Oregon Lawyers’ Mandatory Duty to Report Elder Abuse

TROY J. WOOD, ASSISTANT GENERAL COUNSEL
OREGON STATE BAR

New Reporting Duty

- As of January 1, 2015, all attorneys are mandatory reporters of elder abuse. See HB 2205 (2013).
- Attorneys remain mandatory reporters of
  - Child abuse, ORS 419B.005(3)(m);
  - Abuse of adults with mental illness or developmental disabilities, ORS 430.735(12)(i); and
  - Abuse of long-term care resident, if representing the resident, ORS 441.630(6)(i).

Changing Demographics

- In 2013, an estimated 15 percent of Oregonians were 65 or older.
- In 2030, an estimated 20 percent of Oregonians will be 65 or older.
- CDC estimates Oregonians have 15 expected “healthy” years beyond age 65.
- Average Oregonian’s life expectancy is 84.3 years.
Adult Abuse in Oregon

- 28,449 reports of potential abuse in 2013
- 14,250 allegations of abuse were investigated
- 4,221 substantiated findings of abuse and neglect
- Unsubstantiated claims are maintained by DHS, and can result in a substantiated claim later on.

Where does abuse occur?

- 66% of abuse occurred in own homes
- 34% of abuse occurred in licensed care settings

2013 Complaint Outcomes in the Community

<table>
<thead>
<tr>
<th>Outcomes</th>
<th>Incidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk reduced</td>
<td>673</td>
</tr>
<tr>
<td>Victim declined intervention</td>
<td>447</td>
</tr>
<tr>
<td>Issue resolved</td>
<td>429</td>
</tr>
<tr>
<td>Referred to District Attorney</td>
<td>369</td>
</tr>
<tr>
<td>Accepted services</td>
<td>335</td>
</tr>
<tr>
<td>Entered care setting</td>
<td>323</td>
</tr>
<tr>
<td>Guardian/Conservator appointed</td>
<td>112</td>
</tr>
<tr>
<td>Victim deceased</td>
<td>56</td>
</tr>
<tr>
<td>Moved out of the area</td>
<td>42</td>
</tr>
<tr>
<td>Services not available</td>
<td>35</td>
</tr>
</tbody>
</table>
“Public or Private Official”

- ORS 124.050 (9).
- 21 categories of professions are included in these definitions; including:
  - (g) Regulated Social Workers;
  - (k) Licensed professional counselor or marriage and family therapist; and
  - (r) Attorney
- Not specifically included:
  - Non-Attorney Mediators, unless they happen to be affiliated with a DHS or community disabilities program; or the Oregon Health Authority, county health department or mental health program;
  - Non-Attorney Judges

Your Elder Abuse Reporting Duty

If you have:

1. Reasonable Cause to Believe;
2. Elder Abuse Has Occurred; and
3. Contact with Elder or Abuser

*Person 65 or older

Then You MUST Report UNLESS an Exception Applies.

ORS 124.060

Abuse Has Occurred
Financial Exploitation

- **Financial Exploitation**
  - **Wrongfully taking** the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability. (See OAR 490. 020-0002(1)(e))
  - **Alarming** an elderly person or a person with a disability by conveying a threat the person would reasonably believe.

ORS 124.050(4)

Financial Exploitation Indicators

- Unusual bank, credit card activities.
- Use of ATM when there has been no prior use of ATM by account holder or account holder does not have access to ATM machines.
- Utilities being shut off.
- Evictions.
- Substandard care or housing when money should be available
- Extraordinary interest by perpetrator in control over financial affairs.
- Request for surrender value on life insurance.
- New power of attorney signed by a confused person. Changes in property titles, wills, etc.
- Mail redirected to another address and/or opened by RP.
- Home filled with sweepstake notices, junk mail, magazines, and unopened ‘gifts’.
- Funds or personal property missing from room at care facility or residence.
- Bills at care facility not getting paid.
Neglect

Neglect, ORS 124.050(7)
- "Failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person."
- "...assumed responsibility or a legal or contractual agreement..." OAR 411-020-0002 (1)(b)(A)(iii)
- Religious exception, ORS 124.095

Neglect Indicators

Physical Indicators:
- Poor hygiene, soiled clothing, dirty hair or nails, matted or lice infested hair, odors of feces or urine
- Glasses, teeth, hearing aids missing or in poor condition
- Unattended or improperly clothed for weather
- Skin breakdown or rashes
- Dehydration
- Absence of assistive devices
- Exacerbation of chronic disease despite a plan of care; Worsening dementia.
- Untreated medical or mental conditions;

Behavioral Indicators:
- Emotional distress
- Nightmares or difficulty sleeping
- Sudden loss of appetite
- Confused and disoriented
- Self-destructive behavior.

Abuser Indicators:
- Isolates AV
- Lacks skills to provide care
- Refuses to apply for additional services

Environmental Indicators:
- Absence of necessities;
- Inadequate living environment;
- Signs of medication mismanagement
- Unsafe housing when there are resources to pay for upkeep.

See also: [http://www.ncall.us/](http://www.ncall.us/)

Verbal Abuse

Verbal Abuse, ORS 124.050(13)
...to threaten significant physical or emotional harm to an elderly person or a person with a disability through the use of
- Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or
- Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.
Verbal Abuse Indicators

- **Perpetrator indicators:**
  - Isolation of AV
  - Unreasonably critical, dissatisfied with social and health care providers
  - Shuns and ignores victim
  - Disrespectful to AV, even when APS present.

- **Victim Indicators:**
  - Emotional distress
  - Withdrawn
  - Confused and disoriented
  - Will not answer questions.
  - Defers to RP for answers.
  - Minimizes RP's behaviors.
  - Fear of reported perpetrator
  - See also: [http://www.ncall.us/](http://www.ncall.us/)

Physical Abuse & Abandonment

- **Physical injury or pain**
  - "Any 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." ORS 124.050(1)(a).
  - Willful infliction of physical pain or injury upon an elderly person. ORS 124.050(1)(d).

- **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." ORS 124.050(1)(c).

Indicators – Abuse/Abandon

- **Indicators of physical abuse**
  - Unexplained Injuries
  - Multiple Injuries
  - Burn
  - Abrasions
  - Hair and Tooth loss
  - Bruising
  - Pain
  - Bleeding
  - Dislocations, fractures, or sprains
  - Difficulty with normal bodily functions

- **Indicators of abandonment:**
  - Self report of abandonment.
  - Unexplained and/or unaccompanied presence at a location not frequently attended
  - Unexplained absence from places frequently attended.
  - Unanswered phone calls to residence.
  - Failure to pick individual up from community setting.
  - Caregiver leaves person and premises without arranging for substitute caregiver.
  - See also: [http://www.ncall.us/](http://www.ncall.us/)
Sexual Abuse

- Sexual Abuse, ORS 124.050 (11)(a), (1)(b)
  - Nonconsensual sexual contact
  - Rape, sodomy, unlawful sexual penetration, public indecency, private indecency, incest.
  - Verbal or physical harassment of a sexual nature or sexual exploitation.

- Sexual contact between employee or paid caregiver and elderly person served.
- Any sexual contact achieved through force, trickery, threat or coercion.
- Exception for consensual sexual contact with paid caregiver. ORS 124.050 (11)(b).

Sex Abuse Indicators

- Physical indicators:
  - Difficulties walking or sitting;
  - Torn, stained or bloody underclothing;
  - Pain or itching in genital areas;
  - Unexplained somatic complaints: stomach aches, headaches, loss of appetite;
  - Change in eating patterns to under or over eating;
  - Decline in productivity, concentration, ability to do tasks;
  - Clinging behaviors, fear of being alone; Reclusive or withdrawn behaviors;
  - Unusual or new sexual behavior exhibited;
  - Genital harm or excessive genital touching that is new;
  - Sexual comments

- Mood indicators:
  - Irritability; Withdrawal; Crying, moodiness;
  - Anxiety; Agitation, hyperactivity;
  - Suicidal ideation or behavior

See also: http://www.ncall.us/

Seclusion & Restraint

- Wrongful use of a physical or chemical restraint
  - "...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." ORS 124.050 (1)(j)

- Involuntary seclusion
  - "...for the convenience of a caregiver or to discipline the person." ORS 124.050 (1)(j)
**Indicators of Seclusion**

- Reports from family members or friends regarding inability to see or visit with victim.
- Unexplained absence from places commonly or frequently attended.
- Statements regarding missing certain people or other comments indicating lack of contact with people important to the individual.
- Broken nails, bruising or cuts on hands, or other injury associated with attempting to open a locked door.
- Victim prohibited from using telephone.
- Residence or facility enforcing rules to keep victim in a certain area. See also: [http://www.ncall.us/](http://www.ncall.us/)

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**Reasonable Cause to Believe**

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**What is Reasonable Cause?**

- DHS advice is to report any “reasonable suspicion of abuse.”
- Reasonable suspicion is more than a hunch – ability to point to articulable facts based on totality of the circumstances.
- Court may look to “whether the evidence creates a reasonable suspicion of child abuse, not whether abuse in fact occurred or even probably occurred.” *Berger v. SOSCF*, 195 Or App 587 (2004) (interpreting analogous child abuse reporting provision).
Contact with Elder or Abuser

What is Contact?

- Contact need not be to be linked or temporal to abuse
- Can have contact before or after learning of abuse
- Direct vs. Indirect Contact?
  - Oregon Attorney General interpreted “contact” element of child abuse reporting requirement to require more than board members’ receipt of information about abuse through board because acquisition of information was too indirect.
  - AG Op. No. 5543
- Email or phone?
- No statutory definition or case law interpreting

Then, Must Report If No Exception Applies
Confidentiality of mediation communications and agreements

- **ORS 36.220:**
  - (1) Except as provided in ORS 36.220 to 36.238:
    - (a) Mediation communications are confidential and may not be disclosed to any other person.
  - (5) Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.

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Exception Certain Client Confidences

- **Attorney-Client Privileged** under ORS 40.225 (OEC 503) AND/OR
- **Information communicated during representation that is detrimental to client if disclosed** (reconciles RPC 1.6 duty)

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Your Ethical Duty

**RPC 1.6(A) REQUIRES LAWYERS TO PRESERVE CONFIDENCES**

- Attorney-client privileged information AND
- Other information gained during course of representation IF
  - Client requests to keep secret;
  - Embarrassing if disclosed; or
  - Likely detrimental to client if disclosed.

**RPC 1.6(A), (B) ALLOW LAWYERS TO REVEAL CONFIDENCES IF**

- Client consents;
- Required by law (including ORS 124.050 et seq.);
- Client intends to commit future crime; or
- Necessary to prevent reasonably certain death or substantial body harm.
### Elder Abuse Reporting Exceptions vs. RPC 1.6

**MUST NOT REPORT**
- if A/C Privileged ORS 40.225
- if confidential and detrimental

**RPC 1.6**
Ethical duty to keep information relating to representation confidential, including information that is (1) A/C privileged, (2) secret, (3) embarrassing, or (4) likely detrimental to client if disclosed.

### To Report or Not to Report?

<table>
<thead>
<tr>
<th>MUST REPORT</th>
<th>MUST NOT REPORT</th>
<th>MAY REPORT</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser <strong>AND</strong> the information on which you would base your report is (1) not attorney-client privileged or (2) if confidential under RPC 1.6, would not be detrimental to client if disclosed.</td>
<td>If you have reasonable cause to believe that elder abuse has occurred and you have had contact with elder or abuser <strong>BUT</strong> the information on which you would base your report is either (1) attorney-client privileged (ORS 40.225), or (2) is confidential and would be detrimental to your client if disclosed.</td>
<td>If you have reasonable grounds to believe that elder abuse has occurred, you report in good faith, <strong>AND</strong> the information is confidential under RPC 1.6 <strong>BUT</strong> your client consents, or reporting is necessary to prevent reasonably certain death or substantial bodily harm or future crime.</td>
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</tbody>
</table>

### If No Exception Applies........

Then, Must Report
Nuts & Bolts of Reporting

- **Immediately = without delay** to DHS or law enforcement
  - Oral report required
  - Give as much information as possible
  - Explain allegation of abuse

**Reporting Hotline:**
1-855-503-SAFE

Or DHS Branch Offices:

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**Report Should Include...**

- Names and addresses of the elderly person and any persons responsible for the care of the elderly person.
- Nature and the extent of the abuse (including any evidence of previous abuse).
- Explanation given for the abuse.
- Any other information which might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

ORS 124.065(1)

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**Behind the Scenes**

- DHS
  - Screening
  - Investigation and Evaluation (Substantiated, Unsubstantiated, Inconclusive)
  - Follow-up with Reporter
- Possible Law Enforcement Involvement
Immunity & Confidentiality

- Civil immunity if
  - Report made in good faith and
  - Reasonable grounds for report
- Confidentiality of Reporter - see ORS 124.075, 124.085, 124.090
- Anonymity would only apply to non-mandatory reports

Consequences

- Class A violation (fine)
- Failure to perform duties of office
- Tort liability
  - Failure to protect from foreseeable harm? Negligence per se?
  - ORS 124.110?
- Ethics violation – not in most cases

Hypothetical No. 1

Your neighbor Clara, who is 87 years old and has been diagnosed with Alzheimer’s Disease, maintains she is doing “fantastic.” Although she is always upbeat and smiling, she can’t tell you the name of the president or the dog napping in her lap. This morning you noticed an eviction notice on her door and are worried about her. When Clara is outside weeding her flowerbed she mentions that she recently bought a $1 million luxury home in Sherwood that she plans on sharing with her daughter and son-in-law. She doesn’t seem to understand the notice. Do you have a duty to report elder abuse?
Hypothetical No. 2

Over lunch, your old college buddy Steve mentions that he is worried about his 89 year old mother, Wanda. Steve explains that Wanda is at home recovering from a broken hip. He visited her yesterday and she had not bathed for two weeks and had an open sore on her side. Steve’s sister, Amanda is being paid about $900 a month by the state to take care of Wanda, but Steve thinks Amanda may be using the money to buy lottery tickets instead. You remember meeting Wanda at Thanksgiving last year at Steve’s house. Do you have a duty to report?

Hypothetical No. 3

83 year old Evelyn was in a coma when her family members obtained her power of attorney and sold and/or disposed of all of her assets, from her home to her wedding album. They were sure she wouldn’t survive. All of the proceeds of were distributed to Evelyn’s relatives or favorite charities. Evelyn woke up from her coma with no home and no money. She waited in the hospital long after she needed to because there was no good discharge plan. Evelyn has come to your law office to consult about what to do next. Do you have a duty to report elder abuse?

Questions?

Troy Wood
Oregon State Bar
503.431.6366
1.800.452.8260 x 366
twood@osbar.org