

Daily Journal

www.dailyjournal.com

WEDNESDAY, MARCH 22, 2017

Gray is the newest shade of legal malpractice

By Karen K. Stromeyer
and Arthur J. Harris

We find ourselves in the midst of arguably the greatest wealth transfer in the history of our country. Over the next few decades, baby boomers, the largest and wealthiest generation in U.S. history, will transfer their life savings — roughly \$30 trillion in assets — to their Generation X and millennial heirs. To effectuate this massive conveyance of wealth, baby boomers will use a variety of professionals, including lawyers.

While this is certainly an opportunity to act as advocates for elderly by handling important financial and estate planning matters and taking care of day-to-day issues affecting the senior's care, a decidedly dangerous weapon has recently emerged as a hazard to engaging in this lucrative field of law: civil claims for financial elder abuse *against lawyers*.

Generally speaking, every state has financial elder abuse statutes which impose criminal penalties for the financial exploitation of the elderly. Up until recently, however, attorneys acting in their professional capacities were exempt from the enhanced damages recoverable under these statutes; an attorney's potential exposure for any errors in their judgment or representation was limited to economic damages.

Well, times have changed, and some large and influential jurisdictions are enacting statutes that permit elderly clients to pursue civil causes of action against their lawyers to address abuse of an elderly. Increasingly these causes of action are pled in addition to malpractice claims when there is dissatisfaction with the professional services that have been rendered to an elderly individual. However, the crucial distinction between a run-of-the-mill legal malpractice claim and a cause of action for elder abuse are the greater civil liability and dramatically increased recoverable damages available under an elder abuse claim that include emotional distress dam-

ages, punitive damages, and statutory attorneys fees.

As the old adage goes, "the greater the risk, the greater the reward." In weighing whether to represent an elderly client, attorneys need to remember that the risk may have just gotten a whole lot greater.

Increasingly these causes of action are pled in addition to malpractice claims when there is dissatisfaction with the professional services that have been rendered to an elderly individual.

California and Florida Lead the Way

As would be expected, states with large elderly populations are on the forefront of civil financial elder abuse legislation, as well as application of these statutes by plaintiff's attorneys. Most financial elder abuse or vulnerable adult statutes have similar features such as expansive allowances for who has standing to bring claims on behalf of the elder, mandatory or permissive awards of attorney fees, and punitive or treble damages.

Florida has a "vulnerable adult" statute that provides for a claim by a vulnerable adult against any perpetrator who financially exploited an elderly person. See Florida Statute Ann. Section 415.1111 et seq. An adult is "vulnerable" if their ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, *or the infirmities of aging*. These claims can be brought by the elderly adult or by their personal representatives and the plaintiff can be entitled to attorney fees, costs and punitive damages.

California, often the innovator in legal trends, has an even more robust elder abuse statute. There is strict liability for anyone who "takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropri-

ating, obtaining, or retaining, real or personal property of an elder or dependent adult" for a wrongful use; with intent to defraud; or by undue influence. See California Welfare and Institutions Code Section 15610.30 et seq. An elder is defined as anyone 65 years or older regardless of whether they have any diminished physical or mental capacity. More importantly, a prevailing elder plaintiff is entitled to actual damages, mandatory attorney fees and costs, emotional distress damages, and potential punitive damages. The backdrop for these claims varies widely, but a common allegation is that the attorney wrongfully "obtained" the property of the elder by overcharging them for services rendered or taking an excessive property interest as payment for their services.

For example in *Wood v. Jamison*, 167 Cal. App. 4th 156 (2008), an attorney helped an elderly woman in a joint venture with Jerk, who the attorney also represented. The attorney helped the elder take out a loan she could not afford and invest in a nightclub with Jerk. From the loan proceeds, the attorney received a referral fee from the bank. The court found the attorney committed malpractice and financial abuse of an elder by not advising elder of his conflict of interest, for failing to advise the elder that the nightclub investment was not appropriate for her, and for knowingly aiding and abetting in Jerk's efforts to defraud elder.

Again, historically these circumstances created garden variety legal malpractice causes of action, with limited available damages that were usually covered by insurance. The addition of a financial elder abuse cause of action adds a massive complication to the resolution of the dispute between the elderly client and their former attorney. Most insurers consider elder abuse claims intentional torts and are, therefore, excluded from the lawyer's professional liability insurance policy. Similarly, most professional liability policies have specific exclusions for punitive damages and

disgorgement of attorney fees. In these cases, plaintiff's attorneys are using financial elder abuse causes of action to place increased pressure on the former attorney and their insurer to settle such claims early and for more than the actual value of the case to avoid a potentially uncovered judgment against the individual attorney. There is the potential that elders will be less well served by professionals, who will avoid handling their cases.

Clearly, state legislatures have a clear and valid motivation for enacting financial elder abuse statutes, which is to protect elder, dependent and vulnerable adults from abuse and exploitation. Even the expansion of the statutes to include previously exempt professional groups is timely given the wealth transfer from the baby boomers to their heirs and the professionals needed to effectuate that conveyance. However, it has yet to be determined if its applications to attorney-client disputes is an equitable and fair burden on the profession or achieved the social goals of protecting elders.

Ultimately, attorneys are no different than any other professionals when contemplating new business opportunities as we consider the risks, first, then the reward, and after assessing both try to make an educated guess as to the probability of a positive outcome versus a worst case scenario. While a financial elder abuse claim is simply another factor to weigh in that risk/reward scenario, the considerable exposure it creates is starting to look less like a feather, and much more like an anvil, on the risk side of the scale.

Karen K. Stromeyer and Arthur J. Harris are senior counsel with *Murphy Pearson Bradley & Feeney*.



STROMEYER

HARRIS