The number and variety of types of abuse, as well as the fact that most cases of abuse are committed by family members, make identification of abuse difficult for police, practitioners, and professionals. Fortunately, there are steps legal practitioners can take to identify instances of elder abuse and exploitation. With an appropriate investigation and consideration of several important factors, practitioners have several potential solutions available to combat elder abuse and help curb its growth.

## Notes

1. “Adult Protective Services Data Summary Fiscal Year 2008–09,” available at [www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22APSDDataReport2008.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251694156755&cssbinary=true](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22APSDDataReport2008.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251694156755&cssbinary=true).

2. The National Center on Elder Abuse at the American Public Human Services Association, in collaboration with Westat, “National Elder Abuse Incidence Study” (1998), available at [www.aoa.gov/AoA/Root/AoA\\_Programs/Elder\\_Rights/Elder\\_Abuse/docs/ABuseReport\\_Full.pdf](http://www.aoa.gov/AoA/Root/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf).

3. *Id.*

4. Bonnie and Wallace, eds., *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (The National Academies Press, 2003).

5. Wasik, “Fleeing of America’s Elderly,” *Consumer’s Digest* (March/April 2000).

6. Colorado’s State Plan on Aging (2011), available at [www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22SUA-StatePlanOnAging-2012-2015.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251774324162&cssbinary=true](http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22SUA-StatePlanOnAging-2012-2015.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251774324162&cssbinary=true).

7. CRS §§ 15-10-601 *et seq.* (Compensation and Cost Recovery Act).

8. CRS §§ 15-14-312 and -406(7).

9. CRS §§ 15-10-501 *et seq.*

10. CRS § 15-12-723.

11. CRS § 13-14-102(1.5)(c).

12. Stiegel and Wood, “Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,” 30 *BIFOCAL* 35 (Feb. 2009).

13. CRS § 15-14-312. ■

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