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BANKS' EFFECTIVENESS AT REPORTING FINANCIAL ABUSE OF ELDERS: AN ASSESSMENT AND RECOMMENDATIONS FOR IMPROVEMENTS IN CALIFORNIA

I. INTRODUCTION

A. Case History

A San Diego woman, referred to here as “B.,” in her late seventies, was suffering early Alzheimer’s disease when a man in his mid-sixties, “T.,” introduced himself after he overheard that she was selling her condominium. B. suffered a stroke during her first “date” with T. and was hospitalized. When B. was released from the hospital, T. showed up unexpectedly and spirited her off to Las Vegas where he married her. Immediately upon return from the “honeymoon,” T. gained power of attorney in a meeting that B. cannot recall. T. presented the power of attorney to B.’s bank, and then proceeded to join her accounts. He used the net proceeds from the condo sale to purchase an expensive motor home and car, to transfer money out of the country, to cash B.’s social security checks, and to stash some of the money in a hidden bank account. B.’s bank account showed frequent ATM withdrawals of the maximum amount—from casinos. During much of this time B. and T. were not living together; T. spent some of the money on a “girl-friend.” A marriage dissolution proceeding forced the return of a portion of the money, but much of it was lost. This case depicts a common form of elder abuse.¹

B. Definition of Elder Abuse and Financial Abuse

Although “elder abuse” may conjure up visions of elderly people who are beaten by family members or caregivers, or perhaps lying neglected, infected and dehydrated at home or in a nursing home, financial abuse is also a form of elder abuse. It may be the most common type committed by another person upon an elderly victim. To understand financial abuse, it is useful to consider what constitutes elder abuse in general.

1. Telephone Interview with B. and her daughter (Jan. 13, 2003). B. gave permission to use the facts of her case, which I worked on as an intern at Elder Law and Advocacy (EL&A) in San Diego. Lois Kelly, B.’s lawyer, said some hard-won restitution resulted from divorce proceedings.

Definitions of elder abuse in the literature vary widely and have been a serious source of controversy.² Definitions vary in state statutes as well, but generally cover “physical, psychological, fiduciary, and sexual abuse or exploitation as well as neglect.”³ Almost all states address physical abuse and neglect, and exploitation is also a common element in these statutes, usually defined as “the illegal or improper use of a vulnerable or incapacitated elder, his resources, or property for the exploiter’s or another’s monetary profit or personal advantage.”⁴ While definitions of financial abuse also may vary in their particulars, at its core financial abuse is the misuse of an elder’s assets, manifested as: (1) theft, including burglary and robbery; (2) fraud, including various homeowner, lottery and telemarketing scams; (3) intentional misuse of assets by a fiduciary or caregiver; (4) negligent use of assets, such as mistakenly depleting assets in order to become Medicaid eligible.⁵ Asset misuse is particularly abhorrent because someone whom the elderly person trusts, such as a family member, caretaker, or fiduciary, is usually the perpetrator.⁶ Banks are often a key institution in financial abuse, because the words of Willie Sutton, a renowned bank robber, often ring true. When asked why he robbed banks, Sutton said: “[T]hat’s where the money is.”⁷ “Banks should take more responsibility in training bank tellers in looking for red flags,” said Paul Greenwood, a deputy district attorney for San Diego County, who heads up one of the country’s first elder-abuse prosecution units.⁸ “Sadly,

2. OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 256-57 (1997). Barnett cites a useful taxonomy by Margaret F. Hudson that offers four forms of elder mistreatment: (1) physical (physical force is used to inflict the abuse; or available and warranted physical assistance is not provided, resulting in neglect); (2) psychological (verbal force is used to inflict the abuse; or available and warranted psychological/emotional assistance is not provided, resulting in neglect); (3) social (prevention of the basic social needs of an older adult from being met; or failure to provide available and warranted means by which an older adult’s basic social needs can be met); (4) financial (theft or misuse of an older adult’s funds or property; or failure to provide available and warranted means by which an older adult’s basic material needs can be met). Margaret F. Hudson, *Elder Mistreatment: A Taxonomy with Definitions by Delphi*, 3 J. ELDER ABUSE & NEGLECT 14 (1991), reprinted in BARNETT, *supra*, at 257 tbl.11.2.

3. Audrey S. Garfield, Note, *Elder Abuse and the States’ Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 872 (1991).

4. *Id.* at 873-74.

5. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 206-08 (2000).

6. Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911, 921 (2001).

7. Steve Cocheo, *The Bank Robber, the Quote and the Final Irony*, ABA BANKING JOURNAL ONLINE (Mar. 1997), at http://www.banking.com/aba/profile_0397.htm.

8. Katie Kuehner-Hebert, *Calif. Banks Get Pointers on Protecting the Elderly*, AM. BANKER, Oct. 12, 2000, at 11.

elder financial abuse is rampant, and it occurs right in the bank."⁹ Even bank employees themselves may be guilty of exploiting elders.¹⁰

C. Approach and Organization of Comment

The goal in this Comment is to examine how effectively banks combat financial abuse of elders. Although it will examine historical and theoretical issues, for the most part the Comment will look at what has happened, what is happening, and what should happen to engage banks more successfully to combat financial abuse, particularly in California. Section II will provide some historical perspective on the recognition and response to the phenomenon of elder abuse in the U.S.

After potential elder abuse has been spotted, it must be reported to the authorities designated to respond. Some assert that specified reporters should be mandated to report financial abuse while others say reporting should be voluntary. Different states split on this issue in their statutes. The debate has been particularly heated with respect to reporting requirements for banks. Section III will examine both sides of this controversy.

Many believe that banks should be pivotal in the fight against financial exploitation, but banks report abuse infrequently. This has raised demands to require banks to report financial abuse. Section IV assesses the effectiveness of mandated reporting by banks in Florida, then reviews the failure by the California Assembly to improve bank reporting legislatively and considers reasons the banking community opposed this legislation.

Section V will study in detail a successful model from Oregon, because a way must be found to further engage banks to combat financial abuse. The Comment also looks at several current activities in California that may engage the banking community on a voluntary basis and concludes by proposing additional initiatives via legislation and improved record-keeping.

II. HISTORICAL PERSPECTIVE

A. Overview

While the emphasis on elder abuse in our society seems relatively recent, it is a problem that human society has faced for many years.¹¹ Elder

9. *Id.*

10. *Hoppe v. Kandiyohi County*, 543 N.W.2d 635, 636 (Minn. 1996) (holding county was not liable for negligence for slow reaction to report of possible exploitation where a bank employee who had gained power of attorney wrote numerous checks in excess of \$100,000 making himself payee for money in the account of an elderly nursing home resident).

11. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—the Legal Framework*, 31 CONN. L. REV. 77, 81 (1998) [hereinafter Moskowitz, *Saving Granny*] (standing in contrast with the “understandable tendency to view the past as a ‘golden age’ and to mourn the ‘world we have lost.’”). Even Shakespeare uses the theme of children abusing

abuse is not strictly an American concern, or even just a Western European problem. It has even been manifested in countries where the common wisdom has it that there is great respect for age.¹² However, some contemporary trends increase the likelihood of abuse in the U.S. Increased geographical mobility, greater employment of women, and the stresses of divorce and economics, all conspire to diminish family care giving, thereby making financial abuse more likely.¹³

Different types of abuse have been emphasized in different decades in the U.S. One may characterize the 1960s as a time of “discovering” child abuse, the 1970s spousal abuse, and the 1980s elder abuse.¹⁴ Studies began to appear in the late 1970s indicating the seriousness of the elder abuse problem in the U.S.¹⁵ This research culminated in a 1981 report on the “Hidden Problem” published by the U.S. House of Representatives, Select Committee on Aging.¹⁶

B. Legislative Response

The 1981 “Hidden Problem” report exposed elder abuse as a sweeping national catastrophe, nearly as frequent as child abuse, victimizing about four percent of the elderly each year.¹⁷ This translated into an estimated one million cases per year, with “[p]hysical violence including negligence [as] the most common form of abuse, followed by financial abuse.”¹⁸ The report

parents in King Lear. *Id.* (citing WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 3).

12. See ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL 2-3 (Jordan I. Kosberg & Juanita Garcia eds., 1995) (discussing elder abuse in a collection of essays from such diverse nations as Australia, Finland, Greece, Hong Kong, India, Ireland, Israel, Norway, Poland and South Africa). Types of elder abuse, rate of abuse, and laws to protect elders vary greatly from country to country. BARNETT, *supra* note 2, at 266.

13. See Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 805 (2000).

14. Garfield, *supra* note 3, at 863-64 (citations omitted). “[V]olumes of research on child abuse surfaced” in the early 1960s. Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, 12 PROB. & PROP. 52, 52-53 (1998) [hereinafter Moskowitz, *New Remedies*]. By 1965 all states except Hawaii, which followed later, had adopted laws mandating reporting of child abuse. SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW AND POLICY 15 (2d ed., 1999). See also BARNETT, *supra* note 2, at 43 (describing how child abuse definitions also expanded rapidly in the 1960s). Further, “in the 1970s, some early British studies examined elder abuse coining the phrase ‘granny bashing.’” Santo, *supra* note 13, at 807.

15. Moskowitz, *Saving Granny*, *supra* note 11, at 83.

16. HOUSE SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter HIDDEN PROBLEM].

17. *Id.* at xiv. Despite the relatively high incidence of elder abuse as compared to child abuse, the states were allocating 86.7% of their protective service budgets to children while only 6.6% went to the elderly. *Id.* at xvi.

18. *Id.* at xv. “[T]he Committee developed literally thousands of examples which [fell] into the category of financial exploitation.” *Id.* at 13.

also pointed out that the abused often do not report abuse.¹⁹ The large amount of abuse, coupled with elders' reticence to inform the authorities, suggest how critical other reporters are in combating the problem. At the time of the Hidden Problem report, twenty-six states had adult protective service laws, sixteen of those required mandatory reporting of abuse, although reporting procedures varied dramatically, and several other states were planning to implement such laws.²⁰ Testimony suggested that mandatory reporting was effective, so the committee concluded that the list of mandated reporters and reportable conditions should be broadened,²¹ and recommended that Congress consider providing funding incentives to reward states enacting mandated reporting laws.²²

In the early 1980s, California was one state grappling with the problem of elder abuse. The California Assembly's failure to pass two bills that would have required mandatory reporting of elder abuse and provided protective services funding spurred hearings to examine the current system and to identify ways to improve it.²³ In 1983, the California legislature passed Senate Bill 1210, its first law aimed specifically at elder abuse, which defined abuse and set out the mandatory reporting provisions that are the basis for California's Adult Protective Services (APS) laws today.²⁴ Other states, perhaps encouraged by the possibility of federal funding, also enhanced their procedures for handling elder abuse; nevertheless, the problem was increasing.²⁵

Unfortunately, Congress did not follow up on its good intentions to attack elder abuse. Many states reported an upswing in elder abuse in a 1990

19. *Id.* at xv. *But see* PATRICIA J. BROWNELL, FAMILY CRIMES AGAINST THE ELDERLY 99-100 (1998) (characterizing elderly abuse victims in New York City who made police reports as a "spunky group"). However, Brownell only studied those who had reported abuse and had no way to know about those victims who did not report to the police. *Id.* at 100.

20. HIDDEN PROBLEM, *supra* note 16, at xvi-xvii. There was much inconsistency between states concerning who was required to report and what penalties were levied for failure to report. *Id.* This is also true in 2003, and similarly, such inconsistency is true of the reporting of child abuse. KALICHMAN, *supra* note 14, at 18-21. The definitions of abuse and conditions for reporting are the greatest sources of variability. *Id.* at 20-30.

21. HIDDEN PROBLEM, *supra* note 16, at 140-41. The testimony of Maureen Saiz, Study Director for Research on Elder Abuse, UCLA/USC Long Term Care Gerontology Center, also indicated that in sixteen states surveyed, the passage of mandatory reporting laws had steadily increased reports of "elder abuse, neglect and exploitation." *Id.*

22. *Id.* at xvii. The Committee suggested a plan to incentivize states through enactment of H.R. 769, The Prevention, Identification, and Treatment of Elder Abuse Act of 1981. *Id.*

23. *Elder/Dependent Adult Abuse: Hearing Before the Assemb. Comm. on Aging and Long-Term Care*, 1985-86 Reg. Sess. 2 (Cal. 1985). The committee fully recognized that elder abuse was "on the rise with no abatement in sight" and that there was no comprehensive system to respond to elder abuse. *Id.*

24. Garfield, *supra* note 3, at 922. However, reporting of fiduciary abuse, neglect and abandonment was only voluntary. *Id.* at 922-23.

25. Santo, *supra* note 13, at 808.

Congressional hearing.²⁶ Elder abuse estimates jumped from 4% to 5% between the 1981 and 1990 hearings, representing an increase of 500,000 elder abuse cases annually.²⁷ While one out of every three cases of child abuse was reported, only one of every eight cases of elder abuse was reported, a slip-page from the one in five estimated in 1981.²⁸ Low rates of reporting persist today,²⁹ making first line observers of elder abuse critical reporters.

C. Response by the States

By 1990, forty-three states had adopted mandatory reporting requirements, a substantial increase from the sixteen states reported a decade earlier, but Congress had not provided the proposed funding to fight elder abuse.³⁰ Consequently, a great disparity existed between the more generous spending on protective services for children and the limited spending on adult services.³¹

In the absence of a comprehensive federal approach to handling elder abuse, the task was left to the states. And the states responded. By the 1990s all fifty states had enacted legislation to address elder abuse.³² While varying in specific content, the state statutes shared many of the same general provisions.³³ States modeled laws to protect elders after legislation addressing child abuse that had been in place since the mid-1960s.³⁴ So it is hardly surprising that the core components of elder abuse reporting laws are very simi-

26. *Elder Abuse: A Decade of Shame and Inaction: Hearing Before the Subcomm. on Health and Long-Term Care of the Select Comm. on Aging*, 101st Cong. 98 (1990) [hereinafter *Decade of Shame*]. Ninety percent of the states reported elder abuse increases, while six states reported a rapid increase in elder abuse. *Id.*

27. *Id.* at 95.

28. *Id.*

29. NAT'L. CTR. ON ELDER ABUSE, THE NATIONAL ELDER ABUSE INCIDENCE STUDY, at 4-3 (1998), prepared for Admin. on Aging, U.S. Dep't of Health and Human Servs., available at http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/AbuseReport_Full.pdf. This report estimated that only 21% of domestic elder abuse instances were reported and substantiated. *Id.* One factor exacerbating the low reporting rate is that an abused elder is less likely to report abuse than victims in other age groups. *Decade of Shame*, *supra* note 26, at 97. These statistics strongly suggest that the methodology in Brownell's study, cited *supra* note 19, may reflect a sampling bias by only including those who report abuse.

30. *Decade of Shame*, *supra* note 26, at 96.

31. *Id.* In 1989, states spent \$45.03 per child resident for protective services, but only \$3.80 for each elderly resident. *Id.*

32. Garfield, *supra* note 3, at 869.

33. *Id.* at 872-919 (describing provisions in state statutes addressing elder abuse, including definitions of abuse, neglect, and exploitation; mandatory reporting; central registries; confidentiality; expungement of records (only used in a few states); penalties for the abuser; investigations; provision of services; involuntary or nonconsensual intervention; and emergency intervention).

34. See KALICHMAN, *supra* note 14, at 45, 159.

lar to child abuse reporting laws.³⁵ While one is struck by the ubiquity and similarity of reporting requirements for the abuse of children and for the abuse of adults, which are derived from the common assumption that an abused victim needs protection, financial abuse is uniquely characteristic of elder abuse,³⁶ and it may be the type of elder abuse least likely to be reported.³⁷

Because the purpose of these abuse laws is to prevent or mitigate abuse, every state calls for some sort of procedure to report instances of abuse to protective authorities. The vast majority of states designate mandated and non-mandated reporters for both child abuse³⁸ and elder abuse.³⁹ Currently forty-two states and the District of Columbia mandate reporting of elder abuse, while eight states make reporting voluntary: Colorado, Illinois, New Jersey, New York, North Dakota, Pennsylvania, South Dakota and Wisconsin.⁴⁰

35. Compare KALICHMAN, *supra* note 14, at 18 ("All [child abuse] reporting laws: (a) define abusive situations; (b) delineate reportable circumstances, as well as the degree of certainty that reporters must attain, the age limits of reportable children, and details of who must report; (c) outline the sanctions for failing to report; and (d) provide immunity from civil and criminal liability for reports filed 'in good faith.'"), with Garfield, *supra* note 3, at 869 ("[E]lder abuse APS statutes ordinarily contain . . . who is covered by the statute, . . . provisions for mandatory reporting of abuse; guidelines for investigation of abuse; provisions regarding involuntary as well as emergency intervention; and definitions of abuse, neglect, and exploitation.").

36. BROWNELL, *supra* note 19, at 99.

37. See generally *Decade of Shame*, *supra* note 26. The California Attorney General's Office estimates that although 5% of people over the age of 65 are subjected to abuse, only 1 case in 14 of financial abuse is reported. Joan Virginia Allen, *Orange County's "FAST" Response to the Crime of the '90s*, 40 *Orange County Law. J.* 5, 5 (1998).

38. *Child Abuse Reporting Laws and Dependency Statutes: Hearing Before the S. Select Comm. On Children & Youth*, 1987-88 Reg. Sess. 18-20 (Cal. 1987).

39. See Moskowitz, *New Remedies*, *supra* note 14, at 53.

40. *Id.* For mandatory reporting statutes, see ALA. CODE § 38-9-8 (2003); ALASKA STAT. § 47.24.010 (Michie 2002); ARIZ. REV. STAT. ANN. § 46-454 (2003); ARK. CODE ANN. § 5-28-203 (Michie 2003); CAL. WELF. & INST. CODE §§ 15600-15755 (Deering 2003); COLO. REV. STAT. ANN. § 26-3.1-102 (2003), COLO. REV. STAT. 26-3.1-204 (2003); CONN. GEN. STAT. § 17b-451 (2003); DEL. CODE ANN. tit. 31, § 3910 (2003); D.C. CODE ANN. § 7-1903 (2003); FLA. STAT. ch. 415.103 (2003); GA. CODE ANN. § 30-5-4 (2002); HAW. REV. STAT. ANN. § 346-224 (Michie 2003); IDAHO CODE § 39-5303 (2003); IND. CODE ANN. § 12-10-3-9 (Michie 2003); IOWA CODE ANN. § 235B.3 (2003); KAN. STAT. ANN. § 39-1431 (2002); KY. REV. STAT. ANN. § 209.030 (Michie 2003); LA. REV. STAT. ANN. § 14:403.2 (West 2002); ME. REV. STAT. ANN. tit. 22, § 3477 (West 2003); MD. CODE ANN., FAM. LAW § 14-302 (West 2002); MASS. GEN. LAWS ANN. ch. 19A, § 15 (West 2003); MICH. COMP. LAWS § 400.11a (2002); MINN. STAT. § 626.557 (2003); MISS. CODE ANN. § 43-47-7 (2003); MO. REV. STAT. § 565.188 (2003); MONT. CODE ANN. § 52-3-811 (2003); NEB. REV. STAT. § 28-372 (2003); NEV. REV. STAT. § 200.5093 (2003); N.H. REV. STAT. ANN. § 161-F:46 (2003); N.M. STAT. ANN. § 27-7-30 (Michie 2003); N.C. GEN. STAT. § 108A-102 (2003); OHIO REV. CODE ANN. § 5101.61 (Anderson 2003); OKLA. STAT. ANN. tit. 43A, § 10-104 (West 2002); OR. REV. STAT. § 124.050-.095 (2001); R.I. GEN. LAWS § 42-66-8 (2003); S.C. CODE ANN. §§ 43-35-5 to -90 (Law. Co-op. 2002); TENN. CODE ANN. § 71-6-103 (2003); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2003); UTAH CODE ANN. § 62A-3-305 (2003); VT. STAT. ANN.

D. Mandated Reporters

Mandated reporters cover a range of people who come into frequent contact with the elderly. Laws generally require health care and social work professionals to report elder abuse.⁴¹ This duty has been extended in some states to lawyers, guardians or conservators, and in four states, to bank employees. Even members of the clergy are mandatory reporters in a few states.⁴² Following an abuse report, state agencies typically conduct a visit and then report to state officials.⁴³ Most states provide anonymity or confidentiality to reporters and mandated reporters are typically granted immunity from criminal and civil liability.⁴⁴ Just because it is required by statute does not guarantee reporter compliance. As with reporters who suspect child abuse but do not report,⁴⁵ mandated reporters such as physicians, mental health workers and social workers may suspect elder abuse but fail to report.⁴⁶ Physicians report that fear of court appearances, of abusers' anger, and of compromising confidentiality may deter reporting; these deterrents may apply to other mandated reporters as well.⁴⁷ Even clergy are likely to fail to comply with mandatory reporting laws.⁴⁸

III. DEBATE OVER REPORTING OF ABUSE

A. Mandated vs. Voluntary Reporting

The alacrity with which most states embraced mandated reporting may imply agreement about its superiority to voluntary reporting but there has been significant disagreement about its efficacy. Some critics of mandatory

tit. 33, § 6903 (2003); VA. CODE ANN. § 63.2-1606 (2003); WASH. REV. CODE § 74.34.035 (2003); W. VA. CODE § 9-6-9 (2003); WYO. STAT. ANN. § 35-20-103 (Michie 2002).

For voluntary reporting statutes, see 320 ILL. COMP. STAT. ANN. § 20/4 (West 2003); N.J. STAT. ANN. § 52:27D-409 (2003); N.Y. SOC. SERV. LAW § 473-b (Consol. 2003); N.D. CENT. CODE § 50-25.2-03 (2003); 35 PA. CONS. STAT. ANN. § 10225.302 (2003); S.D. CODIFIED LAWS ANN. § 22-46-6 (Michie 2003); WIS. STAT. § 46.90 (2002).

41. Moskowitz, *New Remedies*, *supra* note 14, at 53.

42. Seymour Moskowitz & Michael DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 34 (1999) [hereinafter Moskowitz, *Silence*] (indicating that six states require clergy to report abuse, while many others require every person to report).

43. Moskowitz, *New Remedies*, *supra* note 14, at 53.

44. Garfield, *supra* note 3, at 875. While granted immunity from liability for reporting abuse, "[i]n a number of states mandated reporters actually may be prosecuted or fined for failure to report when required." *Id.* (emphasis added).

45. See KALICHMAN, *supra* note 14, at 12 ("Surveys have repeatedly shown that one in three professionals have had contact with at least one case of suspected abuse that they have declined to report.").

46. Moskowitz, *New Remedies*, *supra* note 14, at 53-54.

47. *Id.* at 54.

48. See Moskowitz, *Silence*, *supra* note 42, at 39-40.

reporting say that people who do not already report known abuse will hardly be compelled to do so by these rarely enforced statutes, or that mandated reporting may not locate a significant number of cases that are not already reported by voluntary methods.⁴⁹

Others have attacked mandated reporting on the basis that it is motivated by ageist assumptions. Their thesis is that mandated reporting stems from a *parens patriae*⁵⁰ model originating in child abuse reporting.⁵¹ Because our thinking about elder abuse, and the statutes themselves, are based on earlier approaches to child abuse, we tend to view elders as weak and incompetent rather than as independent and resourceful. They argue that mandated reporting is an unwarranted intrusion upon many competent elders' lives.⁵²

However, the National Incidence Study reports that six out of ten elder abuse victims experienced some degree of confusion, and more than three in four have difficulty caring for themselves.⁵³ Confused, incapable elders seem to be just the right candidates for a *parens patriae* doctrine. (Even mentally competent elders may not be able or willing to report elder abuse.⁵⁴) In fact, the original *parens patriae* obligation to protect property⁵⁵ is perfectly congruent with combating financial abuse of elders who are incompetent, with the state taking the place of the sovereign. Furthermore, if elders were offended by such ageism, one might predict that they would reject intervention. But in a California study, 85% of those abused indicated that they would accept protective services.⁵⁶ In Nova Scotia, in the two years following enactment of mandatory reporting there was not a single case of elder abuse where protective services were rejected.⁵⁷ After weighing both sides of the ageism issue, one reviewer concluded that compared to the alternative of doing nothing, any invasion of elder privacy seems to be worth the sacri-

49. Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 89 (1982).

50. *Id.* at 76 (“*Parens patriae* originated with the English sovereign’s duty to protect the property of subjects too incompetent to handle their own affairs.”). Today the state has taken the place of the sovereign. *Id.*

51. *Id.* at 79.

52. *Id.* at 79-80.

53. NAT’L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-20.

54. Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L. J. 165, 173-75 (1995) (suggesting fear of reprisals by family members or caretakers, isolation, and embarrassment hinder reporting).

55. Faulkner, *supra* note 49, at 76.

56. Garfield, *supra* note 3, at 921.

57. Stephen G. Coughlan et al., *Mandatory Reporting of Suspected Elder Abuse and Neglect: A Practical and Ethical Evaluation*, 19 DALHOUSIE L.J. 45, 64-65 (1996). All 144 cases of “senior” abuse over a two-year period were “dealt with as voluntary service cases,” i.e., did not require a court order to provide services. *Id.* at 65. Over the five years from April 1988 through March 1993, court orders were required in fewer than ten percent of the cases. *Id.*

ficie.⁵⁸ Given the prevalence of elder abuse, particularly that directed at elders who are failing physically and mentally, the focus on ageism seems a bit academic. The American Bar Association, grappling with ethical obligations to clients who lack competence, reveals just how unsettled the ageism issue is: “[t]he action taken should be the least restrictive of the client’s autonomy that will yet adequately protect the client in connection with the representation.”⁵⁹ It is doubtful that merely describing the problem will be of much help to the practitioner.

Another set of critics posits that it is not possible to study this question in a scientific fashion. A 1991 GAO study that surveyed officials concluded that mandated and voluntary reporting could not be meaningfully compared because: “(1) laws concerning elder abuse vary substantially from state to state; (2) states differ widely in the procedures they use for collecting case identification data; and (3) the number of elder abuse cases that states identify is strongly influenced by many [other] factors.”⁶⁰ The debate over mandated versus voluntary reporting has been described as “based almost entirely on anecdotal evidence.”⁶¹ Nevertheless, the GAO report did not deter Congress from its support for mandated reporting.⁶² Testimony before legislative hearings is replete with stories about helpless victimized elders. It does seem likely that many legislators have internalized a *parens patriae* model of vulnerable elders who need protection. Ohio Representative Mary Beth Oakar, at a 1991 Congressional hearing on elder abuse, said that if federal funding did not require mandated reporting, “you will not see the decline in elder abuse that I think all of us want.”⁶³

Concerns have also been expressed that mandated reporting violates the confidentiality of physician-patient privilege,⁶⁴ where generally the elderly patient is the victim of abuse.⁶⁵ A similar concern is voiced about child abuse

58. See Velick, *supra* note 54, at 172-75.

59. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 404 (1996).

60. U.S. GEN. ACCOUNTING OFFICE, ELDER ABUSE: EFFECTIVENESS OF REPORTING LAWS AND OTHER FACTORS 2 (1991) (reporting on study including interviews with officials from twenty-five states' adult protective services agencies).

61. Timothy W. Silva, *Reporting Elder Abuse: Should It Be Mandatory or Voluntary?*, 9 No. 4 HealthSpan 13 (1992).

62. *Decade of Shame*, *supra* note 26, at 3-4 (recommending funding incentives for states to facilitate mandated reporting). See also Velick, *supra* note 54, at 166.

63. *Elder Abuse: What Can Be Done?: Hearing Before the Subcomm. on Human Servs. of the House Select Comm. on Aging*, 102d Cong. 19 (1991) [hereinafter *Elder Abuse House Hearing*] (statement of Rep. Oakar, Member, House Select Comm. on Aging). Representative Oakar estimated that shifting from voluntary to mandatory reporting would reduce under reporting by 50%, and she also saw no “compelling arguments in the [GAO] study against mandatory reporting.” *Id.*

64. Faulkner, *supra* note 49, at 83 (arguing that such an “exception would likely create a severe strain on the doctor/patient relationship,” possibly even “discourag[ing] the older person from seeking medical assistance.”).

65. See *id.* at 83.

reports,⁶⁶ and is relevant wherever confidentiality is required. State laws abrogating these privileges can overcome physicians' reluctance to report when the law requires it.⁶⁷ States justify the creation of these exceptions because of a "significant social interest" in preventing elder abuse.⁶⁸ If mandated reporting were deleterious to the interests of physicians, then one would expect the American Medical Association to oppose it. Nevertheless they have offered "strong support for mandatory reporting laws."⁶⁹ There is also support in the legal community for mandated reporting of elder abuse by physicians and others.⁷⁰ The philosophical debate continues, but if states are difficult to compare because of statutory and definitional differences, perhaps there is another way to find out whether mandatory reporting makes a difference.

B. Analysis of Mandated vs. Voluntary Reporting

If a comparison between states is confounded by multiple variables, then examining what happens when a single jurisdiction goes from voluntary to mandatory reporting should provide a cleaner comparison. This approach might also eliminate the methodological bias that comes from surveys of officials who may have a vested interest in their own agencies or the legislation that they are sponsoring, which was part of the methodology in the GAO study. Increased disclosure of elder abuse after introduction of mandatory reporting has been noted, but critics question the methodology.⁷¹ A similar increase in reporting of child sexual abuse was seen when Maryland adopted mandatory reporting of abuse and neglect for "all professionals and nonprofessionals."⁷² Further, similar increases have been seen in other countries.⁷³ Given the large number of cases of elder abuse, even a small shift in

66. KALICHMAN, *supra* note 14, at 44.

67. Garfield, *supra* note 3, at 884 (pointing out that such exceptions are not necessarily offensive because there are often exceptions to privileges).

68. See Velick, *supra* note 54, at 176.

69. *Id.*

70. Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 666-68 (2000). Oberloh explains that if medical professionals can report child abuse successfully, they should also be able to do so for elder abuse. He concludes that "medical professions must be compelled to report suspected elder abuse." *Id.* at 668.

71. See Karen I. Fredriksen, *Adult Protective Services: Changes with the Introduction of Mandatory Reporting*, 1 J. ELDER ABUSE & NEGLECT 59-70 (1989) (describing an increase in reports and referrals of elder abuse in Seattle). At the time, the value of mandatory reporting was hotly debated in the literature. *Id.*

72. KALICHMAN, *supra* note 14, at 58-59 (showing a rise of almost seven percent from 1988 to 1989).

73. *Id.* at 41. Increases in reporting of child abuse with the institution of mandatory reporting have also been seen in Canada, Australia, New Zealand, and elsewhere. *Id.*; cf. Coughlan, *supra* note 57, at 65 n.50 ("It [was] not readily apparent . . . whether the cases . . . were detected because of the mandatory reporting law."). In contrast to the researchers in Washington, Coughlan did not discuss data prior to enactment of the law. *Id.*

percentages could increase the number of reports by tens of thousands,⁷⁴ but there are very few of these before-and-after studies.

Despite a paucity of evidence, some reviewers have concluded that mandatory reporting of elder abuse is necessary and beneficial.⁷⁵ One supporter suggested that with mandatory reporting laws on the books in most states, the main agenda becomes increasing compliance by increasing funding for APS services, publicizing mandatory reporting requirements, increasing interagency cooperation, and amending, where necessary, state statutes to protect reporters.⁷⁶ Of course, this agenda also makes sense in a voluntary reporting state. On the other hand, Canadian authors rejected mandatory reporting on both ethical and practical grounds, then concluded that voluntary reporting coupled with protection from liability is "probably a better alternative."⁷⁷ The debate over mandatory reporting is far from settled, nor is it likely to be resolved soon because it seems to be based more on philosophical assumptions than on hard data. A battle still rages in California and other states about whether to include employees of banks and other financial institutions as mandatory or voluntary reporters of financial abuse. The next section will consider just how effective reporting by banks has been and whether this sheds light on the reporting controversy.

III. REPORTING BY BANKS

A. Banks Should be Important Reporters of Financial Abuse

Financial abuse of elders has been addressed in an enormous variety of ways, confirmed by a state-by-state perusal of statutes.⁷⁸ Many states have so recently criminalized financial abuse of elders that little judicial interpretation of these laws exists.⁷⁹ But it is likely that banks, holding vast amounts of money,⁸⁰ will frequently be involved in transactions that cause financial

74. See Velick, *supra* note 54, at 172. The National Elder Abuse Incidence Study estimated over 500,000 cases of elder abuse, neglect and self-neglect in domestic settings alone in 1996. Only a one percent increase in reporting would translate into over 5000 additional reports. NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 1-1.

75. Velick, *supra* note 54, at 188 (asserting mandatory reporting "can only result in more investigation and remedial action"). See also Jill C. Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZ. L. REV. 627, 638 (1996) (asserting "mandatory reporting laws are necessary to aid defenseless elders who suffer from abuse"). See generally Moskowitz, *New Remedies*, *supra* note 14, at 107.

76. Velick, *supra* note 54, at 177.

77. Coughlan, *supra* note 57, at 69. This is the practice in New Brunswick and Prince Edward Island. *Id.*

78. Carolyn L. Dessin, *Financial Exploitation Statutes' Impact on Domestic Relations Practice*, 16 J. AM. ACAD. MATRIMONIAL LAW. 379, 381 (2000).

79. *Id.*

80. See FDIC Statistics on Banking, available at <http://www.fdic.gov/bank/statistical/statistics/0112/deposit.html> (last visited Dec. 10, 2003). On Dec. 31, 2001, 257.6 billion dollars was on deposit in FDIC insured commercial banks in California alone. *Id.*

abuse.⁸¹ Symptoms of such abuse “include closing joint accounts and transferring monies into the separate account of the exploiter; regular withdrawals of money from existing accounts; borrowing money on the elder person’s credit line or credit card; and obtaining loans from the elder person’s bank account and pledging that account, or the elder person’s home, as loan collateral.”⁸² Bank employees themselves may even be the abusers.⁸³ Telemarketing and lottery scams often target the bank accounts of elderly victims,⁸⁴ and banks may even inadvertently aid the scammers by clearing counterfeit checks,⁸⁵ and then making the victims bear the losses,⁸⁶ which sometimes mount into the hundreds of thousands of dollars per victim.⁸⁷ Many such cases of financial abuse go currently unreported.⁸⁸

81. See Ken Ransford, *Financial Abuse of Elderly Adults*, 23 COLO. LAW. 1077, 1078 (1994) (“[S]ymptoms of financial abuse often appear at the bank operations level.”). See also *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254 (R.I. 2002) (describing how an elderly woman, who was failing mentally and physically, opened a \$39,000 account in December 1995, withdrew \$27,000 in less than two years while accompanied by a man who was a known drug abuser, and was then declared incompetent by the court).

82. Ransford, *supra* note 81, at 1078.

83. *Hoppe v. Kandiyohi County*, 543 N.W.2d 635, 636 (Minn. 1996). See also Nancy Weaver Teichert, *Suit Alleges Financial Elder Abuse: Washington Mutual is Accused of Assisting a Scheme to Defraud a Veteran of His Life Savings*, SACRAMENTO BEE, Oct 12, 2001, at B1. Teichert describes how a financial adviser employed by Washington Mutual Bank was alleged to have deposited in his own account checks for between \$150,000 and \$500,000 from an 84 year old customer’s account, and how he made himself beneficiary on two annuities that he sold the elderly man. *Id.*

84. *Warnings About Canadian Lottery Swindle Circulating in Area*, GAMING, at <http://www.gamingmagazine.com/managearticle.asp?c=490&a=430> (Oct. 2, 2001). See also *New Kent Woman Loses Life Savings in Lottery Scam*, VIRGINIAN-PILOT (Nov. 22, 2002), available at <http://www.pilotonline.com/news/nw1122scam.html>.

85. See *Warnings About Canadian Lottery Swindle Circulating in Area*, *supra* note 84.

86. In a case at Elder Law and Advocacy, an elderly man was sent a check for \$250,000 from the Canadian Lottery scammers. His bank cleared the counterfeit check into his account without checking for its validity or putting on a 30-day hold. The victim sent a total of about \$200,000 to the scammers. The bank is suing him for the money. Deputy District Attorney Paul Greenwood, addressing an elder abuse seminar in Southern California in 2000, describes a similar case in San Diego, where a bank allowed two roofers to cash a check for \$90,000 signed as a blank check by an elderly partially blind woman on which they had inserted the amount. The bank failed to telephone the woman to verify that it was correct but still refused to reimburse her. Kuehner-Hebert, *supra* note 8, at 2.

87. Telephone Interview with Carolina Curfio, Project Colt (Dec. 10, 2002). According to Curfio, telemarketing fraud involves a number of groups; there were 884 reports to Project Colt from the U.S. in 2002.

88. *Id.* See also A. Paul Blunt, *From the Frontlines: Banks and the Responsibility to Report Financial Exploitation*, NARCEA EXCHANGE FRONTLINE 6, 9 (1991) (stating although legally obliged, very few banks routinely report) (on file with author and available from the Clearinghouse on Abuse and Neglect of the Elderly (CANE), at <http://db.rdm.s.udel.edu:8080/CANE>). Bank reporting has probably improved since 1991, and some banks do report financial abuse when it is self-abuse. Telephone Interview with Chris Alire, Adult Protective Services Assignment Supervisor, San Diego, Cal. (Feb. 4, 2003).

The characteristics of exploitation suggest why banks could play a crucial role in combating this very prevalent financial abuse.⁸⁹ It is often difficult for the victim to recognize that financial abuse has occurred,⁹⁰ they are unlikely to report the abuse,⁹¹ and are generally confused—they need help to protect themselves (sometimes even from themselves).⁹² Banks often play a central role when the assets of an elderly person are targeted, so they are a first line of defense in protecting elders from financial abuse.⁹³ Prevention of financial abuse and prevention of pollution have a striking similarity: just as pollution is best nipped at the point of production, so is much financial abuse—the point of production is at the active bank operations level. Early action can greatly mitigate the effects of financial abuse.⁹⁴

B. Actual Reporting of Financial Abuse by Banks

Two studies report that banks made *less than one half of one percent* of substantiated abuse reports.⁹⁵ Family members, hospitals and friends, or neighbors were far more likely than banks to report financial abuse.⁹⁶ The National Incidence Study dramatically presented how substantiated reports by “sentinels”—selected reporters—represent just the “tip of the iceberg.”⁹⁷

89. NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-7 (stating that financial abuse accounted for 30.2 % of all reports). Definitions of elder abuse generally include financial exploitation and financial abuse is recognized in almost every state's elder abuse statutes. See BARNETT, *supra* note 3; discussion *supra* Part II.C.

90. See Dessin, *supra* note 5, at 216 (explaining that even victims with capacity may not be aware of complex financial manipulations because a thorough review of bank statements and ATM transactions might be required).

91. NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4 (calculating that 84% of abuse cases are not reported).

92. *Id.* at 4-20 to 4-21 (calculating about sixty percent are confused).

93. Press Release, Providian Fin. Corp., Providian Financial to Join Fight Against Financial Abuse of Senior Citizens, at <http://home.providian.com/Press-Releases/05-30-2001.htm> (May 30, 2001). See also Press Release, Novato Community Bank, Marin County Community Bank Project (2002), at <http://www.ncbanking.com/communityaffairs/commbankproject.asp> (last visited Dec. 16, 2003).

94. Kuehner-Hebert, *supra* note 8 (quoting Deputy District Attorney Paul Greenwood, addressing an elder abuse seminar in Southern California in 2000: “Banks can help by becoming more proactive in recognizing problems before victims are drained of their accounts.”).

95. NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-8 (calculating bank reporting at about 0.4 %). Out of fifteen states with a total of 18,476 financial exploitation reports, about 0.3% came from banks. NATL. ASSOC. OF ADULT PROTECTIVE SERVS. ADM'RS, REPORT ON STATES' ADULT PROTECTIVE SERVICES RESPONSES TO FINANCIAL EXPLOITATION OF VULNERABLE ADULTS 7 (July 2003), available at http://www.elderabusecenter.org/pdf/publication/NAAPSA_9.pdf. States that do not code banks as reporters would bias this statistic downwards, but a lack of coding generally reflects a low baseline level of reporting.

96. NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-10.

97. *Id.* at 5-3 to 5-4.

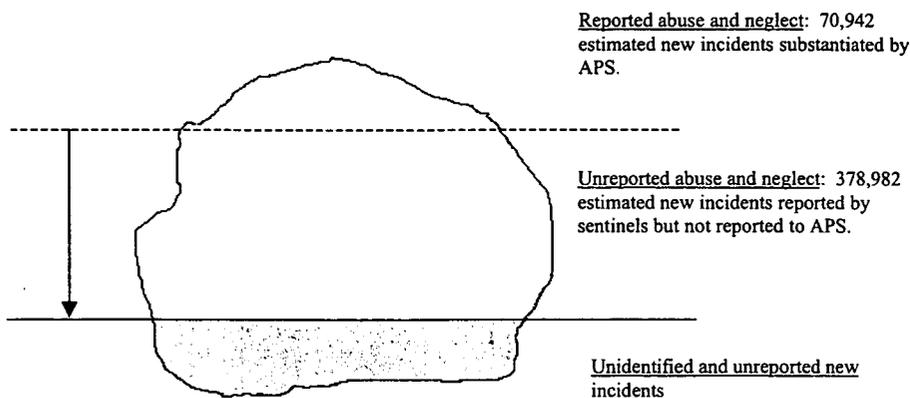


Figure 1. Iceberg theory showing NEAIS identified unreported abuse and neglect, excluding self-neglect from the National Elder Abuse Incidence Study.⁹⁸

Although banks were well situated to observe financial abuse, “[the National Incidence Study] was not very successful in obtaining reports from bank sentinels.”⁹⁹ In confirmation, a 2003 National Association of Adult Protective Service Administrators study concluded about financial institutions: “Their lack of engagement in cases of financial exploitation of vulnerable adults, both in their role as reporters and participants on community and state coalitions and teams remains a critical concern among states.”¹⁰⁰ There has been so little reporting by banks up to now that, in its system of recording the type of source making a report, Arizona does not even have a code to represent a report from a bank,¹⁰¹ nor does Florida,¹⁰² or California.¹⁰³ Commenting on reporting of suspected financial abuse in California, As-

98. *Id.* at 5-4 fig.5-1.

99. *Id.* at 5-9.

100. NAT'L. ASSOC. OF ADULT PROTECTIVE SERVS. ADM'RS., *supra* note 95, at 9.

101. Telephone Interview with Tina Dannenfesler, Operations Manager, Arizona Adult Protective Services (Jan. 28, 2003). Dannenfesler estimated that of about 10,000 cases of reported abuse in 2002, 22% of which was financial abuse, there were only 100 reports from banks. *Id.* Arizona APS plans to start coding bank reports of abuse in the near future. *Id.*

102. FLA. DEP'T. OF CHILD. & FAMS., ADULT PROTECTIVE SERVICES REPORT FISCAL YEAR 2000-2001, at 31 (2002).

103. ADULT PROGRAM ANALYSIS TEAM, CALIFORNIA DEP'T OF SOC. SERVS., ELDER AND DEPENDENT ADULT ABUSE AND NEGLECT & ADULT PROTECTIVE SERVICES IN CALIFORNIA: SEPTEMBER 1999 TO AUGUST 2000, at <http://www.dss.cahwnet.gov/research/res/pdf/APS%20Exec%20Staff%20Presentation.pdf> (last visited Dec. 16, 2003) (providing statistics for California without a breakdown by type of reporter). See also Telephone Interview with Rob Cummings, Information Desk, RADD (Feb. 4, 2003) (commenting that the State does not require data from the counties coded by reporter so the counties do not send it that way).

semblymember Hannah-Beth Jackson said, “[t]he larger banks, I’m told, virtually never do it.”¹⁰⁴

Some banks do play a positive role in combating financial abuse. They provide training to bank employees on how to spot abuse and handle it.¹⁰⁵ They participate on multi-disciplinary teams, providing training and joint consultation and sponsoring legislation.¹⁰⁶ Some observers see such inter-institution cooperation as a potentially useful adjunct to mandated reporting.¹⁰⁷ But in only four states—Florida, Georgia, Kansas, and Mississippi—do statutes identify bank employees as mandated reporters.¹⁰⁸ California, with its size, wealth and huge elderly population, is a major target for financial abusers,¹⁰⁹ but still must resolve whether to mandate bank reporting of this abuse. But does mandatory reporting work? This question prompts a look at mandated reporting in a state that is similar to California in many respects, Florida.

104. Sam Zuckerman, *Golden Fleecing: Big Banks Helped Kill Bill Designed to Protect Seniors From Rip-offs*, S.F. CHRON., Oct. 6, 2000, at B1.

105. *A New Training Cycle, New Materials As The Bank Reporting Project Enters Its Fourth Year*, MASS. BANKER, Spring 1999, <http://thewarrengroup.com/home/wp/mab/mab-spring1999/060412199900001.asp> (on file with author) [hereinafter *Massachusetts Bank Training*]. “The project’s mission remains what it was when first articulated: . . . ‘to help protect elders from financial exploitation by scam artists and unscrupulous caretakers without sacrificing the confidentiality and control that we all value in our personal financial affairs. [The Bank Reporting Project] seeks to establish an industry-wide standard that will help prevent victimization by both educating employees and by providing simple reporting procedures for banks that will enable more effective cooperation between bank officials, elder protective-services agencies and local law enforcement.’” *Id.* (alteration in original).

106. *See, e.g.*, Allen, *supra* note 37, at 10-11 (describing participants in the Orange Count FAST program as the District Attorney’s Office, Probate Court, Adult Protective Services, Public Guardian, Office of the Ombudsman, County Health Care, Regional Center, Area Agency on Aging, City Attorney, Health Insurance Counseling and Advocacy Program (HICAP), Department of Health Services, Attorney General, Social Security, Alzheimer’s Association, law enforcement officials, case managers, mental health professionals, financial services providers, public and private legal services providers, real estate professionals, *banking professionals*, medical services providers, and private professional conservators).

107. *Id.* at 11, 39. *See also* Dessin, *supra* note 5, at 226 (asserting “those charged with alleviating abuse need adequate education”).

108. FLA. STAT. ANN. § 415.1034 (West 2003); GA. CODE ANN. § 30-5-4 (2002); KAN. STAT. ANN. § 39-1431 (2002); MISS. CODE ANN. § 43-47-7 (2003). Colorado also “urges” bank employees to report, COLO. REV. STAT. § 26-3.1-102 (2003), while Idaho, Virginia and Washington say they “may” report. IDAHO CODE § 39-5303 (2003); VA. CODE ANN. § 63.2-1606 (2003); WASH. REV. CODE § 74.34.020, .035 (2003). The Arizona statute seems to imply that bank employees are included, specifying “a person who has responsibility for any other action concerning the use or preservation of the incapacitated or vulnerable adult’s property,” and a “trustee, guardian, [or] conservator,” but it has not been so interpreted. *See* ARIZ. REV. STAT. ANN. § 46-454 (West 2003).

109. Karen Pierce Gonzalez, *Seminars Help Seniors Spot Predators*, S.F. CHRON., Sept. 7, 2001, at 1 (quoting Royal Canadian Mounted Police Constable Sylvain L’Heureux, a member of Montreal’s Project COLT: “[M]ost telemarketing fraud complaints come from California.”).

C. Mandated Reporting of Financial Abuse in Florida

Like California, Florida is a large, wealthy state with a sizable elderly population.¹¹⁰ Because of the large number of elders, "Florida has one of the most comprehensive and responsive adult protection investigation systems in the nation."¹¹¹ Because the provision for mandatory reporting by banks has been there from the beginning, as have other components of the system, it is difficult to tease out the exclusive variable of mandated reporting to study its effectiveness. There is also a lack of good statistics, so anecdotal evidence will have to do.

Preston Mighdoll, assistant state attorney in Palm Beach, Florida says, "The existence of mandatory reporting has to have an impact."¹¹² But there are no statistics to support this view—keeping good records and generating useful statistics is difficult while you are "under the gun."¹¹³ If, as in Mighdoll's Palm Beach County, intake workers do not code bank reporters, or, as sometimes happens, if bankers report to law enforcement officers, who in turn call a hotline and are coded as the reporters, then the statistic is pushed downwards. Statistics are not absolutely reliable measures.

Mighdoll emphasizes the importance of training bank employees to recognize signs of financial abuse and the importance of local initiatives that bring together financial and law enforcement people. The effectiveness of training and multidisciplinary efforts was heard numerous times from people who are actively combating financial abuse, regardless of their position on mandatory reporting.

Chris Shoemaker, Deputy Director of Adult Services in Florida, says his state may well be a model for the rest of the country.¹¹⁴ Mandatory reporting

110. FLA. DEP'T. OF CHILD. & FAMS., *supra* note 102, at 1. "Florida's over 65 population was estimated at 2.4 million in 1990, 3.5 million in 2000, and is projected to increase to almost 5 million in the next 20 years." *Id.*

111. *Id.* at 2. Florida statutes: (1) define "exploitation" very specifically, FLA. STAT. ANN. § 415.102 (West 2003); (2) mandate a centralized hotline, FLA. STAT. ANN. § 415.103 (West 2003); (3) provide immunity for reporters, FLA. STAT. ANN. § 415.1036 (West 2003); (4) protect the confidentiality of reporters, FLA. STAT. ANN. § 415.107 (West 2003); (5) employ adult protective service teams, FLA. STAT. ANN. § 415.1102 (West 2003); (6) provide criminal (misdemeanor) penalties for failing to report or filing false reports, FLA. STAT. ANN. § 415.111 (West 2003); (7) provide a civil cause of action to the victim, FLA. STAT. ANN. § 415.1111 (West 2003); and (8) Florida also requires mandatory reporting by banks, FLA. STAT. ANN. § 415.1034 (West 2003).

112. Telephone Interview with Preston Mighdoll, Assistant State Attorney in Palm Beach, Florida (Jan. 6, 2003). Mighdoll's office receives a lot of reporting from lower level employees like tellers who have noticed something unusual going on in an account, but, significantly, there was no record in his office of the volume of reports from banks.

113. Telephone Interview with Aileen Kaye, Abuse Prevention Coordinator, Or. Dep't. Human Servs., Seniors and People with Disabilities (Jan. 17, 2003). According to Kaye, "in all of social services, statistics are a problem."

114. Telephone Interview with Chris Shoemaker, Senior Management Analyst and Deputy Director Adult Services, State of Florida (Jan. 22, 2003).

has made a difference in Florida, but it is not a panacea.¹¹⁵ Because financial exploitation is on the rise and it is first recognized in banks, Protective Services has been working for several years with banks to train employees to recognize the signs of abuse¹¹⁶ and to identify a point of contact in each bank to make reports to APS.¹¹⁷ The Florida Bankers Association has been very supportive of this comprehensive approach to training bank employees.¹¹⁸ Shoemaker hopes that the “training piece” will heighten the awareness of bank employees and result in more reporting.¹¹⁹ One comes away from the examination of Florida’s approach to combating financial abuse more convinced about the importance of training and teamwork than the necessity of mandatory reporting.

More than 39,500 abuse reports were made to the Florida hotline in 2000-2001.¹²⁰ A state report showed no reports from bank employees, but this is misleading;¹²¹ because of the low level of bank reporting, a bank employee reporter type is not coded from hotline calls. This approach leaves no statistical basis to assert that mandatory reporting by banks makes a difference, and the low level of reporting suggests it may not.

Whether there is evidence in Florida for its efficacy or not, there are some California legislators who believe that banks should be mandated to report. There are others who want a voluntary approach. In the next two sections, the paper will consider how this difference has played out in the California Assembly.

D. Mandated Reporting of Financial Abuse in California

In the 1980s, California responded to the onslaught of elder abuse with some significant legislation concerning reporting.¹²² “The first piece of legislation, Assembly Bill 1805, . . . encouraged but did not mandate health providers, social service workers and community members in general to report suspected cases of abuse.”¹²³ In 1983, Senate Bill 1210, established mandated

115. *Id.* Shoemaker explained that one weakness of a mandatory reporting law is that not everyone knows about it. As an example, he noted that the Florida Association of Social Workers did not know about this legal obligation. This lack of knowledge could be a serious problem in banks where there are traditionally high teller attrition rates.

116. *Id.* Shoemaker described how Florida uses a model from Oregon to train bank employees, funding the effort with money from the Older Americans Act. *Id.*

117. *Id.*

118. *Id.* The Florida Bankers Association has bought into the premise that there is a good-faith obligation to protect elders. *Id.*

119. *Id.*

120. FLA. DEP’T. OF CHILD. & FAMS., *supra* note 102, at 1.

121. *Id.* at 31. *See also* Telephone Interview with Chris Shoemaker, *supra* note 114 (relating that he gets about one call per month from banks).

122. Garfield, *supra* note 3, at 921.

123. *Id.* at 921-22 (referring to A.B. 1805, 1981-82 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 15600-15637 (2003))).

reporting of elder physical abuse in California.¹²⁴ The statute “encouraged” reporting of fiduciary abuse, neglect and abandonment. At this point financial abuse was recognized as a problem, but nobody was required to report it.

By 1986, mandatory reporting provisions were finally consolidated and enhanced, becoming the mainstay of the California APS system.¹²⁵ Assembly Bill 3988 set out requirements to report elder and dependant adult abuse, clarified roles in handling abuse, and enhanced protections for reporters, including confidentiality of reports.¹²⁶ More than a decade later, Chapter 980, codifying Assembly Bill 1780 in 1998, created the most recent significant enhancements of reporting requirements. This law extended types of reportable abuse to abandonment, isolation, neglect, and *financial abuse* and extended the mandated reporter list.¹²⁷ Financial abuse now *must* be reported, but not by bank employees.

Inclusion of financial abuse in Assembly Bill 1780 had both supporters and detractors. The California Attorneys for Criminal Justice (CACJ) opposed the mandatory reporting of financial abuse on privacy grounds¹²⁸—the tension between privacy and protection is inherent in financial abuse—however, a number of organizations supported this bill.¹²⁹

The legislature continued to expand the list of mandated reporters, introducing the most recent revision of mandated reporting in 2002, in Assembly Bill 255.¹³⁰ The list of mandated reporters in California now includes:

124. *Id.* at 922. (referring to S.B. 1210, 1983-84 Reg. Sess. (codified at CAL. WELF. & INST. CODE §§ 9380-9386 (West 1983), repealed by 1986 Cal. Stat. 769 § 1.3)). Mandatory reporters of physical abuse were elder care custodians, medical practitioners, non-medical practitioners, and employees of protective agencies. It contained additional provisions that make it the foundation for today's laws: abrogation of physician-patient privileges, reporter immunity from civil and criminal liability, and a fine for the failure of a mandatory reporter to report. *Id.* This bill paralleled the legislative response by other states to the Hidden Problem report. See HIDDEN PROBLEM, *supra* note 16; discussion *supra* Part II.

125. Garfield, *supra* note 3, at 926-27 (citing A.B. 3988, 1985-86 Reg. Sess. (amending CAL. WELF. & INST. CODE §§ 15600-15601, 15610, 15620, 13630-35, 15640 (2003))).

126. *Id.*

127. Santo, *supra* note 13, at 816. It also added to the mandated reporter list “any person who has assumed full or intermittent care for an elder or dependent adult.” *Id.*

128. *Elder and Dependent Adult Abuse: Third Reading of A.B. 1780 Before the S.*, 1997-98 Reg. Sess. (Cal. 1998) (reporting the California Attorneys for Criminal Justice argument that under Chapter 980, “the privacy of all elder and dependent adults is threatened, as their financial transactions may be reported without their knowledge or consent.”).

129. *Hearing on A.B. 1780 Before the Assemb. Comm. on Pub. Safety*, 1997-98 Reg. Sess. 4 (Cal. 1998) (listing the names of agencies supporting Assembly Bill 1780, including the County Welfare Directors Association of California, California Long Term Care Ombudsman Association, and the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)). AFSCME said: “[I]t helps to ensure that our members' loved ones and elderly individuals in general, are receiving the proper care and treatment they deserve in their later years.” *Id.*

130. A.B. 255, 2001-02 Reg. Sess. (Cal. 2002) (adding clergy to the list of mandated reporters of elder abuse in Chapter 54).

care custodians of elder or dependent adults, local law enforcement agencies, and members of the clergy. Bank employees, as community members, are merely “encouraged” to report.¹³¹ Although financial abuse has been added to the list of reportable offenses, the law still does not require bankers and members of other financial organizations to report it, despite some vigorous efforts by members of the California legislature to include this. Still, the list of mandated reporters may yet be expanded. Paul Greenwood, head of the San Diego District Attorney’s Office Elder Abuse Prosecution Unit, recommended that a Senate committee consider the “[e]xpansion of the list of categories of mandated reporters of elder abuse and an increase in the penalty for failure to comply with the mandated reporting.”¹³²

A dramatic increase in financial abuse in California spurred recent ill-fated legislation to enhance reporting by banks.¹³³ In 1998, Senator Calderon introduced Senate Bill 1715 to expand the list of mandated reporters to include “[any] person[] working for a bank or other financial institution.”¹³⁴ The powerful California Bankers Association (CBA) opposed the bill.¹³⁵ Among criticisms it raised in the Senate Judiciary Committee were: (1) “vagueness problems” applying to “any person who works in a bank,” and (2) that mandated reporters may have no training in detecting abuse yet face misdemeanor charges.¹³⁶ The bankers’ point about vagueness raises a concern about failure to provide adequate notice to relevant bank employees.¹³⁷ The criticism by the bankers also raised the legitimate point that bank employees are not trained to recognize signs of abuse. The Senate amended the bill, removing the provision to mandate bank reporting.¹³⁸

131. *Id.*

132. *Abuse of the Elderly: Hearing Before the S. Special Comm. on Aging*, 107th Cong. (2001) (statement of Paul Greenwood, Deputy District Attorney, Head of Elder Abuse Prosecution Unit, District Attorney’s Office, San Diego, Cal.).

133. *Elder and Dependent Adult Abuse: Hearing on S.B. 1715 Before the S. Judiciary Comm.*, 1997-98 Reg. Sess. 3 (Cal. 1998) [hereinafter *Hearing on S.B. 1715*] (estimating that crimes against the elderly and disabled increased by 20% between 1991 and 1995, with financial abuse accounting for nearly a quarter of all confirmed elder abuse cases in 1995).

134. *Id.* at 2.

135. *Id.* at 4.

136. *Id.*

137. *But see State v. Fisher*, 631 P.2d 239, 244-45 (Kan. 1981). It is not uncommon to see protective statutes broadly drawn and given over to reasonable interpretation in the courts. *Id.* at 245. The court said “[r]easonable adults of common intelligence would have no difficulty in ascertaining the type of conduct proscribed by the statute and the type not so restricted.” *Id.* at 244. Unconstitutional vagueness may also be addressed by statute. *See, e.g., Cuda v. State*, 639 So. 2d 22 (Fla. 1994). There, the Florida Supreme Court held that section 415.111(5) describing exploitation in a statute calling for criminal penalties was unconstitutionally vague. *Id.* at 23. The Florida legislature responded in 2000 by enacting section 415.102 offering definitions of terms that included a lengthy definition of exploitation describing persons who exploit and examples of exploitation. FLA. STAT. ch. 415.102 (2003).

138. *See Elder and Dependent Adult Abuse: False Imprisonment: Hearing on S.B. 1715 Before the S. Comm. on Pub. Safety*, 1997-98 Reg. Sess. 1 (Apr. 21, 1998) (analyzing S.B.

In 2001, the Assembly tried again to enact mandated reporting by bank employees. Prodded by recognition that about one third of elder abuse cases involve financial abuse, eighty percent of which are not reported, and that banks are in a key position to spot financial exploitation,¹³⁹ Assemblymember Alquist offered a bill to add bank employees as mandated reporters.¹⁴⁰ Following the lead of several other states, the legislation excused bank employees from liability for making good faith disclosure of financial information.¹⁴¹ Assembly Bill 109 was widely supported,¹⁴² but, like the Calderon bill, was opposed by the banking lobby.¹⁴³ The bankers also expressed concern that the state exemption would not prevent a federal claim for privacy violations, although, in a widely disseminated opinion, the Oregon Bankers Association (OBA) disagreed.¹⁴⁴ The bill was heartily supported on the Assembly floor, but ultimately scaled back to merely a pilot project for training bank employees. But it never made it back from the Senate Committee. Bankers are still free of mandatory reporting and training provisions, and it

1715, as amended Apr. 20, 1998, to remove the provision to amend CAL. WELF. & INST. CODE § 15630).

139. *Elder and Dependent Adult Abuse: Hearing on A.B. 109 Before the Cal. Assemb. Comm. on Aging and Long Term Care*, 2001-02 Reg. Sess. 3 (Apr. 17, 2001) [hereinafter *Hearing on A.B. 109*].

140. A.B. 109, 2001-02 Reg. Sess. (Cal. 2001) (amending CAL. WELF. & INST. CODE § 15630 to include "officers, trustees and employees of certain financial institutions" as mandated reporters) (emphasis added). *But see* A.B. 109, 2001-02 Reg. Sess. (Cal. 2001) (amended Apr. 2, 2001, Apr. 26, 2001) (eliminating the language making bank employees mandated reporters).

141. *Hearing on A.B. 109*, *supra* note 139, at 3.

142. *Id.* at 4-5 (listing supporters: California Senior Legislature (sponsors); AARP; Area Agency on Aging for San Luis Obispo and Santa Barbara Counties; Attorney General Bill Lockyer; Calaveras Works and Human Services Agency; California Federation of Business and Professional Women; California Judges Association; California Welfare Directors Association; County of Santa Clara; Department of Health and Human Services, Sacramento County; Department of Human Services, City and County of San Francisco; Los Angeles County District Attorney's Office; Older Women's League of California; Police Officers Research Association of California; San Gabriel Valley, Whittier, Pomona Chapter of the National Organization for Women; Triple A Council of California).

143. *Id.* at 5 (listing opposition: California Advocates for Nursing Home Reform; California Bankers Association; California Bank and Trust; Imperial Capital Bank). The bankers said: "Although the state may have a compelling interest in protecting the elderly, singling out bank employees to play cops is not the answer." *Id.* at 3.

144. Letter from Tom Perrick, President/CEO Oregon Bankers Association, to Bank Presidents, CEOs and Senior Managers (Mar. 15, 1999) (on file with Or. Dept. Human Serv.) (stating: "We have not had to appear in court and have had no negative repercussions from reporting."). *See also* Telephone Interview with Aileen Kaye, *supra* note 113 (referring to an OBA legal opinion that said there was no collision with federal law). She was probably referring to the Sherman letter *infra*. *See also Elder Fraud and Abuse: New Challenges in the Digital Economy: Hearing Before the S. Special Comm. on Aging*, 106th Cong. (2000) [hereinafter *New Challenges*] (statement of Tom Perrick, President/CEO, Oregon Bankers Association) (describing an OBA legal opinion suggesting that federal privacy law would not override a similar Oregon statute).

does not appear likely that another legislator will promote mandatory reporting again soon, as Senator Calderon and Assemblymember Alquist are in their final terms. Given the lack of hard evidence for the efficacy of mandatory reporting by banks, inevitable opposition by the powerful banking lobby, and the current focus on the budget crisis, it seems unlikely that there will be strong support in the Assembly for another attempt, at least until a voluntary approach has been given a chance.

E. Voluntary Reporting of Financial Abuse in California

In 2000, the legislature tried to enact a voluntary bank reporting bill. Assemblymember Hannah Jackson (D-Santa Barbara) confidently announced Assembly Bill 2253, intended to “encourage” financial institutions to make timely reports of suspected financial abuse to law enforcement agencies.¹⁴⁵ This bill was modeled after Oregon’s heralded approach to combat financial abuse.¹⁴⁶ Because of the concern, expressed by Oregon bankers as well, that banks might be sued for violating customer confidentiality, Jackson’s bill released financial institutions from liability when they made good faith disclosures about financial abuse.¹⁴⁷ Assembly Bill 2253 was widely supported initially, even by the California Bankers Association.¹⁴⁸ The bill went unopposed because it made reporting of financial abuse by “officers, employees or agents of a financial institution” *voluntary*, and it indemnified these persons from any liability for disclosure.¹⁴⁹ There is no

145. Press Release, Assemblymember Hannah Jackson, Assemblymember Jackson Introduces Bill to Combat Elder Financial Abuse (Feb. 25, 2000), at <http://democrats.assembly.ca.gov/members/a35/press/p352000019.htm>. Assemblymember Jackson said,

“Senior citizens are too often the victims of financial fraud perpetrated by members of their own family and legal guardians. Such crimes are taking place with increasing frequency as the nation’s elderly population grows, and it is often the neighborhood bank teller who is the first to spot such abuse. Unfortunately, bank employees are hesitant to report customer financial information and the facts that form the basis of suspicion to law enforcement because they fear they might be jeopardizing their jobs and the banks’ integrity.”

Id.

146. *Elder and Dependent Abuse: Reporting of Financial Abuse: Hearing on A.B. 2253 Before the Assemb. Comm. on Human Servs.*, 1999-2000 Reg. Sess. 2-3 (Apr. 4, 2000) [hereinafter *Hearing on A.B. 2253*] (describing how the Oregon approach includes both a statute and state-wide training).

147. Zuckerman, *supra* note 104.

148. *Hearing on A.B. 2253*, *supra* note 146, at 4 (listing supporters: Alzheimer’s Association, Ventura County Chapter; AARP; California Bankers Association; California District Attorneys Association; California Seniors Coalition; C.A.R.E. Program, Riverside County; City Attorney, Los Angeles City; County Welfare Directors Association of California; District Attorney, San Diego County; District Attorney, Ventura County; Elder Abuse Prevention; Public Guardian, Orange County; Public Counsel Law Center; Stanislaus Elder Abuse Prevention Alliance; Ventura County Adult Protective Services).

149. *Id.* at 1.

doubt potential reporters would be discouraged if they faced lawsuits for disclosure. Such exceptions are as crucial for bank employees as for physicians reporting abuse.

Several large members of the CBA, Wells Fargo, Union Bank of California, and Bank of America, withdrew support from Assembly Bill 2253 because of an added provision to develop a system for training bank employees in recognizing abuse,¹⁵⁰ and because by requiring banks to act "reasonably" and in "good faith," it would hold banks to a higher standard than was already in place.¹⁵¹ After these major banks opposed Assembly Bill 2253,¹⁵² the CBA withdrew its support and the bill died on November 30, 2000.¹⁵³

Since an argument frequently used against legislation in past was the problem facing untrained bank employees in recognizing abuse,¹⁵⁴ the opposition to training strikes one as inconsistent. It is not clear from the bill's text, but in Wells Fargo's view, mandatory training was tied to the liability provision.¹⁵⁵ To be exempted from disclosure liability, a bank would *be required* to institute training.¹⁵⁶ A staff member of Assemblymember Jackson confirmed this interpretation.¹⁵⁷ This explains why the CBA explained to members of the bankers organization how imposing mandatory training programs on "voluntary participants" eroded industry support for Assembly Bill 2253.¹⁵⁸

150. *Financial Abuse of Elder and Dependent Adults: Reporting: Third Reading of A.B. 2253 Before the S., 1999-2000 Reg. Sess. 5 (Cal. 2000)* (analyzing A.B. 2253 as amended to add training provision).

151. Zuckerman, *supra* note 104 (explaining the position of Ted Kitada, Senior Counsel for Wells Fargo). See also Memorandum from Ted Teruo Kitada, Senior Counsel, Wells Fargo Law Department, to Members of the Assembly and Senate, Wells Fargo Urges the California Legislature to Vote "No" on A.B. 2253 (Aug. 28, 2000) (on file with author). A.B. 2253 would convert an absolute privilege under § 47(b)(3) to a qualified privilege, by requiring reasonableness and good faith," and the requirement for training of bank employees would be undermined by this qualified privilege. *Id.*

152. Telephone Interview with Paul Greenwood, Deputy District Attorney, Head of Elder Abuse Prosecution Unit, District Attorney's Office, San Diego, Cal. (Jan. 6, 2003) (describing how Wells Fargo Bank called this legislation "superfluous," even though at the time it did not provide training to its own employees in handling financial abuse).

153. A.B. 2253, 1999-2000 Reg. Sess. (complete bill history), available at <http://www.leginfo.ca.gov> (last visited Dec. 16, 2003).

154. *Hearing on S.B. 1715, supra* note 133, at 4 (criticizing the bill by stating, "It would seem to be questionable public policy to mandate certain untrained professionals to report various kinds of abuse, and subject them to a possible misdemeanor, without providing any training.").

155. Memorandum from Ted Kitada, *supra* note 151.

156. *Id.* Kitada opined, "If a financial institution elects not to report financial abuse, the training program is not required of it." *Id.*

157. Telephone Interview with Whitney Kramer, staff member for Assemblymember Hannah Jackson (Jan. 17, 2003) (explaining that the liability provision only applied to banks that had a training program).

158. *California Bankers Association Legislative Summary - 2001*, at <http://www.cal->

F. Reasons Banks Resist Mandated Reporting

In summary, banks in California have resisted legislation that would: (1) impose mandatory reporting of financial abuse by bank employees, (2) create liability exceptions, and (3) promulgate mandatory training of their employees. This resistance was powered by a state bankers association largely under the sway of several large banks.¹⁵⁹ Their reasons originate in both non-legal and legal sources.

On the non-legal side, there is a natural resistance by the private sector to government regulation—banks see themselves as a symbol of free enterprise.¹⁶⁰ In such a highly regulated industry, it is hardly surprising to see resistance to additional regulation.¹⁶¹ Bank managers are also driven by overwork and cost considerations.¹⁶² Intervention by bank employees can create situations with customers and their families that are “much more difficult to deal with.”¹⁶³ These considerations are legitimate but not legal in origin. The legal concerns may be even more fundamental.

Banks understandably want to avoid the risk of criminal penalties for failure to report. In many states, failure to report by mandated reporters creates liability for a criminal misdemeanor but this is hardly ever enforced.¹⁶⁴ However, in California, unlike Florida, there is currently no law that explicitly mandates reporting by bank employees, nor provides criminal penalties for failure to report. In California, liability might be possible under Penal Code section 368, which penalizes a person who “willfully causes or permits any elder or dependent adult . . . to suffer . . . unjustifiable physical pain or mental suffering.”¹⁶⁵ Failure to report would be regarded as the omission of a

bankers.com/content/cbapublications_legislative.asp (last visited Jan. 13, 2003) (on file with author) (summarizing the bankers’ view of A.B. 2253’s demise, which was drafted by bank attorneys and introduced by a CBA member, but amendments watering down immunity provisions forced by trial lawyers and imposing mandatory training programs on voluntary participants, eroded industry support). CBA claims it is now working to facilitate voluntary elder abuse training programs under existing law. *Id.*

159. Several unreturned telephone calls were made to the CBA’s chief lobbyist, Maurine Padden; therefore, this conclusion is drawn without comment from the CBA.

160. Telephone Interview with Aileen Kaye, *supra* note 113.

161. Telephone Interview with Christine Young, former bank teller, Manager and Vice President from 1985-2000 (identity of employers withheld) (Jan. 9, 2003) (describing the daily Currency Transaction Reports and Monetary Instrument Reports banks *must* make as evidence that banks can respond to reporting requirements when the government demands them, but also as an indication of the size of the existing reporting burden that banks face).

162. *Id.* Young explained that the banks she worked with did not want employees to report because of legal expenses, because tellers leaving work to testify impacted scheduling and generally created more work for managers, and because of liability issues. She never heard of managers calling a hotline although there was a lot of financial abuse. *Id.*

163. *New Challenges*, *supra* note 144.

164. Moskowitz, *New Remedies*, *supra* note 14, at 54. A computer search from 1994-1997 only yielded one prosecution and that did not involve failure to report. *Id.*

165. Santo, *supra* note 13, at 813. Under the statute, it appears that a bank employee

required act. But in the absence of specific statutory direction, it seems very unlikely that a bank employee would face criminal liability for failure to report financial abuse.¹⁶⁶

Banks are also concerned about civil liability of the bank and bank employees. A few states have explicitly created a civil cause of action for failure to report.¹⁶⁷ But these seem geared toward "professionals" like doctors who fail to report, not to bank tellers. A plaintiff suing for failure to report financial abuse would pursue a negligence theory, but to prove negligence one must prove that a duty exists between the customer and bank employee or bank.¹⁶⁸ Financial abuse cases are "hard, difficult cases" to win, and an abused elder may not be able to afford legal expenses or even be alive when the case comes to trial.¹⁶⁹ In reality, there are very few civil lawsuits against banks.

Some banks are also concerned that in spite of state laws eliminating liability for good faith reporters, federal laws punishing the violation of confidentiality may preempt state protections. However, a differing legal opinion from the Oregon Bankers Association suggests that the federal law provides exceptions that would permit states to create liability exemptions for bank employees.¹⁷⁰

might be held responsible for causing mental suffering by failure to report financial abuse.

166. For a general discussion, see Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101 (1984) (reasoning as follows: If the omission is not described by statute, the omission of an act only creates criminal liability when there has been a duty and the failure to perform a duty causes injury; there are a number of duties that in their omission may lead to criminal liability, but in the case of bank employees, that duty probably has to be based on statute; although the duty may also be based upon relationship, the relationships are those in the family, e.g. parents to children or one spouse to another, master to servant or a ship's captain's duty to aid his passengers). Courts would be extremely unlikely to find this duty implied in the relationship between a bank teller, her customer and the customer's abuser. See generally *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994) (holding that the daughter of an elderly man who died of neglect did not have a legal duty to control the conduct of her two brothers who were found guilty of criminal liability in the death of their father).

167. Moskowitz, *New Remedies*, *supra* note 14, at 55 (describing Michigan, Minnesota, Iowa and Arkansas as having enacted these laws).

168. *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254, 256 (R.I. 2002). It is very difficult to find appellate cases that apply; however, this was a case of elder financial abuse where a Rhode Island bank was sued and the court held that in the absence of explicit statutory direction, "a banking institution and its depositors stand in the debtor and creditor relationship." *Id.* at 257. The court also held that in failing to prove that the bank had used standard bank project materials to train tellers in recognizing financial abuse, plaintiffs failed to show that an industry standard based on such manuals established a duty on the part of defendant. *Id.* at 258. This reasoning implies that when banks use standard materials they may create a duty of care that could be the basis for a liability suit in its breach and would be one explanation of the criticism of mandatory training reported by the CBA.

169. Telephone Interview with Ed Corey, Attorney, Weintraub, Genshlea & Sproul (Jan. 29, 2003) (noting that banks have a lot of lawyers and can afford expert witnesses; it is expensive to try a case against a bank).

170. Letter from Tom Perrick, *supra* note 144; see also *Hearing on A.B. 2253*, *supra*

Banks are pivotal in combating financial abuse, but there is no current California legislative initiative to increase their involvement. APS estimated 100,000 to 125,000 cases of financial abuse occur yearly in California.¹⁷¹ It seems reasonable to assume that many of these cases involved banks. Abuse is increasing rapidly and bank employees are in a key position to curtail financial abuse,¹⁷² but the California Assembly has not been able to enact a provision to facilitate reporting or training by bank employees. Assembly-member Jackson's camp is considering new legislation that would make it easier for bank personnel to report, balancing privacy rights with protection.¹⁷³ They recognize a need for training of bank employees and wonder where the money will come from to pay for it.¹⁷⁴ It does appear that to be successful, any legislative initiative will have to win the support of the big banks and the CBA. It would be surprising to see any push for mandatory reporting of financial abuse or mandatory training in the current legislature. But California's nearest neighbor, Oregon, may offer hope for a solution, and current activities in California should also help to break this impasse.

IV. WHAT SHOULD CALIFORNIA DO?

A. Oregon as a Model for California

Some regard Oregon as a model for combating financial abuse.¹⁷⁵ As the state with the fifth largest elderly population in the nation, it saw a tripling of financial abuse reports between 1993 and 1997, with over 1,000 cases.¹⁷⁶ In 1994, Attorney General Ted Kulogonski (now Governor) was spurred into

note 146, at 3. 15 U.S.C. § 6802(b) states that a financial institution may not disclose "non-public personal information" to a "nonaffiliated third party" unless the institution informs the consumer that information may be disclosed, the consumer is given the opportunity to opt out of disclosure, and is given an explanation of how to opt out. However, § 6802(e) establishes several exceptions that, taken together, permitted financial institutions to report financial information in abuse cases without violating federal law, such as § 6802(e)(3)(B), which permits "disclosure to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability." 15 U.S.C. § 6802 (2003). State provisions, which eliminate liability for good faith reporting of financial abuse, should not be affected by this federal law.

171. *Financial Abuse of Elder and Dependent Adults: Reporting: Third Reading of A.B. 2253 Before the S.*, 1999-2000 Reg. Sess. 2 (Cal. 2000).

172. *Hearing on A.B. 2253*, *supra* note 146, at 3.

173. Telephone Interview with Whitney Kramer, *supra* note 157.

174. *Id.*

175. Lewis, *supra* note 6, at 948.

176. *Examining Legislation Authorizing Funds for Programs of the Older Americans Act, Focusing on Elder Abuse Prevention Provisions, the Preventing Elder Financial Exploitation Project, Medicaid Fraud Control Units, and the Long Term Care Ombudsman Program: Hearing Before the S. Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions*, 106th Cong. 25 (1999) [hereinafter *Examining Legislation*] (statement of Rep. Stephen J. Schneider, Or. Dep't of Justice Liaison, Senior and Disabled Servs. Div., Or. Dep't of Human Res., Salem, Or.).

action.¹⁷⁷ This very proactive Attorney General met with a very receptive bank official, Ted Brawner, President of the Oregon Bankers Association (OBA), who told him banks need immunity in case they are sued for reporting financial abuse. The two men created an effective team, the Attorney General's Task Force on Elder Abuse, which included the OBA, Oregon Senior and Disabled Services and the Oregon Department of Justice (DOJ).¹⁷⁸ The OBA played a major role in the Oregon program.¹⁷⁹ They have sponsored legislation to make it easier to bring a civil suit for physical or financial abuse,¹⁸⁰ and to remove liability for the release of information about financial abuse.¹⁸¹ A key to the success in Oregon has been a statute that accepts good faith bank reporters from liability.¹⁸² Tom Perrick, current President of the OBA, reported to a Senate hearing: "Thanks to these exceptions, there has been a significant and documented increase in the reporting of suspected abuse by Oregon banks."¹⁸³ Statistics from the state of Oregon confirm a steady gain in reporting over the past two years.

	2001	2002 (as of Dec. 2, 2002)
Reports by banks	130	143
Cases financial exploitation	1393	1188
Total cases elder abuse	5903	5746

Table 1. Reporting of Financial Abuse by Banks¹⁸⁴

It should also be noted that while the percentage of reports by banks of the total abuse reports is less than 2.5%, it compares quite favorably with the less than 0.4% of reports by banks cited by the Incidence and the NAAPSA studies.¹⁸⁵

177. Telephone Interview with Aileen Kaye, *supra* note 113 (discussing Kaye's statement to Kulogonski that making sure banks are able to report elder abuse was the most immediate need).

178. *New Challenges*, *supra* note 144 (statement of Roger Auerbach, Adm'r of the Or. Senior and Disabled Servs. Div.).

179. Telephone Interview with Aileen Kaye, *supra* note 113 (describing that the program was initiated under the leadership of OBA President Frank Brawner, which was then continued by Tom Perrick).

180. OR. REV. STAT. § 124.100 (1999).

181. OR. REV. STAT. § 192.575 (1995).

182. *Examining Legislation*, *supra* note 177, at 40 (explaining that the Oregon [Bankers] Association saw the public policy need to protect elders from financial abuse and worked with the state of Oregon to change the law, which opened the gate to start training).

183. *New Challenges*, *supra* note 144, at 39.

184. Telephone Interview with Aileen Kaye, *supra* note 113.

185. See NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-7 to 4-8; NAT'L ASSOC. OF ADULT PROTECTIVE SERVS. ADM'RS., *supra* note 95.

The Oregon Task Force has provided resources and done outreach. It developed a resource kit to teach bank employees to spot financial abuse.¹⁸⁶ Tom Perrick took a leading role in distributing these resources to all the banks and APS branches in Oregon, and to bank associations, APS offices and Attorneys General in all the states.¹⁸⁷ The kits and a video¹⁸⁸ currently in production are expensive, so the task force obtained about \$200,000 in financing from a DOJ program.¹⁸⁹ The OBA, often including Tom Perrick personally, has vigorously participated in outreach and training in Oregon and elsewhere, including California.¹⁹⁰

Oregon bankers express the same concerns about reporting financial abuse as do bankers in California. Banks have many rules and regulations to comply with, and more rules mean more work for managers who are already overtaxed.¹⁹¹ There is a conflict between the desire to protect a customer from financial abuse and statutory privacy protection.¹⁹² Exceptions to privacy laws may not cover every situation, especially when there are family conflicts or diminished capacity.¹⁹³ However, the formula of legislation limiting liability of bank reporters, along with strong advocacy and training at the operational bank level, has been very successful in Oregon and is influencing other states.¹⁹⁴ Both training of bank employees and legislation to limit liability are promising paths for California.

B. Multi-disciplinary Outreach to Banks

Whether or not states compel reporting of financial abuse, watching out for customers is only possible when bank employees understand what signs to watch.¹⁹⁵ In some states, failure to report may be punished—at least in theory. It is not fair and does not serve social policy to impose civil or crimi-

186. *Id.*

187. Letter from Tom Perrick, *supra* note 144. President OBA to Bank Presidents, CEOs and Senior Managers, (discussing the training kit, entitled “Preventing Elder Financial Exploitation: How Banks Can Help”). See also Abuse Prevention Unit, Fact Sheet on Kit Orders (July 19, 2001) (on file with author).

188. *Examining Legislation*, *supra* note 177, at 38 (explaining that the kit and video are “to guide bankers, bank employees, fraud investigators, anybody employed at the bank”).

189. Telephone Interview with Aileen Kaye, *supra* note 113.

190. *Id.*

191. *Id.*; see also Telephone Interview with Christine Young, *supra* note 161.

192. *New Challenges*, *supra* note 144, at 39 (statement of Tom Perrick, President, Or. Bankers Ass’n) (explaining that in spite of this conflict, the exceptions to the privacy laws provided by Oregon legislation caused increased and documented reporting of financial abuse). See also Telephone Interview with Christine Young, *supra* note 161.

193. *New Challenges*, *supra* note 144, at 40.

194. Telephone Interview with Tina Dannenfesler, *supra* note 101. In January 2003, Arizona APS started to meet with bankers, county attorneys and law enforcement personnel to start local training projects based on the Oregon model. *Id.*

195. *Massachusetts Bank Training*, *supra* note 105.

nal penalties for failure to report upon untrained workers or their employers. Massachusetts undertook a systematic approach to address this problem in 1996.¹⁹⁶ Once again, a bankers association played a pivotal role.¹⁹⁷ The Bank Reporting Project (BRP) has provided training to thousands of bank employees in how to work with elders and how to identify and report financial exploitation.¹⁹⁸ To its credit, the Bank Reporting Project has enlisted nearly seventy-five percent of the banks in Massachusetts—about 170 banks.¹⁹⁹ The twenty-five percent of banks who do not participate, though, may leave a gaping hole in the system.²⁰⁰ Both the Massachusetts and Oregon projects have heavily influenced California's outreach to banks.

The task of training bank employees in California is daunting because of the sheer size of the state banking establishment. There are nearly 300 FDIC-insured institutions in California including commercial, community and industrial banks and savings institutions with over 175,000 full-time employees.²⁰¹ The California Community Partnership for the Prevention of Financial Abuse (CCPPFA) tailored the Massachusetts model in Marin County to provide tools to bank managers on how to recognize and respond to financial abuse.²⁰² Community outreach has been the key to this program's

196. *Id.* The Bank Reporting Project (BRP) described its mission as: "[T]o help protect elders from financial exploitation by scam artists and unscrupulous caretakers without sacrificing the confidentiality and control that we all value in our personal financial affairs. [The Bank Reporting Project] seeks to establish an industry-wide standard that will help prevent victimization by both educating employees and by providing simple reporting procedures for banks that will enable more effective cooperation between bank officials, elder protective-services agencies and local law enforcement." *Id.* The Massachusetts Executive Office of Elder Affairs, the Attorney General's Office, the Office of Consumer Affairs, the Division of Banks, and the Massachusetts Bankers Association were the progenitors. *Id.*

197. Gillian Price & Craig Fox, *The Massachusetts Bank Reporting Project: An Edge Against Elder Financial Exploitation*, 8 J. ELDER ABUSE & NEGLECT 59, 63 (1997). The effort to engage the banking industry as a whole makes this unique approach from that of earlier projects oriented to individual banks. *Id.* The authors declared, "The key to success was gaining the sponsorship and active participation in the task force of the private sector, the Massachusetts Bankers Association." *Id.*

198. *Massachusetts Bank Training*, *supra* note 105. The project trains employees to be sensitive in their discussions with elders so as not to embarrass them or invade their privacy, which makes employees more confident and willing to investigate possible financial abuse. *Id.* The project is a model in at least eight states. *Id.* Besides boosting levels of reporting, the project lends itself to educating elders about abuse and is a useful resource for organizations providing elders help with money management. *Id.*

199. Sue Scheible, *A Good Age*, THE PATRIOT LEDGER (Quincy, Mass.), Jan. 22, 2001, at 13.

200. *See id.* (describing how bank employees at Fleet, the largest bank in New England, and not a participant in the project, allowed a young man to coerce a blind, 96-year old retired teacher to open a new account in one branch, after closing out \$150,000 in CDs at a different bank, and then join the new account containing the money at a second branch).

201. California Bankers Association, *Fact Sheet*, at <http://www.calbankers.com/pdf/factsheet.pdf> (last visited Dec. 16, 2003).

202. Telephone Interview with Jenefer Duane, Executive Director of CCPPFA (Jan. 14, 2003).

success,²⁰³ along with a receptive response by the Novato Community Bank. The CCPFA involved the banks themselves, district attorneys, APS and law enforcement in the effort to train people in recognizing financial abuse.²⁰⁴ Since 1999, the CCPFA has trained over 500 bank employees, mostly branch managers, in the expectation that they will train their own employees.²⁰⁵ It recently produced a video to leverage the training effect to many more financial institutions.²⁰⁶ The need for training is great: the CCPFA estimated that there are 225,000 cases of elder abuse each year in California and about thirty percent of this is financial abuse.²⁰⁷

Fiduciary Abuse Specialist Team (FAST) is another California organization that combats financial abuse.²⁰⁸ FAST was started in Los Angeles County in 1994, in response to the rapid increase in frauds and scams of elders.²⁰⁹ Now in many counties, it has been a model for multidisciplinary elder abuse teams across the state and country.²¹⁰ FAST is also popular with a California legislature that passed two bills to make FAST more available: Senate Bill 163 in 1999 authorized a three-county three-year pilot study, then Assembly Bill 1111 in 2001 funded FAST in every county in California; the governor, however, vetoed both bills.²¹¹

Nevertheless FAST has been widely implemented. FAST employs a multidisciplinary approach—APS workers, ombudsmen, public guardians, physicians, lawyers, realtors, law enforcement, bankers—that provides expert consultation in a number of counties in California to those providing protective services in financial abuse cases.²¹² Although the primary focus is team support to APS workers, FAST is starting to train bank employees.²¹³ Such countywide efforts are a good beginning and model, but so far they have reached a very small proportion of the 175,000 bank employees.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *County, D.A. Team Up to Fight Elder Abuse*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Oct. 09, 2002, at 6.

208. Virginia Hennessey, *California Legal Teams Combat Financial Abuse of the Elderly*, MONTEREY COUNTY HERALD, May 12, 2002, at A14.

209. Kelly Schulman, *L.A. Cracking Down on Fraud Against the Elderly*, COUNTY NEWS ONLINE, at <http://www.naco.org/pubs/cnews/97-05-26/elder3.htm> (May 26, 1997).

210. *Id.*

211. S.B. 163, 1999-2000 Reg. Sess. (Cal. 2000) (complete bill history); *see also* A.B. 1111, 2001-02 Reg. Sess. (complete bill history).

212. Schulman, *supra* note 209.

213. Telephone Interview with Michele Findler, FAST Director of the Elder Abuse Prevention Program (Jan. 13, 2003) (explaining that FAST has trained emergency room and law enforcement personnel in the past and will also train managers of a multi-branch bank in Los Angeles to recognize financial abuse). The concept is to train the branch managers; the managers will subsequently train the bank tellers. *Id.*

An effective FAST organization operates in San Diego as well, where banks placed strong representatives on the specialist team who relate well to APS.²¹⁴ Gayle Powers, APS Supervisor in San Diego, dislikes mandated reporting because it alienates banks but believes that the multidisciplinary outreach model will facilitate bank reports of financial abuse.²¹⁵ Powers says, "APS needs to find ways to build good relationships with banks."²¹⁶

Strong statewide and national advocacy by the Oregon Attorney General, APS and the Oregon Bankers Association created successful bank reporting in Oregon. This kind of leadership has not yet emerged in California from state officials or from the California Bankers Association, but there is impressive leadership recognized at the county level.²¹⁷ For example, California Office of Criminal Justice Planning selected San Diego's Elder Abuse Protection Unit, consisting of prosecutors, investigators and counselors, as a model program.²¹⁸ It may be that in California change will bubble up from the counties rather than be imposed top-down as it was in Oregon.

C. Individual Bank Programs

Some banks have come around to introducing their own programs to train employees to recognize and respond to financial abuse. Although banks saw plenty of financial abuse in the 1980s, there were no training programs to help tellers or managers spot and respond to this problem.²¹⁹ Bank-initiated programs began to make an appearance in the 1990s. Litigation has spurred some banks to take action.²²⁰ Banks could also use an active com-

214. Telephone Interview with Gayle Powers, APS Supervisor San Diego County (Feb 10, 2003). There is now strong representation from Union Bank, Wells Fargo and San Diego National Bank. *Id.*; see also Telephone Interview with Cheryl Gonzalez, Vice President Wells Fargo, San Diego (Feb. 14, 2003) (stating that she is spearheading a training initiative at her bank, and has been a principal point of contact with APS).

215. Telephone Interview with Gayle Powers, *supra* note 214.

216. *Id.*

217. *Abuse of the Elderly: Hearing Before the Senate Special Committee on Aging, supra* note 132, (statement of Paul R. Greenwood, Deputy District Attorney, Head of Elder Abuse Prosecution Unit, San Diego, Cal.) (describing the effectiveness a multi-disciplinary approach to combating elder abuse). The District Attorney's office works closely with "police, sheriff, APS, Public Guardian, Coroner's Office, Probation, City Attorney, Attorney General, County Mental Health, Fire and Paramedics, etc." *Id.* Greenwood meets with a San Diego FAST team, as well, to discuss cases of financial abuse. *Id.* He emphasized that training is crucial for those who first come in contact with elder abuse. *Id.*

218. Santo, *supra* note 13, at 820-21.

219. Telephone Interview with Christine Young, *supra* note 161 (describing her experiences with two large California banks; where she worked, there were numerous instances of financial abuse but no training programs during the 1980s).

220. *Id.* Young said that one bank began training after becoming involved in a lawsuit. *Id.* Training was done by a security officer who brought a two to three page handout describing the characteristics of financial abuse; employees were instructed to call a hotline and were told, incorrectly, that they were committing a criminal offense if they did not report. *Id.* Tell-

mitment to contain financial abuse as a positive marketing feature and to polish their image in the community.²²¹ For example, Union Bank of California established a non-profit, Partnership for Elder Abuse Community Education (PEACE), in 1997, with a mission to increase reporting and thereby lower incidence of elder abuse by combining community education with employee training.²²²

There are several downsides to a bank-by-bank approach to fighting financial abuse. There is always the possibility of a threat that a bank may eliminate a voluntary training program. For example, in a 2001 letter to Governor Gray Davis, Union Bank threatened to suspend the "Financial Watch" program under which it conducts employee training in financial abuse if Assembly Bill 2253 passed.²²³ Training developed independently by banks varies in quality, training model,²²⁴ and frequency. A high rate of teller attrition demands frequent training. Training materials may skirt crucial but sensitive issues such as abuse by family members.²²⁵ Some banks may not participate in training.²²⁶ Individual bank training does not benefit from the synergy of a coordinated joint bank training approach. There is much promise in a coordinated approach to training spearheaded by state or county au-

ers typically told their managers about suspected abuse, and Young never heard of managers calling a hotline. *Id.*; see also Telephone Interview with Ed Corey, *supra* note 169 (stating that Corey was currently pursuing litigation against Washington Mutual). He said that banks were concerned about public relations as well as liability. *Id.* See also 2002 Elder & Vulnerable Adult Abuse Conference, *Financial Exploitation: Investigation & Prosecution Strategies* (2002), available at <http://www.sdsd.hr.state.or.us/about/brochure.pdf> (last visited Jan. 25, 2003). This conference was held in Oregon and included the "usual suspects": AARP, Oregon human service organizations and the OBA; Washington Mutual was the lone Bank attendee. *Id.*

221. See, e.g., Press Release, Providian Fin. Corp., *supra* note 93.

222. E-mail from Beth H., Client Banking Services, to Charles Pratt (Jan. 23, 2003) (on file with author). Surprisingly PEACE is not highlighted on the Union Bank Web site, at <http://www.uboc.com>.

223. Zuckerman, *supra* note 104 ("In the face of such opposition, Jackson removed the legislation from active consideration.").

224. Telephone Interview with Jenefer Duane, *supra* note 202. CCPPFA employs a training of trainers model, where they train managers who will later train other employees. *Id.* This approach also helps to combat the high rate of teller attrition. See Telephone Interview with Christine Young, *supra* note 161 (estimating that tellers lasted about eight months on the job).

225. UNION BANK OF CALIFORNIA, FINANCIAL WATCH PROGRAM (2002). (On file with author and available by request at <http://www.uboc.com> (last accessed Jan 12, 2003)). This brochure does not mention family members or friends as potential abusers, *id.*, yet family members are by far the most likely perpetrators of abuse. See, e.g., NAT'L. CTR. ON ELDER ABUSE, *supra* note 29, at 4-28.

226. Telephone Interview with Jenefer Duane, *supra* note 202. In 1996, when CCPPFA first started contacting banks to sell them on using Massachusetts Bank Project materials, Wells Fargo, Bank of America and Union Bank were not interested. *Id.* The Bank of Marin, because of the advocacy of a senior Vice President, initiated the Marin Bank Reporting Project that trained all eighty-eight employees in 1996. *Id.* Then, working with the Novato Community Bank, they formed a non-profit organization comprised of twenty-one financial institutions to extend the training. *Id.*

thorities, human services agencies and the bankers association. But training is only one part of the Oregon model approach. Eliminating liability for reporting is the other.

D. Exemptions from Liability

Most states provide liability exceptions to all people mandated to report elder abuse, neglect or exploitation,²²⁷ but bank employees are only mandated to report in four states, including Florida.²²⁸ Florida bank employees are also provided immunity.²²⁹ The immunity provision, coupled with proactive support for training by the state of Florida and Florida Bankers Association has been called a key to success in handling elder financial abuse.²³⁰ Three states do not mandate reporting by bank employees, but expressly waive liability of bank employees for disclosure of customer information: Oregon,²³¹ New Jersey,²³² and Maryland.²³³ Liability exceptions and strong statewide advocacy of training—including by the state bankers' associations—are also crucial weapons to combat financial abuse at the bank working level in Oregon.²³⁴ It would make sense to give this liability exclusion another try in California.

227. Moskowitz, *New Remedies*, *supra* note 14, at 53.

228. FLA. STAT. ch. 415.1034 (2003) (including “[b]ank, savings and loan, or credit union officer, trustee or employee” as mandatory reporters).

229. FLA. STAT. ch. 415.1036 (2003) (“Any person who participates in making a report under section 415.1034 or participates in a judicial proceeding resulting therefrom is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed.”).

230. Telephone Interview with Chris Shoemaker, *supra* note 114.

231. OR. REV. STAT. § 192.575(5) (2001) (“A financial institution shall not be liable to any person for any loss, damage or injury arising out of or in any way pertaining to the release of information pursuant to ORS 192.555 (2)(a).”).

232. N.J. STAT. ANN. § 17:16T-4 (West 2003) (“Any financial institution, or officer, employee, or agent thereof, making a disclosure of information pursuant to this act, shall not be liable to the customer under any law or regulation or common law of this State for that disclosure or for any failure to notify the customer of that disclosure.”).

233. MD. CODE ANN., FIN. INST. § 1-306 (2002) (“There shall be no liability on the part of and no cause of action of any nature shall arise against, and there shall be immunity from any civil and criminal liability that would otherwise result for, a fiduciary institution or an officer, employee, agent, or director of a fiduciary institution for an action or omission involved with: (1) Making or participating in making a disclosure or report under this section; (2) Participating in an investigation or a judicial proceeding resulting from a report filed under this section; or (3) Declining to provide information as described in subsection (d) of this section.”).

234. *New Challenges*, *supra* note 144 (statement of Tom Perrick).

E. Improve Statistics

A major impediment to assessing what works in drawing banks into combating financial abuse is the lack of statistics. For example, Florida,²³⁵ Arizona,²³⁶ and California²³⁷ do not require data from counties that specifically identify banks as reporters. Because the state does not require this information, many California counties do not code reports by banks.²³⁸ Mendocino County, an exception, does record reports by banks of financial abuse of elders, and banks represented one percent of financial abuse reports since July 2000.²³⁹ Sacramento County also codes financial institutions as reporters, comprising two percent of financial abuse reports over the past ten months,²⁴⁰ as it pursues vigorous outreach to banks. These data reinforce concerns about the low level of bank reporting. But simply having such data is a starting point for making improvements. Sacramento and Mendocino Counties provide good models in data gathering for other California counties.

Adding banks as reporters of financial abuse in every county's statistics would offer several benefits: (1) it would provide counties a valuable management tool; (2) it could influence state allocation of training money; (3) it would provide useful input to legislators; (4) it could provide banks that encourage employee training with a way to distinguish themselves from com-

235. FLA. DEP'T. OF CHILD. & FAMS., *supra* note 102, at 31.

236. Telephone Interview with Tina Dannenfelser, *supra* note 101.

237. Telephone Interview with Rob Cummings, *supra* note 103.

238. Telephone Interview with Emily Zaravia, Project Specialist, Aging and Indep. Servs., San Diego County, Cal. (Jan. 31, 2003). San Diego County sends in a monthly report to the state but does not provide codes identifying types of reporters. *Id.* There is a check box for mandatory or non-mandatory reporters but not for reporter types. Telephone Interview with Chris Alire, *supra* note 88. Alire's subjective impression is that San Diego County receives most of its bank referrals reporting self-neglect, but that about two cases per month are reports by banks of financial abuse by others. *Id.* Los Angeles only codes reporter type for mandated reporters. Telephone Interview with Polly Martinez, Human Services Administrator, Los Angeles County, CA (Feb 5, 2003). The Adult Protective Services Monthly Case Movement and Referral Report has eighteen categories of reporters, but does not include banks, though banks would be subsumed under "private agencies." *Id.* Martinez does believe that a bank reporter code would be useful information. *Id.* See also Telephone Interview with Lori Delagrammatikas, APS Program Specialist Riverside County, CA (Feb. 4, 2003) (reporting that Riverside County does not keep statistics on reporting party).

239. E-Mail from Nancy Vinson, Adult Protective Services, Mendocino County, CA, to Charles Pratt (Feb. 24, 2003) (on file with author) (reporting that financial abuse was about 12% (170 instances) of the total abuse reports to APS (1379), and that since July 2000, banks have made only two out of 1397 elder abuse referrals to APS).

240. Telephone Interview with Thomas Harris, Supervisor of the Financial Abuse Team, Sacramento County, Cal. (Feb. 3, 2003); see also E-mail from Thomas Harris, Supervisor Financial Abuse Team Sacramento County, Cal., to Charles Pratt (Feb. 4, 2003). Financial abuse was 14.62 % of 5546 abuse reports and banks reported 2% of the abuse overall. *Id.* The data on banks were collected for a six to eight month period, therefore the estimate may be low, though the 2% figure suggests a positive effect of outreach.

petitors and to assess progress; (5) it might prompt the CBA into recognition of the need to improve its members' participation. The current lack of hard data is unacceptable. It hamstrings analysis, denies a useful management tool and provides cover for institutions who fail to protect their elderly customers.

V. CONCLUSIONS

Financial abuse poses a severe challenge to California, as it does to the rest of the nation. Banks are a first line of defense to protect elders but they have been reluctant to report abuse because of several legitimate concerns, especially liability for disclosure and negligence. States have tried several different approaches to improve this line of defense: statutes that require mandatory reporting, statutes that exclude bank employees from liability for disclosure and statewide voluntary training of bank employees.

Mandatory reporting by bank employees makes intuitive sense, and states mandate other classes of reporters who are likely to see elder abuse. But while there is some subjective support for mandatory reporting by banks, there is a lack of convincing supporting data. The rate of reporting by banks, often unrecorded, is too low and confounded with too many other variables (especially training and liability exceptions) to support a compelling analysis. Some people working on elder abuse in states with mandatory bank reporting believe it makes a difference, but cannot prove it. Others in states that do not have it believe mandatory reporting would have a negative effect on the banks' attitude and be counterproductive. For California, this debate may be academic. The Assembly has failed to pass mandatory reporting twice in the past few years and there are no current known proponents in the legislature; the immediate focus is on the budget shortfall.

California should undertake a voluntary approach to try to elicit the full engagement of the banking community. Oregon offers a model with two major elements: (1) partnership between government and the banking community, and (2) an exemption from disclosure liability for good faith reporting of financial abuse by bank employees. Keys to Oregon's success have been energetic advocacy by state officials and the banking community. Some California counties also provide good models. Organizations like FAST, multi disciplinary teams, and the CCPPFA that bring together financial institutions, protective services and law enforcement should be encouraged and supported. A top down approach such as the one that worked in Oregon may not be feasible in California. Change may have to "bubble up" from the counties. There is evidence that individual banks are becoming more engaged in the fight against financial abuse, but both the state government and CBA also need to become more proactive.

Currently available statistics are inadequate for management purposes and for informing the legislative and political process. Coding of reporting

by banks and financial institutions must be initiated at the county level as soon as feasible. It should be required and implemented statewide with funding provided for technology upgrades. This may have to wait for the budget crisis to pass.

Banks need to enhance a culture of caring for the security of their elderly customers. There are marketing advantages to offering this protection and liability considerations that are likely to pay for costs to implement training and legal follow up. If we do not protect our elders from financial abuse, at some point a fed up electorate will force the legislature to act. As Paul Greenwood suggests, "if the voluntary approach doesn't work then maybe we'll have to try something else."²⁴¹ That "something else" is likely to be a mandatory reporting scheme that many in the APS and banking communities in California would rather do without.

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241. Telephone Interview with Paul Greenwood, *supra* note 152.

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