



Elder Law Newsletter

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Who is the client—parent or child?

By Sylvia Sycamore, Attorney at Law

There is an old folk saying, both curse and blessing, that states: *May you live in interesting times.* In my elder law practice, I often imagine that there is a newer version of this: *In your old age, may you have children who care.*

Generally, we are glad to learn that an elder has caring, supportive children. We probably support “family values,” however we individually define those values, and encourage family members to be involved in one another’s lives. It does not seem unreasonable to us that children worry when their parents do not have wills or trusts or powers of attorney or advance directives. After all, we spend a lot of time trying to teach the populace that estate and incapacity planning are very important. We aren’t surprised when an elder who does have testamentary capacity nevertheless needs help remembering appointments and gathering estate planning and financial documents. And it seems only fair to us that an adult child whose needs when young were paid for by parents would now repay that care by picking up the cost of a parent’s expenses when necessary.

As lawyers, we are aware of the need to protect client confidentiality. As elder law practitioners, we are trained to watch for elder abuse, undue influence, and manipulation. These concerns come into strong focus each time an elder and caring daughter or son approach us, by phone or in the office, regarding legal services for the parent.

In an elder law practice, we must assess whether the adult child who involves herself or himself in this particular instance is acting only to support and assist the parent, or instead is seeking some financial or other benefit. We must weigh the likelihood of having before us a child who cares against the risk of a child who is self-dealing and involved to the extent that we cannot render competent legal services to the parent. How do we decide whether we are dealing with curse or blessing?

Red flag moments

Who is our client, and what is the role of supportive family members? In my practice, I have identified a number of points of client contact where these issues must specifically be addressed. I must decide who is my client and whether I can communicate with that client so as to provide competent legal representation and maintain client confidentiality, without damaging any family relationships upon which my client must rely. I think of these as *red flag moments*.

Making the appointment

On a regular basis, my office will receive a call from someone who wants to make an appointment for his or her parent. *Red flag moment:* Why is he or she making the phone call?

This initial phone call is an opportunity to screen a potential client matter and make an assessment as to whether an adult child is helpful or harmful. First, determine what concern is presented: estate planning, change to

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Who is the client?

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current estate planning, Medicaid, elder abuse, protective proceeding? Second, ask why the parent is not calling to make this appointment.

"Just curious, but why are you calling to make an appointment for your parent?"

The mere fact that the parent is not making the call suggests that he or she is not handling all personal business matters and that an adult child has decided to step in and take action.

Listen carefully to what the child tells you. I tend to view the following scenarios very differently, and my course of action will be determined by the type of service requested.

1. *Mom has died. Dad doesn't have a will or advance directive or power of attorney and we kids think he should have. Dad says OK, he'll go to attorney but I have to make the appointment for him.*

I insist on talking to Dad to find out if he really wants the appointment. If he is not available, I ask to have Dad call me to set the appointment.

2. *I have been taking care of Dad for several years now, and he wants to change his will.*

Again, I insist on talking to Dad to make sure he really wants the appointment. If he is not available, I ask the son or daughter to have Dad call me to set the appointment. My own biases lead me to see #2 as more suspect than #1, and I am more cautious.

3. *Dad has Alzheimer's. Mom is nearly worn out taking care of him, but doesn't have money for care. I know there is Medicaid but we don't know anything about it. Mom thinks the state will take everything. I want to make an appointment for Mom and my brother and me.*

I tend to view this kind of appointment as an informational family session, with minimal legal advice to anyone, other than "Here's what the Medicaid rules are. I advise you to abide by them." This first appointment is usually intended to reassure Mom and family that Medicaid may be available without total impoverishment of Mom, and that Dad may be eligible for Medicaid in the near future. It will include strong warnings against making disqualifying gifts. It is also an opportunity to find out whether further representation is needed and who actually will be my client. If Mom's capacity is borderline, the adult child with Dad's previously executed durable power of attorney (DPOA) may be my client.

4. *I am visiting from out of state. Based on what Mom has said and things I have observed, I think someone is misusing Mom's power of attorney and stealing things from her house. We want to know what can be done. Mom is afraid of making the alleged abuser angry.*

In my experience, elders who have been subjected to abuse are often timid, embarrassed, and passive. They may need the support and urging of a supportive child to agree to talk to an attorney. Even so, I try to meet privately with the elder in the office, to determine whether he or she perceives abuse, and if so truly wishes to take any action. If that is the case, I may then also meet with the child to obtain additional information, but with the explanation that I am going to be representing the elder, not the child.

5. *I think Mom needs a power of attorney because she can't handle her finances any more. Can I come in to get one for her?*

This phone call will elicit a brief lecture from me about "only your mother can create her own power of attorney. You can't do it for her." Depending on the caller's response, I may suggest that Mom call me for an appointment, or that the caller make an appointment to discuss with me the need for a conservatorship for Mom.

6. *Dad is very hard of hearing and hates to use the phone. He wants a will.*

I take this opportunity to inquire about how Dad does communicate, and whether he can hear well enough in a one-on-one situation to meet with me. (I figure I can shout as loud as a family member, if shouting is what is required. I can also communicate in writing in the office if necessary.) I may then make a tentative appointment, obtain Dad's mailing address, and write a letter to the effect that: "Your child has made an appointment for you to meet with me to discuss making a will. Because I have not yet met you, I do not know whether you wish to have this meeting. If you do, I will be happy to consult with you privately in my office about your will, or any other legal matter you choose. Our discussion will be held in confidence. If you wish to keep this appointment, please indicate to me, by phone or in writing, that the date and time are acceptable to you."

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Who is the client?

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I do not assume in any of these situations that the parent does not truly need legal services, or that competent legal representation cannot be achieved. I recognize that any one of us may from time to time be reluctant to act in our own best interests and need the energy and persuasion of an interested other person to get us moving. I simply make a note that the child has taken an active role and, barring some really egregious comment that causes me to refuse the case immediately, suspend judgment pending further developments.

Incidentally, while finishing this section of the article, I received a call from a person who wanted to make an appointment for herself and her mother for estate planning and long term care issues. I informed her that I would need to meet privately with her mother, both to determine her wishes and whether she has capacity to act. I suggested that her mother call me to make an appointment. The woman reluctantly said, "Well, OK, I'll let her talk to you." And then she added: "We just want to know if there is some way we can get around the law." Red flags all over the place!

Nevertheless, if that parent does call me, wants to talk privately with me, and appears to have the capacity to engage in that conversation, I may very well make that appointment. I will then get her mailing address, and send an appointment confirmation letter which includes a statement along these lines:

*At your appointment scheduled for [date and time], we will discuss ****. Our conversation will be private, and everything you tell me will be held in confidence. At the end of that meeting, you and I will discuss whether any other legal steps will be necessary.*

If an elder does call as you have requested, you can take that opportunity to assess his or her level of comprehension and independence. That is, do you hear someone in the background prompting his or her responses? Does the elder "take charge" of his or her side of the phone conversation, or does he or she need you to totally structure the call?

On occasion, I find that despite my best pre-screening efforts, an adult child brings to an appointment a parent who does not appear to have sufficient capacity to enter into an attorney-client relationship, or to independently describe to me the legal services required. If I believe further action is advisable (such as a need to establish a conservatorship because the parent is now incapable of informed execution of a power of attorney), I refer the family elsewhere to eliminate any possible conflict of interest.

In the reception area

Even if an elder has made the initial appointment, he or she may arrive at the office with one or more offspring. In many cases, the elder no longer drives (often a good thing), and the child brings the parent to the office and waits until time of the appointment. *Red flag moment*: Does the child appear to expect to sit in on the appointment?

Occasionally, there is good reason for an adult child to accompany a

parent into the conference room. One example would be mobility problems that the younger person is accustomed to dealing with. But even when there is no good reason, he or she will often stand up and prepare to follow the parent into the meeting. How you respond at this point depends in part on whether other parties are also in the reception area, and whether you believe he or she is just naive or you suspect that you are in fact dealing with a conniver.

I find that stating the ground rules clearly and matter-of-factly often solves the problem.

"I'll start by meeting with your parent privately, and I will let you know if I need to speak with you also."

"Help me get your parent seated, and then I will have you wait outside until we're finished."

If either the parent or the child objects to the separation in the presence of other clients in the reception area, I usually continue my discussion of the matter with both of them in the privacy of my conference room. But if no one else is in the reception area, I hold my ground right there.

Sometimes, the elder will be very dependent on the child and show signs of alarm or distress at being separated. *Red flag*: The elder may be incapacitated or may be under undue influence. An elder's objections may consist of a non-verbal look of alarm at being separated from the son or daughter, a statement that "I don't have any secrets from my child," or a statement that "my child helps me with everything."

I have seldom found an argument in regard to the preservation of attorney-client privilege to be persuasive to an elder who says "But I tell my daughter/son everything." Some parents value their present bond with their child more highly than they value my silence in some future, unimagined legal dispute. Often, instead, I will play the relationship



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Who is the client? *Continued from page 3*



An adult child may contact your office to provide information about his or her parent, or to seek it.

card, saying to the parent: "That's wonderful to have such a helpful child. Let's you and me get together first and get acquainted, since you are the client. We'll call your daughter in if we need her." Generally, if the parent has sufficient capacity to engage legal representation, we won't need the child at all, and the dignity of both of them has been preserved.

An adult child's objections to separation may consist of "I need to take notes for my father," or "My mother won't understand what you tell her, and I have to be able to explain later," or "I want to make sure my parent does the right thing," or—boldest of all—"I just don't understand why I can't be in the meeting."

Here, I am likely to say something like, "Look. You and your mother both think she needs to see me about a legal matter. She is the client, and I have to be able to hear about it directly from her, to determine what she wants and whether she can legally do it. I have to be sure she has the legal capacity to act on her own, and that she is doing whatever of her own free will. Your presence in the conference room can raise doubts about both issues." In my experience, only the most conniving or most dense person will persist in trying to cross this legal line in the sand.

Despite sometimes feeling inflexible in taking this hard line, I am bolstered by the memory of two clients who when finally separated from the daughter-in-law who had chauffeured them, said to me, "I really don't want my daughter-in-law to know anything, but she is so pushy. Thank you. I didn't know how to make her stay out."

In the client conference

Sometimes an elder will express concern that she will not remember everything I tell her during our meeting, and that she wants her son or daughter to sit in to "take notes." Or he says that he needs his son or daughter to be able to explain things to him after the meeting. *Red flag moment.* I understand the elder's fears, but I am unwilling to appear to agree to his or her child acting as my surrogate after the meeting, to explain what I said and meant.

Instead, I often offer to write a letter after our meeting which will summarize the main points of the conference. "That way, you can have it in writing to refer to." I find that usually the elder happily accepts that offer. Since I have to write up meeting notes afterward

anyway, putting that information into a letter format for the client doesn't take much more time. The letter is also an opportunity to confirm that no further work will be done or to present an engagement agreement for further representation.

At other times, though, I agree to include the son or daughter in the conference. When I agree to meet with a parent and child or children, my group dynamics skills are often rigorously tested. For example, whose questions do I answer? To whom do I address my comments?

Early in my practice, I once met with both parents and their four children for an informational session about Medicaid rules. One parent was probably going to need Medicaid down the road, but this appointment was simply for them to learn what might eventually be in store. A conference that should have taken no more than an hour lasted more than two hours, because everybody had questions, nobody listened to the answers to anyone else's questions, and I kept going over the material again and again.

I try to keep the focus on the parent/client by looking directly at and speaking directly to him or her. If I answer the child's question, I turn back to the parent to gauge his or her response to the question. I work to keep the conversation between the parent and me. Of course I never start talking about the parent in the third person, as if she or he were not in the room. If a child dominates the meeting, it's a red flag moment. If necessary, I will simply observe that the son or daughter is asking all the questions, and that I need to focus on my client and make sure that his or her concerns are addressed. If a parent seems subdued or intimidated by a child at this point, I will ask the child to step out of the room so that I can wrap up the client session.

After the initial appointment

Even after a client relationship with an elder has been established, an adult child may still contact my office to provide information about his or her parent, or to seek it. *Red flag moment:* if the child seems to be trying to insert himself into the attorney-client relationship or to learn details about the representation that client has never authorized, I clearly must decline to satisfy him or her, no matter how well-intentioned the inquiry.

Who is the client?

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It is more complicated if a parent has appointed a child as agent under a DPOA. The child may have valid questions about how to carry out the duties of an agent. However, if I have represented the parent in the preparation of the DPOA, providing legal advice to the agent now may establish an attorney-client relationship with him or her and may put me into a conflict-of-interest situation. In the event that the child and the parent ever disagree about management of the parent's financial affairs, I have likely made it impossible to assist either one. On the other hand, if the DPOA includes language that waives the attorney-client privilege, I may be obligated to provide certain information to the agent.

I find that clients and family members rarely grasp the concept of my potential conflict of interest when there is no apparent-to-them conflict present between them at the time.

Paying the bill

Sometimes an elder needs legal services, but has no money to pay. The most obvious example is the person who needs long term care, has no resources, and requires an income cap trust. Another example is the person on very limited income in a possible elder abuse situation, who is brought to the office by a child coming to the rescue.

To avoid the "He who pays the piper calls the tune" problem, if I think there may be an issue here, I address the matter early in the office conversation, usually by asking to what address I should send my bill. *Red flag moment:* If the elder says that the son or daughter has offered to pay for legal services, I explain that because I am going to represent the elder, I will send my bill to him or her. If the son or daughter wants to pay, he or she should give the money directly to the parent and the parent can pay me by sending me a check.

If an elder's checking account is compromised by an alleged abuser, I will reluctantly accept a one-time payment directly from a third party, as long as the elder signs a statement that payment by that party is acceptable to the elder and that such payment does not authorize the third party to direct the course of

the elder's legal representation.

Realistically, though, if a child pays directly or gives his or her parent money to pay, he or she will probably cease to contribute if he or she feels that the legal representation is of no benefit. In such cases, I am more likely to take the case *pro bono* if I feel strongly about it, or else decline to accept representation rather than struggle with third-party payments. What do you do if the client agrees to pay, but the check you receive is drawn on a son's or daughter's account? The one time that happened to me, I sent the check back to the child with a polite letter saying, "Thank you very much but I have no authorization to accept payment on this client account from anyone except your parent," and sent a copy of the letter to the parent/client, who paid shortly thereafter.

So, blessing or curse?

As elderly parents grow frail, vulnerable, and more passive, children often step in to fill the vacuum and take over making decisions and arrangements. The caring, supportive child will probably operate out of a belief that she or he is acting in the parent's best interest. With sensitive guidance and clear explanation, such a son or daughter can usually be induced to withdraw from active participation in situations where the parent's legal independence and privilege of attorney confidentiality might be compromised by a child's involvement.

However, the conniving son or daughter, whose involvement in a parent's legal affairs often masks concern about his or her own controlling role in the parent's life or interest in an eventual inheritance, may require that the elder law attorney set firm ground rules if that attorney wishes to assist the parent in any way.

By close attention to language and behavior of both parent and child at every point of client representation, and by quick intervention in the form of clear statements and expectations, the elder law attorney can provide a private, protected opportunity for an elder to address legal concerns, in spite of a son or daughter's over-involvement, whether well or ill intended. ■

The caring, supportive child will probably operate out of a belief that she or he is acting in the parent's best interest.

Determining capacity at the first meeting

By Michael D. Levelle, Attorney at Law



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Lawyers must be prepared to deal with the issue of capacity when they attempt to counsel elderly clients and carry out their wishes. The skills to make a preliminary assessment, maximize the client's ability to understand technical information, and provide alternatives in the event there is a potential of legal incapacity are critical to being able to provide effective legal representation of the client.

A lawyer also should have knowledge of the issues and law relevant to elder populations, the unique ethical considerations relating to the lawyer-client relationship, and the ability to communicate clearly and sensitively with elder clients. The lawyer should understand the standard of capacity required to perform certain legal acts, be capable of performing a preliminary assessment of capacity, and know what steps can be taken to maximize a client's independence.

The very nature of providing legal services to the elderly may require a lawyer to focus on the person's capacity at the initial client contact. A lawyer must incorporate into his or her practice a way to confirm that the client is sufficiently competent to benefit from the legal services being sought. See A. Frank Johns & Rebecca C. Morgan, *Counseling Clients Who May Have Diminished Capacity*, note 15 (ALI-ABA Conference 2002); J. Regan, Rebecca Morgan & David English, *Tax, Estate and Financial Planning for the Elderly*, ch 1 (1992 & Cum Supp Rel 10/01); Charles P. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?" *Journal of American Academy of Matrimonial Law*, Vol 16 (2000).

Empowering the client

Make an effort to empower the elderly client at the initial meeting. Meet privately with him or her, possibly after an introduction by a family member or trusted friend if that person set up the appointment. Create a relaxing and comfortable interview environment; converse about topics that interest the client. Conduct the interview at the client's best time of day. Ask open-ended questions that encourage more than a yes or no answer. Encourage the client to ask questions. Reassure the client that one purpose of the meeting is to become acquainted. Remind the client that the client's decisions,

and not those of a family member, will control the outcome of the meeting. Use indirect questions to assess capacity. Do not ask intimidating questions that put the client on the spot. Asking topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client. Take verbatim notes.

When preparing written materials for elderly clients, use short words, sentences, and paragraphs. Use active verbs; avoid passive voice. Avoid technical legal terms as much as possible. Where such terms are unavoidable, define them in nontechnical language when they first appear. Use the names of the parties in a contract or other document. Do not use legal role names to identify parties. Avoid double negatives. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily read sections.

Be familiar with the community resources available to the elder client. If you conclude that a client may lack the capacity required to take the desired action, you should talk to the client about enlisting the help of a professional such as a social worker, gerontologist, nurse, family therapist, or similar practitioner with expertise and experience with the elderly. This course of action promotes the autonomy and safety of the client.

The lawyer's role in assessing capacity

The American Bar Association views the lawyer's role in assessing capacity as one where the lawyer fills a systematic role in capacity screening at three levels. The first level is that of "preliminary screening" of capacity, the goal of which is merely to identify capacity "red flags." The second level of involvement, if needed, involves the use of professional consultation or referral for formal assessment. The third level of involvement requires making a legal judgment that the level of capacity is either sufficient or insufficient to proceed with representation as requested. See: ABA Commission On Law & Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

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Determining capacity

“Legal competency” is technically defined in terms of a person having the mental capacity to understand the nature of the act and comprehend its consequences. Historically, legal competency has been viewed as “all or nothing” determination. However, in practical application, legal competency is a flexible concept. For example, a clinical diagnosis of a debilitating condition or disease that causes dementia suggests diminished capacity, but you should not assume that a person is incompetent to participate in or consent to a particular transaction because of such a diagnosis. Competency must be viewed in terms of the client’s ability to perform a specific task. See Charles P. Sabatino, “Assessing Clients with Diminished Capacity,” Vol 22, No 4 *ABA Bifocal*, 1 (Summer 2001). A person may be competent for certain tasks, but lack capacity for others. *Restatement (Third) of the Law Governing Lawyers*, 35 cmt c (2000).

Standardized tests to determine capacity

Some lawyers may consider the use of standardized tests to measure a client’s capacity (with the client’s consent). However, a standardized test is only a starting point and offers no conclusion about the client’s decision-specific capacity. The administration of a standardized test can be awkward and is not recommended. However, reviewing such tests to become familiar with the indicators of capacity is useful. If, after the lawyer’s informal evaluation of the client, a question remains about the client’s capacity, the lawyer should consider seeking a formal evaluation. The article by Charles P. Sabatino in the *Journal of the American Academy of Matrimonial Law* has a sample of brief screening tests. See also Baird Brown, “Determining Client’s Legal Capacity,” *The Elder Law Report* (Feb 1993).

The contextual capacity model

A lawyer might use a model of contextual capacity that integrates substantive and procedural concerns. See Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L REV* 1073 (1994), 1083-1090. This model contrasts with the conventional objective tests of capacity, which are unrelated to the act and do not integrate the substance of a decision and its values context. The contextual capacity model focuses on six factors, three functional

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and three substantive, to determine a client’s “contextual capacity”:

- (1) The client’s ability to articulate the reasoning behind the decision
- (2) The variability of the client’s state of mind
- (3) The client’s ability to understand the consequences of the decision
- (4) The irreversibility of the decision
- (5) The substantive fairness of the transaction
- (6) Consistency of the act or transaction with the client’s lifetime commitments.

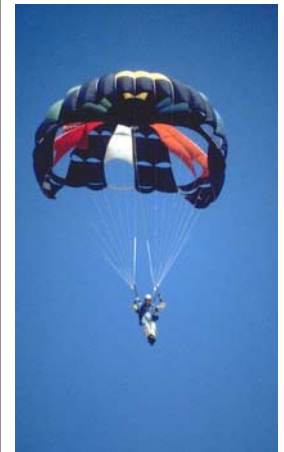
This model has been integrated into ABA Model RPC 1.14, Comment [6].

Determining legal capacity

The lawyer must form an independent opinion about the client’s capacity. The lawyer’s opinion should be based on personal observations, contacts with friends and family, and — if appropriate — clinical examinations by medical professionals. See Mezzullo & Woolpert, *Advising the Elderly Client*, 3.9 (1992 & Supp 1994). If signs of questionable legal competency arise, the lawyer must become more deliberate in the assessment of capacity and it would be appropriate to discuss more sophisticated testing done by a qualified professional to assess capacity.

Although elderly clients are more likely to be frail in health, subject to the deteriorations of old age, and dependent on others, a lawyer should presume that the elderly client has the necessary mental competency to make legal choices and avoid the temptation to ask whether the client is competent. See ORS 126.098; *First Christian Church v. McReynolds*, 194 Or 68, 73-74 (1952). The presumption of competency can be relied upon until the contrary is shown. *Schaefer v. Schaefer*, 183 Or App 513 (2002) (citing *First Christian Church v. McReynolds*, 194 Or 68, 74, 241 P2d 135 (1952)).

Eccentricity or lack of prudence should not be confused with lack of legal capacity. The lawyer’s task when considering the legal standard of competency is to be able effectively to distinguish foolish, socially deviant, risky, or simply “crazy” choices made competently from comparable choices made incompetently. See A. Frank Johns & Rebecca C. Morgan, *Counseling Clients Who May Have Diminished Capacity*, note 17 (ALI-ABA Conference 2002); Marshall Kapp, “Evaluating Decision-Making Capacity in the Elderly: A Review of Recent Literature,” 2 *Journal of Elder Abuse & Neglect*, 15 (1990).



Eccentricity or lack of prudence should not be confused with lack of legal capacity.

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Determining capacity

If there is a concern about the client’s competency, the client’s file should be clearly documented to establish that competency was present at the time of the particular act in case the act is contested at a later date. The lawyer may want to consider suggesting a geriatric evaluation to assess the client’s competence and to establish that the client possessed the requisite capacity to consent or perform an act at that time. However, discussing the need to consult with a mental health professional is not only awkward but gives rise to other issues the lawyer must consider and address.

For example, the general rule is that a client must have competency to consent to a lawyer pursuing any particular course of action to achieve the client’s objectives. Oregon RPC 1.14(b) provides that when the lawyer reasonably believes that the client has diminished capacity, the lawyer may take reasonably protective action such as consulting with individuals, including seeking guidance from an appropriate diagnostician. See ABA Model

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RPC 1.14, Comment [6]. There is also the issue of what effect consulting a third party will have on lawyer-client privilege. Oregon RPC 1.14(c) provides that information relative to the representation of a client with diminished capacity is protected by Oregon RPC 1.6. However, the lawyer must be cautious about what information is revealed. The rule only provides protection of such information to the extent reasonably necessary to protect the client’s interest.

Conclusion

The lawyer who works with an elderly client will always be required to employ his or her traditional legal skills. However, with the aging of America’s population and the significant transfer of wealth that will occur in the near future, the lawyer must also acquire a completely different set of skills to deal with the elderly client on a personal level.

To prepare to deal with questions of client competency the lawyer should:

- Know the legal standards governing competency
- Understand his or her role in assessing a questionably competent client
- Develop and use techniques designed to empower the elder client

The goal is to promote the autonomy and safety of the client. ■

Important elder law numbers

as of July 1, 2008

Supplemental Security Income (SSI) Benefit Standards	Eligible individual.....\$637/month Eligible couple\$956/month
Medicaid (Oregon)	Long term care income cap..... \$1,911/ month Community spouse minimum resource standard \$20,880 Community spouse maximum resource standard \$104,400 Community spouse minimum and maximum monthly allowance standards\$1,750/month; \$2,541/ month Excess shelter allowance Amount above \$525/month Food stamp utility allowance used to figure excess shelter allowance\$303/ month Personal needs allowance in nursing home.....\$30/ month Personal needs allowance in community-based care\$144/ month Room & board rate for community-based care facilities..... \$494.70/ month OSIP maintenance standard for person receiving in-home services..... \$638.70 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2006\$5,360/ month
Medicare	Part B premium \$96.40/month* Part B deductible \$135/year Part A hospital deductible per spell of illness..... \$1,024 Part D premium: Varies according to plan chosen..... average is \$27.35/ month Skilled nursing facility co-insurance for days 21-100\$128/ day * A person whose income is more than \$82,000/year will pay a higher premium

Legal Ethics and client incapacity

By Helen M. Hirschbiel, Oregon State Bar Deputy General Counsel

Lawyers who represent clients who are planning for their incapacity or who later become incapacitated are faced with unique and often complicated ethics challenges. The following hypothetical situation exemplifies one of the more common ethics issues that faces the elder law practitioner.

You represented husband and wife (H and W) years earlier for estate planning which included nominating each other as guardian and/or conservator in the event of incapacity. May you now represent W and petition the court to appoint her as guardian/conservator for H? If another lawyer represents W to set up the guardianship/conservatorship, can you represent W after the appointment has been made? What if H and W both signed disclosure and consent letters waiving any conflict?

Oregon Rules of Professional Conduct (RPC) 1.9 provides that a lawyer who has represented a client in a matter may not later represent another person in the same or a substantially related matter where the new and former clients' interests are materially adverse, unless both clients give their informed consent, confirmed in writing. According to RPC 1.9(d), matters are substantially related if:

- representation in the new case will injure or damage the former client in connection with the same matter in which the lawyer represented him or her, or
- there is a substantial risk that confidential information that normally would have been obtained in the prior representation would materially advance the current client's position in the new matter.

In *In re Snell*, 15 DB Rpt 166 (2001), the lawyer prepared a power of attorney (POA) and will with nomination of conservator for the client in the spring of 1996. The client nominated an agent under both the POA and the will. Several months later, the lawyer represented the agent to file a petition for appointment of conservator/guardian for the former client. The lawyer stipulated to a reprimand for violating the disciplinary rule regarding former-client conflicts.

According to *Snell*, the answer to the first question in our hypothetical is clearly "no." You may not represent W to petition the court to appoint W as guardian and/or conservator for H. H is your former client, and the proposed protective proceeding against H is the same as or substantially related to the prior estate and incapacity planning you did for H. Further, W's and H's interests are objectively and materially adverse because W will be the petitioner and H the respondent in the protective proceeding.

Although you cannot represent W to establish her appointment as fiduciary for H, once W has been appointed, you may represent her as guardian/conservator. After appointment, her interests are no longer materially adverse to H. In fact, as a fiduciary, W is expected to act in the best interests of H. Of course, if in the course of representing W, you conclude she is acting contrary to H's established plans or best interests, a conflict would arise and you would have to withdraw.

The final question in our hypothetical is whether the clients could waive the conflict that arises when one spouse seeks protective action over the other. Former-client conflicts generally can be waived with informed consent, confirmed in writing, from both affected clients. If the reason for having a guardian/conservator appointed for H is that he is incapable of acting in his own interest, he will not have the capacity to give informed consent to the adverse representation. But could the

clients sign informed consents at the time of the original estate planning, waiving the future conflict of interest?

Future-conflict waivers are generally permitted under the rules of professional conduct. See ABA Formal Op No 05-436. As discussed in Comment [22] to ABA Model Rule 1.7, the effectiveness of advance waivers depends on the extent to which the client reasonably understands the material risks of giving consent to the future representation when a conflict exists. Comment [22] explains that, "[t]he more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding."

Thus, as long as the advance waiver accurately and clearly identified the risks of the lawyer representing W against H in the protective proceeding, representation of W would be allowed. At minimum, an advance waiver for our hypothetical should include an explanation that in the future one spouse may think that the other spouse is incapacitated, while the other spouse may disagree and object to a guardian/conservator. Each spouse would need to understand and agree that they consent to the lawyer advocating for the petitioning spouse notwithstanding the other spouse's expressed objections.

Finally, remember that even with informed consent confirmed in writing, you could not simultaneously represent both H and W in the protective proceeding. Doing so would be a nonwaivable current conflict of interest because you would have an obligation to advocate a position for W (appointment of a guardian/conservator), that you would have a duty to oppose on behalf of H. See RPC 1.7(b)(3).

Understanding conflicts is just one of the more complicated aspects of representing clients when planning for and dealing with incapacity. For more information about representing a client who is under a disability, see ABA Formal Op No 96-404. ■

Helen M. Hirschbiel is Deputy General Counsel of the Oregon State Bar where, among other things, she answers ethics questions from lawyers. She previously worked in private practice in Oregon and at legal aid in Arizona.

Keep civil rights in mind when representing a proposed protected person

By Jan E. Friedman, Disability Rights Oregon



Jan E. Friedman is an attorney with Disability Rights Oregon (formerly known as Oregon Advocacy Center), which is the state's protection and advocacy law agency for people with disabilities. Her clients are people with disabilities, including respondents in protective proceedings; appellants attempting to gain coverage for assistive technology; and victims of abuse or neglect.

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

—The Oregon Rules of Professional Conduct, Rule 1.14(a).

The focus of and reason for a protective proceeding is an allegedly incapacitated person. When such a person is represented by counsel, the judicial system fails to work for him or her if the attorney ignores the client and instead imposes the attorney's own "best interest" standard or aligns with the position of the court, visitor, or petitioner's attorney. Under these circumstances, the respondent's right to due process is denied. Therefore, the attorney for an allegedly incapacitated person should represent him or her as any other client.

Although the attorney may need to take more time and have much more patience to represent a respondent, difficulty in working with the client does not diminish the client's rights. This is true even if the respondent is in denial that he or she has a condition that seriously impairs his or her abilities. In a situation where the attorney recognizes that the client's version of reality is not reasonable or compelling, the attorney may acknowledge that he or she has heard what the client has to say and advise the client that the court is unlikely to agree with the client's version of reality. If corroborating evidence would be helpful, then the attorney should explore this with the client. All of my clients are people with disabilities, and a few are extremely challenging. I find it useful to compare the time I must commit to addressing the challenges of working with my client (in the brief window of time that I represent him or her) with the time frame of my client's challenges and how those challenges permeate his or her day-to-day life.

This article addresses the situation in which the allegedly incapacitated person is represented by an attorney. Unfortunately, the right to an attorney stated in ORS 125.070(2)(e)(A) is not supported by public funding. Whether to appoint an attorney for an allegedly incapacitated person who is indigent or other-

wise unable to retain an attorney is left to the judge's discretion. ORS 125.025(3)(b). There have been multiple legislative attempts to gain judicial funding for allegedly incapacitated people. They have failed, not because the nature of the proceeding is considered insufficiently serious, but because appointed counsel is deemed too costly. Probate judges in some counties maintain a list of attorneys whom they appoint for allegedly incapacitated people who object in protective proceedings.¹ However admirable this effort may be, there remain serious due process concerns for the allegedly incapacitated people who do not have access to an attorney and thereby to the court system.

The whole purpose of a protective proceeding is to benefit the respondent. However, guardianships and conservatorships have a high potential for doing harm to the "protected person" by removing independence, dignity, and hope. Given the gravity of the proposed deprivation of civil rights of the respondent, at minimum the attorney for the respondent should protect:

1. The client's right to object, including reviewing alternatives to the proposed guardianship or conservatorship
2. The client's right to notice of what the proceedings entail and to be heard as to his values and expressed wishes
3. The client's right to request a limited guardianship/conservatorship

I have provided a worksheet to assist with the above review. (See pages 12 & 13.)

First, the respondent has a right to object. Generally, if an attorney has been appointed or retained to represent a respondent, the respondent has been able to communicate that he or she objects to the protective proceeding. The respondent's objection should provide adequate minimum direction for his or her attorney. If, for example, a client is not able to

Representing a proposed protected person

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provide names and addresses of witnesses or other helpful information that cannot be found otherwise, then the judge will have the opportunity to factor in this lack of evidence at the hearing.

The attorney should review whether alternatives to the guardianship or conservatorship exist or could be established. Many alternatives are less intrusive. For example, the existence of family, friends, and service providers who interact with the respondent may preclude the need for a guardian or conservator. A respondent who has a managed chronic mental health disorder and receives an inheritance that would affect receipt of public benefits may seek counsel to establish a special needs trust, rather than having a permanent conservatorship imposed.

Second, the client has the right to be notified of the purpose and course of the proceedings and to be heard. The attorney should communicate with the respondent about the day-to-day effect that a guardianship or conservatorship may have on his or her life. A guardianship or conservatorship can be a tremendous intrusion on the respondent's personal autonomy. For example, many people with guardians lose the rights to decide where to live, what medical services they may receive, and when they can come and go. In addition, a protected person will likely pay for the fiduciary's services as well as those of the fiduciary's attorney(s). The respondent should be told that the relationship with the fiduciary, once established by the court, is permanent unless changed by the court. The respondent should be informed of his or her continuing right to object to the guardianship or conservatorship, explaining circumstances under which the court may change or terminate the terms of guardianship or conservatorship.

The respondent's attorney must determine the client's values and express wishes with regard to the fiduciary proceeding. Specifically, the attorney should determine the client's preferences as to:

- a person to serve as a guardian or conservator
- health services
- living arrangements
- management of finances
- other care, comfort, and maintenance services
- arrangements after death

The attorney should ensure that the respondent is provided an opportunity to communicate in the most comfortable setting for him or her. For example, when the attorney meets with the respondent, the attorney may need to ensure that the client's support person is present, may need to meet at the client's home, or both. As with any other attorney-client relationship, the role of the respondent's attorney is to listen to the client and provide advice, not to impose the attorney's idea of what might be in the "best interests" of the client. The attorney, of course, should advise the respondent about all of the options as well as the benefits and drawbacks of pursuing each option.²

Third, the respondent's attorney should find out whether the client considers a guardianship or conservatorship appropriate and, if so, whether the client's goal is simply to limit it to specific areas.

The respondent's attorney should then find out what assistance the client has in making medical, financial, and other decisions and advocate for a limited guardianship on the respondent's behalf. Limited

guardianships are envisioned by strict adherence to ORS 125.300(1), which states:

A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations.

Unfortunately, for many of the "protected people" we hear from at Disability Rights Oregon, the effect of protective hearings is extremely negative. They express feelings of disbelief that they have essentially been sentenced to the equivalent of life in prison, with no hope for positive change. Some say that they feel they were treated like children, prisoners, or murderers.

Attorneys for respondents should represent them just as they would any other clients by protecting their rights to object, to be informed of the nature of the proceedings, to be heard, and to experience the least restrictive outcome.

When respondents who become protected people feel that their dignity, voice, and hope have been denied, what has been protected? ■

Footnotes

1. From my work on the Multnomah County Probate Mediation Committee, my understanding is that Multnomah County appoints an attorney for every allegedly incapacitated person who objects to the protective proceedings. Further, my understanding is that Lane and Washington counties also maintain lists of attorneys to appoint for the allegedly incapacitated person.
2. Oregon Rules of Professional Conduct, Rule 2.1 indicates that the attorney's role includes exercising independent professional judgment and rendering candid advice. In rendering advice, an attorney may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Worksheet for Protective Proceedings

1. Alternatives to Guardianship and/or Conservatorship

ALTERNATIVES	DESCRIPTION OF ALTERNATIVES	RULED OUT?
Other Assistance	Family members, personal care assistants, case managers, home health services, “meals on wheels,” as well as education regarding people and agencies who may be able to work together to provide care for the physical and financial needs of a person with diminished capacity. This requires the person’s cooperation and the financial authority to act on his or her behalf.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Advance Directive for Health Care	This allows the management of health care and access to medical records. ORS 127.531.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Declaration for Mental Health Treatment	This allows the designation of a representative to make decisions pertaining to mental health care in the event that a person becomes unable to do so.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Durable Power of Attorney	This allows a capable person to grant another person authority to act for him or her if incapacity occurs. DPAs usually affect property decision-making, but may also relate to health care.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Education Power of Attorney	This is like the Durable Power of Attorney above and allows the designated person to make decisions pertaining to education.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Daily Money Management	Daily money management services help people with the gamut of services regarding their financial affairs. DMM is voluntary; a person must be capable of asking for or accepting services.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Special Needs Trust	This allows a person to remain eligible for government benefits, while the designated trustee manages the funds for particular uses for the grantor’s benefit.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Joint Ownership	Joint ownership of land or bank accounts may allow a co-owner to manage an incapacitated co-owner’s property.	<input type="checkbox"/> No <input type="checkbox"/> Yes
Representative Payee	A representative payee is appointed by a government agency to receive, manage, and spend government benefits for a beneficiary.	<input type="checkbox"/> No <input type="checkbox"/> Yes

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Worksheet for Protective Proceedings

2. Values & Expressed Wishes

Specify preferred guardian/conservator. Is this person a family member? Does he or she have either a criminal record or a bankruptcy filing? Carefully consider qualifications and willingness.

Specify preferred health care services. What sorts of services are desired and/or needed? Who are the preferred treatment providers?

Specify preferred manner of managing finances.

Specify preferred care, comfort, and maintenance services.

Indicate expressed wishes regarding disposition of remains.

3. Appropriate Scope of Guardianship

SPECIFIC AREA	ABILITY/CAPACITY	COMMENTS
Medical	<input type="checkbox"/> No <input type="checkbox"/> Yes	
Residential	<input type="checkbox"/> No <input type="checkbox"/> Yes	
Financial	<input type="checkbox"/> No <input type="checkbox"/> Yes	
Testamentary	<input type="checkbox"/> No <input type="checkbox"/> Yes	
Care, comfort, and maintenance	<input type="checkbox"/> No <input type="checkbox"/> Yes	
Death and burial	<input type="checkbox"/> No <input type="checkbox"/> Yes	

Is a guardian liable for harm caused by a protected person?

By Sarah Mann

Sarah Mann is a third-year student at the University of Oregon School of Law, focusing in the areas of tax law and estate planning. Sarah is interested in elder law issues, and spends Saturdays volunteering at Senior Law Services in Eugene.

Under ORS 125.315(1)(a) a guardian has “custody” over the protected person and all the usual duties of a legal custodian. But does that custodial relationship extend to liability for harm done to a *third party* by the protected person? In general, a guardian should not be liable for the protected person’s acts if the guardian monitors the protected person’s potential for causing harm, and the guardian acts reasonably in all situations. A review of several scenarios under which this question could arise will help clarify the guardian’s legal position.

Vicarious liability for the protected person’s act

Vicarious liability “imposes liability on one person for the acts of another.”¹ Whether vicarious liability exists depends on the relationship between the parties, e.g., an agency relationship or an employer/employee relationship. Whether the court will impose vicarious liability for a guardian depends on how the relationship is characterized. The most likely analogy is a parent-to-child relationship. In Oregon, parents are not automatically vicariously liable for their children’s torts.² However, ORS 30.765 holds parents liable for “actual damages to person or property caused by any tort intentionally or recklessly committed by” unemancipated minors. There are no reported Oregon cases imposing vicarious liability on parents for the acts of minor children that do not involve the statute, and there are no reported Oregon cases imposing vicarious liability on guardians for the acts of protected persons. If the court applies the law for parents and children to a guardian and protected person, there should be no vicarious liability. The guardianship statutes, ORS 125.300 *et al*, do not have a provision that imposes vicarious liability for a protected person’s acts upon the guardian. In fact, ORS 125.315(1)(e), which discusses the powers and responsibilities of a guardian over a minor, expressly limits the vicarious liability imposed on parents from being imposed onto a guardian of a minor. Assuming that there is no contractual or agency relationship between the guardian and the protected person, the guardian should not be

vicariously liable for a protected person’s act that causes harm to a third party if the court treats this like a relationship of parent to child.

Tortious acts by the protected person caused by the guardian’s negligence

While there is likely no vicarious liability imposed on a guardian, the guardian may be liable if his or her own negligent act is a substantial factor or but-for cause of the protected person who inflicts foreseeable harm on a third party. Obviously the intentional act of the guardian that is a but-for cause of the protected person harming another will also make the guardian liable. Oregon tort law regarding liability for negligence is different from the “duty, breach, causation, scope, and damages” taught in first-year torts.³ Since the Oregon Supreme Court decided *Fazzolari v. Portland School Dist. No 1J*⁴ in 1987, Oregon has used a foreseeability standard to determine liability. Under the *Fazzolari* test, the question is “whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.”⁵ *Buchler v. Or. Corrections Div.*,⁶ decided in 1993, added two important pieces to the *Fazzolari* analysis relevant to a guardian’s potential liability. First, the foreseeability test was modified to reasonably foreseeable risks, not just any foreseeable risk (no matter how unreasonable). Second, while *Fazzolari* discussed the relationship between the defendant and the victim, *Buchler* analyzed the relationship between the defendant and the party who committed the harmful act. The *Buchler* court adopted §319 of the Second Restatement of Torts (1965), which states that “[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” In *Buchler*, the court determined that the harm must be closely related to what the liable party knew about. There, the fact that a prisoner was incarcerated for property crimes was not related closely enough to the harm of shooting people

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Is guardian liable?

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to hold the jailer liable for negligently leaving the keys in a van accessible to the prisoner.⁷

Applying these standards to the issue of a guardian's liability, the first factor is whether the conduct of the guardian was a substantial factor or but-for cause of the harm befalling the third party. Without that but-for causation, the guardian will likely not be liable. If the guardian is the but-for cause, the second factor turns to the *Fazzolari / Buchler* analysis. If the guardian knew or should have known of the protected person's propensity to commit bodily harm, the §319 specific duty applies (the duty to exercise reasonable care to control the protected person to prevent him from doing bodily harm). However, if there was no reason to know that the protected person would cause bodily harm, then the *Fazzolari* standard (the general standard for all negligence law in Oregon) applies to the situation. Under the *Fazzolari* standard, the question is whether the conduct of the guardian created a reasonably foreseeable risk to the protected interest of the injured third party. The guardian will likely be liable for damages stemming from the harm caused by the protected person if the guardian had a specific duty because he or she knew or should have known about the potential for the bodily harm and was a "but for" cause of the harm. If no specific duty was owed, then under a general negligence analysis the protected person's injury to another was a reasonably foreseeable "but for" consequence of the guardian's unreasonable conduct.

An example may be helpful to describe the difference in the analysis. Imagine a situation in which an adult son has a guardianship over his mother, who lives with the son and his wife. If either the son or his wife unreasonably created a situation that allowed mom to harm someone, the standard for whether the harm was reasonably foreseeable would be a bit different for the son than for his wife if the son knew that his mother had the potential to harm third parties. Based on his legal relationship as mom's guardian, the son would be held to the "knew or should have known" standard and the reasonably foreseeable standard when deciding whether the son is liable if he is the but-for cause of the harm. For the son to be held to the §319 standard, the type of harm mom commits must be narrowly related to what was known, otherwise the question is

whether the harm was reasonably foreseeable. His wife, however, does not have a guardian relationship with her mother-in-law so she is not held to the "knew or should have known" standard even if she does know that mom has the potential to do this type of harm. The question of her liability is the *Fazzolari/Buchler* standard of whether it was a reasonably foreseeable risk, although knowledge of the potential for the harm could be evidence that the harm was reasonably foreseeable.

For a guardian to be liable for the harm caused by the protected person, the guardian must first have acted negligently in causing the situation, the guardian's act must be a substantial factor or but-for cause of the harm, and the guardian must have known or should have known of the potential for the protected person to commit that specific type of harm, or the harm must be reasonably foreseeable. If any of these factors are not present, the guardian may not be liable for the protected person's act.

A guardian's duty to warn

Assuming that a guardian is aware that the protected person has the propensity to do harm to others, does the guardian have a duty to warn others of that risk? While other states don't impose a duty to warn as between parties without a special relationship, Oregon applies the *Fazzolari* standard for liability for a failure to warn or protect to everyone. The controlling case, *Fuhrer v. Gearhart-By-The-Sea, Inc.*,⁸ held that

a defendant may be liable if the defendant can reasonably foresee that there is an unreasonable risk of harm, a reasonable person in the defendant's position would warn of the risk, the defendant has a reasonable chance to warn of the risk, the defendant does not warn of the risk, and the plaintiff is injured as a result of the failure to warn."⁹

Applied to a guardian, he or she may be held to a duty to warn either under the *Fuhrer* standard or based on the existing relationship with the protected person. Under the *Fuhrer* standard (applied when there is no special relationship between the parties), when a guardian can reasonably foresee the risk that the protected person may harm third parties,

For a guardian to be liable for the harm caused by the protected person, the guardian must first have acted negligently in causing the situation, the guardian's act must be a substantial factor or but-for cause of the harm, and the guardian must have known or should have known of the potential for the protected person to commit that specific type of harm, or the harm must be reasonably foreseeable.

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Is guardian liable?

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If the protected person is a family member who resides with the guardian, then negligent acts of the protected person may be covered under the guardian's homeowner's insurance policy.

he or she is obligated to act reasonably. That means that the guardian may need to warn of the danger if it is reasonable to do so and the guardian has a reasonable chance to do so. However, the special relationship between the guardian and protected person (such as the one that triggers a duty under §319), may create a specific duty to warn, as is the rule in most states. In either case, the injured third party would still have to prove that the guardian's failure to warn was unreasonable and caused the harm. If a guardian knows that there is a risk of harm by the protected person, the reasonable course of action will likely be to warn others and thus reduce the risk of liability to the guardian for failure to do so.

Will insurance cover a guardian?

Whether a guardian could obtain insurance against liability for acts of a protected person depends on whether the protected person is a relative, whether he or she lives with the guardian, and whether the injury is but-for the negligence by the guardian.

If the protected person is a family member who resides with the guardian, then negligent acts of the protected person may be covered under the guardian's homeowner's insurance policy.¹⁰ If the protected person is not a family member, but is under 21 and resides with the guardian, homeowner's insurance may also cover the situation.¹¹ However, a protected person who is not a family member and does not live with the guardian would likely not be covered under the homeowner's policy. It can be argued whether a homeowner's policy would cover the guardian's negligence that is the cause of the protected person's harm. If the guardian was not the cause of the harm, damages stemming from that intentional harm would not be covered by insurance regardless of whether the protected person was family or resided with their guardian.¹² A person who is acting as a guardian for a relative or friend may want to investigate whether an umbrella policy is available that would cover the guardian's activities. Professional guardians should maintain sufficient liability insurance to cover themselves and their employees.

Concluding thoughts

So what is a guardian to do? With a potential risk of liability for the act of the protected person, why would anyone want to be a guardian? At the outset, guardians should be notified that they are not vicariously liable for the acts of the protected person just by the nature of being a guardian. Further, the analysis under *Fazzolari* and *Buchler* suggests that by taking reasonable precautions, a guardian can mitigate liability arising from actions done by the protected person. If a guardian knows that the protected person could injure a third party, the guardian should take reasonable care to reduce the chance of injury to third parties and should warn others if it is reasonable to do so. Even if the protected person does not have a history of causing harm, a guardian should watch for signs of harmful behavior and respond appropriately if the situation changes. Basically, a guardian should not be liable if reasonable care is taken while fulfilling one's duty toward the protected person. ■

Footnotes

1. *Doe v. Oregon Conference of Seventh-Day Adventists*, 199 Or App 319, 328 (2005).
2. *Herndobler v. Rippen*, 75 Or 22, 26 (1915).
3. For a good overview of Oregon negligence law, see the Oregon CLE on torts, §§ 8.4, 8.7.
4. 303 Or 1 (1987).
5. *Id.* at 17.
6. 316 Or 499 (1993).
7. *Id.* at 502.
8. 306 Or. 434 (1988).
9. *Id.* at 438-39.
10. See *Or. Ins. Div., Consumer Guide to Homeowner and Tenant Insurance* (2008), available at <http://insurance.oregon.gov/homeowner-renter/home.html>.
11. See, e.g., *Farmers Ins. Co. of Oregon v. Jeske*, 157 Or App 362, 365-66 (1998) (discussing the meaning of a permanent resident under 21 for purposes of insurance coverage).
12. See *Or. Ins. Div., Consumer Guide to Homeowner and Tenant Insurance* (2008), available at <http://insurance.oregon.gov/homeowner-renter/home.html>.

Civil case highlights issues of personal dignity in care of elder

By David Loftus

As more of the “boomer” generation moves into the twilight of their lives, one of the issues that elder law attorneys will increasingly face is capacity: what are the special considerations in suing for damages to an elder who cannot recall what happened and who is unable to testify about the effects?

A recent case in the Multnomah County Circuit, *Stephan v. Avamere Lake Oswego Operations Investors LLC*, still pending possible appeal by the defendant, highlights this issue.

On May 12, 2008, the jury returned a verdict that awarded more than \$900,000 in economic, non-economic, and punitive damages to the plaintiff.

Defendant Avamere is the corporate owner of an Alzheimer’s care center in Lake Oswego known as The Pearl at Kruse Way. Elvera Stephan, 86, had been moved into the facility only five days before the incident, which occurred on the night of April 13, 2006.

At about 10 p.m., Stephan showed symptoms of confusion, anxiety, and agitation, related Scott Kocher of Vangelisti Kocher LLP, who represented plaintiff. “She reportedly thought that people were stealing her car keys or were out to get her; she was confused and she was wandering around the unit, and those symptoms continued until about 11:30 or 11:40, when the Lake Oswego Police arrived.”

The one registered nurse on site was associated more with the skilled nursing half of the facility, not the locked Alzheimer’s wing, so caregiving staff reported the situation to an off-site nurse. That nurse spoke by phone to the on-site nurse, who eventually called Stephan’s doctor. He ordered the client transported to a hospital for evaluation.

There was a “significant” question at trial as to whether the on-site nurse had gone personally to the memory wing and made a face-to-face assessment of Stephan, or had only second-hand information when she made the calls to the doctor and 9-1-1. The nurse testified at trial that she had done a face-to-face

assessment, but there was other evidence from which the jury may have concluded that this testimony was not entirely credible.

“The jury heard the 9-1-1 call, in which the nurse described Mrs. Stephan as extremely agitated, extremely aggressive, threatening to staff and other residents,” Kocher said. “The 9-1-1 operator sent the police to the facility and they arrived there first.”

Surveillance video was introduced into evidence that showed Stephan wandering around before the police arrived. As *The Oregonian* reported in a post-verdict story on May 13, 2008, “... jurors said she didn’t look dangerous” on the surveillance video. “She was gesturing with a telephone receiver but didn’t try to hit anyone with it.”

Then, said Kocher, the video showed Stephan “restrained in police handcuffs on the floor, face down, with her hands handcuffed behind her back, for approximately six minutes” After that, the handcuffs were removed and she was strapped to a gurney and taken to the hospital.

Stephan was at the hospital for three hours and returned to The Pearl about 3 a.m.

Aside from the assessment and her treatment on the night of the incident, plaintiff’s counsel also raised an issue of the facility’s conduct in the days that followed.

Stephan’s son, who lives in the same town, received a voice mail message after his mother had been transported to the hospital, and he discussed the matter with facility staff the next morning, but on neither occasion did staff at the Pearl disclose the police involvement.

“The family didn’t find out about police involvement until six days later, and they found out from family members of another resident rather than from the facility,” Kocher said.

Stephan had moderate Alzheimer’s at the time of the injury, and by the time of trial, her condition had developed to advanced Alzheimer’s so she was not involved in trial preparation and could not testify.



Scott Kocher of Vangelisti Kocher LLP, who represented the plaintiff in *Stephan v. Avamere*, spoke with the Elder Law Newsletter about the case.

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Civil case highlights issues of personal dignity

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"The case that we presented stressed the vulnerability of elders in a long term care facility – the importance of accountability when an elder is injured or suffers emotional harm or a loss of dignity."

The defense focused heavily on the alleged inability of Mrs. Stephan to remember what had happened to her when she was handcuffed and restrained on the floor of the defendant's facility. The defendant brought a medical doctor to describe for the jury the elder's inability to remember what had happened.

Thus, said Kocher, "The jury had to decide whether emotional injuries or indignities suffered by an elderly person who has memory loss are somehow less important or less significant than injuries suffered by a younger, healthier person."

In order to make a case for a victim with diminished capacity, litigants have a couple of options, "but the most common one is to have an appropriate person – in this case, the son – appointed guardian ad litem. Procedurally, it's a fairly simple process." Once that was accomplished in November 2006, a complaint was filed.

So how did plaintiff respond to defense's assertion that harm was negligible-to-nonexistent if the victim couldn't remember it?

"The case that we presented stressed the vulnerability of elders in a long term care facility – the importance of accountability when an elder is injured or suffers emotional harm or a loss of dignity."

The importance of protecting the individual's dignity is stressed not only in the federal nursing home's resident bill of rights,¹ but the state of Oregon's resident's bill of rights.²

"Dignity is difficult to define as a legal concept but it's easy for human beings to understand when we see it or when we see it being taken from someone," Kocher said. "And in our case, with the benefit of video showing the events that occurred on April 13, it wasn't necessary for lawyers for either side to talk a lot about what dignity means or doesn't mean."

Avamere's counsel conceded that the incident looked bad, but if the victim didn't remember what had happened, she couldn't have experienced a loss of dignity. Asked how difficult it would have been to make plaintiff's case without the video, Kocher said: "Our firm reviews dozens if not hundreds of potential cases each year. This is one of very few cases

that we have taken on as a firm, because these cases are generally very difficult. The surveillance video was extremely important to protect our client from defenses that could otherwise have made the jury's job very difficult."

The defense also argued that at the time of Stephan's admittance to The Pearl, her family might not have provided sufficient information to guide the facility in responding to her behavior on April 13.

Kocher said, "Before Mrs. Stephan moved in, the facility collected information from Mrs. Stephan's daughter who lives in Virginia, who was visiting to help Mrs. Stephan move to the new facility, and they collected information from the assisted living facility that Mrs. Stephan was moving from."

Defense attorney Kelly A. Giampa was quoted in *The Oregonian* as telling the jury, "Maybe [the daughter] was afraid the Pearl wouldn't take [her mother] if they knew she had aggression." Giampa said the elderly woman should have been on anti-psychotic medication.

"So the jury had the opportunity to consider whether Mrs. Stephan's children had some additional obligations to provide information," Kocher said. "In fact, both of Mrs. Stephan's children were on the verdict form for comparative fault purposes, and the jury assigned no comparative fault to the family."

A complication in the procedure occurred when Mrs. Stephan passed away after the first four days of trial. This caused the claim to pass to her estate. Mrs. Stephan's daughter was appointed personal representative of the estate, the caption altered, and the claim went forward. Unlike what can happen in other jurisdictions, it was possible in Multnomah County to do that promptly, with minimal disruption to the trial process.

Kocher said the claim and plaintiff's case were largely unaffected by Mrs. Stephan's death; the caption was changed to reflect the daughter's role, and a claim for attorney fees was added, under the survival statute – "a claim that is sometimes overlooked by lawyers."

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Civil case highlights issues of personal dignity

Continued from page 18

In the judgment of most elder advocates, conditions in the nursing home industry have improved considerably in recent decades following the implementation of the Nursing Home Reform Act of 1987.³ Congress adopted the legislation in response to a 1986 Institute of Medicine report that documented the extent of the problems in nursing homes. The Nursing Home Reform Act of 1987 guarantees a number of rights for residents, including the right to be free from physical and chemical restraints except in specific situations.

Bob Joondeph, executive director of Disability Rights Oregon (formerly Oregon Advocacy Center), says, "Oregon continues to have a progressive perspective on keeping people in a community-based environment – and yet financial demands are increasing. Medicaid and Medicare are becoming tighter in what they're willing to reimburse, and there's a lack of development of residential placements for people with dementia."

Kocher sees at least one area where further legislation might be called for. "The fines that you would typically see from the Department of Human Services for violations that involve significant injuries to an elder in a facility or risk of serious injuries to an elder often are in the range of \$200 to \$500. Those fines are far too low to have any meaningful impact or incentive on multi-state for-profit corporations that are running elder care facilities."

Under ORS 441.715 and 441.995, the maximum civil penalty in many situations is \$500 per violation. The maximum civil penalty for abuse resulting in serious injury or death is \$1,000 per violation with an overall limit of \$6,000 on the total amount of civil penalties that the Department of Human Services can assess against a nursing facility for a 90-day period.

On August 1, 2006, a state investigator found the Avamere nursing home at fault for failing to assess the woman's condition and "intervene appropriately and in a timely manner," and DHS fined the facility \$300.

Nearly two years later, a jury voted 11-1 that Avamere had acted with malice or reckless indifference and awarded \$4,200 in economic damages (the cost of the victim's shared room for a month), \$400,000 in non-economic damages, and \$500,000 in punitive damages. (Under ORS 31.735(1)(b), 60 percent of the punitive award goes to the state crime victims assistance fund.)

"Dignity is eternal," Kocher had told the jury in closing argument. "If dignity were not eternal, we would not have cemeteries. Just because she had Alzheimer's disease or memory loss ... does that mean she's not entitled to the same kind of dignity as you or I?"

The Oregonian quoted the lead juror as saying that if a patient with memory loss couldn't experience a loss of dignity, "that gives carte blanche for elder-care facilities to do anything."

Jim Stephan, the son who had filed suit, urged others to research a facility thoroughly before putting a parent in Alzheimer's care, and said that he had been too impressed by The Pearl's new building and the claims of its marketing department.

"It's a horrible thing, what happened to my mother," he was quoted by *The Oregonian* as saying. "If I save one person's mother from this experience, I'll be happy." ■

Footnotes

1. 42 USC 1396rc(1)(A); 42 CFR 483.10
2. ORS 441.605; OAR 411-85-0310
3. The Nursing Home Reform Act is available online at www.aarp.org/research/legispolit/legislation/aresearch-import-687-FS84.html



David Loftus is a Portland writer, actor, and law-office administrator. His Web site is www.david-loftus.com.

ABA takes up elder causes

The American Bar Association held its 69th Midyear Meeting in Los Angeles February 6-11, 2008. The House of Delegates urged all American jurisdictions and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation. It also urged governments to develop and assess innovative programs to provide a reasonable and fair solution to long term care financing.

Scenes from the 2008 unCLE program



UnCLE participants from around the state use the breaks between sessions to continue discussions and informally share ideas. Mark Williams of Eugene (right) chairs the OSB Elder Law Section CLE Subcommittee and is the moving force behind the popular unCLE programs.



Eugene attorneys Alice Plymell and Steve Skipton (seated) and Portland attorney Steve Owen (standing) prepare for the session on Contested Protective Proceedings.

The session on Trust Review and Administration: Tax Issues



Brian Haggerty of Newport brought along his copy of the Internal Revenue Code to help facilitate the session.



Rick Mills of Salem makes a good point.

Photos courtesy of Penny Davis

Resources for elder law attorneys

Upcoming events

2008 NAELA Special Needs UnProgram

August 8-10, 2008

Minneapolis, Minnesota

www.naela.org/events.aspx

Estate Planning for Protected Persons and People with Disabilities

Oregon Law Institute seminar

October 24, 2008

Oregon Convention Center, Portland

<http://law.lclark.edu/org/oli>

2008 NAELA Advanced Elder Law Institute

October 23-26, 2008

Kansas City, Missouri

www.naela.org/events.aspx

National Aging and Law Conference 2008

Setting the Agenda: Advocating for Elders after the Election

December 3-6, 2008

Arlington, Virginia

www.abanet.org/aging/home.html

Web sites

Elder Law Section Web site

www.osbar.org/sections/elder/elderlaw.html

The Web site has useful links for elder law practitioners, past issues of the *Elder Law Newsletter*, and current elder law numbers.

Newsletter Board

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ABA CLE Podcast: Ethical Issues to Consider when Providing Legal Services to Older Clients

www.abanet.org/cle/podcast/f08eicpod-reg.html

Difficult professional ethical issues frequently arise in providing legal services to elderly clients, especially in the context of their family network. Using an audience-polling system and a series of thought-provoking vignettes, this program examines key ethical issues in elder law.

Network of Care

<http://oregon.networkofcare.org>

Comprehensive database of county-by-county community resources for elders, people with disabilities, and their families, caregivers, and service providers. Articles about medical, financial, legal, long term care, and caregiving issues. Services directory for in-home care, housekeeping, transportation, assistive devices, respite care, medical help, legal advice, housing, mental-health care, support, groups, etc. Includes both free and fee-for-service options. Web site is joint project of Oregon Association of Area Agencies in Aging and Department of Human Services.

Oregon Home Care Commission

<https://www.or-hcc.org>

Registry of qualified home care workers.

Elder Law Section electronic discussion list

All members of the Elder Law Section are automatically signed up on the list, but your participation is not mandatory.

Send a message to all members of the Elder Law Section distribution list by addressing it to: eldlaw@lists.osbar.org. Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: eldlaw@lists.osbar.org, or you can choose "Reply to all." ■