

**OLDER ADULTS WITH COGNITIVE DISABILITIES**  
**2018 Oregon State University Gerontology Conference**  
**April 4, 2018**  
**Tim McNeil, The Elder Law Firm**  
**111 SW Fifth Avenue, Suite 1890**  
**Portland, Oregon 97204**  
**503-224-6229**

**This presentation instructs care providers about legal issues affecting older adults with cognitive disabilities.**

**Goal I:**

**1. Assist care providers in understanding the authority delegated in a power of attorney and advance directive**

Financial Power of Attorney

- a. Purpose - Delegation of financial authority to third party
- b. Execution - No specific requirements for execution
- c. Effectiveness of delegated authority
  1. Springing v. durable
  2. Termination upon death
- d. What does it authorize? Review the form.
- e. Note Oregon law declaring that a power of attorney is not invalid simply due to its age (ORS 127.025)
- f. Potential for fraud
- g. Elder Financial Abuse - liability for “innocent bystander”  
“An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse.” ORS 124.100(4)
- h. ORS 127.035. Liability limitation - Reasonable reliance  
“Any person who reasonably relies in good faith on the authority of an attorney-in-fact or agent under a power of attorney is not liable to any other person based on that reliance.”

Advance Directive

- a. Purpose - appoint health care representative; give end-of-life instructions

- b. Execution - Witness requirements; note qualification requirements for witnesses
- c. Authority
- 1. Appoints health care representative

Authorized to make health care decisions

Health care decision “means consent, refusal of consent or withholding or withdrawal of consent to health care, and **includes decisions relating to admission to or discharge from a health care facility.**” (ORS 127.505(9))

- 2. Provides health care instructions
- d. Form - Statutory (ambiguity; general)

Comparison to POLST (Physician’s Orders re Life Sustaining Treatment)

- a. Purpose - strictly to give end-of-life instructions
- b. Execution - Physician signs form
- c. Limitations - no representative appointed; typically executed only for the infirm
- d. Benefits - effective instructions for EMTs; Developed by health care providers; less ambiguity

**Goal II**

- 2. **Assist care providers in recognition of when guardianship might be necessary for a client**

What is guardianship? What is conservatorship?

When is it necessary

No capacity to make decisions; no delegation of authority to make decisions

Less restrictive means unavailable or ineffective (Why is guardianship to be avoided: Civil rights; cost; stress)

Less restrictive alternatives

Advance Directive

Power of Attorney

## Case Management

Common circumstances which may lead to guardianship

Isolated individual hospitalized with no POA or in conflict with POA

Multiple POAs; revoked POAs ; abuser with POA

What is the process (how long does it take and how much)

### **Goal III**

#### **3. Assist care providers in recognizing and preventing financial abuse**

##### **I. Reporting elder abuse (ORS 124.050)**

###### *1. What is elder abuse?*

(a) **Physical injury to an elderly person caused by other than accidental means**, or which appears to be at variance with the explanation given of the injury.

(b) **Neglect.**

(c) **Abandonment**, including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.

(d) **Willful infliction of physical pain** or injury upon an elderly person.

(e) An act that constitutes **a crime** under ORS 163.375 (Rape in the first degree), 163.405 (Sodomy in the first degree), 163.411 (Unlawful sexual penetration in the first degree), 163.415 (Sexual abuse in the third degree), 163.425 (Sexual abuse in the second degree), 163.427 (Sexual abuse in the first degree), 163.465 (Public indecency) or 163.467 (Private indecency).

(f) **Verbal abuse.**

(g) **Financial exploitation.**

FOCUS POINTS FOR FINANCIAL EXPLOITATION:

Power of Attorney

Joint Accounts / Estate Plans / Credit Cards / Deeds

Capacity / Will of donor v. actions of donee

Undue Influence

Confidential relationship – expectation that donee will not act against donor’s interest; trustee, POA; isolation; dependence

Suspicious circumstances

- a. Donee’s role in procuring gift
- b. Lack of independent advice
- c. Secrecy; haste
- d. Unexplained change in attitude toward others
- e. Unexpected change in testamentary plan
- f. Unnatural or unjust gift
- g. Susceptibility of donor to influence

(h) **Sexual abuse.**

(i) **Involuntary seclusion of an elderly person** for the convenience of a caregiver or to discipline the person.

(j) A **wrongful use of a physical or chemical restraint** of an elderly person, excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.

2. APS Warning Signs

- A. Significant change in financial management
- B. Nervous, confused, someone speaks for victim
- C. Isolation
- D. 1 in 10 elder abuse incidents are reported

3. Under what circumstances must it be reported?

(ORS 124.060) Any public or private official having **reasonable cause to believe** that any person 65 years of age or older with whom the official comes in contact (NOT THIRD PARTY REPORT), has suffered abuse, or that **any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report** to be made in the manner required in ORS 124.065 (Method of reporting). Nothing contained in ORS 40.225

(Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges) affects the duty to report imposed by this section, **except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 (Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges).**

4. Who must report?

(9) Public or private official means:

(a) Physician or physician assistant licensed under ORS chapter 677, naturopathic physician or chiropractor, including any intern or resident.

(b) Licensed practical nurse, registered nurse, nurse practitioner, nurses aide, home health aide or employee of an in-home health service.

(c) Employee of the Department of Human Services or community developmental disabilities program.

(d) Employee of the Oregon Health Authority, county health department or community mental health program.

(e) Peace officer.

(f) Member of the clergy.

(g) Regulated social worker.

(h) Physical, speech or occupational therapist.

(i) Senior center employee.

(j) Information and referral or outreach worker.

(k) Licensed professional counselor or licensed marriage and family therapist.

(L) Member of the Legislative Assembly.

(m) Firefighter or emergency medical services provider.

(n) Psychologist.

(o) Provider of adult foster care or an employee of the provider.

(p) Audiologist.

(q) Speech-language pathologist.

(r) Attorney.

(s) Dentist.

(t) Optometrist.

- (u) Chiropractor.
- (v) Personal support worker
- (w) Home care worker
- (x) Referral agent

5. How does one report?

(1) When a report is required under ORS 124.060 (Duty of officials to report), an oral report shall be made immediately by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county where the person making the report is at the time of contact. If known, such reports shall contain the names and addresses of the elderly person and any persons responsible for the care of the elderly person, the nature and the extent of the abuse (including any evidence of previous abuse), the explanation given for the abuse and any other information which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

FOCUS POINT: Self-Neglect

Definition – Inability of person to understand consequences of actions, which may lead to harm.

For APS, this is the most often reported form of elder abuse

©2018 The Elder Law Firm

***Important Notice:** This article or outline contains general information. It does not provide legal advice about a particular situation. Unless otherwise noted, this article or outline has not been updated or revised to reflect changes in statutes, administrative rules, or case law following the date when it was first published.*