AVOIDING THE SPECTER OF ELDER ABUSE:
Working With a Questionably Competent or Incapacitated Client

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With the aging of America's population and the significant transfer of wealth that will occur in the near future, professionals working with seniors will be required to acquire a completely different set of skills to deal with the elderly client on a personal level. The demographics suggest that you will more frequently face the questions of client capacity and possible elder abuse.

I. THE AGING DEMOGRAPHIC

The Census Bureau refers to the "human tidal wave" that will "change the face of America." Every day, for the next 19 years, more than 10,000 Baby Boomers will reach age 65!

- **Population over 62 years:**
  There are currently 44.2 million Americans in the 62-84 years age group. This group is expected to increase to 47.3 million in 2020, jumping Up to 61.8 million in 2030 and to 65.8 million by 2050, **an increase of 113%.**

- **Population over 85 years:**
  Who the Census Bureau refers to as the "**oldest old"** is projected to be the fastest growing part of the elderly population into the next century. There are currently 6.1 million Americans over 85 years. This group is expected to increase to 9.6 million by 2030, 15.4 million by 2040 and 20.8 million by 2050, **an increase of 288%.** www.census.gov/population.www.pop-profile/elderpop.html.

- **Prevalence of Dementia** - The National Institute on Aging reports finds that the "**prevalence of cognitive impairment is significant**" in older Americans, especially with advancing age. Symptoms of memory loss, language disturbance, decline in judgment and reasoning, and personality change increase with age. A national study has determined that
  - **4-17 percent of people age 65 to 75,** and
  - **38-45 percent** of **people age 85 and older**

  had experienced **some degree of cognitive impairment,** short of dementia.

- **Transfer of Wealth** – Many economists believe that America is sitting on the edge of what is expected to be the "**greatest transfer of wealth in our history.**" Today's retirees constitute one of the wealthiest segments of the U.S. population with more personal wealth than any previous generation. Economists believe that bequests of this wealth will significantly boost the resources of the 76 million Baby Boomers (1946-1961) (currently ages 47-62). That means **by the year 2052, an estimated $40.6 trillion will change hands** as Baby Boomers pass on their accumulated assets to their heirs.

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II. CIVIL ACTIONS FOR ELDER ABUSE – ORS 124.100

ORS 124.100 allows for a civil action to be brought against a person who has caused physical or financial abuse to an elderly or incapacitated person, for damages including economic and non-economic loses, attorney fees, and fees for a conservator or guardian ad litem incurred in bring the action. The economic and non-economic damages to be awarded shall be **triple** the actual damages.

A. Actions For Financial Abuse. An action may be brought under ORS 124.100 for financial abuse in the following circumstances:

(a) "*When a person wrongfully takes or appropriates money or property of an elderly or incapacitated person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the elderly or incapacitated person.*"

(b) "*When an elderly or incapacitated person requests that another person transfer to the elderly or incapacitated person any money or property that the other person holds or controls … and the other person, without good cause, either continues to hold the money or property or fails to take reasonable steps to make the money or property readily available to the elderly or incapacitated person.*"

B. Actions Against Person Permitting Abuse – "Bystander Liability". ORS 124.100 (5) states that a civil action may be brought against a person for **permitting** another person to engage in physical or financial abuse if the **person knowingly acts** or **fails to act** under circumstances in which a **reasonable person should have known of the physical or financial abuse.**

IMPORTANT NOTE: IF YOU KNOW OR SUSPECT THAT ELDER ABUSE IS OCCURRING, CONTACT THE OREGON DEPARTMENT OF HUMAN SERVICES AT

1-855-503-SAFE (7233)

This is a state wide hotline number for reporting abuse. You will be connected to an Adult Protective Services specialist who will take your information and initiate an investigation to determine whether abuse has occurred. State law protects confidentiality of all individuals reporting abuse. Your identity and the information you provided are kept strictly confidential. You are not required to give your name if you wish to remain anonymous.

IMPORTANT NOTE: RED FLAGS

Closely examine any transaction where **(a)** a party to the transaction is over the **age of 65 years** (or younger person suffering from cognitive impairment); and **(b)** elements of the transaction are **not commercially sound or fair.**

III. THE QUESTIONABLY COMPETENT CLIENT

A. Capacity is a Threshold Decision

"Whenever a professional comes in contact with a client regarding a transaction – a determination of capacity is being made." Fitzwater Meyer Hollis & Marmion, LLP. *Representing Your Client Through Diminishing Mental Capacity*, OSB CLE Basic Estate Planning and Administration, June 25, 2010.

A client's legal capacity or competency to perform a particular act is a threshold question that must be one of the professional's first considerations. The professional should begin with the assumption that the client is competent. *Cloud v. U.S. Bank*, 280 Or 83, 90 570 P2d 350 (1977). That is to say a person is presumed to possess legal capacity unless it is shown that the person's capacity is compromised.

Interactions with your client that raise concerns about capacity generally seem self evident under an '*I know it when I see it'* test. However, the professional should key into specific areas of cognitive status and resulting conduct in order to address specific determinations of levels of capacity.

B. Oregon Notary Public Guide

The very first paragraph of the Oregon Notary Public Guide reads:

"The main function of the notary is to witness a legal proceeding so that the courts and other interested parties can be certain ***that the person signing*** *a document* ***knows what is being signed, is able to understand the action taken****, and is in fact the person whose signature is on the document."*

C. Legal Standards of Capacity

Legal capacity is the determination that an individual possesses a certain cognitive ability to complete a transaction. A person's capacity to be able to legally take these actions depends on the nature of the act in question. Different acts require different thresholds of capacity, thus making a determination of capacity "a sliding scale." Arguably testamentary capacity is at the lowest end of this scale and contractual capacity is at the top.

1. Testamentary Capacity:

Testamentary capacity is typically referred to as the lowest level of capacity to perform a legal act. This form of capacity is primarily referring to the execution of a will or trust. For a person to be considered as having sufficient mental capacity to make a valid testamentary transfer, the person must:

a. Be able to understand the nature of the act;
b. Know the nature and extent of the person's property;
c. Know, without prompting, the claims of people who are or might be the natural objects of the person's bounty; and
d. Be aware of the scope and reach of the provisions of the document.

2. Capacity of Persons Subject to Guardianship and Conservatorship:

Incapacitated persons who are unable to make decisions about their health and safety may require a court-appointed Guardian. An inability to manage financial resources may require the appointment of a Conservator.

ORS 125.005 defines "**incapacitated**" as:
"*a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety"*

ORS 125.005 defines "**financially incapable**" as:

"a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental deficiency, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance."

"Manage financial resources,' means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income."

3. Contracts, Deeds, Lifetime Gifts, and Power of Attorney

The capacity to enter into or execute **contracts, deeds, lifetime gifts, and a power of attorney** is substantially similar**. A person must possess greater competency to execute a deed than to execute a will**. *First Christian Church v. Mcreynolds*, 194 Or. 68, 72, 241 P.2d 135 (1952). Conveying an inter vivos gift requires the same degree of capacity as making a contract. *Kugel v. Pletz*, 22 Or App 249, 251 (1975). A person can enter into a valid contract if the person's reasoning ability enables the person to understand the nature and effect of the act. *Kruse v. Coos Head Timber Co.*, 248 Or 294, 306 (1967).

Lack of capacity is not proved simply because a person is easily influenced and is a dependent person, or because the person states that he or she does not understand a contract. A person of below average intelligence can enter into a binding legal contract. The relevant question is whether the person is capable of understanding the act itself.

"The test of mental capacity to make a deed requires that a person shall have ability to understand the nature and effect of the act in which he is engaged and the business which he is transacting. * * * [A] grantor must be able to reason, to exercise judgment, to transact ordinary business and to compete with the other party to the transaction."
First Christian Church v. Mcreynolds, 194 Or. 68*, 72-3,* 241 P.2d 135 *(1952*).

D. The Professional's Role in Assessing Capacity

The professional can take steps to maximize the chances of finding the requisite capacity of elderly or infirm clients. One step is to use a functional approach to determine capacity. In this approach, the professional assesses capacity by observing the client's decision-making process as it relates to the substance of the act to be taken. This approach contrasts with the conventional objective tests of capacity that are unrelated to the act. One commentator identifies six factors that can be applied in using the functional approach:

1. The client's ability to articulate reasoning behind the decision;
2. The client's ability to understand the consequences of the decision;
3. The variability of the client's state of mind;
4. The irreversibility of the decision;
5. The substantive fairness of the transaction; and
6. A substantial change in the Estate Plan of the client.

When capacity becomes an issue with a client, the professional should consider the following when interacting with the client:

1. Meet privately with the client, possibly after an introduction by a family member or trusted friend if that person set up the initial meeting.
2. Create a relaxing and comfortable interview environment; converse about a topic that interests the client.
3. Conduct the interview at the client's best time of day.
4. Encourage questions.
5. Reassure the client that one purpose of the meeting is for the professional and the client 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.
6. Use indirect questions to assess capacity. Asking questions such as the identity of the President of the United States can be intimidating and put the client on the spot. Asking other equally topical questions in the course of seemingly casual conversation can be just as helpful without unsettling an already defensive or uncomfortable older client.
7. Take verbatim notes.
8. When preparing written materials for elderly clients, the professional should:
   a. Use short words, sentences, and paragraphs;
   b. Use active verbs; avoid passive voice;
   c. Avoid technical legal terms as much as possible; where unavoidable, define terms in non-technical language when they first appear;
   d. In a contract or other document, use the names of the parties. Do not use legal role names such as "trustee" or "settlor" to identify parties;
   e. Avoid double negatives.
   f. Use various type sizes and spacing, paragraphs, numbering, and bold facing or underlining to break the letter or document into easily readable sections.

Gorn, *A Guide to Representing Older Clients*, *cited in* 1 *Serving Elderly Clients* 5 (LRP Publications 1995).

E. Cognitive Assessment

Based on the interactions with the client, a professional should be able to come to some form of assessment of the cognitive abilities of their client. Most individuals are not generally qualified to attempt to undertake administering even simplified cognitive tests to their clients. The professional might consider consulting with and referring a client to a medical professional in regard to further evaluate a client's cognitive functioning. Once the professional has an understanding of the client's cognitive abilities, such should be documented and applied to the legal definition of the capacity necessary to carry out a specific action.

IV. DEALING WITH INCAPACITY – THE LEGAL TOOLS

The legal tools available to deal with incapacity can be simply divided as "planning tools" and "crisis tools."

Planning tools are established by a client when he or she is competent and capable of appointing a **surrogate** or **substitute decision-maker** to assist the client when, and if, the time comes. Having incapacity planning tools in place often saves both time and significant expense – truly the "*ounce of prevention*."

Crisis tools are those legal methods available to make decisions for a person how has become incapacitated and, likely, has no planning tools in place. Crisis tools, most often, involve family members hiring attorneys and a Court appointing a substitute decision-maker. As a result, these tools are complex, expensive and take control away from the person – "*the pound of cure*."

A. Legal Tools - Health Care Decisions

1. The Oregon Advance Directive

If a person becomes sick and unable to make health care decisions, someone else may be required to make those decisions. If he or she does not have the appropriate legal tool in place, it may be necessary for a court to appoint another person (a guardian) to make health care and medical decisions.

The Oregon Advance Directive form allows a person to choose someone to make health care and medical decisions when he or she is unable to make those decisions. A spouse, partner, family member, or friend (called "health care representative") can be designated to act legally to make health care decisions. This document has no effect until the person signing the Advance Directive is incapable of making health care decisions.

The health care representative will be authorized to make most necessary health care decisions. This can include the authority to withdraw life support procedures, such as respirators or artificial nutrition and hydration. The Advance Directive is a statement to the family and the doctor regarding life support. This is an opportunity to direct that if death is imminent because of a terminal disease or injury, a person does or does not want artificial life support procedures used to postpone the natural moment of death.

Copies of the Oregon Advance Directive form are available as a free download on our website at https://docs.wixstatic.com/ugd/686763_ff0dac56fa314f1d9f773f245a601645.pdf

2. P.O.L.S.T.

The Physicians Order For Life-Sustaining Treatment is an order signed by the doctor at the direction of the ill individual, or his or her health care representative or guardian. The POLST is a tool to *implement* the ill individual's desires regarding life-sustaining measures.

3. Guardianship

A guardian is a person named by the court who has the authority and duty to make personal and health care decisions for a minor (under18 years) or adult incapacitated person (the "protected person"). A guardian may determine where the protected person will reside and what medical care he or she will receive. The court may appoint a guardian either with unlimited authority, or only for specific actions.

B. Legal Tools - Financial Decisions

1. POWER OF ATTORNEY

A "Power of Attorney" usually refers to a Durable Power of Attorney (for Finances.) This is a legal document in which you delegate to another (your "agent" or "attorney-in-fact") the authority to deal with your finances and assets. Usually a Power of Attorney becomes effective when you sign it, although you may indicate that it is not to be used unless you ask your agent to use it, or unless you become incapacitated.

The Power of Attorney document describes the powers you are giving to your agent, and your agent does not have any authority to act on your behalf outside the scope of such powers. Sometimes a Power of Attorney only allows the agent to deal with a specific matter, such as the sale of a particular piece of real estate. This is known as a "Limited Power of Attorney." In contrast, a "General Power of Attorney" gives your agent very broad authority to deal with your assets and finances.

Most standard forms of General Powers of Attorney do not include optional provisions, such as the right to make gifts, which in certain appropriate situations might be very useful. For instance, if spouses gave each other a Power of Attorney that included provisions allowing assets to be transferred into just one of the spouse's names, and one spouse becomes ill and needs Medicaid to assist with his or her long-term care expenses, the healthier spouse could use the Power of Attorney to transfer assets into the healthier spouse's name alone. This would help to preserve assets for the healthy spouse, while allowing the ill spouse to more easily plan for Medicaid. Or, if an individual has a taxable estate and has been making annual gifts in order to reduce the potential for estate taxes upon his or her death, the individual's agent could continue to make such annual gifts on his or her behalf if such gifting power were specifically granted in the Power of Attorney. In these examples, having appropriate language in your Power of Attorney could potentially save you thousands of dollars. We can help you decide which optional provisions should be included in your Power of Attorney.

In Oregon, a Power of Attorney for Finances is "durable" unless specifically stated otherwise in the document. This means that the Power of Attorney remains valid even if you become incompetent. However, a Power of Attorney is only valid during your lifetime. When you die, the Power of Attorney dies with you.

IMPORTANT NOTE: Powers of Attorneys

When faced with an agent under a power of attorney who is requesting transfer of property to himself or herself without adequate consideration (or a property sale that benefits the agent), the careful professional may wish to inquire further and rule out the possibility of elder abuse. Some of the following questions may be appropriate:

a. Was the power of attorney prepared by an attorney (follow-up thank you with the attorney to verify that the principal was independently represented and competent)? Escrow may not be willing to accept an Internet form, especially one filled out by the power of attorney.

b. What is the current mental state of the principal (in other words, is this a very recently signed document by someone with questionable mental capacity)? Most dementias are slow, progressive illnesses. It is hard (but not impossible) to claim that a principal with dementia was competent two months ago, but is not now.

c. Does the power of attorney contain a “springing” provision - stating that it does not take effect until the principal becomes incapacitated? Most escrow companies will either not accept this document or will require evidence of incapacity before closing the sale.

2. REVOCABLE LIVING TRUST

A Revocable Living Trust is an estate planning document that allows your assets to be managed and distributed in the manner you desire, both during your lifetime and upon death. It is referred to as a "living" trust because it is established during lifetime and, in most cases, goes into effect immediately. It is a "revocable" trust because you are free to revoke or amend the trust at any time as your circumstances change.

The Revocable Living Trust is an excellent way to plan for decision-making if you become incapacitated. The trust appoints a decision-maker (successor trustee) to step in when, and if, you are unable to manage your own financial affairs. The trust document can incorporate specific instructions about how funds will be used if you become incapacitated.

How Does A Revocable Living Trust Work While I Am Able To Manage My Finances? A Revocable Living Trust is created during your lifetime, and your assets are placed in the Trust while you are alive. You can name yourself as trustee of the Trust. This means that you can manage your own income and assets much the same as you have always done, and file individual tax returns like before. You can revoke or amend the Trust at any time, and the terms of the Trust are set entirely by you.

If you want help in managing your estate now, even though you still have mental capacity, the trust document allows you to name a trustee or co-trustee to handle the Trust. Further, you have an opportunity to appoint someone to serve as your trustee or co-trustee and then see if he or she handles things responsibly and according to your wishes. If you are dissatisfied with the way your trustee or co-trustee handles your Trust, you can take over as trustee yourself, name a new trustee, modify the powers you have given to the trustee, or revoke the Trust altogether.

What Happens If I Become Incapacitated? In the Revocable Living Trust, you can specify under what circumstances a successor trustee takes over management of the Trust. This is usually when the person who created the Trust becomes incapacitated. You can spell out in the Trust how incapacity must be established. Typically, a determination of incapacity requires one or two letters from a physician. Once incapacity is established, the successor trustee, who has been named by you in the Trust, can take over management of the assets.

A Revocable Living Trust avoids the need for a court order establishing a conservatorship if at some time in the future you become unable to manage your own financial affairs, either temporarily or permanently. While naming an agent in a Power of Attorney for Finances can often accomplish this, Powers of Attorney are not as reliably recognized by financial institutions.

How Does The Revocable Living Trust Work At My Death? Your successor trustee will have the authority to take over management of the Trust and follow your instructions as spelled out in the Trust. Assets that are owned by the Trust will avoid probate entirely, which, in turn, can avoid significant costs and delays at your death. People with real property in more than one state can avoid multiple probates with the use of a Trust.

3. CONSERVATORSHIP

A conservator is a person appointed by the court with the authority and duty to manage the financial affairs of a person needing protection, such as a minor (under 18 years) or an incapacitated adult (the "protected person").

A conservator may be appointed for an adult if a judge determines that the individual lacks the capacity to manage his/her financial resources. The conservator can be an individual (i.e. family member or trusted friend), bank, trust company, or professional fiduciary. The conservator is empowered to take possession of the protected person's assets and income, and provides for payment of the protected person's expenses.

The conservator becomes the sole financial decision-maker for the protected person. The protected person loses all control of his or her property and assets, except for a few limited powers in certain situations. Sometimes a protected person may be competent to make a Will, or change beneficiaries of life insurance and annuity policies. The conservator may also give the protected person access to a limited amount of funds for personal use.

Oregon law allows the appointment of a temporary conservator in an emergency situation. Examples of situations requiring a temporary conservator include irreparable financial abuse, or where emergency access to funds is necessary to pay for medical treatment. Appointment of a temporary conservator can also be used to freeze or limit access to bank accounts and investments while an investigation into elder abuse is being conducted.

V. WORKING WITH FIDUCIARIES

Litigation against fiduciaries, including agents under Power of Attorney, Trustees of Revocable or Irrevocable Trusts, even court- appointed Conservators or Personal Representatives is on the rise. As discussed above, the aging of our society and the large shift of wealth that will occur in the next 30 years is increasing both the number of fiduciaries acting on behalf of incapacitated adults and the temptation to breach those duties when large sums of money are involved.

A. The Fiduciaries

1. Agent under Powers of Attorney

A power of attorney is a written instrument in which one person, as "principal", appoints another to serve as his or her agent or "attorney-in-fact." A power of attorney confers upon the agent the authority to act in place of the principal for the purposes stated in the instrument.
The fiduciary duties of an agent under power of attorney are generally governed by (and in the order of) (a) the document, (b) ORS 127.002-127.045 and (c) applicable case law.

2. Trustee of Revocable Living Trust

The Revocable Living Trust is an excellent way to provide for decision-making if the settlor becomes incapacitated. The trust appoints a decision-maker (successor trustee) upon the incapacity of the settlor. The trust document can incorporate specific instructions about how funds will be used if your client becomes incapacitated.
The fiduciary duties of a trustee of a Trust are generally governed by (and in the order of) (a) the document, (b) the Uniform Trust Code, ORS Chapter 130 and (c) applicable case law.

3. Court-Appointed Conservator or Personal Representatives

A conservator may be appointed by the court if, based upon medical testimony, it is determined that the individual lacks the capacity to manage his/her financial resources. A personal representative is appointed by the court to administer the estate of a deceased person. The conservator or personal representative can be an individual, bank, trust company or professional fiduciary.

A conservator is empowered to take possession of the protected person's assets and income and provide for payment of the person's expenses. The conservator has all the powers that the person would individually possess to manage financial affairs, with or without prior court approval.

A personal representative (executor) is empowered to take possession of the deceased person's income and assets, to pay final expenses, taxes and any claims against the estate and to distribute the estate to the heirs upon final approval of the court.

B. The Duties and Liabilities of a Fiduciary

A fiduciary has accepted the duty and liability to act in the best interests of the principal. All fiduciaries, whether an agent (power of attorney), trustee, conservator or personal representative, are bound by similar legal obligations. Breach of one or more of these legal duties are actionable, often exposing the fiduciary to personal liability for the financial harm done.

A fiduciary must:

1. Preserve and protect the assets of the principal and entity.

2. Keep funds "titled" in the name of the principal or entity. Keep all funds entirely separate from fiduciary's own personal funds.

3. Use the property for the benefit of the principal, beneficiary or protected person only.

4. No gifts, loans or transfer to a third-party without specific, written authority in the document or by the court.
5. Keep scrupulous records of all income and expenses. Be prepared to provide a full accounting as required by law.

6. Preserve and protect the "**Estate Plan**" of the principal, settlor or protected person.