SAFEGUARDING AGAINST GOLDEN OPPORTUNITIES

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I. INTRODUCTION

By definition, estate planners are responsible for their client's property after death. However, as estate planners' clients are increasingly targeted for investment schemes, estate planners feel pressure to be responsible for the safekeeping of their client's property before death.

The AARP advises that "people over age 60 make up only one-eighth of the U.S. population, yet they constitute one of every three scam victims."[1] This is because scheming individuals view the elderly as easy targets, properly nicknaming the situation the "golden opportunity."[2] Today, many elderly individuals are outliving their savings due to increasing life expectancies and poor planning. This is a terrifying situation for the elderly, making them susceptible to dangerous investments.[3]

In addition to this fear, elderly clients are at risk of being exploited because they are often lonely and are not as mentally sharp as they once were.[4] Regarding the population as a whole, "[o]nly four percent of Americans have sufficient quantitative literacy skills to compare and contrast credit card offers or to calculate the total amount of interest from a home equity loan."[5] Even a smaller percentage of Americans can comprehend age-appropriate investment strategies.[6]

It is particularly difficult for the elderly to keep up with the rapidly-changing worlds of "marketing, advertising, and financial product design."[7] In addition, "[m]any of the products being offered to consumers today simply were not available a decade ago, when many older clients were full participants in the economy."[8]

Estate planners observe people taking advantage of their clients frequently, but they do not have much autonomy to try to fix the situation. For example, what if a client comes in and tells her attorney about this great investment opportunity that will yield a guaranteed thirty-nine percent return on investments in the next six months? The attorney tries to reason with the client, explaining that such a return is unrealistic and that it must be a very risky

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1. Jayne W. Barnard, *Deception, Decisions, and Investor Education*, 17 ELDER L. J. 201, 237 (2010).

2. The New York Times did a series of articles entitled "Golden Opportunities: Blind Eye to Fraud," http://topics.nytimes.com/topics/news/business/series/golden_opportunites/index.html. These articles examine "how businesses and investors seek to profit from the soaring number of older Americans, in ways helpful and harmful." *Id*.

3. Nancy Trejos, *Many of Us Likely to Outlive Savings*, THE SEATTLE TIMES, July 13, 2008, *available at* http://seattletimes.nwsource.com/html/nationwide/200804859_retirees13.html.

4. Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1, 1 (2009).

5. Barnard, *supra* note 1, at 226 (quoting Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 197 (2007)).

6. Barnard, *supra* note 1, at 226-27.

7. Martin, *supra* note 4, at 2.

8. *Id*.

investment. The client explains that she is comfortable with the investment, especially because she will be investing through her church. The attorney knows that someone is taking advantage of his innocent client, but what can he do? An attorney's hands are tied in situations where his client needs help but will not accept it. How can he help his client and her estate while preserving her independence at the same time?

Problems such as this one are occurring with increasing frequency as the baby boomer population ages and unscrupulous individuals try to profit from their weaknesses.[9] The consumer credit industry is mostly unregulated, "provid[ing] ample opportunity for predatory solicitors to take advantage of the elderly, one of society's most vulnerable groups."[10] Although some scams that target the elderly are illegal, most of them are legal, and are simply "poor financial deals."[11] Consequently, "there is often little one can do to stop the harm except educate the elderly person and, if necessary, remove some of his or her freedoms."[12] This article seeks to analyze the different approaches available to attorneys in this situation.

Part II introduces some of the different investment schemes that deceive elderly individuals: reverse mortgages, annuities, spin-life insurance policies, life settlements, and Ponzi schemes.[13] Part III differentiates between elderly and young investors, showing why the elderly are specifically targeted by predatory schemers.[14] Part IV presents a discussion of what attorneys are forbidden to do in situations like this by the Model Rules of Professional Conduct, which have been adopted in some form by every state. Under the rules, attorneys cannot disclose confidential information to the client's beneficiaries, give the client uneducated financial investment advice, or appoint a guardian for the client.[15] Part V discusses possible approaches for attorneys that would not breach the Model Rules.[16] These include getting the client's permission to speak with their family, giving the client candid advice as to the attorney's apprehension about the investment, trying to get more protection for the elderly, getting in contact with the person taking the client's money, getting the client's permission to get in touch with a Certified Financial Planner, and setting up a trust for the client.[17] Part VI addresses possible solutions to the problems involved with investments by the elderly.[18] These solutions include educating the elderly, regulating these industries more closely with regard to

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9. *See* discussion *infra* Part II.
10. Martin, *supra* note 4, at 2.
11. *Id*.
12. *Id*.
13. *See* discussion *infra* Parts II.A-E.
14. *See* discussion *infra* Part III.
15. *See* discussion *infra* Part IV.
16. *See* discussion *infra* Part V.
17. *See* discussion *infra* Parts V.A-F.
18. *See* discussion *infra* Part VI.

elderly investors, and giving attorneys more power to properly protect their clients who fit this profile.[19]

II. THE "GOLDEN OPPORTUNITY" AND ITS EFFECT ON THE ELDERLY

The golden opportunity can take many forms, and those who take advantage of the elderly have found several ways to do so. Although this is not an exhaustive list, some of the different investment schemes that unscrupulous individuals use to deceive the elderly include reverse mortgages, annuities, spin-life insurance policies, life settlements, and Ponzi schemes.

A. Reverse Mortgages

While reverse mortgages have helped some elderly individuals to live more comfortably, they have also devastated others.[20] Salespeople prey on elderly individuals, attempting to convince them that their homes will pay them cash.[21] But reverse mortgages are extremely complex, and elderly individuals often do not understand the fees and final ramifications until it is too late.[22]

Consider Erika Baker for example.[23] Erika "was 67 years old, divorced and worried about her job when a saleswoman showed up at her door in late 2006."[24] A salesperson told Erica that a reverse mortgage could give her instant access to the money she needed for her final years.[25] She borrowed $218,900 from the value of her home, but only received around $33,000 after all of the fees and complex investments.[26] The saleswoman did not explain that there would be $17,100 in fees taken out of the proceeds of the loan.[27] Nor did she explain that Erika's $218,900 loan would grow to $400,000 within ten years.[28]

In order to prevent this from happening to people like Erika, the federal government requires individuals interested in reverse mortgages to speak with an independent advisor before closing.[29] But some of these meetings last only ten minutes, instead of the sixty to ninety minutes that it should take for counselors to explain reverse mortgages.[30] The main reason for the brief nature of these meetings is that the reverse mortgage companies are the ones paying

19. *See* discussion *infra* Parts VI.A-D.

20. Charles Duhigg, *Tapping Into Homes Can Be Pitfall for the Elderly*, N.Y. TIMES, Mar. 2, 2008, at A1, *available at* 2008 WLNR 4135397.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. *Id*.

30. *Id*.

for the meetings.[31] Instead of explaining different options to the customers, the counselors' advice is one-sided because their next paycheck depends on convincing someone to get the loan.[32] These informational meetings would be much more beneficial if disinterested advisors were giving the advice. The safeguards currently in place with regard to reverse mortgages are insufficient, and many elderly individuals lose everything they have due to predatory reverse mortgage salespeople.[33]

B. Annuities

An annuity is "[a] financial product sold by financial institutions that is designed to accept and grow funds from an individual and then, upon annuitization, pay out a stream of payments to the individual at a later point in time."[34] Annuities are sometimes used in conjunction with reverse mortgages.[35] The salesperson convinces the investor to invest the proceeds from the reverse mortgage in these annuities, claiming that it will provide income stability.[36] While it is true that annuities can provide a steady stream of income, they are not suitable investments for elderly individuals since the money is untouchable for a long period of time unless the investor pays a large fee.[37] Despite the obvious incompatibility, salespeople continue to promote the product to elderly individuals due to the high commissions that they receive.[38]

C. "Spin-Life" Insurance Policies

Through spin-life insurance policies, investors loan money to elderly individuals and have them purchase life insurance policies on themselves.[39] The investors then purchase the policy from the individual, hoping that the individual will die soon so that the investor does not have to continue paying premiums.[40] These deals are so lucrative that investors are wooing older people "in every fathomable way."[41] For example, in "Florida, investors have sponsored free cruises for seniors willing to undergo physical exams and apply for life insurance while onboard."[42] Investors are also using more traditional

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31. *Id*.
32. *Id*.
33. *Id*.
34. Investopedia, Annuity, http://www.investopedia.com/terms/a/annuity.asp (last visited Jan. 14, 2010).
35. Duhigg, *supra* note 20.
36. *Id*.
37. *Id*.
38. *Id*.
39. Charles Duhigg, *Late in Life, Finding a Bonanza in Life Insurance*, N.Y. TIMES, Dec. 17, 2006, *available at* 2006 WLNR 21899539.
40. *Id*.
41. *Id*.
42. *Id*.

forms of solicitation such as hiring telemarketing companies to lure elderly individuals.[43]

Not only do such schemes threaten the survival of the life insurance industry, but they can also be detrimental to the insured.[44] When the elderly individual is ready to sell the policy, he owes "so much in interest and fees on the loan" that the profit is obliterated.[45] Furthermore, the elderly individual is now unable to purchase more life insurance in order to protect his family and his estate because life insurance companies place a limit on the amount of life insurance each individual can purchase.[46]

Even more frightening is the possibility that these elderly people will become entangled in unexpected litigation over such schemes. Spin-life insurance policies are so new that states are just starting to fight back.[47] "Legislatures in New Jersey, New York and nine other states have proposed laws intended to outlaw spin-life investments or make it more difficult for investors to get payouts . . . ."[48] Elderly individuals also might find themselves getting sued by the insurance companies in order to cancel the policy, with the insurance companies "contending that payouts benefiting outside investors violate the legal requirement that beneficiaries have an 'insurable interest' in the policyholder's life."[49] The elderly individual's plan may backfire and the elderly individual, or his estate, may end up in trouble with the law.[50]

Due to the current uncertainty of the spin-life market, "many advocates for the elderly and industry insiders worry that seniors will lose their legitimate ability to sell life insurance policies they have held for years."[51]

D. Life Settlements

A life settlement, which is similar to a spin-life policy, refers to the sale of an in-force life insurance policy to a third-party investor.[52] Since a Supreme Court ruling in 1911, Americans have been able to sell their life insurance policies.[53] For many elderly Americans, a life insurance policy may be one of the most valuable assets in their estate.[54] Life settlements enable elderly

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43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *America's Life-Settlement Industry: From Mortgages to Mortality*, ECONOMIST, June 13, 2009, *available at* 2009 WLNR 11214930.
53. *See* Grigsby v. Russell, 222 U.S. 149, 155 (1911) (holding that the insured, owning an otherwise valid policy, can sell that policy to another not having any insurable interest, and the purchaser is entitled to the proceeds from the policy as against the deceased's heirs).
54. *America's Life-Settlement Industry: From Mortgages to Mortality*, *supra* note 52.

individuals to sell their policies for an amount much greater than the cash surrender value that the life insurance company would pay the policyholder.[55]

For these reasons, selling a life insurance policy seems to be an easy answer for some elderly individuals. However, in addition to all of the potential problems of a spin-life policy, it is also difficult to determine what a policy should be worth, and the market for life settlements is not efficient.[56] Elderly individuals should be prepared to incur hefty fees, fill out a substantial amount of paperwork, incur expenses to determine the individual's life expectancy, and accept about twenty percent of the face value of the policy.[57]

Life settlements are only sensible for a select few elderly individuals, and one author suggests that those considering selling their life insurance policy should follow these four steps in doing so: (1) "Seek independent advice from someone who does not have a vested interest in the sale"; (2) "Get expert help in selling"; (3) "Negotiate commissions"; and (4) "Make sure your broker gets multiple quotes."[58]

The Securities and Exchange Commission recently created a task force to examine the sales practices, privacy rights, and the role of securitizations with regard to life settlements.[59] With this task force in place, elderly individuals' private health information may become better protected, and they also may be better protected from devious marketing schemes.[60]

E. Ponzi Schemes

A Ponzi scheme is "[a] fraudulent investing scam promising high rates of return with little risk to investors," generating "returns for older investors by acquiring new investors."[61] The earlier investors actually receive the promised returns, "as long as there are more new investors."[62] Although the only Ponzi schemes most people are familiar with are the Madoff and Stanford Ponzi schemes, there have been hundreds of others.[63] While they do not compare in magnitude, these Ponzi schemes devastated individuals in the same way that the

55. *Id*.

56. Brett Arends, *Your Money or Your Life Insurance?*, WALL ST. J., Oct. 2, 2009, *available at* http://online.wsj.com/article/SB10001424052748704471504574447350852232082.html.

57. *Id*.

58. *Id*.

59. *See* Paula Dubberly, Associate Director, Division of Corporation Finance, Securities and Exchange Commission, Testimony concerning "recent innovations in securitization" (Sept. 24, 2009), http://www.house.gov/apps/list/hearing/financialsvcs_dem/dubberly_-_sec.pdf.

60. *See id*.

61. Investopedia, Ponzi Scheme, http://www.investopedia.com/terms/p/ponzi-scheme.asp (last visited Jan. 14, 2010).

62. *Id*.

63. *Id*. Bernard Madoff ran a hedge fund which lost about $50 billion, "but kept it hidden by paying out earlier investors with money from later investors." Investopedia, Bernard Madoff, http://www.investopedia.com/terms/b/ bernard-madoff.asp (last visited Jan. 14, 2010). Sir Allen Stanford, a former banker, is "under investigation for securities fraud in excess of $8 billion." Investopedia, Sir Allen Stanford, http://www.investopedia.com/terms/s/sir-allan-stanford.asp (last visited Jan. 14, 2010).

infamous few have. Many of them have been directed towards elderly individuals.[64]

In the mid 1990s, many elderly individuals were approached to invest in the Baptist Foundation of Arizona.[65] Investors lost about $590 million.[66] Two attorneys in Fort Lauderdale targeted the terminally ill and elderly individuals, causing a $1 billion loss to investors.[67] In Los Angeles, a $52 million Ponzi scheme devastated the elderly community.[68] All of these Ponzi schemes involved churches, charities, or other non-profit organizations.[69] Elderly individuals likely have a hard time perceiving the danger in investing with people they trust and in a cause that they believe in.

III. WHY ARE THE ELDERLY TARGETED?

Predatory schemers know that elderly individuals are much easier to scam than middle-aged, full participants in the market.[70] But why is it easier? What is it about the older population that makes them a prime target? There are defined physiological differences between the elderly and the young, and schemers have exploited these differences in developing techniques that are ultimately more effective on the elderly.[71]

A. The Difference Between the Elderly and the Young

An elderly individual's brain does not comprehend or make decisions the same way that a younger individual's brain does.[72] For the following reasons, elderly adults are more susceptible to smooth-talking salespeople than younger adults.

With regard to telemarketers, the elderly are the perfect targets "because they are often at home, rely on delivery services, and are lonely for the companionship that telephone callers provide."[73] Richard Guthrie, "a 92-year-old Army veteran," was the victim of a telemarketing scam.[74] In an interview, Mr. Guthrie said, "I loved getting those calls," and "[s]ince my wife passed

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64. Gary Snyder, Nat'l Comm. for Responsive Philanthropy, *Charities Have Felt the Effects of Ponzi Schemes*, June 12, 2009, http://www.ncrp.org/blog/2009/06/charities-have-felt-effects-of-ponzi.html.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*.
70. *See infra* text accompanying notes 70-83.
71. *Id*.
72. *See infra* text accompanying notes 102-04.
73. Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. TIMES, May 20, 2007, *available at* 2007 WLNR 9467405.
74. *Id*.

away, I don't have many people to talk with. I didn't even know they were stealing from me until everything was gone."[75]

Barnard has more theories as to why the elderly do not have as strong of a defense against smooth-talking salespeople as younger adults.[76] First, elderly adults are more likely to be convinced by advertisements that appeal to them emotionally.[77] Emotionally, they need to be close to, and provide for, their family and friends.[78]

Second, elderly adults "sometimes respond to their changing social identity by engaging in compulsive consumer behavior."[79] For example, some elderly adults respond to "retirement, grandparenthood, onset of chronic medical conditions, or loss of one's spouse" by attempting to regain control.[80] They may do so by making compulsive purchases, gambling, or making risky financial decisions.[81]

Third, neuroscientists have found that elderly adults screen out and resist information that they do not want to contemplate.[82] They entirely avoid troublesome concepts and those that upset them.[83] This makes them avoid considering the red flags when they speak with telemarketers or financial salespeople.[84]

Fourth, elderly adults want more than anything to please people, including the salesperson who is trying to sell them investment products.[85] Other visceral needs that may compel elderly adults to purchase things include "greed, fear, and the need for companionship or intimacy."[86]

These differences between the way that elderly adults think and the way that younger adults think make it much easier for people to sell financial products to the elderly or to convince them to make unnecessary investments. Salespeople are realizing that elderly adults are a much easier target and are taking advantage of them.[87]

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75. *Id*.
76. Barnard, *supra* note 1.
77. *Id*. at 214.
78. *Id*. at n.67.
79. *Id*. at 215.
80. *See id*.
81. *Id*.
82. *Id*. at 218.
83. *Id*.
84. *Id*.
85. *Id*. at 223.
86. *Id*.
87. NASD INVESTOR EDUCATION FOUNDATION, INVESTOR FRAUD STUDY FINAL REPORT (2006), *available at* http://www.sec.gov/news/press/extra/seniors/nasdfraudstudy051206.pdf.

B. Schemers Have Developed Techniques Specifically Targeting the Elderly

Investment fraud criminals use a variety of "influence tactics" to defraud the elderly victim.[88] The three most common tactics used are "source credibility (claiming to be from a known legitimate business), phantom fixation (dangling the prospect of wealth and riches) and social consensus (showing examples of others who have invested)."[89]

IV. WHAT ATTORNEYS CAN'T DO

While attorneys may want to do what is best for their clients, their powers in this situation are very narrow. The Model Rules forbid attorneys from acting in certain ways, even though these ways may seem to be the best approach to protect their clients.[90] Under the Rules, attorneys cannot disclose confidential information to the client's beneficiaries, give the client uneducated financial investment advice, or appoint a guardian for the client, among many other things.[91]

A. Inform the Client's Beneficiaries that the Client is Exploited

If the attorney was the client's son instead of the client's attorney, he would most likely go talk to the person taking advantage of his elderly mother. He would explain to the church or the entrepreneur that his mother was no longer operating at full mental capacity, and that she will most likely need her money for living expenses or medical expenses in the future. Unfortunately, the attorney does not have as much power to protect the elderly client as the son would.

Model Rule 1.6 prevents attorneys from revealing information regarding their clients unless the client gives informed consent or the lawyer reasonably believes that it is necessary for one of six reasons.[92] An attorney may reveal information in order to prevent death or serious bodily injury, to prevent the client from using the attorney's services to financially harm another, to secure legal advice about ethics, to defend himself, or to comply with a court order.[93]

The Third Restatement of the Law Governing Lawyers further supports this position:

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88. *Id.* at 5.
89. *Id.* at 6.
90. MODEL RULES OF PROF'L CONDUCT (2009).
91. MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.1, and 1.14.
92. MODEL RULES OF PROF'L CONDUCT R. 1.6.
93. *Id.*

> A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:
> (a) the crime or fraud threatens substantial financial loss;
> (b) the loss has not yet occurred;
> (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
> (d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.[94]

Preventing injury to the financial interests of another which will result from the client's commission of fraud is the only one of the six that comes close to applying to this situation.[95] Here, we have clients and beneficiaries whose financial interests are at risk of being harmed, but the client is not the one committing fraud or doing anything illegal.[96] Thus, there is no exception to the Model Rules or the Restatement which squarely allows an attorney to disclose this information.[97]

When a client tells her attorney about an "exciting" investment, and the attorney has serious doubts about the investment, under this rule, the attorney must keep this information confidential, regardless of whether or not the attorney believes that confidentiality is the best thing for his client.[98]

If the attorney decides to reveal confidential information anyway, he may be subject to discipline from the state bar association. For example, in *Bernard v. Galen Group, Inc.*, attorney Cornwell was fined $2,500 for revealing confidential settlement offers from a mediation proceeding.[99] Not only does the attorney have to fear being fined, he also has to worry about harming his reputation. He does not want his clients to think that he will reveal their confidential information because then they may avoid disclosing any and all information.

B. Give the Client Uneducated Financial Investment Advice

Model Rule 1.1 requires attorneys to provide "competent representation."[100] In order to represent a client, an attorney must have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[101] While an attorney may have suspicions about a reverse mortgage or a spin-life policy that has been recommended to his client, he most

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94. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (2000).
95. MODEL RULES OF PROF'L CONDUCT R. 1.6.
96. *Id.*
97. *Id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (2000).
98. MODEL RULES OF PROF'L CONDUCT R. 1.6.
99. Bernard v. Galen Group, Inc., 901 F. Supp. 778, 779 (S.D.N.Y. 1995).
100. MODEL RULES OF PROF'L CONDUCT R. 1.1.
101. *Id.*

likely does not fully understand these investments and all of the potential risks. Thus, the attorney should not attempt to give his client advice regarding these financial investments because he may expose himself to liability if he counsels in an area with which he is unfamiliar.[102]

C. Appoint a Guardian

Model Rule 1.14 discusses clients with diminished capacity and warrants an in-depth discussion.[103] This rule gives lawyers the discretion to reveal information about a client, interfere, and even appoint a guardian in situations when the client is at risk of substantial financial harm.[104]

At first glance, this rule seems to solve the attorney's dilemma, allowing him to appoint a guardian and wash his hands clean of the situation. However, the rule does not define "diminished capacity" or set any bright-line rules as to when an attorney can interfere in such a drastic way.[105] When confronted with such an issue, an attorney should contemplate and balance the following factors: "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[106]

In a situation with elderly individuals, they may be completely autonomous in every aspect of life but are simply making unwise financial decisions. Recent neurological studies show that elderly individuals' inability to process information necessary to make sound financial decisions may be caused by the aging of an area of the brain known as the ventromedial prefrontal cortex.[107]

Elderly individuals with this brain atrophy cannot assess risk as well, and they do not have the appropriate physiological response to risk either.[108] However, these individuals are still fully-functioning, independent people whose lives are mostly unaffected by the atrophy.[109] Attorneys cannot possibly claim that an elderly individual in this situation qualifies as a client with diminished capacity.[110]

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102. The Model Rules, however, do state that a lawyer can become competent in an area before giving their client advice. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2009). While this is true, dealing with complicated investments is an area where the client would be best served by bringing in an investment professional.

103. MODEL RULES OF PROF'L CONDUCT R. 1.14).

104. *Id*.

105. *Id*.

106. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6.

107. Natalie L. Denburg, Daniel Tranel & Antoine Bechara, *The Ability to Decide Advantageously Declines Prematurely in Some Normal Older Persons*, 43 NEUROPSYCHOLOGIA 1099 (2005).

108. *Id*. at 1104.

109. *Id*.

110. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5.

Further, the commentary to the rule provides that the attorney should intrude "into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."[111] Appointing a guardian would be a drastic solution in this situation and would greatly inhibit the client's independence. In order to appoint a guardian, the attorney must reasonably believe that the client needs a guardian.[112] It is doubtful that any attorney would believe that an elderly individual needs a guardian simply because he decides to participate in a spin-life insurance policy, reverse mortgage, or other risky investment.

V. WHAT ATTORNEYS CAN DO

While the Model Rules restrict attorneys regarding the manner in which they handle exploited, elderly clients, attorneys still have some options in handling these situations. These options include getting the client's permission to speak with their family, giving the client candid advice as to the attorney's apprehension about the investment, trying to get more protection for the elderly, getting in contact with the person taking the client's money, getting the client's permission to get in touch with a certified financial planner, and setting up a trust for the client.[113]

A. Get Client's Permission to Speak with Their Family

Model Rule 1.6 says that an attorney cannot reveal confidential information unless his client gives informed consent.[114] Informed consent can be given by the client "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[115] Once the client gives informed consent, the attorney is free to consult with the client's family.[116] Together, they can discuss solutions and figure out what is best for the elderly client.

This would be the ideal solution in a situation where the attorney truly feels someone is taking advantage of the client financially. However, the real issue arises when the client does not want the attorney to discuss his financial circumstances with his family or beneficiaries and will not give informed consent.

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111. *Id.*
112. MODEL RULES OF PROF'L CONDUCT R. 1.14.
113. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, 12.1; *Martin*, *supra* note 4, at 1; Duhigg, *supra* note 20; BEYER, *infra* note 126.
114. MODEL RULES OF PROF'L CONDUCT R. 1.6.
115. MODEL RULES OF PROF'L CONDUCT R. 1.0(e).
116. MODEL RULES OF PROF'L CONDUCT R. 1.6.

B. Give Clients Candid Advice as to Whether or Not They Should be Investing in this Investment

Model Rule 2.1 allows attorneys to "render candid advice" when referring to considerations in addition to legal advice, such as economic factors that are relevant to the representation of the client.[117] Although an attorney is not expected to give advice to a client until it is requested, an attorney may give such advice when doing so appears to be in the client's best interest.[118] This applies even when the client has indicated that the advice is unwanted.[119] Without crossing the line into giving the client financial advice, attorneys can advise elderly clients not to invest in unsound investments and offer to contact an expert for them. Attorneys have enough reasoning abilities to discern whether or not an investment is too risky for the client. However, the true issue occurs when the client will not listen to the attorney's advice and wants to invest in dangerous investments anyways.

C. Try to Get More Protection for the Elderly

Should the attorney be so inclined, he can also fight for the rights of the elderly, finding new ways to protect them without infringing upon their independence. One commentator suggests that instead of people having to put their names on a "do not call" registry, the default should be that telemarketers can't solicit elderly individuals unless they have taken themselves off of the do not call registry.[120]

As previously mentioned, elderly individuals' loneliness and boredom contribute to their vulnerability to investment schemes over the phone.[121] They simply enjoy having someone to speak with and are easily convinced of the broker's brilliance thereafter. Ms. Baker, the previously-mentioned victim of a reverse mortgage sale, claimed that the "saleswoman was so friendly and personable" and that "[i]t was like God had sent me a friend to tell me how to survive."[122] This same sweet saleswoman is the reason why Ms. Baker can no longer afford to purchase meat and fresh vegetables, and no longer has the security that her home cannot be taken away from her.[123]

Ponzi scheme artists, reverse mortgage salespeople, and spin-life proponents solicit elderly individuals over the phone and in person. If they were no longer allowed to do so, elderly individuals would have less of a chance of falling for these "lucrative" investment opportunities.

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117. MODEL RULES OF PROF'L CONDUCT R. 2.1.
118. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5.
119. *Id.*
120. Martin, *supra* note 4, at 1.
121. *Id.*
122. Duhigg, *supra* note 20.
123. *Id.*

D. Get in Contact With the Person Taking the Client's Money

If the client puts the attorney in charge of sending the charity, church, or entrepreneur the donation or investment money, it may be a good idea to send a letter with the check asking that the person stop calling and stating that future promises made by the client will not be honored.[124] While this may be an effective way to protect the client, it may also be considered a breach of confidentiality. However, if the client has given the attorney the authority to communicate with this person, the attorney may also have implied authority to place a letter inside the envelope.

E. Get Client's Permission to Get Advice from a Certified Financial Planner

While an attorney is not usually allowed to reveal information as per Rule 1.6, we already know that the client can give informed consent, enabling the attorney to discuss the information with others.[125] If the client is unwilling to consent to the attorney speaking with her family members or beneficiaries, the attorney might instead ask that he be able to speak with a certified financial planner.

If the attorney works with the certified financial planner, he may then be able to give his client more thorough advice regarding the investment. Perhaps the client is still unwilling to allow the attorney to disclose this information, but does agree to meet with the certified financial planner on her own. Either way, the attorney would be helping the client to learn more about the investment, hopefully, enabling the client to make a better-informed decision. Certified financial planners should know everything there is to know about risky investments, and may be able to reason with the client.

F. Set Up a Trust for the Client

An attorney may recommend setting up a trust for his client, but this method is only possible and practical for very wealthy clients.[126] If the client does not want his children involved in the decision, he can choose a bank as the trustee.[127] As a beneficiary of the trust, the client will receive consistent payments to live off of, but will not be involved in any of the investment decisions.[128]

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124. Martin, *supra* note 4, at 8.
125. MODEL RULES OF PROF'L CONDUCT R. 1.6.
126. *See* GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES – EXAMPLES AND EXPLANATIONS 328 (Aspen Publishers) (4th ed. 2007).
127. *Id*. at 329.
128. *Id*.

If the client still wants more control, an attorney may suggest a "stand-by" trust.[129] The client can serve as the trustee himself until he reaches the point of incapacity.[130] At this time, the client's designated successor trustee would begin to make the trust decisions in accordance with the client's directions as expressed in the trust instrument.[131]

While a "stand-by" trust may avoid the embarrassment and expenses of having a guardian appointed, it may not solve the current problem that the attorney is facing: trying to prevent the client from making bad investment decisions today rather than later in life.[132]

VI. POSSIBLE SOLUTIONS

While investments by the elderly seem to present a sticky problem, there may be a few ways to reduce risks to the elderly. First, we can try to further educate the elderly population, and warn them about the potential threats associated with these dangerous investments. Second, we can attempt to further regulate other industries, mainly those involving investments, similar to the self-regulated industry of attorneys. Third, we could give attorneys more authority to protect their clients who are currently being exploited.

A. Further Education

Warning the elderly about these investment schemes may help them to avoid falling into one of the previously mentioned traps.[133] However, there are already many different fraud prevention education mediums.[134] "These include written brochures, videos and DVDs, websites and podcasts, small-group workshops at senior citizen gathering places, elaborate town meetings, literature enclosed with home-delivered meals, and celebration of a 'National Fraud Against Senior Citizens Awareness Week.'"[135] These mediums present a number of common messages to the elderly:

> (1) if an investment opportunity seems to be too good to be true, it probably is; (2) don't make hasty investment decisions; (3) check the credentials of people seeking your money; (4) beware cold-callers; and (5) don't be too embarrassed to call the authorities if you believe you have been the victim of a crime.[136]

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129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*.
133. *See supra* Part II.A-E.
134. Barnard, *supra* note 1, at 227.
135. *Id*.
136. *Id*. at 228-29.

If this much information is already available to the elderly, why are so many people still able to take advantage of the elderly? The National Association of Securities Dealers conducted a survey regarding the relationship between financial literacy and investment fraud victims.[137] The study found the exact opposite of what was expected: "[I]nvestment fraud victims scored higher than non-victims on eight financial literacy questions."[138] To further demonstrate the point, "a subgroup of 'likely active investors' was created within the larger group of non-victims to determine if the difference in financial literacy scores had to do with the number of active investors in the non-victim group."[139] The fraud victims outscored this subgroup of "likely active investors" on the questions determining financial literacy.[140] The results of this survey suggest that financial education is important, but it is most likely not adequate to prevent fraud.[141]

With regard to all of the information being presented to the elderly community, maybe the current education efforts are failing because the brochures are too difficult to understand, or maybe the effort to educate has been half-hearted with few coherent ideas and advice actually placed into the mediums.[142]

Further, experiments suggest that the repetition of a warning about a financial investment to elderly individuals "may cause them to internalize that message in the short run but to recall *the opposite* message after a passage of time."[143] Thus, rather than deterring him from participating in a dangerous investment opportunity, fraud prevention education may push an elderly person to trust a scheming individual.[144]

Behavioral biases of the elderly might also be preventing the education from sinking in.[145] It is hard to teach elderly individuals what to do in situations where a telemarketer is convincing them of the brilliance of an investment since emotion plays such a large role in these investment decisions.[146]

Another reason why investment education has not been successful is that elderly individuals likely become annoyed with the messages and tune them out.[147] It is also logical to assume that the elderly individuals who do pay attention to the education mediums are the already cautious and risk-averse individuals.[148] The stubborn, independent seventy-year-old man is least likely

137. INVESTOR FRAUD STUDY FINAL REPORT, *supra* note 87.
138. *Id*.
139. *Id*.
140. *Id*.
141. *Id*.
142. *Id*. at 33-34.
143. Barnard, *supra* note 1, at 229.
144. *Id*. at 229-30.
145. *Id*.
146. *Id*. at 214.
147. *Id*. at 230.
148. *Id*. at 231.

to seek out and follow the education efforts while most likely to make an unfounded investment decision.[149]

With all of these reasons why education will not work, should we attempt to further educate the elderly anyway? Should we change the mediums or perhaps be content with them?

B. Further Regulation of Other Industries

Maybe we should focus on the actual origin of the problem: the investment industry. Since "current regulations are too seldom[ly] enforced and inadequately matched to the volume and complexity of the problem, they provide little or no deterrence for a malevolently pervasive and flourishing industry."[150] Also, the current rules "fail to protect the elderly, who lose their assets, along with their independence, before legal remedies become available."[151] If there were more effective regulations on the people selling to and soliciting the elderly individuals, we would not be quite as concerned with educating the elderly population. Attorneys regulate themselves by following some version of the Model Rules.[152] The investment industry could apply some of these rules to create a safer investment environment.

1. Model Rule of Professional Conduct 7.1

First, the investment industry could apply Model Rule 7.1: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[153] A lawyer is prohibited from making a statement that is truthful yet misleading.[154] A statement is considered misleading "if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."[155]

If the investment industry applied this rule to their sales people, brochures about reverse mortgages could not say things like "Your Home Pays You Cash!"[156] Telemarketers could no longer leave out possible risks when telling

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149. *Id*.

150. Martin, *supra* note 4, at 3.

151. *Id*.

152. MODEL RULES OF PROF'L CONDUCT (2009).

153. MODEL RULES OF PROF'L CONDUCT R. 7.1.

154. MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 2.

155. *Id*.

156. *See* Duhigg, *supra* note 20. Sixty-seven-year-old Erika Baker fell for a reverse mortgage investment that left her in financial ruins. *Id.* The saleswoman gave her a brochure that claimed "Your Home Pays You Cash!" but failed to tell her about all of the expenses and fees that were associated with the reverse mortgage. *Id*.

elderly individuals about spin-life policies. These types of statements would be considered "misleading" and would violate the Rule.[157]

2. Model Rule of Professional Conduct 7.2

Second, Model Rule 7.2 allows attorneys to advertise if they meet certain requirements.[158] The Rule requires any communication made to "include the name and office address of at least one lawyer or law firm responsible for its content."[159]

The investment industry could also apply Rule 7.2. Under this rule, salespeople could not simply manufacture misleading brochures and mail them out to the elderly population without facing consequences. Currently elderly individuals who read these advertisements and believe them have no one to contact regarding their validity or to answer their questions. If the salesperson's contact information is on the brochure, the targeted individual can call the salesperson to get more information, and that salesperson can be held responsible for the advertisement should it be considered misleading.

3. Model Rule of Professional Conduct 7.3

Third, Model Rule 7.3 prohibits attorneys from soliciting some clients:

> A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
> (1) is a lawyer; or
> (2) has a family, close personal, or prior professional relationship with the lawyer.[160]

Applied to the investment industry, people seeking elderly individuals' money could not contact the elderly directly. They could not use the elderly individual's need for human contact to convince them to invest by speaking to them in person, via telephone, or in online chat rooms. The reason for the two exceptions is that attorneys are not concerned with other attorneys using power to influence other attorneys or those whom they are close to. One can assume attorneys can stand their ground against other attorneys, and that attorneys would not take advantage of family members or others with whom they have a close relationship. The same exceptions could apply to the investment industry. Consider part (b) of Model Rule 7.3:

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157. MODEL RULES OF PROF'L CONDUCT R. 7.1.
158. MODEL RULES OF PROF'L CONDUCT R. 7.2.
159. MODEL RULES OF PROF'L CONDUCT R. 7.2(c).
160. MODEL RULES OF PROF'L CONDUCT R. 7.3(a).

> A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
>
> (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> (2) the solicitation involves coercion, duress or harassment.[161]

This section of the rule prevents permitted forms of solicitation from being abused.[162] When applied to the investment industry, if someone who is seeking the elderly individual's money sends the individual information regarding an investment and continues to send information when the elderly individual does not respond, this section of the rule would be violated.[163] Those who want the elderly individuals' money could no longer harass them.

To expand on Martin's suggestion mentioned earlier that the do not call registry be switched to an opt-out registry rather than an opt-in registry, Model Rule 7.3(b)(1) would work to protect the elderly population even further.[164] Any elderly individual who did have his name removed from the do not call registry could not be solicited because he has made it known that he desires not to be solicited by default.

The Model Rules that govern attorneys are in place specifically to address the dangers created by attorneys having so much influence over their clients.[165] Because of their esteemed position and persuasion abilities, attorneys can conceptually convince people to make decisions through "undue influence, intimidation, and over-reaching."[166] Salespeople have the same kind of power over elderly individuals as attorneys have over clients. Elderly individuals view salespeople as trustworthy people, and salespeople are just as persuasive as attorneys. The danger created by this power to influence needs recognition and policing accordingly.

C. Give Attorneys More Power to Protect Clients Who Fit this Endangered Profile

For clients who are lingering somewhere between competency and incompetency, or who are perhaps competent in some areas and incompetent in others, attorneys should have more authority to help them.

Perhaps clients past a certain age should give their attorney a name or two of people whom they trust and allow the attorney to reveal information when the attorney deems it necessary. Or, maybe each state could have a designated

161. MODEL RULES OF PROF'L CONDUCT R. 7.3(b).
162. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 5.
163. *Id*.
164. *See* Martin, *supra* note 4, at 27.
165. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 1.
166. *Id*.

person for attorneys to contact when they suspect that their clients are being taken advantage of. This person could investigate and try to solve the situation without having to appoint a guardian or resort to any other drastic measures. There are many possible ways that attorneys could be given more authority to reveal certain information about their clients, and these different alternatives need thorough exploring.

D. Other Possible Solutions

Barnard, author of "Deception, Decisions, and Investor Education," discusses five possible alternative ways to spend the money that is currently being spent on fraud prevention education for elderly adults:

> increased criminal prosecution for the perpetrators of securities fraud schemes targeted at the elderly; increased sanctions for those who are found guilty; monitoring of securities fraud first offenders with a profile suggesting the likelihood of recidivism; development of noninvasive diagnostic tools to identify those older adults whose risk assessment capacity has been compromised; and more fraud prevention education aimed at families.[167]

First, the current possible penalties for those committing fraud against older adults are inadequate.[168] These current penalties include "the imposition of civil penalties, occupational bars, penny stock bars, and 'obey-the-law' injunctions."[169] Due to the devastating effect of these fraud schemes on individuals, criminal prosecution may be more appropriate to deter offenders and protect elderly individuals.[170]

Second, once offenders have been found guilty of committing fraud against elderly individuals, "they should be sanctioned harshly."[171] Currently, sentence length is primarily determined by the amount of financial loss suffered by the victim.[172] Upward adjustments from this base amount should be allowed for a broader range of punishments, rather than the few that are currently allowed.[173]

Third, those who show traits associated with committing repeat offenses need close monitoring, similar to the way that sex offenders are monitored with a recidivism profile.[174] People committing financial fraud on elderly individuals "deserve the same type of regulatory scrutiny" as sex offenders.[175]

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167. Barnard, *supra* note 1, at 234.
168. *Id*.
169. *Id*. at 234-35.
170. *Id*. at 235.
171. *Id*.
172. *Id*.
173. *Id*.
174. *Id*. at 236.
175. *Id*.

Fourth, we need to figure out why elderly individuals are not receptive to the current financial fraud education tactics.[176] Further, a noninvasive method of identifying which elderly individuals have, or are likely to contract, diminished risk assessment capacity needs to be developed.[177]

Fifth, we need to aim fraud prevention education at families rather than solely at elderly individuals.[178] Family members are better situated to protect elderly individuals than attorneys or government agencies. If we can inform them "about the cognitive biases, marketing stimuli, psychological needs, and environmental circumstances that contribute to decisions to engage in unwise investing," we can assist family members to oversee and provide better care for their elderly family members.[179]

E. Conclusion

Investment fraud committed against the elderly population is an escalating and destructive phenomenon. While attorneys may be the in the best position to recognize that an elderly client is being exploited, they definitely are not in the best position to help their clients get out of trouble.

The Model Rules effectively narrow an attorney's range of solutions. While confidentiality is a benchmark concept in attorney-client relationships, there needs to be a way around the Model Rules in exceptional situations. Attorneys need to be able to better serve and protect their elderly clients without infringing upon their independence, their dignity, and their rights.

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176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*