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Practice Tips

***23 MANDATORY REPORTING REQUIREMENTS FOR FINANCIAL ELDER ABUSE**

[James P. Bessolo](#) [\[FN1\]](#)

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FINANCIAL ELDER ABUSE may be the crime of the twenty-first century, which should not be shocking news, given America's aging population. It is estimated that 40 million Americans will be 65 and over in 2010, increasing to 55 million in 2020. [\[FN1\]](#) In California, the state with the largest population of older Americans, the U.S. Census Bureau projects that the elderly population will increase from 3.7 million to more than 6.4 million within the next 20 years. These projections, coupled with the baby boomers' wealth concentration, lay the groundwork for significant potential financial elder abuse.

In an effort to combat financial abuse, California law requires individuals in certain positions, who are known as mandated reporters, to report incidents that reasonably appear to constitute elder or dependent adult abuse. The reports are generally made to the local Adult Protective Services (APS) agency or to local law enforcement. Effective January 1, 2007, officers and employees of financial institutions became mandated reporters of suspected financial abuse of an elder or dependent adult. [\[FN2\]](#) The Elder Abuse and Dependent Adult Civil Protection Act defines "financial abuse" as occurring when a person or entity takes, hides, appropriates, or retains real or personal property of an elder or dependent adult for wrongful use and/or with the intent to defraud, or assists in doing so. [\[FN3\]](#)

Abuse of elders can take many forms, such as physical abuse, financial abuse, emotional abuse, neglect, isolation, abandonment, and abduction. [\[FN4\]](#) The California Department of Justice estimates that approximately one of every 20 elders is a victim of abuse every year. The number of incidents of elder abuse is difficult to determine because it is often unreported. According to one source, only 1 in 14 cases of elder abuse is reported to authorities. [\[FN5\]](#) Reasons for nonreporting can include a victim's fear, embarrassment, or lack of capacity. Sadly, a majority of the perpetrators of elder abuse are adult children or other family members.

An "elder" is a California resident age 65 or older. [\[FN6\]](#) A "dependent adult" is a California resident between the ages of 18 and 64 who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. [\[FN7\]](#) Under California law, certain individuals who, in their professional capacity or within the scope of their employment, observe or have knowledge of an incident that reasonably appears to constitute the abuse of an elder or dependent adult are legally required to report the incident. [\[FN8\]](#) These individuals include persons who assume responsibility for the care or custody of an elder or dependent adult, whether or not compensated; administrators, supervisors, and licensed staff of a public or private facility that provides care or services for elders or dependent adults; physicians and medical professionals; clergy; and employees of APS agencies and local law enforcement.

The report must be made by telephone immediately or as soon as practicably possible, followed by a written report sent within two working days. Subject to certain exceptions, the report is made to either the local APS agency or local law enforcement. [\[FN9\]](#) One exception is that if the purported abuse occurred in a long-term care facility other than a state mental health hospital or a state developmental center, the report is made either to the local ombudsman or to local law enforcement. [\[FN10\]](#) The report is confidential and may generally be disclosed only to certain persons and government entities. Violation of the confidentiality requirement constitutes a misdemeanor. [\[FN11\]](#) Failure of a mandated reporter to comply with his or her reporting obligations under the act is also a misdemeanor. [\[FN12\]](#)

A mandated reporter who reports a known or suspected instance of abuse of an elder or dependent adult as required or authorized by the act is protected from civil and criminal liability with respect to the report. A person who is not a mandated reporter who knows or reasonably suspects that an elder or dependent adult has been the victim of abuse may report the abuse in the same manner as a mandated reporter. [\[FN13\]](#) The act protects nonmandated reporters from civil and criminal liability for making reports unless it can be proven that the report was false and that the nonmandated reporter knew the report was false. [\[FN14\]](#)

Advocates for elder abuse victims have advanced the position that employees of financial institutions can help prevent financial elder abuse by reporting known or reasonably suspected financial abuse to government authorities. Advocates have noted the devastating *24 harm that financial abuse can cause an elderly victim. By the time the abuse is discovered, the abuser often will have dissipated the victim's assets and elderly victims are often unable to financially recover from their losses, which can lead to increased reliance on public welfare programs, greater physical problems, and a higher mortality rate. Advocates believe that financial institutions have the potential to be the first line of defense against financial elder abuse. Nonetheless, while supporting efforts to prevent financial elder abuse on a voluntary basis, many in the financial industry opposed efforts to impose mandatory reporting obligations on financial institutions or their employees. For example, the California Bankers Association opposed previous legislative attempts to impose mandatory reporting obligations because of concerns about such issues as whether a financial institution could be liable for a false report and whether criminal penalties could be imposed on an employee or financial institution for failing to report. However, these concerns have now been substantially addressed.

Employee Reporting Obligations

Employees of financial institutions became mandated reporters effective January 1, 2007, but only of suspected financial abuse of an elder or dependent adult. [\[FN15\]](#) For reporting purposes, "suspected financial abuse of an elder or dependent adult" occurs when an employee observes or has knowledge of behavior or unusual circumstances or transactions, or a pattern of behavior or unusual circumstances or transactions, that would lead an individual with like training or experience, based on the same facts, to form a reasonable belief that an elder or dependent adult is the victim of financial abuse. [\[FN16\]](#)

The act defines "financial institution" to include national banks, savings and loans, state banks and trust companies whose deposits are not limited solely to funds held in a fiduciary capacity, and federal or state credit unions. [\[FN17\]](#) A financial institution does not include a subsidiary or affiliate of a financial institution that does not itself come within the definition of a financial institution. The definition does include an "institution-affiliated party," which encompasses directors of and agents for an insured depository institution; certain shareholders or other persons who participate in the conduct of the affairs of an insured depository institution; and attorneys, accountants, and other persons who knowingly or recklessly participate in certain conduct that caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, an insured depository institution. [\[FN18\]](#) The inclusion of an institution-affiliated party in the definition of financial institution is somewhat confusing. For example, since mandated reporter status is imposed on employees of financial institutions, would employees of a bank director, if any, be mandated reporters of suspected financial elder abuse, or is the intent that the director be the mandated reporter?

The obligation of an employee of a financial institution to report arises in two situations. [\[FN19\]](#) The first situation involves an employee who observes or knows of an incident through direct contact with the elder or dependent

adult that reasonably appears, or that the employee reasonably suspects, to be financial abuse. The act does not expressly limit the direct contact to in-person contact, and therefore the term presumably includes contact by oral or written communication. The second situation involves an employee who reviews or approves the elder or dependent adult's financial documents, records, or transactions, and by doing so the employee concludes that there reasonably appears to be, or reasonably suspects, financial abuse. The employee may rely solely on the information before him or her at the time of reviewing or approving the documents, records, or transactions; there is no duty to further investigate.

In both situations, an obligation to report may apply only if the employee's knowledge or observation arises "in connection with providing financial services with respect to an elder or dependent adult" within the scope of the employee's "employment or professional practice" and the incident is "directly related to the transaction or matter that is within that scope of employment or professional practice." Therefore, if an employee of a financial institution observes an incident outside the confines of his or her employment that could reasonably constitute financial abuse of an elder or dependent adult, the employee is not a mandated reporter and has no duty to report the incident. Also, the act does not distinguish between customers and noncustomers, so if the reporting requirements are otherwise satisfied a report must be filed whether or not the elder or dependent adult is a customer of the financial institution. For example, if in connection with an application for a loan that is ultimately denied an employee reasonably suspects financial elder abuse, the employee is required to report.

An allegation by an elder, dependent adult, or other person that financial abuse has occurred is not sufficient to trigger the reporting requirement if two conditions are met: 1) The employee is not aware of any other corroborating or independent evidence of the alleged financial abuse (without any duty to investigate any accusations), and 2) in the exercise of the employee's professional judgment, the employee reasonably believes that financial abuse did not occur. [\[FN20\]](#)

A required report must be made by telephone immediately, or as soon as practicably possible, with a written report sent to the agency that received the oral report within two working days thereafter. When two or more employees jointly have knowledge or reasonably suspect that financial abuse of an elder or dependent adult has occurred, with the mutual consent of the employees the report may be made by a designated member of a reporting team. [\[FN21\]](#) The California Department of Social Services has issued a form for use by employees of financial institutions to make a written report. This is different from the form used by other mandated reporters. [\[FN22\]](#) The form requests personal information about the elder or dependent adult, the location of the incident, the reporter's observations, information relating to the targeted account (although only the last four digits of the account number are disclosed on the form, the form's instructions provide that the full account number will be requested in the oral report), information about the alleged abuser, and whether any other persons are believed to have knowledge of abuse against the alleged victim. The original and one copy of the form must be submitted to the appropriate agency. The oral and written report must be made to either the APS agency in the county where the apparent victim resides or to a law enforcement agency in the county where the incident occurred. If the mandated reporter knows that the apparent victim resides in a long-term care facility, the report must be submitted to either the local ombudsman or the local law enforcement agency. The identity of all persons reporting suspected financial abuse is confidential and may generally be disclosed only to certain persons and government agencies. Since the government agency's investigation is confidential, a financial institution will not be able to obtain further information on the reported matter unless the elder or dependent adult consents to the disclosure.

A question arises whether copies of documentation referenced in the report may be disclosed as part of the report without violating federal and state financial privacy laws. For example, if a suspected abuser attempts to transact business under a power of attorney purportedly executed by an elder, could a copy of the power of attorney be submitted to APS with the report? The act does not expressly authorize the disclosure of documentation as part of a report. Nonetheless, there appears to be support under California law for disclosure of documentation, at the time the report is filed, that is directly related to the incident and referenced in the report. [\[FN23\]](#)

A report of suspected financial abuse of an elder or dependent adult made by an *25 employee of a financial institution is a privileged communication under [Civil Code Section 47\(b\)](#). [FN24] The [Section 47\(b\)](#) privilege immunizes the reporter against all tort actions except for malicious prosecution. [FN25] In addition, the act protects a mandated reporter from civil and criminal liability for any report required or authorized by the act. [FN26] Although the liability protections afforded to employees of financial institutions under the act do not expressly reference the financial institution itself, presumably financial institutions are also protected by the absolute privilege under [Section 47\(b\)](#) with respect to an employee's report of suspected financial abuse of an elder or dependent adult. [FN27]

If an employee of a financial institution fails to report an incident that should have been reported, the financial institution, and not the employee, is subject to a civil penalty of up to \$1,000, or up to \$5,000 for a willful failure. The penalty can be recovered only in a civil action brought against the financial institution by the attorney general, district attorney, or county counsel. [FN28]

When a report of suspected financial abuse is made by an employee of a financial institution, the financial institution must consider whether to file a Suspicious Activity Report (SAR) with the federal government. The filing of a SAR may be required if there are one or more financial transactions conducted through the financial institution involving known or reasonably suspected financial abuse of an elder or dependent adult that aggregate at least \$5,000. A SAR must usually be filed within 30 days from the date of the initial detection of the suspicious activity. Federal law provides complete protection from civil liability for the filing of a SAR. [FN29]

In anticipation of the January 1, 2007, effective date, training programs were implemented to educate employees of financial institutions on their reporting responsibilities, and financial institutions established procedures for determining whether and how to report incidents of suspected financial elder and dependent adult abuse. Some financial institutions, particularly the larger institutions, have established a centralized group to assist employees with the reporting process.

Warning Signs

A common factor in financial abuse cases is the presence of a third party during transactions. This individual may be a relative, friend, caregiver, or even an apparent casual acquaintance. This third party is often someone in whom the elder or dependent adult has placed trust and confidence. The following are some possible warning signs of financial abuse in a financial institution setting.

Unusual account activity can indicate that *26 an elder or dependent adult is being financially abused. Common examples include:

- Large cash withdrawals.
- Activity inconsistent with the person's physical ability, such as ATM use by a physically impaired person.
- Activity inconsistent with a person's normal banking habits, such as ATM use by an elder or dependent adult with an established pattern of client service representative transactions.
- Frequent new withdrawals, usually in round numbers.
- Increased activity on credit/debit cards.
- Withdrawals made from savings or certificates of deposit despite penalty assessments or loss of interest.

Account changes may also indicate that an elder or dependent adult is a victim of financial abuse. Examples may include:

- New use of power of attorney to gain access to financial accounts.
- Change in account beneficiaries.
- New authorized signers on accounts.
- Change in receipt of account statements.
- Recent change of physician, attorney, or accountant.
- Change in property title, or new or refinanced loan.
- Recent change in power of attorney.
- Recent change in a will or trust, when the elder or dependent adult seems incapable of managing his or her affairs.

- Recent change in a will or trust to favor a new or much younger “friend.”

Elders and dependent adults who are being financially abused may also display significant changes in their behavior as customers. Examples may include:

- Withdrawn, tired, confused, or depressed.
- Confusion about recent financial arrangements.
- Reluctance to discuss matters that were previously routine.
- More apprehensive of the outside world.

An elder or dependent adult who is being financially abused may also demonstrate that he or she is being influenced or directed by someone in a position of trust (e.g., caregiver, relative, adviser, or friend). Examples may include:

- Comes to the financial institution accompanied by a third party, whereas he or she previously came alone.
- Appears to depend on the input or direction of another to conduct a transaction.
- Stops coming to the financial institution.
- Employee is told that elder or dependent adult is not willing or able to accept visits or telephone calls.
- Another person is overly concerned about the elder's or dependent adult's finances.
- Another person speaks for the elder or dependent adult, even when the elder or *27 dependent adult is present.

- Another person appears dependent on the elder or dependent adult for financial support.
- An individual accompanies the elder or dependent adult and encourages him or her to withdraw money.
- An individual accompanies the elder or dependent adult and pressures or coerces him or her into a transaction.

The above behaviors are all signs of possible financial abuse. However, these behaviors may have legitimate explanations, and therefore it is important for an employee of a financial institution not to jump to conclusions but to make a reasoned determination, after receipt of appropriate internal assistance, about whether a report should be filed.

Preliminary indications are that the new reporting obligations imposed on employees of financial institutions will result in a significant increase in the number of financial abuse reports filed. According to information provided by a representative of Los Angeles County APS, financial abuse reports filed with APS in Los Angeles County during the first four months of 2006 numbered 1,062, with most reports submitted by financial institutions voluntarily. For the first four months of 2007, the filings increased to 1,485, with most reports derived from financial institutions. This represents a 40 percent increase in financial abuse reporting. Hopefully, the increased reporting will result in a reduction of actual losses incurred by elders and dependent adults and an increase in assistance to those who have been victimized.

[\[FNa1\]](#). James P. Bessolo is a senior attorney with Northern Trust, N.A., in Los Angeles. The author wishes to thank Raymond M. Lynch, associate general counsel, Greater Bay Bank N.A., for his permission to use the warning signs checklists that appear in this article.

[\[FN1\]](#). ADMINISTRATION ON AGING, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, A PROFILE OF OLDER AMERICANS: 2005.

[\[FN2\]](#). Elder Abuse and Dependent Adult Civil Protection Act, [WELF. & INST. CODE §§15600 et seq.](#), as amended by the Financial Elder Abuse Reporting Act of 2005 (SB 1018).

[\[FN3\]](#). [WELF. & INST. CODE §15610.30](#).

[\[FN4\]](#). [WELF. & INST. CODE §15610.07](#).

[\[FN5\]](#). House Select Committee on Aging (1994).

[\[FN6\]](#). [WELF. & INST. CODE §15610.27](#).

[\[FN7\]](#). [WELF. & INST. CODE §15610.23](#).

[\[FN8\]](#). [WELF. & INST. CODE §15630](#). *See also* [WELF. & INST. CODE §15610.65](#) (defining “reasonable suspicion”).

[\[FN9\]](#). APS is a state-mandated program that assists elders and dependent adults who are unable to meet their own needs or are victims of abuse. Each county in California has an APS agency. Upon receipt of a report, an APS social worker will typically meet with the alleged victim to investigate and assess the situation and, when appropriate, work with local law enforcement agencies in an attempt to eliminate any apparent abuse. For more information on APS and a contact list of APS agencies for each county, *see* www.dss.cahwnet.gov/cdssweb/AdultProte_175.htm.

[FN10]. See [WELF. & INST. CODE §15610.47](#) for the meaning of “long-term care facility.” Ombudsmen are persons who advocate for the protection and rights of residents in long-term care facilities. See [WELF. & INST. CODE §15610.50](#). For more information, see www.la4seniors.com/ombudsman.htm.

[FN11]. [WELF. & INST. CODE §15633](#).

[FN12]. [WELF. & INST. CODE §15630\(h\)](#).

[FN13]. [WELF. & INST. CODE §15631](#).

[FN14]. [WELF. & INST. CODE §15634](#).

[FN15]. [WELF. & INST. CODE §15630.1](#).

[FN16]. [WELF. & INST. CODE §15630.1\(h\)](#).

[FN17]. [WELF. & INST. CODE §15630.1\(b\)](#).

[FN18]. See [12 U.S.C. §1813\(u\)](#) for a definition of “institution-affiliated party.”

[FN19]. [WELF. & INST. CODE §15630.1\(d\)\(1\)](#).

[FN20]. [WELF. & INST. CODE §15630.1\(e\)](#).

[FN21]. [WELF. & INST. CODE §15630.1\(d\)\(2\)](#).

[FN22]. The financial institution form, SOC 342, as well as the form for other mandated reporters, SOC 341, may be obtained from the California Health & Human Services Agency Web site.

[FN23]. The California Right to Financial Privacy Act §7471(c) (codified at [GOVT. CODE §§7460 et seq.](#)) authorizes a financial institution to disclose a customer's financial records to a state or local agency concerning suspected violation of any law. Also, the California Financial Information Privacy Act §4056(b)(8) (codified at [FIN. CODE §§4050 et seq.](#)), also known as SB1, authorizes the disclosure of a customer's nonpublic personal information (as defined in [FIN. CODE §4052](#)) when reporting a known or suspected instance of elder or dependent adult financial abuse.

[FN24]. [WELF. & INST. CODE §15630.1\(i\)](#).

[FN25]. See [Silberg v. Anderson, 50 Cal. 3d 205 \(1990\)](#).

[FN26]. [WELF. & INST. CODE §15634](#).

[FN27]. See [Hagberg v. California Fed. Bank FSB, 32 Cal. 4th 350 \(2004\)](#). See also [PENAL CODE §368](#), which makes financial abuse against an elder or dependent adult a crime, and [WELF. & INST. CODE §15656](#).

[FN28]. [WELF. & INST. CODE §15630.1\(f\), \(g\)\(1\)](#).

[FN29]. [31 U.S.C. §5318\(g\)\(3\)](#)

