

## **A Step-by-Step Analysis: ORS 124.060**

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The Oregon Legislature passed HB 2205 in 2013. The bill amended ORS 124.050(9) to add attorneys (and dentists, optometrists, and chiropractors) to the list of professionals who have a legal duty to report elder abuse. As of January 1, 2015, all attorneys have the duty to report elder abuse, as described in ORS 124.060. The duty only arises in some situations. There are exceptions to the duty, even in many of the situations where the duty arises.

ORS 124.060 states the duty and sets forth the exceptions for mandatory elder abuse reporters. Due to the potential for conflict between the ethical obligations that lawyers owe their clients and the duty to report elder abuse, attorneys should be aware of the relationship between ORS 124.060 and other rules or statutes that may have a significant effect on the practical application of the mandatory reporting requirement.

In order to analyze the duty and exceptions to the mandatory elder abuse reporting properly, it is essential first to review the statute governing mandatory reporting. ORS 124.060 reads as follows:

**124.060 Duty of officials to report; exception.** 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.

Parsing this statute, it is important to consider the following terms:

### **I. Elderly Adults**

Elderly adults, as defined for purposes of ORS 124.060, include all adults 65 years of age or older who are not residents in a long term care facility. ORS 124.050(2). The mental capacity or vulnerability of the elderly adult *does not* affect the duty to report. There is still a duty to report abuse when the alleged victim is a 68 year employed person with full mental capacity and little apparent vulnerabilities for abuse, provided that the circumstances meet the elements set out in ORS 124.060, and provided that no exceptions to the attorney's duty to report exist.

## **II. Public or Private Official**

ORS 124.060 specifies who is required to report elder abuse. A “public or private official” is required to make such reports in the covered circumstances. The definition of “public or private official” sets forth the professions that have a duty to report. This list includes attorneys. ORS 124.050(9)(r). There is no distinction as to who is considered a “public” versus a “private” official.

## **III. Reasonable Cause**

To trigger the duty to report, the “public or private official” must have “reasonable cause to believe” that an elderly person was abused. While ORS 124.060 does not define “reasonable cause,” there are a few sources that may serve as guidance for this definition.

The Oregon Rules of Professional Conduct (“ORPC”) is one important source of such guidance. ORPC 1.0(*l*) defines “reasonable belief” to be when “a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”

Case law is another possible source of the definition of “reasonable cause.” The Oregon mandatory child abuse reporting requirement has very similar language to the elder abuse reporting requirement. *See* ORS 419B.010. In child abuse reporting case *Berger v. State Office for Services to Children and Families*, 195 Or App 587, 590 (2004), “reasonable cause” is defined as “reasonable suspicion.”

In general, “reasonable cause” seems to be a lower standard than what law enforcement might term “probable cause.”

## **IV. Contact**

The statute also requires the attorney to have come in contact with the alleged abused elderly victim or the alleged abuser before the mandatory reporting requirement is triggered. ORS 124.060. When an attorney receives information from a third party regarding alleged abuse, and has not been in contact with the alleged abuse victim or alleged perpetrator, the attorney *does not* have a duty under ORS 124.060 to report the alleged abuse, even if the lawyer has reasonable cause to believe that there has been elder abuse.

Of course, an attorney may *want* to report certain cases even if there is no trigger to make the mandatory report. For instance, an attorney may want to make a report due to the attorney’s moral code, to prevent harm to another being, or to protect the attorney from potential personal civil liability.

There remains a question whether the attorney is ethically allowed to make such a report in a wide variety of circumstances. For more discussion of these issues, please see the brief discussion below in this author’s materials, and the somewhat more detailed discussions in materials provided by other authors of this chapter, also set forth below in subsequent sets of materials provided by these other presenters.

## **V. Abuse**

Abuse is defined in ORS 124.050 as non-accidental injuries or pain, neglect, abandonment, sexual abuse, rape, sexual harassment, sexual exploitation, inappropriate exposure to sexually explicit material or language, verbal abuse, financial exploitation, private indecency, involuntary seclusion, or the wrongful use of physical or chemical restraints. Definitions of abuse other than the definition set forth in ORS 124.050 may be important in a variety of situations. However, for analysis of the statutory duty to report, it is important to remember that the only definition that directly applies to the reporting duty set forth in ORS 124.060 is the definition set forth in ORS 124.050.

It may also be important to note that in 2015, the Oregon Legislature passed HB 2227, which amended ORS 124.050 to specify that sexual abuse *does not* include consensual sexual contact between the elderly person who resides in a facility and an employee of that facility who is *also* the elderly person's spouse. ORS 124.050(11)(b).

## **VI. Work Life and Personal Life**

Mandatory reporting is not confined to work. Attorneys are also required to report elder abuse disclosed to the attorney in the attorney's personal life if the mandatory reporting requirements are triggered. Indeed, it may be more common for a reporting requirement that is triggered in the attorney's private life to result in an actual duty to report than it is when a reporting requirement is triggered in the attorney's professional life. The reason for this is that a great many of the exceptions to the duty to report only apply to situations that arise in the attorney's professional life where there is an actual attorney-client relationship, and where issues of privilege, confidentiality, and detriment to a client can arise.

## **VII. The Report**

A mandatory reporter who becomes privy to elder abuse, as defined in ORS 124.050, must make an elder abuse report if no exception to the duty to make a report exists. ORS 124.060. The method of reporting must be an immediate oral report to the local DHS office or law enforcement agency *within the county* where the attorney making the report is *when receiving notice* of the alleged abuse. ORS 124.065.

Specifically, the attorney must report:

- Name and address of the alleged elderly victim;
- Names and addresses of any person responsible for care of alleged victim;
- Nature and extent of alleged abuse, including previous abuse;
- Explanation given for alleged abuse, if any; and
- Any other information which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the abuser.

## **VIII. Exceptions**

Due to inherent conflicts between the attorney-client relationship and mandatory reporting of abuse, ORS 124.060 allows for exceptions to the duty to report. In the analysis of the statutory exceptions to the duty to report, attorneys should remember that an attorney is required to abide by the client's decisions concerning the objectives of the client's representation and is required to consult with the client as to means of pursuing such objectives. ORPC 1.2(a). The attorney is also required to keep the confidences of the client, and is allowed an exemption from the duty to report if disclosure will be detrimental to the client. Further, the attorney is required to explain information to a client to the extent "reasonably necessary" for the client to make an informed decision. ORPC 1.4(b). The attorney is also required to explain this material in a way that is appropriate for the client in question (Oregon Formal Ethics Opinion 2005-159).

### **A. Privileged Information**

An attorney is *not* required to make a report if the information that the attorney is relying on stems from an attorney-client communication that is privileged. ORS 124.060. A privileged communication is governed by ORS 40.225 (Oregon Evidence Code ("OEC") Rule 503). A client who consults with an attorney to obtain professional legal services has made a confidential communication if the communication was not intended to be disclosed to others, unless it would further the legal services rendered or the communication was reasonably necessary to be disclosed. Such a confidential communication is privileged under most circumstances *See* ORS 40.225(1) (OEC 503). The client holds the privilege, not the attorney. *See* ORS 40.225(2) (OEC 503).

If the client would like the report to be made, then the attorney is required by ORS 124.060 to make the report if the duty to report is triggered. Even if the duty to report is not triggered, but the client wishes a report to be made, the attorney may need to report in order to comply with the client's instructions (and ORPC 1.2(a), which requires a lawyer to comply with the client's decisions), but this is not a duty that is triggered by ORS 124.060.

Without the privilege exception, the attorney would still need to do a thorough analysis as to whether there is a duty to report. The attorney *may* reveal information stemming from representation if the attorney reasonably believes it is necessary to disclose the client's intent to commit a crime and the information is necessary to prevent the crime, death, or substantial bodily harm. ORPC 1.6(b). Since this will not involve abuse that has actually occurred, as set forth in ORS 124.050, no actual duty to report will have arisen under ORS 124.060, however.

### **B. Detriment to Client**

An attorney is also *not* required to make a report if information that was disclosed to the attorney in the course of the attorney's representation of a client would detrimentally affect the client. ORS 124.060. This is a broad exception for attorneys and is not available to other public or private officials. Any degree of detriment to the client is sufficient for the exception to apply. The type of detriment caused by the disclosure is subjective to what the client believes is detrimental.

For example if a client is being financially exploited by her son, but the client believes the release of the information would detrimentally affect her relationship with her son and her grandchildren, the attorney is *not* required to make an elder abuse report.

However, if the client would like the report to be made despite such perceived detrimental effects, then the attorney will be required to make the report in most circumstances. While the attorney may feel the disclosure would be detrimental, and while the client may agree that the disclosure would be detrimental, the client is entitled to direct the attorney's conduct of the case, so long as that conduct of the case is within the law. Since the exemption from the duty to report is a permissive exception instead of a mandatory exception, the attorney is *not* required to report if the exception applies. Yet, the attorney may still report if the client so directs.

If disclosure is not required by statute, and if the disclosure would violate an ORPC, the attorney *may not* disclose the information, unless this disclosure is mandated or authorized in some other fashion. For a further discussion of such exceptions to the exceptions, see accompanying sections authored by other presenters.

## **IX. Penalty**

An attorney, or any other required reporter, who is found to have violated the duty to report commits a Class A violation, for which the penalty is currently a \$2,000.00 fine. However, as stated herein, there are exceptions to the duty.

Of course, an attorney who violates the law may also be subject to discipline, which may be an even more severe penalty for the attorney. The attorney who violates the ORPCs, of course, may also be subject to discipline, so a careful analysis of the interplay between the statutory requirements and safe harbors of ORS 124.060 and the various ORPCs is crucial.

It is also worth noting that a person who is found guilty of elder abuse (or of failing to prevent elder abuse where a reasonable person should have known of the abuse) may be liable for treble damages, which triples the amount of damages that the victim proves, plus attorney fees, which can themselves be substantial. Once again, an analysis of the ethics rules will be crucial, particularly if compliance with the ethics rules would prevent an attorney from making an elder abuse report or otherwise taking steps to prevent elder abuse, thereby providing a potential defense against any allegation that might give rise to this potential civil liability.

## **X. Conclusion**

An Oregon attorney is required to report elder abuse when triggered by ORS 124.060. However, when there is an attorney-client relationship, there may be many situations in which the attorney is *not* required to report due to an exception to the reporting requirements of the statute. Further, in many such situations, an attorney may be restricted from reporting where such a report would violate the ORPC. An analysis of each individual situation is necessary to determine if the duty is triggered, if an exception exists, and whether an ethical rule would prevent disclosure or reporting.