



Mandatory Duty to Report Child and Elder Abuse

Hon. Amy Holmes Hehn, Multnomah County Circuit Court

Hon. Courtland Geyer, Marion County Circuit Court

Amber A. Hollister, Oregon State Bar

Through the Eyes of a Child, XIX Conference

August 7, 2016

Roadmap

- Child Abuse Reporting
 - The Penn State Case
 - What is the Duty?
 - What is Child Abuse?
- Elder Abuse Reporting
 - The Brook Astor Case
 - What is the Duty?
 - What is Elder Abuse?
- Common Considerations
 - What is Reasonable Cause?
 - What is Contact?
- Exceptions to the Duties
- Hypothetical Scenarios
-





Child Abuse Reporting



The Penn State Case



Penn State Football



- 7 undefeated seasons
- 2 **national** championships
- 3 Big Ten Conference titles



Penn State University Football

THE BUSINESS OF COLLEGE FOOTBALL



- In 2012, *Forbes* magazine estimated that college football's most valuable team was worth \$133 million
- In 2011, that same team generated \$104 million in revenue



Penn State University Football

THE BUSINESS OF COLLEGE FOOTBALL



In 2011, *Forbes* magazine ranked Penn State as college football's third most valuable team

Failure to Report



*Coach Joe Paterno
(right)*

- 44 seasons as head coach at Penn State
- Held record for most wins as Division 1 head football coach

Failure to Report



Jerry Sandusky (left, holding photo), former defensive coordinator at Penn State, was once considered the heir-apparent to longtime coach Joe Paterno

Failure to Report



Headline
11/7/11

“Two Top
Officials Step
Down Amid
Penn State
Scandal”

Failure to Report



2001: Penn State graduate assistant reported seeing Jerry Sandusky sexually assault a naked boy, estimated to be about 10 years old, in a team locker room shower.

Failure to Report



- Reported to Coach Joe Paterno (right)
 - Reported immediately to Tim Curley, the athletic director (center)
- Reported to Gary Schultz, the school's senior vice president for business and finance

Failure to Report



NEVER
reported
to police

Failure to Report



June, 2012

- Sandusky (68) convicted on 45 of 48 counts of child sexual abuse involving ten different children
- Sentenced to 30-60 years in prison

Failure to Report



- Joe Paterno was fired November 9, 2011
- He died in January, 2012 at the age of 85

Failure to Report



Former AD Tim Curley was placed on administrative leave; Penn State declined to renew his employment contract

Failure to Report



Curley and Gary Schultz were indicted for perjury at the grand jury and failing to report child abuse.

Failure to Report



Curley and Schultz are still pending trial. The case pending a decision on a pre-trial appeal.

Failure to Report



WALL STREET JOURNAL

July 17, 2013

“Penn State to
Settle Some Claims
for \$60 Million

*Settlement Covers About
Two Dozen Men Who Say
Sandusky Abused Them”*

Failure to Report



WALL STREET JOURNAL
July 17, 2013

"The settlements are nearing completion a year after an independent investigation found that former Penn State officials allegedly conspired to keep silent about Mr. Sandusky's abuse and allegedly failed to report knowledge of at least one instance to authorities."

Failure to Report



Foxnews.com

November 27, 2015

**“Penn State reports
6 more Sandusky
settlements,
bringing total in
abuse scandal to
nearly \$93M”**



Mandatory Reporting of Child Abuse



Penn State
University Football



THE BUSINESS

OF COLLEGE FOOTBALL

- In 2011, *Forbes* magazine ranked Penn State as college football's third most valuable team
- In 2012, *Forbes* found that Penn State's value dropped 21%.
- Severance packages and payments to child abuse initiatives drove up expenses 55% year-over-year

But that will never happen here, right?



Mana Neyestani
Iran



Child Sex Abuse Statistics



- Nationally, about 200,000 children are sexually abused each year
- 1 out of 4 girls, 1 out of 9 boys will be abused
- Children ages 7-9 are most commonly abused

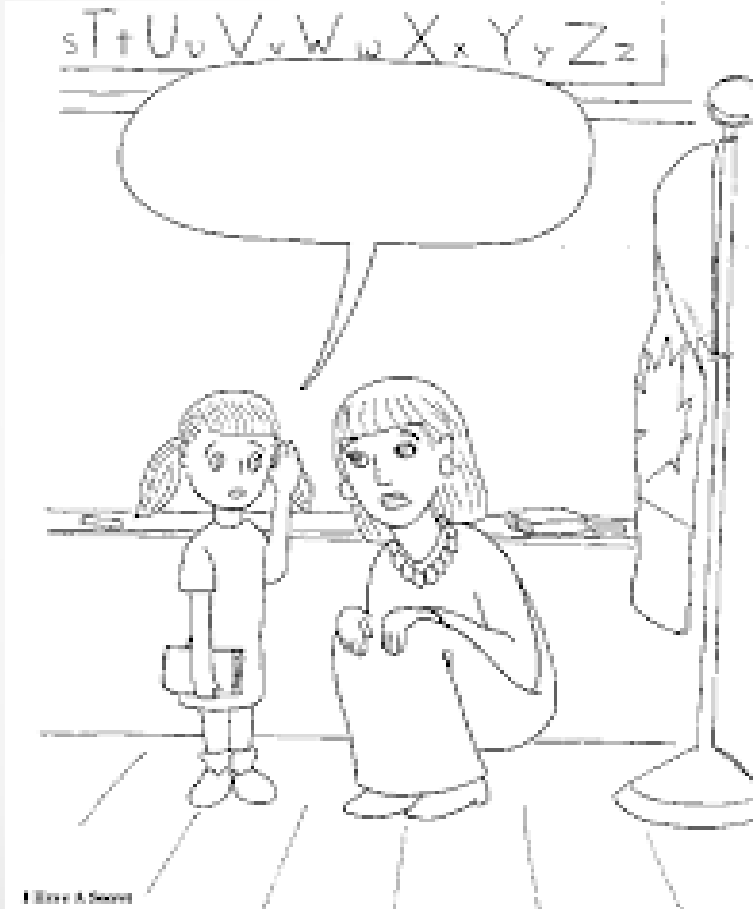


Child Sex Abuse Statistics



- Sex offenders commit an average of 120 separate sexual crimes before they're caught
- Have only 3% chance of being caught

Child Abuse Statistics



- Fewer than 5% of child victims tell anyone
- Community response has improved -- but people still have trouble reporting



Child Abuse Reporting



What is the Duty?





The Child Abuse Reporting Duty in Oregon



If you have

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

Then You **MUST** Verbally Report
UNLESS an Exception Applies.

ORS 419B.010





Legislative Intent



The Prevention of Child Abuse

- Protect children; and
- Encourage voluntary reporting
(ORS 419B.0007)

Provides civil immunity for making a report in good faith

Who has to report?

Certain professions most likely to encounter initial disclosure, designated as “Public or private officials”

ORS 419B.010





Public/Private Officials



Public or private official" means:

- (a) Physician, osteopathic physician, physician assistant, naturopathic physician, podiatric physician and surgeon, including any intern or resident.
- (b) Dentist.
- (c) School employee.
- (d) Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.
- (e) Employee of the Department of Human Services, Oregon Health Authority, State Commission on Children and Families, Child Care Division of the Employment Department, the Oregon Youth Authority, a county health department, a community mental health program, a community developmental disabilities program, a county juvenile department, a licensed child-caring agency or an alcohol and drug treatment program.
- (f) Peace officer.





Public/Private Officials



Public or private official" means:

- (g) Psychologist.
- (h) Member of the clergy.
- (i) Regulated social worker.
- (j) Optometrist.
- (k) Chiropractor.
- (L) Certified provider of foster care, or an employee thereof.
- (m) Attorney.
- (n) Licensed professional counselor.
- (o) Licensed marriage and family therapist.
- (p) Firefighter or emergency medical services provider.
- (q) A court appointed special advocate, as defined in ORS 419A.004.
- (r) A child care provider registered or certified under ORS 657A.030 and 657A.250 to 657A.450.
- (s) Member of the Legislative Assembly. *



Public/Private Officials



Public or private official" means:

(t) Physical, speech or occupational therapist.

(u) Audiologist.

(v) Speech-language pathologist.

(w) Employee of the Teacher Standards and Practices Commission directly involved in investigations or discipline by the commission.

(x) Pharmacist.

(y) An operator of a preschool recorded program under ORS 657A.255.

(z) An operator of a school-age recorded program under ORS 657A.257.

(aa) Employee of a private agency or organization facilitating the provision of respite services, as defined in ORS 418.205, for parents pursuant to a properly executed power of attorney under

- ORS 109.056.



Child Abuse Reporting



What is Child Abuse?





Cents-Less Coupons

Your money-saving circular

Announcing the arrival of new **Monthlies** **THE EXPANDABLE DIAPER!**

With new Monthlies, constant changing's a thing of the past! A patented reservoir fanny e-x-p-a-n-d-s to carry a month's worth of loads — as much as your little one can dish out! A super absorbent, quicklime lining locks in most odors while decomposing waste. Dated "Change Me" stickers remind you when it's time to replace diaper.

Dated "Change Me" stickers remind you when it's time to replace diaper!

May cause severe chafing in some infants.



Start Saving Now!
HURRY! OFFER EXPIRES TODAY!

MANUFACTURER'S COUPON — WHO ELSE'S?

Save \$1.50

when you buy any **Monthlies** expandable diapers



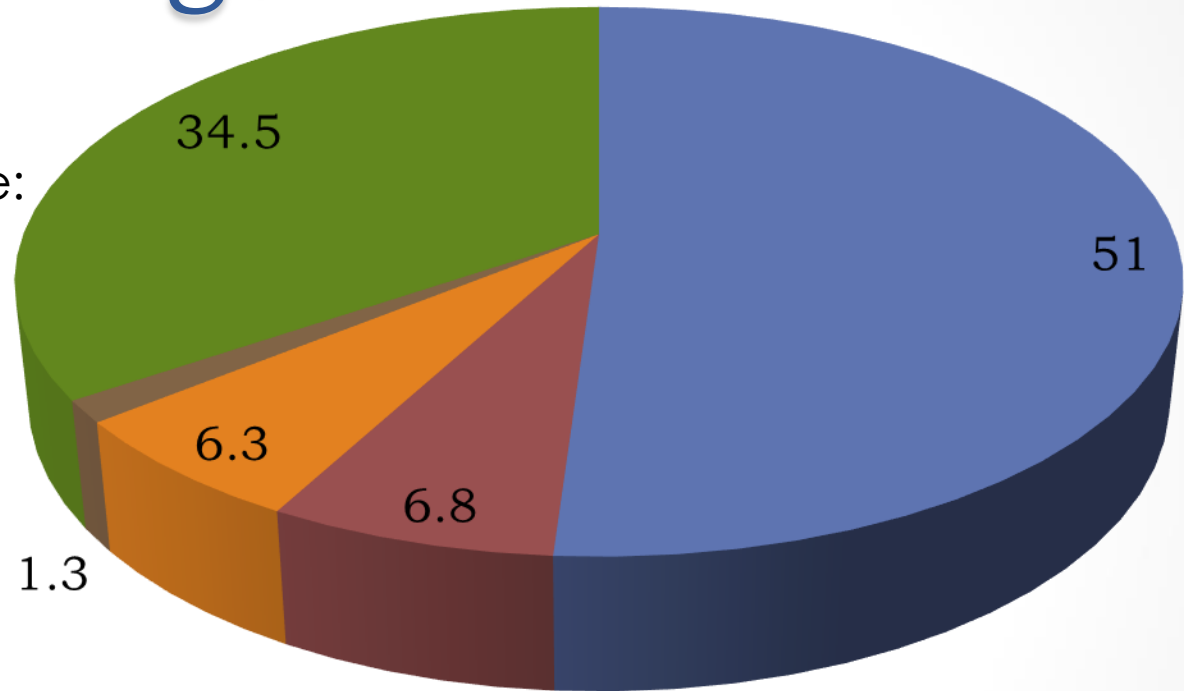
Consumer: Limit one coupon per purchase on product(s) indicated. Coupon not transferable. Consumer must pay any sales tax. Help me, Obi-Wan Kenobi! You're my only hope! Good only in the continental U.S.A., Alaska, Hawaii, and Puerto Rico.

WRITER: SCOTT MARO
ARTIST: SCOTT BRIGER
PHOTOGRAPHER: IRVING SCHILD

AMAZON KIDS
FAKEOUT AD

Categories of Abuse

Percentages of Oregon reports involving major categories of abuse:



■ Threatened Harm

■ Physical Abuse

■ Sexual Abuse

■ Mental Injury

■ Neglect

Abuse Defined

- Threatened Harm
 - Activities, conditions or persons that result in a *substantial* risk of harm to child's health or welfare
 - Consider if domestic violence, presence of sex offender, drug use, DUII with child in car



Physical abuse

- Criminal assault, ORS Chapter 163
- Non-accidental physical injury
- Not reasonable discipline

Signs

- Injury at variance with explanation
- Delayed or inappropriate treatment



Sexual Abuse

- All sex crimes, ORS Chapter 163
- Sexual exploitation

Mental Injury

- Cruelty that results in observable and substantial impairment of child's mental or psychological ability to function



Neglect or Maltreatment

- Failure to provide food, clothing, shelter or medical care that is likely to endanger a child
- Lack of supervision and protection
- Unsafe or extremely unsanitary home
- Typically long-term issue, but can be single serious incident





Elder Abuse Reporting



The Brooke Astor Case



The Brooke Astor Story

- Brooke Astor was a philanthropist, writer, and “queen” of New York Society
- Upon her husband Vincent Astor’s death, she was named the sole trustee of the Astor Trust
- In 2007, her estate valued at nearly \$200 million dollars



The Brooke Astor Story



The Brooke Astor Story

- Mrs. Astor was diagnosed with Alzheimer's and anemia
- Anthony earned \$450,000/yr to take care of her portfolio
- Anthony "Tony" Marshall, her only son, was also tasked with her care



The Brooke Astor Story



- Surrounded by staff, nurses and family
- Beloved donor and board member
- *Mrs. Astor Regrets* chronicles her abuse based on her nurses' diaries



The Unhappy Ending

- Phillip Marshall, Mrs. Astor's grandson, sought a change in guardianship
- Phillip alleged that despite her great wealth Mrs. Astor was living in squalor and his father Anthony had reduced her necessary medication and doctor's visits
- On August 13, 2007 Mrs. Astor died at age 105.





Elder Abuse Reporting



What is the Duty?





Attorney's Elder Abuse Reporting Duty



If you have:

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

**Person 65 or older*

Then You **MUST** Verbally Report
UNLESS an Exception Applies.

Duty exists 24 hours a day, 7 days a week.

ORS 124.060

Legislative Purpose



- “The Legislative Assembly finds that for the purpose of preventing abuse, safeguarding and enhancing the welfare of elderly persons, it is necessary and in the public interest to require mandatory reports and investigations of allegedly abused elderly persons.”

ORS 124.055



Changing Demographics



- In 2014, an estimated 16 percent of Oregonians were 65 or older.
- In 2030, an estimated 20 percent of Oregonians will be 65 or older.
- CDC estimates Oregonians have 15 expected “healthy” years beyond age 65.
- Average Oregonian’s life expectancy is 84.3 years.



Other Mandatory Reporters

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

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

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

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

(e) Peace officer.

(f) Member of the clergy.

(g) Regulated social worker.

(h) Physical, speech or occupational therapist.

(i) Senior center employee.

(j) Information and referral or outreach worker.

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

(L) Member of the Legislative Assembly.

(m) Firefighter or emergency medical services provider.

(n) Psychologist.

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

(p) Audiologist.

(q) Speech-language pathologist.

(r) **Attorney.**

(s) Dentist.

(t) Optometrist.

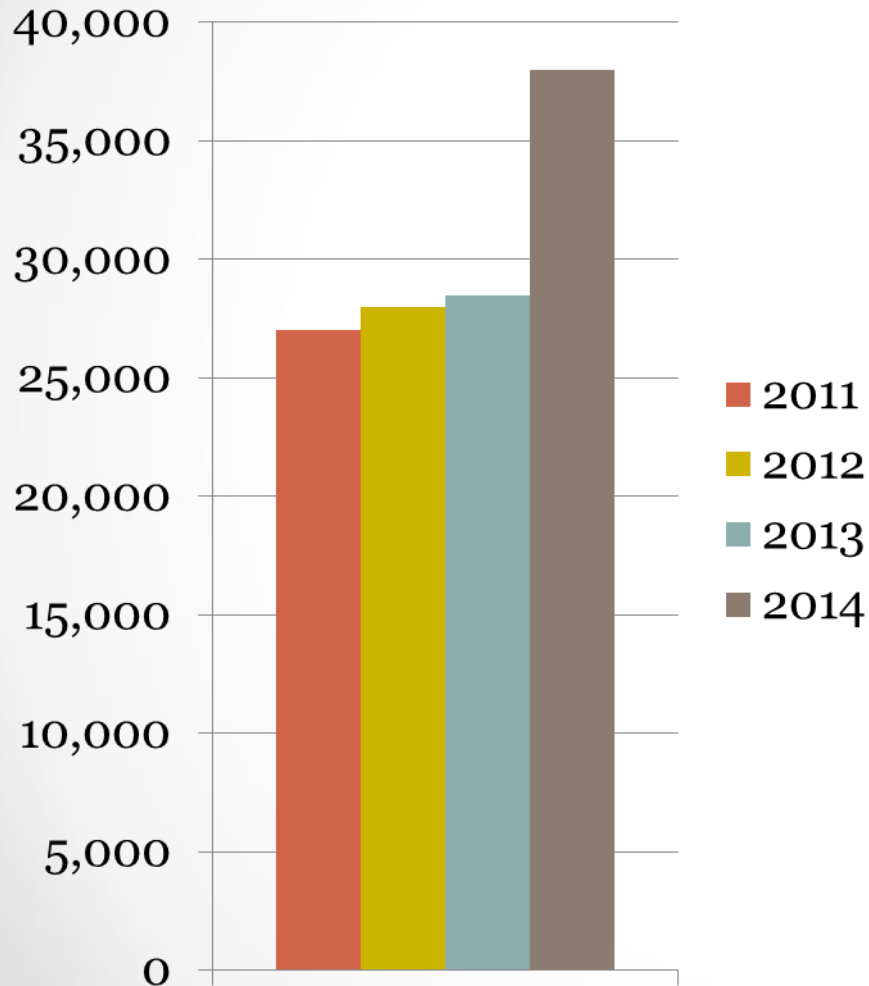
(u) Chiropractor.

(v) Personal support worker, as defined by rule adopted by the Home Care Commission.

(w) Home care worker, as defined in [ORS 410.600](#).

ORS 124.050(9)

Adult Abuse in Oregon



2014

- Over 38,000 reports of potential abuse
- 18,185 allegations of abuse investigated
 - More than half living in the community
- 4,544 substantiated findings of abuse
 - 4,208 victims (multiple abuses / incidents)

Related Laws?



- Family Abuse Prevention Act, ORS 107.700 to 107.732
- Elderly Persons and Persons with Disabilities Prevention Act, ORS 124.000 to 124.040
- Stalking Protective Orders, ORS 30.866



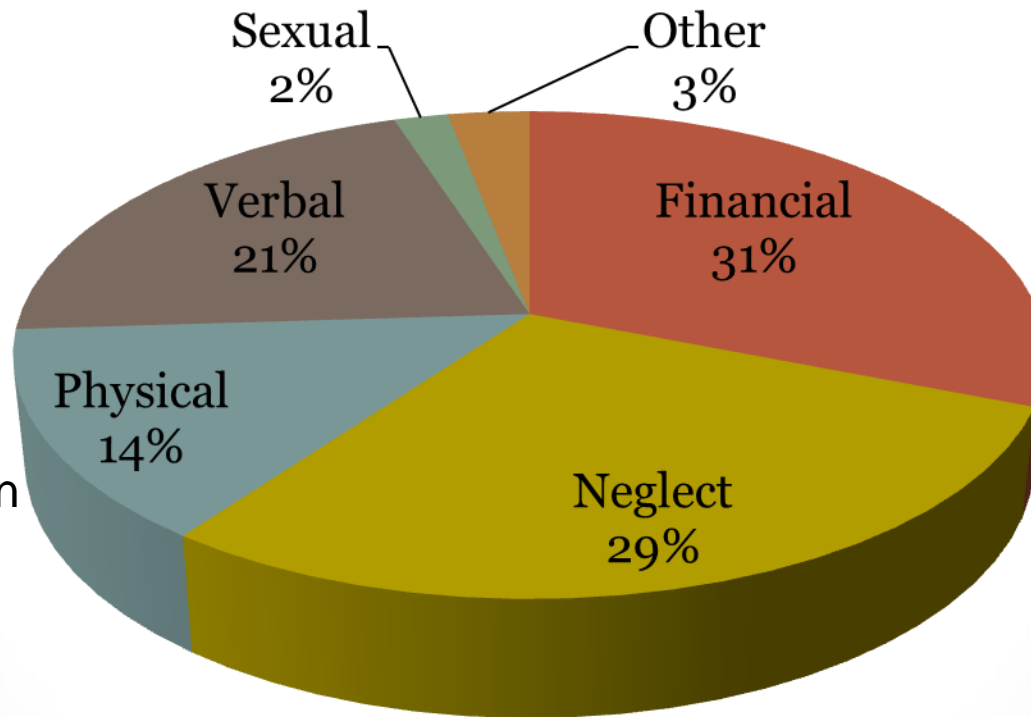
Elder Abuse Reporting



What is Elder Abuse?



2014 Substantiated Abuse



Note: 66% of Abuse Occurs in **Home Settings** vs. 34% in **Licensed Care Settings**

Financial Exploitation

- **Wrongfully taking** the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability. (See OAR 411.020-0002(1)(e))
- **Failing to use income or assets effectively** for support and maintenance of person.
- **Misappropriating, misusing or transferring** without authorization any money from any account
- **Alarming** an elderly person or a person with a disability by conveying a threat the person would reasonably believe.

ORS 124.050(4)

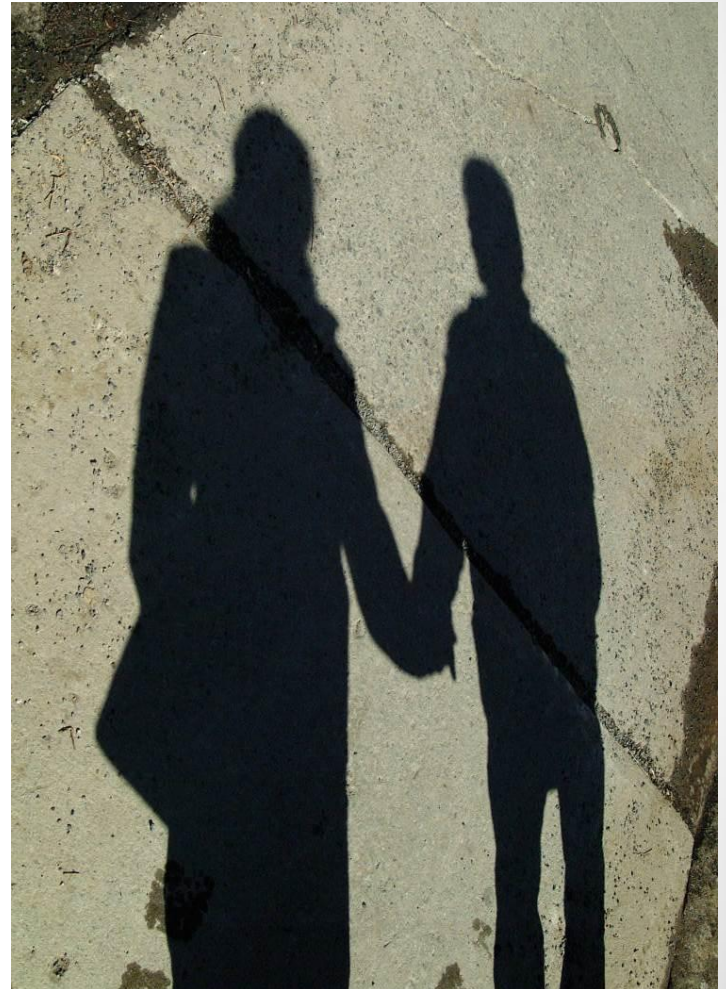


Neglect

“Failure to provide basic care or services that are necessary to maintain the health or safety of an elderly person.” ORS 124.050(7)

“...assumed responsibility or a legal or contractual agreement...” OAR 411-020-0002 (1)(b)(A)(iii)

Religious exception, ORS 124.095



Verbal Abuse



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

Physical Abuse & Abandonment

- Abandonment
 - “ ... including desertion or willful forsaking of an elderly person or the withdrawal or neglect of duties and obligations owed an elderly person by a caretaker or other person.” ORS 124.050(1)(c).
- Physical injury or pain
 - “Any physical injury to an elderly person caused by **other than accidental means**, or which appears to be **at variance** with the explanation given of the injury.” ORS 124.050(1)(a).
 - Willful infliction of physical pain or injury upon an elderly person. ORS 124.050(1)(d)

Sexual Abuse

- Sexual contact between employee or paid caregiver and elderly person served.
- Any sexual contact achieved through force, trickery, threat or coercion.
- **Exception** for consensual sexual contact with paid caregiver. ORS 124.050 (11)(b).
- Sexual Abuse, ORS 124.050 (11)(a), (1)(h)
 - Nonconsensual sexual contact
 - Rape, sodomy, unlawful sexual penetration, public indecency, private indecency, incest.
 - Verbal or physical harassment of a sexual nature or sexual exploitation.

Seclusion & Restraint

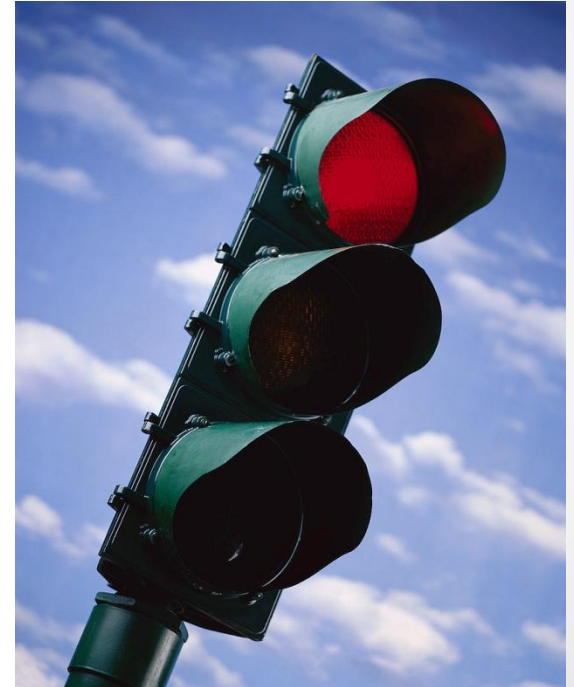
- Wrongful use of a physical or chemical restraint
 - “excluding an act of restraint prescribed by a physician licensed under ORS chapter 677 and any treatment activities that are consistent with an approved treatment plan or in connection with a court order.” ORS 124.050(1)(j)
- Involuntary seclusion
 - “...for the convenience of a caregiver or to discipline the person.” ORS 124.050(1)(i)



Warning Signs of Abuse



- Any unexplained injury that doesn't fit with the given explanation of the injury.
- The elder is not given the opportunity to speak for themselves without the presence of the caregiver.
- Being extremely withdrawn and non communicative or non responsive.
- Unpaid bills, overdue rent, utility shut-off notices.





Common Elements:



Reasonable Cause



What is Reasonable Cause?



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



“Reasonable Cause?”



“A negligence per se claim based on ORS 419B010 would leave a factfinder to determine whether the reporter had ‘reasonable cause to believe’ that child abuse [had] occurred. The doctrine of negligence per se allows a plaintiff to supplant the applicable standard of care with a statutory rule; however, in this case the rule itself contains an issue of fact that requires a subjective analysis by the factfinder.”

-- Jordan M. New, *To Report or Not To Report: Understanding and Defending Mandatory Child Abuse Claims*, THE VERDICT, 2013 – Issue 3 (Bulletin of the Oregon Association of Defense Counsel)





Other Considerations



- You have no duty to investigate
- The report will set in motion an appropriate investigation to determine whether a child has been abused
- Experience shows that professionals do a great job of recognizing child abuse (case example – “The Pee Story”)
- Compare the risk in reporting what turns out NOT to be child abuse against the risk in failing to report





Common Elements:



Contact with Elder/Child or Abuser



What is Contact?



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





What if?



- Elder is deceased?
- Victim is now 18 years old or older, but abuse happened when still a child?
- Contact with Elder occurred before age 65?
- Contact with child occurred after child turned 18?



Common Exception:



Exception for Client Confidentiality
Or why that lawyer isn't reporting ...



Child Abuse & Elder Abuse Exception for Certain Client Confidences

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

Lawyer's Duty

RPC 1.6(A) REQUIRES LAWYERS TO PRESERVE CONFIDENCES

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

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

- ✓ Client consents;
- ✓ Required by law (including ORS 419B.010 and ORS 124.060 et seq.);
- ✓ Client intends to commit future crime; or
- ✓ Necessary to prevent reasonably certain death or substantial body harm.



Reporting Exceptions

vs. RPC 1.6



**MUST NOT
REPORT
if confidential
and
detrimental**

**MUST NOT
REPORT
if A/C
Privileged ORS
40.225**

RPC 1.6

Ethical duty to keep information relating to representation confidential, including information that is (1) a/c privileged, (2) secret, (3) embarrassing, or (4) likely detrimental to client if disclosed



Report?



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



Only Child Abuse



Exception for Official Reports





Official Report Exception



- Information about child abuse learned from official report
 - Report already made OR
 - Court proceeding arising out of a report made (e.g. dependency/delinquency) AND
 - You reasonably believe the information already known by DHS and/or law enforcement
 - Note: This exception not in elder abuse statute



Common Elements:



How to Report



Nuts & Bolts of Reporting

- **Immediately = without delay** to DHS or law enforcement
 - Oral report required 24/7
 - Give as much as information as possible
 - Explain allegation of abuse

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

Or DHS Branch Offices:

<http://www.oregon.gov/dhs/spwpd/pages/offices.aspx>



Report Should Include ...

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



Behind the Scenes

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

Immunity & Anonymity

- Civil immunity if
 - Report made in good faith and
 - Reasonable grounds for report
- Anonymity of Reporter



Consequences

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





Scenario No. 1

- Judge Williams has a dependency case in which the children were removed from the parents' care and placed with grandmother, Ms. Ellis. The court has seen Ms. Ellis at hearings and has had concerns about her cognitive capacities and physical health. She appears dirty and disheveled and often seems unable to track conversations in the courtroom. One day Ms. Ellis appears in Judge Williams's courtroom with a petition for an elder abuse restraining order.



Scenario 1 cont.

- She says her prescribed medication is poison so she hasn't been taking it, she has been heating her apartment by leaving the oven on with the oven door open, and she believes someone is taking her money, although based on her statements, it seems unlikely that this is actually happening. Judge Williams is unable to issue an order of protection because it does not appear that she meets the criteria for the issuance of a restraining order. Does Judge Williams have a reporting responsibility?



Scenario No. 2

- On his way into work one day, Judge Paul sees a woman screaming at and slapping a toddler in the face and head. A citizen has called the police and they are just arriving as Judge Paul approaches the scene. Judge Paul does not know the identity of the mother or child. Does Judge Paul have a reporting responsibility?



Scenario 2 cont.

- The next day, as Judge Paul is leaving work and heading for his car, he sees a man hitting and kicking an elderly woman. The woman is obviously in pain and distress. The police arrive and rush in to protect the woman and to take the man into custody. Judge Paul does not know the identity of either party. Does Judge Paul have a reporting responsibility?



Scenario 3

- Judge Barbour is handling family law ex parte matters. A man comes in with a motion for temporary emergency custody of a child alleging immediate danger. It appears the mother of the child has filed an unmarried parent's petition for custody and parenting time regarding the child, but the man has not yet been served. The family law case is specially assigned to Judge Carrie. The man reports to Judge Barbour that the mother is a daily heroin user, and that the mother's current boyfriend called him to come take the child when the mother overdosed in a motel room with the child in her care. Judge Barbour determines that the man has not established paternity of the child.



Scenario No. 4

- In the course of a juvenile delinquency case involving a 12 year-old youth Judge Boyce learns that the father of the youth is a recreational marijuana user and smokes daily in the house with the youth present. It appears that cannabis smoking paraphernalia is left within reach of the youth, but not cannabis itself, which the father keeps in a locked drawer. Does Judge Boyce have a reporting responsibility?



Scenario No. 5

- Judge Blocker is handling a criminal drug case involving a single mother who is in residential treatment due to Meth addiction. Judge Blocker learns that the child is the subject of a juvenile dependency case assigned to Judge Kearns in which the child is in the temporary legal custody of DHS but placed with the mother in treatment. Judge Blocker learns at sentencing in the criminal case that the mother has relapsed on Meth and has left treatment. She is now homeless. She will not reveal the whereabouts of the child other than to say that the child is “safe.”



Questions?



**Hon. Amy Holmes Hehn, Multnomah County
Circuit Court**

503.988.3052

amy.holmeshehn@ojd.state.or.us

**Hon. Courtland Geyer, Marion County Circuit
Court**

503.373.4445

Courtland.geyer@ojd.state.or.us

Amber Hollister, OSB General Counsel

503.431.6312 ahollister@osbar.org