

Comment,
**ABUSE OF A POWER OF ATTORNEY:
WHO IS MORE LIKELY TO BE PUNISHED,
THE ELDER OR THE ABUSER?**

Introduction

It happens to all of us – we begin to age and with that comes forgetfulness and difficulties such as being unable to handle our finances. However, as we age we wouldn't expect our loved ones to attempt to take advantage of us in our most trying point in life. We wouldn't expect our loved ones to do such things, but often times they do. A loved one may see an opportunity to capitalize on an elderly relative and not even think twice about it. This happens everyday. A son may attempt to have his dad deed his house to him. A local roofer may attempt to persuade an elderly woman that her perfectly fine roof needs replacing and the cost is outrageous. These types of activities could be defined as elder abuse. Elder abuse is not limited to actual physical abuse. There may be elder abuse when one takes financial disadvantage of an elderly person.¹

One common method of elder abuse is the misuse of the power of attorney that an elderly person has granted. Most times the elderly person chooses a specific person to be their power of attorney because he/she trusts that appointee. Many times the appointee of a power of attorney ends up disadvantaging the elderly person instead of benefiting him/her as a power of attorney is intended to do.

This article will address how state statutes address the financial exploitation of the elderly through the delegation of power of attorney rights. With more and more people looking for a gain and wanting the least amount of work to get that gain, elderly persons are preyed upon. States are recognizing that financially abusing elderly persons is a growing problem. As the states begin to recognize these problems, more and more legislatures are addressing them by passing laws which punish those who disadvantage the elderly by financially exploiting them.

¹ See generally Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000).

I. What is a power of attorney?

“A power of attorney is an instrument by which a principal empowers an agent to act on the principals behalf.”² A person may appoint another person to take care of all of his/her financial dealings. The person acting with the power of attorney has a fiduciary duty to the elderly person that assigned the person that role.³

II. How are some states addressing the growing problem of financial exploitation of the elderly by abusing a power of attorney right?

A. *Classification of misuse of power of attorney as theft*

1. *Arizona*

Arizona has recently passed a new statute addressing the abuse of a power of attorney status, by exploiting elderly individuals. Arizona Revised Statute makes it a crime for someone to financially exploit an elderly person by abusing his power of attorney status. Section 13-1815 of the Arizona Revised Statutes is entitled “Unlawful Use of Power of Attorney.”⁴ The statute makes it a theft for an individual to take advantage of his/her power of attorney status. The statute reads: “An agent who holds a principal’s power of attorney. . . and who uses or manages the principal’s assets or property with the intent to unlawfully deprive that person of the asset or property is guilty of theft.”⁵ If a person who has been delegated a power of attorney knowingly abuses this power for his own financial gain, the Arizona statute makes it a crime and the individual may be punished by the criminal statute pertaining to theft, which is § 13-1802.⁶

² Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 576 (1996).

³ See Dessin, *supra* note 1, at 208.

⁴ ARIZ. REV. STAT. ANN. § 13-1815 (West 2000).

⁵ *Id.*

⁶ See *id.*

B. *Classification of misuse of power of attorney under an elder adult abuse statute*

1. *Utah*

Utah has an exploitation of an elder adult statute. The statute makes it an offense when another individual exploits the elderly adult by misusing the grant of a power of attorney. Subsection four of the statute states that exploitation of an elderly adult occurs when an individual misuses an elder adult's power of attorney designation to the advantage of someone other than the elderly person.⁷ If a person does exploit an elderly person by misusing his power of attorney subsection 4(b) provides for criminal liability. That section states that if a person is found guilty of exploiting an elderly individual he could be guilty of a felony or a misdemeanor depending on the intent and amount of money that is exploited.⁸

2. *Montana*

Montana's Elder and Persons with Developmental Disabilities Abuse Prevention Act sets forth definitions of exploitation in § 52-3-803. This section defines exploitation as:

[T]he unreasonable use of . . . a power of attorney . . . with regard to an older person . . . to obtain control of or to divert to the advantage of another the ownership, use benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person . . . of the ownership, use, benefit, or possession of the person's money, assets, or property.⁹

⁷ UTAH CODE ANN. § 76-5-111 (2000) ("A person commits the offense of exploitation of a disabled or elder adult person when. . . (iv) unjustly or improperly uses a disabled or elder adult's power of attorney or guardianship for the profit or advantage of someone other than the disabled or elder adult").

⁸ See *id.* ("A person is guilty of the offense of exploitation of a disabled or elder adult as follows: (i) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is or exceeds \$5,000 or cannot be determined, the offense is second degree felony; (ii) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is less than \$5,000 or cannot be determined, the offense is a third degree felony; (iii) if done recklessly, the offense is a class A. misdemeanor; or (iv) if done with criminal negligence, the offense is a class B misdemeanor").

⁹ MONT. CODE ANN. § 52-3-803 (1999).

Section 52-3-825 of the act addresses the penalties for the exploitation of an elderly adult by the misuse of a power of attorney. The statute states that if a person exploits an elderly individual he will be guilty of a misdemeanor.¹⁰ The exploiter may be fined, jailed or both the first time he is found guilty.¹¹ The second time that he is found guilty he may be fined, imprisoned, or both, however the time and amount is exceedingly higher.¹²

3. *Nevada*

Nevada has implemented an act that is similar to Montana's Elder and Persons with Developmental Disabilities Abuse Prevention Act. Nevada's equivalent is termed Abuse, Neglect, Exploitation and Isolation of Older Persons. In the statutes definition section it defines exploitation as:

[A]ny act taken by a person who has the trust and confidence of an older person or any use of the power of attorney or guardianship of an older person to obtain control, through deception, intimidation or undue influence, over the older person's money, assets or property with the intention of permanently depriving the older person of the ownership, use, benefit or possession of his money, assets or property.¹³

In Nevada's penalty section of its Abuse, Neglect, Exploitation and Isolation of Older Persons statute, criteria is set out as to what consequences one will pay for violating the statute. Nevada Revised Statute § 200.5099.3 states that if a person exploits an elderly person he will be punished based on the value of what was exploited.¹⁴ If a person exploits less than \$250 it is considered a misdemeanor and is punishable by imprisonment, a fine or both.¹⁵ If the person exploits \$250 to \$5,000 it will be classified

¹⁰ *See id.* § 52-3-825.2. ("Any individual who purposely or knowingly abuses, sexually abuses, neglects, or exploits an older person or a person with a developmental disability is guilty of a misdemeanor. . .").

¹¹ *See id.* (" . . . upon a first conviction may be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both").

¹² *See id.* ("Upon a second or succeeding conviction, an individual may be imprisoned for a term not to exceed 10 years and may be fined an amount not to exceed \$10,000, or both").

¹³ NEV. REV. STAT. ANN. § 200.5092.2 (Michie 1999).

¹⁴ *See id.*

¹⁵ *See id.*

as a felony and one could be imprisoned, fined or both.¹⁶ Lastly, if the person exploits more than \$5,000 from an elderly person by misusing his power of attorney status it will be classified as a felony but the imprisonment time and/or fine is larger than the previously stated offense of exploiting \$250 to \$5,000.¹⁷

C. *Misuse or abuse of power of attorney status classified as an embezzlement*

1. *California*

California has a statute that classifies the misuse of power of attorney as embezzlement. Section 507 of California's Penal Code states "[e]very person intrusted. . . with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement."¹⁸ If an individual has a power of attorney to sell or transfer certain property for an elderly person and he fraudulently converts the property or money received from the sale of the property into his own the courts in California will find the individual guilty of embezzlement. The individual that is guilty of misusing his power of attorney will be punished under the state embezzlement statute.

2. *Oklahoma*

Oklahoma's misuse of power of attorney statute is practically identical to California's embezzlement statute. Oklahoma's statute states that if the individual with a power of attorney fraudulently converts the proceeds from the sale of the entrusted items, to his own, he will be guilty of embezzlement.¹⁹ Again, as in the California statute, the individual who misuses his power of

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ CAL. PENAL CODE § 507 (West 2000).

¹⁹ *See* OKLA. STAT. ANN. tit. 21, § 1455 (2000) ("If any person being entrusted. . . with any power of attorney for the sale or transfer thereof, fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, he is guilty of embezzlement. . . .").

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attorney will be prosecuted under the state embezzlement statute.

D. *Misuse of a power of attorney classified as exploitation of an infirmed individual*

1. *Louisiana*

Louisiana's statute specifically addresses the exploitation of elderly persons. Section 14:93.4 of the Louisiana statute is entitled "Exploitation of the infirmed."²⁰ It defines the exploitation of the infirmed as "[t]he use of an infirmed person's, or aged person's, or disabled adult's power of attorney. . . for one's own profit or advantage by means of fraudulent conduct, practices, or representations."²¹

Sections B and C of the statute define the penalties for an individual who exploits an elderly person by misuse of his power of attorney. Section B states that an individual will be fined up to ten thousand dollars or put in jail up to ten years or both as a punishment.²² Section C of the statute explains that once an individual is convicted or makes a plea agreement for exploiting an elderly person the individual will be banned from having access to the victim's assets or any other elderly person's assets.²³ The violating individual will also be banned from ever obtaining another power of attorney right from any elderly person, including the victim.²⁴

E. *Misuse of power of attorney implied, but not specifically addressed, in the statute*

1. *Florida*

Section 825.103 of the Florida statutes suggest that a person could be liable for misusing his power of attorney status. The statute does not specifically state that a misuse of a power of at-

²⁰ LA. REV. STAT. ANN. 14:93.4 (West 2000).

²¹ *Id.*

²² *See id.*

²³ *See id.* § 14:93.4(C). ("Whoever is convicted, or who enters a plea agreement for exploitation of the infirmed shall be prohibited from having access to the victim's or any other disabled or aged person's assets or property").

²⁴ *See id.* ("The offender shall be prohibited from being appointed as a power of attorney or guardian for the victim or any other disabled or aged person").

torney could be criminal, however it does state that anyone standing in a position of trust with an elderly person could be liable for financially exploiting that individual.²⁵ If a person holds a position of trust and confidence with an elderly person, and knowingly deceives that person by exploiting his assets and property and using them for his own benefit he will be liable under this statute. The appointment of a power of attorney is a position of trust and confidence, therefore taking advantage of this trust for one's own gain could be declared exploitation and punishable under § 825.103.

The penalties for the exploitation of an elderly person depends on the amount of money that the person in trust exploited. If the exploitation was valued at \$100,000 or more the court will consider this a first degree felony.²⁶ If the exploitation is less than \$100,000, but more than \$20,000, the court will consider it as a second degree felony.²⁷ Lastly, if the exploitation consists of less than \$20,000 the trusted individual will be guilty of a third degree felony.²⁸

2. Illinois

One is guilty of financial exploitation under § 16-1.3 of the Illinois statute if the individual holds a position of trust with an elderly adult and then deceives the elderly adult by taking the elderly adult's property and depriving the elderly adult from using the property.²⁹ Again, as in the Florida statute, it could be implied that a person who holds a power of attorney for an elderly person is in a position of trust, therefore liable under the statute. If the person with the power of attorney knowingly deceives the elderly adult and uses the exploited funds for his own use, he will be guilty of financially exploiting the elderly person.

²⁵ FLA. STAT. ANN. § 825.103.1(a)(1) (West 2000).

²⁶ *See id.* § 825.103.2(a).

²⁷ *See id.* § 825.103.2(b).

²⁸ *See id.* § 825.103.2(c).

²⁹ *See* 720 ILL. COMP. STAT. ANN. § 5/16-1.3(a) (West 2000) (“A person commits the offense of financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person. . . and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person. . . with the intent to permanently deprive the elderly person. . . of the use, benefit, or possession of his or her property”).

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The penalties, for financially exploiting an elderly adult in Illinois, are based on the values of the exploitation. The exploitation is considered a Class four felony if the value is \$300 or less; a Class three felony if the value is less than \$5000 but greater than \$300; a Class two felony if the amount exploited is more than \$5000 but less than \$100,000; a Class one felony if the person exploits a value of \$100,000 or more.³⁰

There are also civil penalties within the statute for an individual who exploits an elderly adult. If the person who exploits the adult is charged and he does not return the elderly victim's property that he exploited, he will be liable to the victim for "treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs."³¹

3. *North Dakota*

As did Florida and Illinois, North Dakota has enacted a statute that calls for liability when a person of trust deceives an elderly person for his own personal gain and exploits something of value from that elderly adult.³² The criminal code of North Dakota states that there are penalties for the exploitation of a vulnerable elderly adult.³³ A vulnerable elderly adult is defined as "a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by physical, mental, or emotional dysfunctioning to the extent that the person is incapable of adequately providing for the person's own health or personal care."³⁴ This position of trust could be a power of attorney

³⁰ *See id.*

³¹ *Id.* § 5/16-1.3(g).

³² *See* N.D. CENT. CODE 12.1-31-07.1(1) (1999) ("A person is guilty of exploitation of a . . . vulnerable elderly adult if: (a) The person stands in a position of trust and confidence. . . with the . . . vulnerable elderly adult and knowingly, by deception or intimidation, obtains or uses, or attempts to obtain or use, the . . . vulnerable elderly adult's funds, assets, or property with the intent to temporarily or permanently deprive the . . . vulnerable elderly adult of the use, benefit, or possession of the property, for the benefit of someone other than the . . . vulnerable elderly adult").

³³ *See id.*

³⁴ *Id.* § 12.1-31-07(1)(c).

Section 12.1-31-07.1 of the criminal code makes the exploitation of such a vulnerable elderly adult a crime.³⁵ An individual may be held liable for violating the statute if he holds a position of trust and confidence with the vulnerable elderly adult and abuses that trust by using the assets or money of the elderly adult for his own gain.³⁶

The penalties for abusing a position of trust granted by an elderly adult, which could be a power of attorney, are as follows: Class A felony if the amount exploited is greater than \$100,000; Class B felony if the value is less than \$100,000 but greater than \$20,000; Class C felony if the exploitation value is less than \$20,000 but more than \$1000.³⁷

4. Oregon

According to § 124.110 of the Oregon statute an individual could be held liable for financially abusing an elderly person when he illicitly takes property or money from an elderly person.³⁸ If a person with a power of attorney wrongfully takes money from an elderly person he should be prosecuted under § 124.100. Under this statute the elderly adult may recover all of the economic damages that he has endured if they total more than \$500.³⁹ However, if the elderly person's damages are less than \$500, he will collect \$500.⁴⁰ The statute states that the elderly individual receives the greater of actual damages or \$500.⁴¹ If the elderly person does not endure monetary damages, but instead sustains non-economic damages, he will be able to recover whatever damages they might have been.⁴² The elderly adult is

³⁵ See N.D. CENT. CODE, *supra* note 32.

³⁶ *Id.* § 12.1-31-07.1(1)(a).

³⁷ See *id.* §§ 12.1-31-07.2(a), (b) & (c).

³⁸ See OR. REV. STAT. § 124.110.1(a) (2000) ("An action may be brought under ORS 124.100 for financial abuse in the following circumstances: (a) When a person wrongfully takes or appropriates money or property of an elderly. . . person, without regard to whether the person taking or appropriating the money has a fiduciary relationship with the elderly. . . person").

³⁹ See *id.* § 124.100.1(a).

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* § 124.100.1(b).

also entitled to all reasonable attorney fees that he expended in order to prosecute the exploiter.⁴³

5. *Vermont*

Under Vermont's Programs and Services for Elderly and Disabled Adults statute exploitation is defined as "[w]ilfully using, withholding, or disposing of funds or property of an elderly or disabled adult without legal authority for the wrongful profit or advantage of another [or] [a]cquiring possession or control of or an interest in funds or property of an elderly or disabled adult through the use of undue influence, harassment, duress, or fraud."⁴⁴ An individual holding a power of attorney could very well misuse that power of attorney by willfully using an elderly adult's funds for his own advantage. If this occurs the holder of the power of attorney could be liable for up to \$10,000 and/or up to eighteen months in prison.⁴⁵

6. *Georgia*

Exploitation, as defined in Georgia's Protection of Disabled Adults and Elder Persons Act is "the illegal or improper use of a disabled adult or elder person or that person's resources for another's profit or advantage."⁴⁶ When a person misuses his power of attorney status it may fall within this definition. If an individual exploits an elderly person he will be punished under § 30-5-8 which states that it is unlawful for an individual to exploit an elderly person.⁴⁷ If an individual exploits an elderly person as defined in the statute that individual will be guilty of a misdemeanor.⁴⁸

7. *Minnesota*

Minnesota has a statute which provides for the criminal prosecution of an individual who financially exploits a vulnerable

⁴³ See OR. REV. STAT. § 124.100.1(c).

⁴⁴ VT. STAT. ANN. tit. 33, § 6902.7(A) & (B).

⁴⁵ See *id.* § 6913(b).

⁴⁶ GA. CODE ANN. § 30-5-3(9) (2000).

⁴⁷ See *id.* § 30-5-8(a)(1). ("In addition to any other provision of law, it shall be unlawful for any person to abuse, neglect, or exploit any. . . elder person").

⁴⁸ See *id.* § 30-5-8(a)(2).

adult. A vulnerable adult is defined as “any person 18 years of age or older who. . . possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction. . . .”⁴⁹ Section 609.2335 of the Minnesota Criminal Code states when a person breaches his fiduciary duty with an vulnerable adult he is liable for financially exploiting that individual.⁵⁰ Such a fiduciary obligation includes contractual obligations which in turn could entail a granted power of attorney.⁵¹ If an individual takes advantage of his fiduciary duty and gains an interest in the vulnerable adults assets he could be liable under the statute.⁵²

The criminal penalties for financially exploiting a vulnerable adult are found in § 609.52 of the Minnesota Criminal Code, which is a theft statute. Under the theft statute one may be punished by imprisonment for less than twenty years, a fine of less than \$100,000 or both for the financial exploitation of more than \$35,000 from a vulnerable adult.⁵³ If the individual exploits \$2500 or more from the vulnerable adult the punishment is imprisonment for less than ten years, a fine up to \$20,000 or both.⁵⁴ If the exploitation amounts to less than \$2500 but more than \$500 the exploiter will be punished by imprisonment for less than five years, a fine of less than \$10,000 or both.⁵⁵ Finally, if the amount exploited is less than \$250 the fine is less than \$700, the jail time is less than 90 days or the violator may be punished by both.⁵⁶

8. South Dakota

South Dakota has enacted an Abuse, Neglect or Exploitation of Disabled Adults statute. A disabled adult is defined as “a person eighteen years of age or older who suffers from a condition of. . . infirmities of aging as manifested by organic brain damage, advanced age or other physical dysfunctioning to the ex-

⁴⁹ MINN. STAT. ANN. §609.232 (Subd. 11)(4) (West 2000).

⁵⁰ See *id.* § 609.2335(Subd. 1)(1).

⁵¹ See *id.* (“Whoever does any of the following acts commits the crime of financial exploitation: (1) in breach of a fiduciary obligation recognized elsewhere in law, including pertinent regulations, contractual obligations. . . .”).

⁵² See *id.* § 609.2335(Subd. 1)(2)(i).

⁵³ See *id.* § 609.52 (Subd. 3)(1).

⁵⁴ See MINN. STAT. ANN. § 609.52 (Subd. 3)(2).

⁵⁵ See *id.* § 609.52 (Subd. 3)(3).

⁵⁶ See *id.* § 609.52 (Subd. 3)(5).

tent that the person is unable to protect himself. . . .”⁵⁷ One who exploits a disabled adult will be held liable under South Dakota’s theft by exploitation statute.⁵⁸ Exploitation is defined as “the wrongful taking or exercising of control over property of a disabled adult with intent to defraud him”.⁵⁹ When one misuses his power of attorney over a disabled adult there is an intent to defraud the disabled adult.

Section 22-46-3 states that if a person is entrusted with property of a disabled adult by having a contractual duty, such as a power of attorney, and he has an intent to defraud the disabled adult, he will be punished under § 22-30A-17.⁶⁰ This section of the South Dakota statutes defines and sets out penalties for petty theft and grand theft. If the exploiter is guilty of grand theft he has exploited more than \$500 from the disabled adult and he is punished under a Class 4 felony.⁶¹ One is guilty of petty theft if the first degree if he exploits more than \$100 which is classified as a Class 1 misdemeanor.⁶² If the person exploits less than \$100 from a disabled adult the individual is guilty of petty theft in the second degree which is classified as a Class 2 misdemeanor.⁶³

9. *Indiana*

Financial exploitation of an endangered adult is a violation of § 35-46-1-12 in Indiana.⁶⁴ The statute states that when a person knowingly and intentionally exploits an endangered adult he is guilty of a Class A misdemeanor.⁶⁵ An endangered adult is defined as someone who is over the age of eighteen and is “incapable by reason of mental illness, mental retardation, dementia,

⁵⁷ S.D. CODIFIED LAWS § 22-46-1(2) (Michie 2000).

⁵⁸ *See id.* § 22-46-3 (stating “[a]ny person who, having assumed the duty by written contract, by receipt of payment for care, or by order of a court to provide for the support of a disabled adult and having been entrusted with the property of that disabled adult, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of his trust, is guilty of theft by exploitation. . . .”).

⁵⁹ *See id.* § 22-46-1(3).

⁶⁰ *See id.* § 22-46-3.

⁶¹ *See id.* § 22-30A-17.

⁶² *See* S.D. CODIFIED LAWS § 22-30A-17.

⁶³ *See id.*

⁶⁴ *See* IND. CODE ANN. § 35-46-1-12 (West 2000).

⁶⁵ *See id.* § 35-46-1-12(a).

habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of the individual's property or providing or directing of self-care."⁶⁶ It could be argued that if a person financially exploits an endangered adult by misusing his power of attorney, he may be held liable for such exploitation under Indiana law.

10. Delaware

Under Delaware law if a theft occurs, and the victim is sixty years of age or older, the person who committed the theft could be liable under Title 11 § 841 of the Delaware statute.⁶⁷ The code defines theft as "when [a] person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it."⁶⁸ It could be argued that a misuse of a power of attorney, to the financial deprivation of an elderly adult, would be considered a theft under the Delaware code. If the person with the power of attorney is intending to deprive the elderly person from use of his property, and he is not within the bounds of his power of attorney, he could be guilty of theft. If a person is found guilty of theft from an individual who is sixty years of age or older, he is guilty of a Class G felony if the amount taken was less than \$1000.⁶⁹ However, if the theft consists of a value over \$1000 the individual will be guilty of a Class F felony.⁷⁰

III. Conclusion

As stated, many states are acknowledging that people take advantage of elderly people when the elderly person entrusts them with a power of attorney. By recognizing that misusing the power of attorney status occurs, states are beginning to formulate consequences for those who take advantage of such a privilege in a form of monetary punishment or jail time. With such penalties states may show greedy relatives and friends that the power of

⁶⁶ *Id.* §§ 12-10-3-2(Sec. 2)(a)(1) & (2).

⁶⁷ *See* DEL. CODE. ANN. tit. 11, § 841 (1999).

⁶⁸ *Id.* § 841(a).

⁶⁹ *See id.* § 841 (c)(2).

⁷⁰ *See id.*

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attorney right is a status that is to help the elderly, not to take advantage of them.

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