



## Monthly Newsletter September 2016



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### **Medical Professionals, Elder Law Attorneys and Their Older Patient/Clients All Benefit When the Professionals Work Together**

There are often situations in which an older person needs the services of an attorney *and* medical professionals. A recent [article](#) in *Bifocal*, a publication of the American Bar Association, highlighted six scenarios in which such a collaboration would be beneficial to the older patient-client's well-being, as well as the professionals. This issue of *ElderCounselor* will summarize these situations.

#### **Decisional Capacity Issues**

When provided with adequate information, most older individuals retain sufficient cognitive and emotional ability to make autonomous, valid decisions about important aspects of their own lives. Sometimes, however, an older person's capacity to make and express valid choices about personal (including medical or residential) or financial matters is questionable and/or questioned by others.

#### *Working Together*

The elder law attorney needs involvement from medical professionals to help recognize when decisional capacity may be compromised and to quantify the existence, degree and reversibility or alterability (for example, through medication management) of decisional impairment. The physician and other medical professionals could benefit by working with an elder law attorney who can identify and accurately describe the potential legal implications of the person's decisional impairment. The attorney can then

evaluate possible interventions such as guardianship, supported decision-making arrangements or reliance on previously created or implied advance directives or other instructions.

### **Elder Mistreatment**

Many older individuals, especially those with cognitive decline, are at risk of physical, psychological and financial mistreatment at the hands of family members and others. In addition to abuse and exploitation, elder mistreatment may occur in the form of neglect, often occurring in the older person's home or that of a relative with whom the older victim resides.

Compounding the problem is the reluctance of many older persons to cooperate in reporting and

investigating their own mistreatment. They may accept physical or emotional abuse, financial exploitation or neglect of basic needs like hygiene or medications by a family member out of fear that making a report might result in being removed from the home and placed in a nursing home.

#### *Working Together*

Medical professionals are generally the first to recognize, evaluate and medically treat signs and symptoms of elder neglect, exploitation or abuse. Their input is essential in considering and effecting legally permissible options or required actions. Health care professionals often have a responsibility to monitor the quality and safety of home care provided by family caregivers or others, and a duty to report instances of suspected abuse to authorities. An elder law attorney can help both the medical professionals and the older patient/client by providing legal advice pertaining to the professionals' responsibilities to report, confidentiality considerations, legal ramifications of failing to report, and legal immunities attached to reporting or other interventions.

### **Self-Neglect**

A significant percentage of older adults, mainly living alone, do not regularly attend to their own needs or well-being when it comes to health care, hygiene, nutrition and other matters. The majority of cases reported to Adult Protective Services (APS) by health and social service professionals and family members are triggered by suspected self-neglect, and the health care system expends considerable efforts trying to intervene in these situations to prevent increased rates of hospitalization, nursing home placement and even death.

#### *Working Together*

In these situations, the medical professional's role is vital in determining the potential problem, nature and seriousness of the risk, and identifying viable intervention strategies. Decisional capacity issues (addressed above) almost always arise in these cases. An attorney can advise the medical professional about legal reporting requirements or options, as well as legal boundaries for interventions that can be designed and conducted in a way that best respects the older person's dignity and autonomy while still protecting the person from foreseeable and preventable self-generated harm.

### **Medical Payment Issues**

When attaining appropriate medical and rehabilitative care for older patients, it is imperative to make sure that payment for needed services will be available. For most people age 65 and over, this means working with not only Medicare but potentially with state-specific Medicaid programs and/or private

insurance companies.

One common problem concerns older patients who have entered hospitals through emergency departments and held for observation, instead of being admitted as in-patients, before being transferred to nursing facilities. This practice, as well as hospital discharge and readmission practices, may jeopardize coverage for subsequent rehabilitation services. Other issues may involve the interpretation and application of Medicare rehabilitation payment policy regarding the standard of need for services instead of continuing potential for benefit. There are also issues with coordinating benefits under Medicare with services covered concurrently in whole or in part by other third-party payers.

#### *Working Together*

The elder law attorney trying to obtain payment for the older patient's medical care or rehabilitative care needs assistance from the patient's medical professionals in order to document, clarify and argue questions about the older person's medical condition, needs and prognosis. Conversely, the medical professional may need assistance from an elder law attorney to assert and advocate for the rights of the older person.

#### **Family Issues**

Families often act as caregivers, sometimes paid but more often as volunteers, for older relatives who are not fully independent. Family members may also be acting as surrogate decision makers for those with reduced decisional capacity, making choices on behalf of the older person, or as helpers to a person who is capable of making decisions with support. In cases of self-neglect, the family may find an older loved one who refuses to acknowledge mental decline and the need for help. And sometimes, families have interests that conflict with those of an older person and seek to put their own interests first, to the detriment of the vulnerable older person.

#### *Working Together*

Medical professionals are important in recognizing when the caregiver's burden is at risk of endangering both the caregiver and the person dependent on their caring. An elder law attorney can inform all parties about public or private sources of financial and other support for family caregivers, including benefits under the federal Family and Medical Leave Act and state counterparts.

For medical decision making, whether for surrogate decision makers when the person has reduced decisional capacity or for those who help the older person make decisions, medical professionals provide information, recommendations and support in the process. An elder law attorney may work with individuals who are currently capable of decision-making and their families in the advance health care planning process. The attorney may also clarify for medical professionals the legal authority of surrogate decision makers. The attorney and medical professionals may also work together to present cases to an ethics committee or consultant when there are serious disagreements among family members, or to act as a mediator and/or patient advocate when there are disagreements about the patient's best interests.

In cases of self-neglect, the attorney and medical professionals working together can often recommend options that will benefit both the family and the loved one.

When a family is acting on its own interests to the detriment of the older person, a medical professional will usually be the one to notify the individual's attorney of the conflict. The attorney may initiate or threaten legal action to protect the rights and welfare of the older person in a way that also protects the ethical and legal interests of the medical professional.

### **Confidentiality**

Medical professionals and attorneys have concerns about the permissible handling of personal information they learn about a particular older patient/client solely as a result of the formal relationship between professional and patient/client. For example, a medical professional may wonder about the confidentiality ramifications of his/her suspicions that an older patient is being neglected, exploited or abused.

#### *Working Together*

A medical professional can educate the attorney about the health care information collected on an individual patient, how and where the information is documented and stored, how to interpret it, clinical uses to which it is applied, and who has access to the information. The attorney can educate and counsel the medical professional about legal parameters of information collection, maintenance and sharing under common law confidentiality principles, state statutes and regulations, the federal Health Insurance Portability and Accountability Act (HIPAA) and other legal provisions. The attorney can also explain different expectations and rules for protecting patient privacy as they apply to members of different professions. For example, a social worker employed as staff in an elder law office who suspects elder mistreatment may be subject to reporting requirements while the attorney is not.

Inter-professional communication about confidentiality can also be beneficial to the older patient/client. Accurately informed medical professionals and attorneys are well-positioned to protect the autonomy and privacy interests of older persons to whom they owe fiduciary duties, while at the same time allowing the sharing of relevant information to authorized recipients so that services for the older person can be maximized.

### **Conclusion**

There are, of course, other situations when it is advisable and beneficial for medical professionals and elder law attorneys to work together for the safety and well-being of their older patients/clients. For example, it might be necessary to manage a situation involving unsafe driving by an older person who resists voluntarily restricting personal use of an automobile.

Generally speaking, elder law attorneys and the medical professionals who care for older patients/clients often have a genuine calling to work with the elderly. And when the professionals work together to serve their older patients/clients, everyone benefits. If you know of someone who could benefit from the advice of an elder law attorney, please contact us. We are ready to help.

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