

Oregon
State
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CLE
Seminars

Your Time to Shine: An Oregon Lawyer's Duty to Report Elder and Child Abuse



Friday, March 17, 2023
Noon–1 p.m.

1 Abuse Reporting credit
(ID 98101)

YOUR TIME TO SHINE: AN OREGON LAWYER'S DUTY TO REPORT ELDER AND CHILD ABUSE

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TABLE OF CONTENTS

Schedule.	v
Faculty.	v
A. Child Abuse Reporting	1
1. The Duty	1
2. Exceptions	5
3. Your Employer Is Irrelevant	6
4. If You Don't Do It, You Will Be Penalized . . . and You Might Face a Grievance.	7
5. What Constitutes Abuse?	8
6. Making the Report	9
7. No One Will Know, but They Probably Will Know	10
8. Don't Use This as a Tactic	11
9. Don't Worry About Honest Mistakes	12
10. You Are a Reporter, Not a "Convictor"	12
B. Elder Abuse Reporting	14
1. How the Law Is Built	14
2. What Constitutes "Abuse"?	15
3. The Breadth of the Rule	16
4. Exceptions	16
5. Confidentiality	17
"Elder Abuse: Lawyers' New Mandatory Reporting Requirement," by Amber Hollister, Oregon State Bar <i>Bulletin</i>, January 2015	19

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SCHEDULE

Noon **Your Time to Shine: An Oregon Lawyer's Duty to Report Elder and Child Abuse (AR23)**

Receive a detailed review of:

- ◆ Statistics and policy reasons for the duty
- ◆ The obligation and who is responsible
- ◆ Reporting, including the "immediate" requirement
- ◆ Exceptions to reporting

See how this duty can be an empowering act of service.

1:00 **Adjourn**

FACULTY

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Oregon Child & Elder Abuse Reporting Program Written Materials

Oregon law makes lawyers mandatory reporters for both child abuse and elder abuse. There are two separate statutes that govern those requirements, and we're going to review them both in this program. Be careful as you evaluate the two laws. They seem very similar in many respects, and they are. But they're not identical and it's important to be aware of the differences.

A. CHILD ABUSE REPORTING

The mandatory duty to report child abuse is set forth in ORS 419B.005 et seq. The full law can be found at this link: https://www.oregonlegislature.gov/bills_laws/ors/ors419B.html.

1. The Duty

ORS 419B.010 establishes the duty to report child abuse. Let's take a look at this section paragraph-by-paragraph and take each section apart. There are 5 total section in this part of the statute.

419B.010 Duty of officials to report child abuse; exceptions; penalty.

(1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made in the manner required in ORS 419B.015. Nothing contained in ORS 40.225 to 40.295 or 419B.234 (6) affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy, attorney or guardian ad litem appointed under ORS 419B.231 is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295 or 419B.234 (6). An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

The primary duty is set forth here in subsection (1), and as you can see from the first sentence, there is a lot packed into that first sentence. First off, what is a “public or private official”? These are the people who have been deemed to be mandatory reporters. That includes a whole host of professionals, including lawyers. There’s a separate section that defines exactly who falls into that category and we’re going to get into this details later. But for now, just know that lawyers are included in that category.

The duty is broad and you need to keep that in mind when you read the requirement. For instance, note that the law applies to “any” official, and “any child”. Thus, it applies to any lawyer. One reason I point that out is because I don’t want you to feel as though this only applies to lawyers who recognize abuse with someone who is their client, or related to a client. Yes, those individuals would be covered but the law, but as attorneys we are trained to believe that the duties we owe are restricted to those we represent. Maybe it’s because still have a privity requirement. Whatever. But remember that this is not the ethics code. There is no privity requirement. You don’t need to be the lawyer of the person you suspect is being abuse. You need to look at this requirement broadly.

It also doesn’t matter where you work or whom you work for. There is no distinction about whether you are a lawyer who works for the government, if you’re in private practice, or even if you don’t have an active practice at all. The rule simply imposes the obligation to report on a person who is an “attorney.” 419B.005(5)(m).

The statute also doesn’t care about the specifics of the child who is subject to the abuse. The requirement is to report abuse that might be happening to “any child” according to the law.

There is a specific state of mind requirement in the law. According to 419B.010, you must have “reasonable cause” to believe that there was abuse. Deputy General Counsel for the Oregon State Bar Amber Hollister explained this standard in an article she wrote¹ as follows: “Reasonable cause is not defined by the law, but has been interpreted by Oregon courts in an

¹ <https://www.courts.oregon.gov/programs/jcip/EducationMaterials/Documents/ChildAbuseReportQA.pdf>, last checked on February 19, 2021.

analogous child abuse reporting context to mean reasonable suspicion. A lawyer has reasonable suspicion to believe elder abuse has occurred if the lawyer can articulate facts, based on the totality of the circumstances, that would lead a reasonable person to believe that the abuse occurred. This means that the evidentiary standard for reporting elder abuse is relatively low. Because probable cause is not required, a lawyer need not believe it is more likely than not that abuse occurred to trigger reporting.”²

Keep in mind that the duty to report doesn’t only apply to the victim of the abuse. If you come into contact with a suspected abuser, you’re required to report them as well. That also gives us a chance to review a term that’s important in this section. What does it mean in section 419B.010 when it says that your duty to report applies to anyone with whom you “come in contact”?

Remember that you need to look at this requirement broadly. Coming into contact with someone for the purposes of this requirement isn’t necessarily restricted to seeing them in person. According to the Oregon Deputy Attorney General, “...the statute does not appear to require reporting only when the lawyer learns of the abuse directly from the child or abuser. Reliable second- or third-hand information may provide the reasonable cause to believe that abuse has occurred; reporting would then be required if the lawyer had come in contact with the abuser or the child. For example, if a neighbor tells a lawyer that she heard from another neighbor that a child living down the street (with whom the lawyer has occasional contact) appears to have been abused, the lawyer may have reasonable cause to believe that abuse occurred if the lawyer believes the neighbors are reliable sources of information.”³

The indirect nature of the “comes into contact” section is particularly important in these days of distance communication. Even after the coronavirus lockdowns subside, there is likely

² Elder Abuse: Lawyers' New Mandatory Reporting Requirement, By Amber Hollister Reprinted with permission of the author. Originally printed in the Oregon State Bar Bulletin, January 2015 online edition, found at <https://www.osbar.org/publications/bulletin/15jan/barcounsel.html> and last checked October 24, 2016.

³ <https://www.courts.oregon.gov/programs/jcip/EducationMaterials/Documents/ChildAbuseReportQA.pdf>, last checked 2/18/2021.

to continue to be a lot of communication on remote platforms. Some people will still want to avoid some personal contact, other people will continue to appreciate the ease of communicating with others via Zoom and similar tools. As a result, it is likely that lawyers will continue to come into contact with other people through those tools. Note that such interaction is almost certainly going to constitute the type of contact contemplated by the reporting statute.

There is a bit of a timing requirement in this section as well. Notice that the report needs to be made “immediately.” As with every such phrase it’s likely that the determination of whether one actually reported something immediately will depend on the circumstances. But consider the definition of the word from the Cambridge Dictionary : “now or without waiting or thinking.”⁴ That gives some important insight. Do not sit on your hands when you suspect this abuse. Don’t delay, “immediately” means do it right away. The temporal nature of the obligation was inserted there for a reason, so be guided accordingly.

Since I just mentioned an issue of timing, let’s continue with that idea. When is the time to report? Once again, I want you to think broad. The answer is, always. Notice in 419B.010 there is no time limit of any sort to this duty. As a lawyer, you have a duty to report child abuse per the statute...well...always. It doesn’t apply to the time that you’re representing someone, it’s not tied to the timing of any court matter or transaction. You have a duty to report and there is absolutely no time restriction whatsoever. We get some good direction in this regard from Oregon State University. They state on their website that, “If you reasonably believe that another person with whom you come in contact abused a child in the past, your reporting obligation has no time limit and you are to contact DHS or law enforcement.”⁵

⁴ <https://dictionary.cambridge.org/us/dictionary/english/immediately>, last checked 2/18/2021.

⁵ <http://hr.oregonstate.edu/policies-procedures/faq/10-what-if-i-learn-abuse-long-time-ago>, last checked by the author on August 17, 2017.

2. Exceptions

There are exceptions to the reporting requirement, some of which are noted as formal exceptions and others of which are built into the rules. For instance, there is an exception for privilege. The rule reads:

419B.010(1) ...Nothing contained in ORS 40.225 (Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges) or 419B.234 (Qualifications) (6) affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy, attorney or guardian ad litem appointed under ORS 419B.231 (Appointment) is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 (Rule 503. Lawyer-client privilege) to 40.295 (Rule 514. Effect on existing privileges) or 419B.234 (Qualifications) (6).

An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client. *[Emphasis added]*

I broke this section into two parts, even though the law, as written, doesn't include that spacing. I did it that way because I want you to read these two sections so you can fully appreciate the details of this exception.

In the first paragraph (as I've broken them apart above) you can see the privilege exception. A lawyer doesn't have to report information that they heard from someone that communication is privileged. thus, there are some realities that must have existed in order to make claim to this exception. The "information communicated by a person" must have come from your client. In addition, all of the other specifics of privilege must have been fulfilled. it had to be legal advice, kept confidential, etc., etc.

The second paragraph, however, goes beyond the technicalities of privilege. A lawyer is also not required to report if the disclosure will be detrimental to your client. Notice a few key parts of this sentence: the information you must have learned must have been:

...communicated to the attorney

...in the course of representing a client

So the information that you learned which gave rise to the reporting obligation only fits into the exception here if it was something said to you, personally. It could not have been something told to another person that maybe you overheard. It couldn't be information that was written to someone else that you read over someone's shoulder, perhaps. It is limited to information that was actually communicated to you. This narrows the exception. Also, that information had to have been communicated to you in the course of representing your client. If it was something that you learned outside of the representation, then it would not qualify for the exception. Only after you've jumped through those hoops can you evaluate the "detrimental" aspect of the exception.

There are more exceptions contained in the following subsection 419B.010(2), which reads:

(2) Notwithstanding subsection (1) of this section, a report need not be made under this section if the public or private official acquires information relating to abuse by reason of a report made under this section, or by reason of a proceeding arising out of a report made under this section, and the public or private official reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.

Thus, if the source of your information is a report that someone made under this section you reasonably believe that the authorities know about it already, you don't have to report. Basically, this is a detailed way of saying that re-reporting isn't necessary, or duplicative reporting isn't required.

3. Your employer is irrelevant

This section follows up on a point I made earlier about the breadth of the mandate to report. Don't get lulled into any kind of belief that you are exempt from these requirements because you are not a "public official" in the commonly used sense of the term. That phrase is a term of art in this context. You are defined to be such an official simply by the fact that you are a lawyer. Any kind of lawyer, working for anyone in any capacity. The law reads:

419B.010(3) The duty to report under this section is personal to the public or private official alone, regardless of whether the official is employed by, a volunteer of or a representative or agent for any type of entity or organization that employs persons or uses persons as volunteers who are public or private officials in its operations.

(4) The duty to report under this section exists regardless of whether the entity or organization that employs the public or private official or uses the official as a volunteer has its own procedures or policies for reporting abuse internally within the entity or organization.

Another interesting point— my reading of the law doesn't even distinguish whether you are a licensed lawyer but don't practice, or even if you are inactive. You are an attorney, you must report.

4. If you don't do it, you will be penalized...and you might face a grievance

The ramifications of failing to fulfill your obligation under the child abuse reporting law are severe:

419B.010(5) A person who violates subsection (1) of this section commits a Class A violation. Prosecution under this subsection shall be commenced at any time within 18 months after commission of the offense. [citations omitted]

There's also an ethical connection to consider in that regard. I'm not sure if violating that law would be considered a "crime," but if it is, then you've got a problem with the ethics rule on Misconduct.⁶ The key section states:

Oregon Rules of Professional Conduct

Rule 8.4 Misconduct

(a) It is professional misconduct for a lawyer to:

...(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

I understand that a "Class A violation" isn't technically considered a crime, but that doesn't mean you're in the clear. Even if it's not a crime, you'll most likely still have an ethics violation to face. I'm quite certain that the failure to report child abuse under the law would be

⁶ I believe that a Class A violation is a misdemeanor, though I'm not entirely certain. I've reached out to Oregon Bar Counsel for clarification on this and I have not yet received a reply. I will clarify that statement in the live program, if there is a reply provided.

considered, “conduct that is prejudicial to the administration of justice” and thus violate another section on the rule against Misconduct, specifically Rule 8.4(a)(4).

5. What constitutes abuse?

A big part of what will trigger the duty to report trial abuse is understanding exactly what constitutes “abuse.” That is set forth in the definitional section of the rule, and it’s quite detailed. Just to give you a heads up, this is one of the places that we’re going to see some important differences when we discuss elder abuse below. It’s important that you actually read the section below. That’s because often people think that abuse means physical abuse. Of course, that is included, but notice from the statute that abuse does’t *only* constitute physical abuse. Among other things, the definition includes mental abuse, sexual exploitation, and exposure to drugs.

419B.005 Definitions. As used in ORS 419B.005 to 419B.050, unless the context requires otherwise:

(1)(a) “Abuse” means:

(A) Any assault, as defined in ORS chapter 163, of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury.

(B) Any mental injury to a child, which shall include only observable and substantial impairment of the child’s mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child.

(C) Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual penetration and incest, as those acts are described in ORS chapter 163.

(D) Sexual abuse, as described in ORS chapter 163.

(E) Sexual exploitation, including but not limited to:

(i) Contributing to the sexual delinquency of a minor, as defined in ORS chapter 163, and any other conduct which allows, employs, authorizes, permits, induces or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording or other exhibition which, in whole or in part, depicts sexual conduct or contact, as defined in ORS 167.002 or described in ORS 163.665 and 163.670, sexual abuse involving a child or rape of a child, but not including any conduct which is part of any investigation conducted pursuant to ORS 419B.020 or which is designed to serve educational or other legitimate purposes; and

(ii) Allowing, permitting, encouraging or hiring a child to engage in prostitution as described in ORS 167.007 or a commercial sex act as defined in ORS 163.266, to purchase sex with a minor as described in ORS 163.413 or to engage in commercial sexual solicitation as described in ORS 167.008.

(F) Negligent treatment or maltreatment of a child, including but not limited to the failure to provide adequate food, clothing, shelter or medical care that is likely to endanger the health or welfare of the child.

(G) Threatened harm to a child, which means subjecting a child to a substantial risk of harm to the child's health or welfare.

(H) Buying or selling a person under 18 years of age as described in ORS 163.537.

(I) Permitting a person under 18 years of age to enter or remain in or upon premises where methamphetamines are being manufactured.

(J) Unlawful exposure to a controlled substance, as defined in ORS 475.005, or to the unlawful manufacturing of a cannabinoid extract, as defined in ORS 475B.015, that subjects a child to a substantial risk of harm to the child's health or safety.

(b) "Abuse" does not include reasonable discipline unless the discipline results in one of the conditions described in paragraph (a) of this subsection.

6. Making the report

I think it's worth printing a part of the text of the statute that relates to making the actual required report. The first part of this section is the important stuff — the rest talks about the process the state department's bus go through when receiving a report. But we care most about the first part:

ORS 419B.015 (*in part*)

Report form and content; notice. (1)(a) A person making a report of child abuse, whether the report is made voluntarily or is required by ORS 419B.010, shall make an oral report by telephone or otherwise to the local office of the Department of Human Services, to the designee of the department or to a law enforcement agency within the county where the person making the report is located at the time of the contact. The report shall contain, if known, the names and addresses of the child and the parents of the child or other persons responsible for care of the child, the child's age, the nature and extent of the abuse, including any evidence of previous abuse, the explanation given for the abuse and any other information that the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

I want you to notice one important aspect of it. 419B.015(1) requires that an oral report be made by telephone (or otherwise) to the local office of the Department of Human Services. There is also a specific listing of the details that must be included in that report. The rest of the rule basically explains what happens after the report is made, but that first section is critical for a lawyer who is required to report per the law. Also, here's what might be a helpful phone number: Child Abuse Hotline at 1-855-503-SAFE (7233)

7. No one will know, but they probably will know.

The statute says that the name of the person who makes the report will not be revealed. Specifically, see ORS 419B.015(3) states:

(a) When a report alleging that a child or ward in substitute care may have been subjected to abuse is received by the department, the department shall notify the attorney for the child or ward, the child's or ward's court appointed special advocate, the parents of the child or ward and any attorney representing a parent of the child or ward that a report has been received.

(b) The name and address of and other identifying information about the person who made the report may not be disclosed under this subsection. Any person or entity to whom notification is made under this subsection may not release any information not authorized by this subsection...

In addition, the Deputy Attorney General points out:

Notwithstanding Oregon's public records law, "reports and records compiled under [the mandatory child abuse reporting law] are confidential and are not accessible for public inspection." ORS 419B.035. DHS is required to make the reports available in some circumstances and permitted to do so in other circumstances. [citation omitted]. In either case, however, the name, address or other identifying information about the reporter cannot be disclosed except by court order. ORS 419B.035(3). Recipients of records under DHS's mandatory or permissive disclosure authority are also required to maintain the confidentiality of the records and commit a Class A violation for failure to do so.⁷

So why do I say that no one will know, but they probably will know? First, because the statute says they "may not disclosed" the identifying information about the person who made the report. The word "may" is often considered to be discretionary. So while the "may" not reveal it... I guess it's possible that they "may" reveal it. But the real reason I think this section is elusive is because if the abuse becomes actionable, there is a decent chance that the reporter will have to testify at some sort of trial or hearing. So even if you are not identified in the in the department notifications, you're not guaranteed that your identity will ultimately be kept secret.

One other thing to keep in mind on the confidentiality tip: it's probably not what the drafters of the law wanted. Again, let's review the words of the Oregon Deputy AG:

⁷ <https://www.courts.oregon.gov/programs/jcip/EducationMaterials/Documents/ChildAbuseReportQA.pdf>, last checked on February 19, 2021.

In addition, Confidentiality may be enhanced by reporting anonymously. While there is no requirement in the statute that the reporter identify him- or herself, it is also clear that the statute does not contemplate anonymous reporting and it is likely not preferred by DHS. Law enforcement and DHS will accept anonymous reports, however. Because of the liability that can result from not reporting, lawyers should weigh the desire for confidentiality with the possible need for proof that a report was in fact made as required.⁸

None of this should really matter, though. Your duty to report exists regardless of whether your identity will be revealed. I only cover it because it's a frequently asked question.

8. Don't use this as a tactic

Let's be frank about something. Sometimes lawyers get pretty zealous on behalf of a client. And how many times have you seen a lawyer take an action that crosses the ethical line, all in the name of being a zealous advocate? Too many times to count. This child abuse reporting obligation is tailor made for that over-zealous lawyer. What I mean by that is, you can envision some lawyer using the filing of a false report as a tactic to to pressure on someone in an effort to help their client. Well the drafters of the law thought about that and they inserted a section to deal with it. Section 419B.016 addresses false reports. And you'll notice that making a false reports of child abuse is a Class A violation.

419B.016(1) A person commits the offense of making a false report of child abuse if, with the intent to influence a custody, parenting time, visitation or child support decision, the person:

- (a) Makes a false report of child abuse to the Department of Human Services or a law enforcement agency, knowing that the report is false; or
 - (b) With the intent that a public or private official make a report of child abuse to the Department of Human Services or a law enforcement agency, makes a false report of child abuse to the public or private official, knowing that the report is false.
- (2) Making a false report of child abuse is a Class A violation. [2011 c.606 §2]

⁸ <https://www.courts.oregon.gov/programs/jcip/EducationMaterials/Documents/ChildAbuseReportQA.pdf>, last checked on February 19, 2021.

9. Don't worry about honest mistakes

Even if one accepts this obligation in a noble manner, it can still feel daunting. It's a serious situation and it can even be scary. I mean, what happens if you report someone, but you're wrong? That's where section 419B.025 comes in:

419B:025 Anyone participating in good faith in the making of a report of child abuse and who has reasonable grounds for the making thereof shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making or content of such report. Any such participant shall have the same immunity with respect to participating in any judicial proceeding resulting from such report. [1993 c.546 §17

It appears that if you do your best, you're going to be covered. Of course, the section requires that you make the report in good faith and have reasonable grounds for the report, but I think it's obvious that those would be requirements. Here's a tip: it might be a good idea to document the process that leads up to you making the report. Write one or several memos to the file where you set forth why you believe that you have reasonable grounds for making the report. Even if you think it's a lock-tight situation, it's probably still a good idea to create a paper trail. That way, if there's ever a question about whether you should be entitled to immunity, you'll have the documentation to back it up.

10. You are a reporter, not a "convictor"

There's one important distinction that I think needs to be made for lawyers in particular. Remember your capacity in this context is that of a "reporter" not a trier of fact. You are not determining whether there is enough evidence to convict someone. You're not determining whether you reasonably believe that they are guilty of committing the act. The standard is that you must have reasonable cause to believe that there has been abuse, and then your only job is to report. I think it's important to make that distinction because we are not usually in that situation. The only time lawyers are ever really in a situation to report someone, is when we

must report ethical misconduct under Rule 8.3. In those situations the rules usually require a greater “knowledge” requirement on the lawyer’s part. We need to review whether we believe that there was a violation of the Rules of Professional Conduct. Here it’s different. Here we only need reasonable cause to believe, and once we have that we make the report and the rest is out of our hands. Someone else investigates and prosecutes. So remember, you’re a *reporter*, not a *convicter*.

B. ELDER ABUSE REPORTING

The State of Oregon has long recognized the fact that Elder Abuse occurs and, maybe more importantly, often goes unreported. To remedy that situation, years ago the legislature passed ORS Chapter 124 (and other related laws) which created a mandatory reporting obligation among certain professions. In January 2015 the State of Oregon changed the law to include lawyers as a mandatory reporter.

The duty to report Elder Abuse is similar to the duty to report Child abuse in many ways. Indeed, as you read through the statutes you'll see a lot of similarities, but there are some key differences. In the discussion below, make special note of the definitions of "abuse."

To give you a short, valuable explanation of the lawyer's obligation for reporting Elder Abuse I've enclosed a nice article written by Amber Hollister, Deputy General Counsel for the Oregon State Bar (that article has been reprinted with permission). There are some additional concerns about which lawyers should be aware and I've covered those issues in this document.

1. How the law is built

There is an important structural aspect to the way the law is written that lawyers need to understand. The general duty to report is set forth in section 124.060. It states:

Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact has suffered abuse, or that any person with whom the official comes in contact has abused a person 65 years of age or older, shall report or cause a report to be made in the manner required in ORS 124.065. Nothing contained in ORS 40.225 to 40.295 affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295. An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

Here is where you notice a lot of similarities with the child abuse statute above. For instance: The individuals required to report are “public or private officials”; the standard is still having “reasonable cause to believe” that the abuse occurred; there is the “comes into contact” standard; and the requirement extends to reporting the abuse and the abuser. But one of the key differences in this first section is the definition of the victim. In this context we’re talking about anyone who is 65 years of age or older. The other big difference between the two contexts is the definition of abuse.

2. What constitutes “abuse”?

Similar to many laws, a bunch of the terms found in that general obligation are defined elsewhere. Specifically, there is a definitional section that comes before the statement of the obligation in section 124.050. Read that carefully, however, because sometimes there are definitions within the definitions. For instance, the word “abuse” is contained in the general obligation of section 124.060. See 124.050(1) for that definition. However, there are several terms contained in the definition of “abuse” that are further defined in the code. Thus, you should peek further at terms like “financial exploitation” 124.050(4), “neglect” 124.050(7), sexual abuse, 124.050(11) and “verbal abuse” 124.050(13). In Deputy AG Hollister’s paper below she expands on the financial exploitation concept. Go review it.

Because of the detailed definitions, you need to make sure that you read the entire definitional section. That’s because if you find yourself evaluating your obligation to report you might find that there is overlap. For instance, harassment is referenced in section 124.050(11)(a)(B) and also in 124.050(13)(b). If you don’t read the whole section you might not have realized that there are two areas that deal with that topic.

3. The breadth of the rule

Something to keep in mind whenever you are evaluating your obligations under Oregon's mandatory elder abuse reporting requirement is that the rules are quite broad. And, I would submit, they are intended to be read and applied that way.

For instance, there is no restriction on the dates and times that this obligation applies. Rather, you are obligated to make the required report all day, every day. It's a duty that runs 24/7...365 days a year. That makes sense, of course, since the information we receive that might trigger the reporting requirement could be provided to us at any time. A temporal restriction of any kind would surely be a victory of form over substance.

Another example of the breadth of the obligation can be seen in the definitional section alluded to above (ORS 124.050). When you review that part of the rule, take a special look at how much depth there is to the definitions of these terms. It applies that the rules are designed to capture as much bad conduct as possible and get that bad conduct into the hands of investigators.

4. Exceptions

One of the important parts of the rule that isn't covered very deeply in the attached article from the Oregon Bar Deputy Counsel are the exceptions to the reporting requirement that apply to lawyers. If you read section 125.060 above, you'll notice that the last two sentences create two exceptions to the lawyer's duty to report. Specifically, an attorney is not required to report if the information we learned is privileged under ORS 40.255 (Rule 503 Lawyer-client privilege) to 40.295 (Rule 514 , Effect on existing privileges). ORS 124.060. Furthermore, an attorney is not required to report if the disclosure of the information communicated to the lawyer would be detrimental to the client. ORS 124.060. Of course, that's just a general restatement of

the exceptions, so make sure to read the full text of the law if you're considering your actual responsibilities in a real-life situation.

What's interesting about those exceptions is the idea that both of those exceptions strike at the heart of the lawyer/client relationship. The idea that we are not required to reveal privileged information allows the lawyer to keep the sacred bond of trust between lawyer and client intact. The "detrimental" exception is key as well. We may, for instance, be representing a client in a matter where the revelation of this information might hurt their position. If that were the case, then the law gives us the ability to avoid causing that damage.

5. Confidentiality

Usually when I discuss issues where there is a question about an attorney's responsibility to disclose information, there is a question that eventually pops up: What about confidentiality? Does our duty to keep our client's information confidential conflict with the requirements of ORS 124.060? Incidentally, this concept would apply to our duty to report child abuse as well.

You might recall that rule 1.6 governs confidentiality. In Oregon that rule states (in part):

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules;

It does not appear that making the report required by ORS 1240.060 would violate confidentiality. There are two possible scenarios. First, as mentioned in the attached article by the Deputy Bar Counsel, there could be a situation where your client could give you informed consent to report the matter. If that consent was received, it would be consistent with Rule 1.6(a) and you'd be able to report without violating confidentiality. Quite frankly, that seems a little ridiculous to me. The more effective section of the rule to rely upon, it appears, is Rule 1.6(b)(5).

Rule 1.6(b) is the part of the rule that grants lawyers an exception to the confidentiality requirement. 1.6(b)(5) in particular gives the lawyer the authority to reveal information "to comply with other law..." Given that ORS 124.060 imposes a mandatory duty to report, it appears that a lawyer's compliance in that regard would qualify as "other law" under Rule 1.6(b)(5).

**Elder Abuse:
Lawyers' New Mandatory Reporting Requirement
Oregon State Bar Bulletin, January Issue**

By Amber Hollister

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Protecting and advocating for vulnerable older Oregonians is a critical part of the work many lawyers do — day in and day out. Expanding the list of mandatory reporters to include our profession is one more important way to help ensure these people are safe from harm.

—Attorney General Ellen Rosenblum

Lawyers across Oregon are talking about elder abuse reporting. On Jan. 1, 2015, legislation took effect making all Oregon lawyers mandatory reporters of elder abuse. HB 2205 (2013). As with any new law, there are still many questions about how the new requirements will apply and impact lawyers' day-to-day practice. This month's bar counsel column outlines the basics of the requirement.

The new reporting requirement was enacted at the recommendation of the Oregon Elder Abuse Prevention Work Group, which was tasked with studying how to better protect older Oregonians. As state Rep. Val Hoyle notes, "For four years, the work group has focused on protecting some of Oregon's most vulnerable citizens. Integrating lawyers into Oregon's elder abuse safety net as mandatory reporters will provide our state with over 19,000 additional advocates."

While the elder abuse reporting requirement is new, lawyers have long been mandatory reporters of child abuse, abuse of developmentally disabled adults and abuse of long-term care residents. See ORS 419B.005(5)(m); ORS 430.735(12)(i); ORS 441.630(6)(i). These existing reporting obligations remain intact.

Part of the reason for the increased focus on elder abuse is that Oregon is in the midst of a demographic shift — as baby boomers age, our population as a whole is aging. The Oregon Office of Economic Analysis forecasts that between 2010 and 2020, the number of

Oregonians aged 65 to 74 will grow by 36 percent. The median age of Oregon’s population was 30.3 in 1980, but is forecast to rise to 39.7 by 2020.¹ And elder abuse is a significant problem in Oregon. In 2013, the state investigated and substantiated over 4,000 instances of elder abuse.² The Legislature has high hopes that the new attorney reporting obligation will provide additional protection to elders. “The addition of Oregon lawyers as mandatory reporters of elder abuse will shine a bright new light on abuse in our communities,” explains Rep. Vic Gilliam. “Lawyers who receive elder abuse prevention training will be even further equipped to recognize warning signs and report their concerns to appropriate authorities.”

The Basics

So what exactly is the elder abuse reporting requirement? In its most condensed form, the new law requires a lawyer to report elder abuse when he or she has reasonable cause to believe elder abuse has occurred, and the lawyer has had contact with the elder or the alleged abuser. See ORS 124.060. The requirement applies to lawyers 24 hours a day, seven days a week. The law includes exceptions to protect attorney-client privileged information and information learned during the course of representing a client that would be detrimental to the client if disclosed.

Much of the law’s complexity stems from the way in which the terms *elder*, *reasonable cause* and *abuse* are defined. First, lawyers should note that the law defines elders broadly to include all people aged 65 or older who are not currently residents of a long-term care facility. ORS 124.050(2). An elder need not be vulnerable or lacking in capacity to be covered by the law.

Reasonable cause is not defined by the law, but has been interpreted by Oregon courts in an analogous child abuse reporting context to mean reasonable suspicion.³ A lawyer has reasonable suspicion to believe elder abuse has occurred if the lawyer can articulate facts,

based on the totality of the circumstances, that would lead a reasonable person to believe that the abuse occurred. This means that the evidentiary standard for reporting elder abuse is relatively low. Because probable cause is not required, a lawyer need not believe it is more likely than not that abuse occurred to trigger reporting.

The definition of abuse is the most intricate piece of the reporting scheme. Elder abuse is defined to encompass a myriad of circumstances including physical abuse, neglect, financial exploitation, verbal abuse and sexual abuse. *See* ORS 124.050(1) *et seq.* For lawyers who are accustomed to analyzing their obligation to report child abuse, it is important to note there are some substantial differences in the definitions of elder abuse and child abuse.

Some of the definitions of elder abuse, including the definitions of physical abuse and neglect, are fairly straightforward. Physical abuse is elder abuse. Any willful infliction of physical pain or injury to an elder is considered abuse, as is the wrongful use of a physical or chemical restraint on an elder. More broadly, elder abuse is defined to include any nonaccidental physical injury to an elder, and any physical injury that appears to be at variance with the explanation given of the injury.

Neglect is also elder abuse. Neglecting an elder by withholding the basic care or services the elder needs to maintain health and safety is deemed elder abuse. Depending on the specific circumstances and capacity of the elder, what is considered a basic care or service may change. Abandonment of an elder is defined as abuse, particularly where a caregiver or other person is neglecting duties and obligations that are owed to an elder. Involuntary seclusion of an elderly person as a measure of discipline or for the caregiver's convenience is also abuse.

Sexual abuse and sexual exploitation are elder abuse. Any nonconsensual sexual contact between an elder and caregiver is included in the definition.

Certain categories of verbal threats are also considered elder abuse. Specifically, threatening an elder with significant physical or emotional harm by using “derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule” or “[h]arassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments” is deemed abuse. ORS 124.050(13).

Financial Exploitation

The type of elder abuse that has generated the most discussion in the legal community to date is financial exploitation. Financial exploitation is defined in ORS 124.050(4) as:

- a) Wrongfully taking the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability;
- b) Alarming an elderly person or a person with a disability by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out;
- c) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elderly person or a person with a disability; or
- d) Failing to use the income or assets of an elderly person or a person with a disability effectively for the support and maintenance of the person.

Certainly, individuals who abuse their powers as an elder’s attorney-in-fact, guardian or conservator to improperly enrich themselves would be engaged in financial exploitation.

Similarly, individuals who threaten to harm an elderly person or an elder’s loved ones in order to reap a financial benefit would be engaged in abuse. Refusing to use an elder’s income or assets to pay for basics such as food, housing or medical care would also likely fall within the definition of abuse.

Lawyers who regularly represent elders in transactions or business deals have expressed a desire for more clarity in the definition of financial exploitation. In response, the work group is discussing possible amendments to the definition of financial exploitation and the phrase “wrongful taking.” 4 Open questions remain about how the new elder abuse reporting requirement will interact with existing civil financial elder abuse protections. See ORS 124.110.

Contact

Before the duty to report elder abuse is triggered, an attorney must have contact with an elder or alleged abuser. Although *contact* is not defined by the statute, contact is commonly defined as a coming together. Being in the room with a person or communicating with a person by phone or email is likely enough to meet the contact element. On the other hand, merely hearing news reports or reading pleadings about an incident of abuse will not be enough to trigger the duty to report.

Client Confidentiality

Even if a lawyer has reasonable cause to believe elder abuse has occurred, and has had contact with the elder or abuser, the lawyer still must examine whether the exceptions to reporting for client confidentiality apply. Lawyers do not have an obligation to report elder abuse if doing so would reveal attorney-client privileged information or would reveal information learned while representing a client that would be detrimental to the client if disclosed. ORS 124.060. If a client consents to the lawyer reporting the abuse, the lawyer could of course make a report. RPC 1.6(a).5

How to Report

To report elder abuse, lawyers should make an immediate verbal report to law enforcement or the Department of Human Services. Lawyers can call (855) 503-SAFE to report elder or child abuse any time of day or night. If harm is imminent, lawyers should call 911. Lawyers who have reasonable grounds to report elder abuse and report in good faith are entitled to civil immunity. ORS 124.075(1).

Endnotes

1. www.oregon.gov/DAS/OEA/docs/demographic/OR_pop_trend2013.pdf
2. Office of Adult Abuse Prevention and Investigations, *2013 Annual Report* (August 2014).
3. In *Berger v. State Office for Services to Children and Families*, 195 Or App 587, 590 (2004), the court noted that the agency's determination of whether child abuse charges are founded is limited only to "whether there is evidence that creates a reasonable suspicion of child abuse; [the agency] does not decide whether child abuse in fact occurred or even probably occurred."
4. Although "wrongfully taking" is not defined by the statute, the Oregon Court of Appeals in *Church v. Woods*, 190 Or App 112 (2003), explored the meaning of "wrongful taking" in the separate context of meeting the standard for obtaining a temporary restraining order against financial elder abuse. See ORS 124.110 *et seq.* In *Church*, the court held that obtaining a joint interest in real property from an incapacitated elder was a "taking" of property, for purposes of establishing a statutory claim for financial abuse. The court also held that the taking was "wrongful" based both on the defendant's motives and the means by which property was taken. It is unclear whether a court would use this same definition when interpreting "wrongful taking" as used in the reporting statute, ORS 124.050(4)(a).
5. Similarly, if a lawyer reasonably believes that reporting elder abuse is necessary to prevent reasonably certain substantial bodily harm or death or to prevent a client's commission of a *future* crime, reporting is allowed. RPC 1.6(b)(1)-(2). These exceptions to RPC 1.6 have been narrowly construed.

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