

Oceana's Law for the Layperson

How to Protect Elders from Harm

James T. O'Reilly

Legal Almanac Series

Oceana

How to Protect Elders from Harm

by

Prof. James T. O'Reilly
University of Cincinnati

Oceana's Legal Almanac Series:
Law for the Layperson

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Eminent International Law Counselor,
Tireless Mentor to Young Lawyers, and
Constant Inspiration to Our Community

ABOUT THE AUTHOR

Professor James T. O'Reilly teaches at the University of Cincinnati College of Law, and has published thirty-eight textbooks on legal issues. He is a member of the National Association of Elder Law Attorneys and is a former chair of the 16,000-member Section of Administrative Law and Regulatory Practice of the American Bar Association. The ABA Press published his earlier textbooks on nursing-home legal issues and on injuries and accidents affecting the elderly. His previous work has been followed by federal and state courts, and the U.S. Supreme Court quoted one of his earlier books as the "expert" on medical issues, in a 2000 FDA decision. In addition to assistance to family members and friends affected by the subject matter of this book, Prof. O'Reilly has aided elders through the Volunteer Lawyers for the Poor program in Cincinnati and the National Veterans Legal Services program in Washington, D.C. He is a graduate of Boston College and of the University of Virginia School of Law.

INTRODUCTION

This book aims to help the reader who has a relative or friend over the age of seventy—or younger but with an impairment like dementia—who faces the risk of harm from one of several risks. Remedies for harm are available in the American legal system, but they are not easily obtained. For the average layperson, the legal system is a daunting wall to climb, a barrier to overcome, without a skilled elder-care attorney to provide advice. The author, as a member of the National Association of Elder Law Attorneys and as a scholar, researcher, and veteran legal-aid advocate, has seen the complexities grow so great that the typical layperson feels overwhelmed. While this book is not endorsed officially by any organization, years of experience and our law textbooks on nursing homes and on elder accidents and injuries have shaped its advice to the reader.

This book helps you to understand the twin legal systems—regulation and litigation—that are used to respond to elders' safety and harm issues. Each system has utility, and this book explains each so that you can maximize its responsiveness. Each has problems, and we lay out some of the issues to facilitate your overcoming them. Please consider carefully whether to engage the services of an experienced elder-law attorney at the outset of your efforts; their expertise and the collective wisdom of their national association will be very helpful and will save you considerable difficulties.

Lastly, there's a special place in heaven for those who honor and support their elders. Whether that kind of folk wisdom appeals to you, the honorable and noble quest for justice on behalf of elders exposed to harm is laudable. Your effort to gain compensation, or to prevent others from experiencing the same harms, is to be applauded.

Along the way to the remedy, you will face inertia in some offices, hostility from negligent or willful violators, and complexities at every turn. This book gives you an overview. From here you can discern a path, and

perhaps an experienced elder-law counselor near you can help chart your course. Remember at every stage that the victory you win acts as an incentive for some and a deterrent for others. Do not give up on your elderly friend or relative, and your persistence and prudence will achieve your goal of success.

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Prof. James T. O'Reilly

Cincinnati, Ohio

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CHAPTER 1:

UNDERSTANDING THE RISKS TO THE SAFETY OF ELDERS

All of us will be elders someday—at least we can hope for long lives. It is sad, frustrating, and sometimes infuriating to see the harm that occurs to some elders. It is doubly frustrating when we don't know what we can do to stop that harm, deter future harm, or compensate them for past harm. That's why you have opened this book: to get the benefit of reasoned and succinct observations from experienced advisors.

Our purpose in this book is to discuss the harm that can occur to elderly persons and the ways in which you can use the legal system to avoid some harms, shield some elders from harm, and compensate other elders or their surviving family members. We write it because of the experiences we have had protecting elders, and the lessons we have learned from years of research, lecturing, and writing in the field of elder safety.

Though there are many books that deal with specific risks and numerous detailed lawyers' textbooks on specific types of lawsuits, our objective is to clarify for you the ways in which you can use the remedies provided by law to protect an elderly friend or relative.

For purposes of this book, we will use the term *elder* to describe a person over seventy years of age who has certain infirmities. Euphemisms like *senior citizen*, *older American*, and the rest are widely known, but for simplicity we select the respectful title *elder*. The selection of seventy reflects the age at which a substantial number of impairments become manifest in a substantial number of people. Of course, we could choose age groups like those sixty and sixty-five years old, but on the whole they are still quite active and involved. Populations of users

of nursing-home and home health-care services are predominantly persons over seventy years old.

What physical harms pose particular risks to elders? Many, but especially falls, fractures, abuse, neglect, assault, infections, and death by accident after wandering as a result of dementia.

What financial harms pose particular risks to elders? Thefts and deceptive sales tactics, including schemes to steal property or equity from homeowners, are the most serious. Greed motivates the less ethical sales representatives to target the savings of elders; in part this reflects a belief among criminals that elder victims are less likely to confront and prosecute when they have been victimized.

How do elders' injuries and illness occur? Multiple ways exist, just as for any adult population; but with our book's focus on preventing harm, we will focus on a few risk events: negligent acts by family and caregivers; errors and accidents by the elder himself or herself; malpractice by professionals; omissions of protective duties; or abuse or assault by a caregiver.

What are the principal medical responses to these problems? Acute injuries bring doctor intervention with medical devices and pharmaceuticals, sometimes with hospitalization, and always with attention to the preexisting physical condition of the elder. Medication for brain stability in depressed elders; physical protection through facility security for confused dementia patients who could wander; and assistive devices for mobility, for those unable to maintain a steady gait, are examples of the responses to harms.

Can an elder rely on government for protection from physical harms? No: most of the scenarios in which an elder is hurt do not have a particular harm that was planned for in advance. Government can write rules or guidelines that aspire to prevent physical harm, but elders should never rely on the rules to be "out in front of" the situations that cause harm. Government's decision-making process is so slow that injury risks are well known before they are stopped (or attempts are made to lessen them) by government regulations.

What portion of injury or illness cases is avoidable? It's difficult to generalize. No definite statistics exist, beyond anecdotes. Projections from small samples are notoriously inaccurate. Many illnesses like influenza are not going to be remedied by laws or lawsuits; many accidents like suffocation from restraint straps in a nursing home are going to be deterred by regulations that prevent the use of straps and by lawsuits that have won large verdicts against strap-employing nursing homes.

What portion of injuries is the result of fault or misconduct by others? Falls by elders are often caused by internal problems in balance, gait, etc. Many fire cases are attributable to negligent failure to protect oneself or to avoid contact between stoves and sleeves of garments. Death by the wandering of a dementia patient outside of the zone of safety is a high risk, but it is not really a matter of "fault," except where a legal duty to protect from risk arose from the status of the patient and the caregivers.

What legal remedies are available for protection of the elder or for compensation to his or her estate? This book's chapters describe each of the major risk factors and then the remedy for them, as well as barriers that the defense will use against any challenge.

How are harms from financial fraud on elders considered? When a fraud or rip-off occurs, the first priority of government should be to stop others from a similar theft by deception. The second priority should be to force repayment, or to liquidate any assets of the fraudulent seller and to distribute the funds to the victims of the fraud.

Can we rely on government to prevent frauds on elders? No. There are not enough federal or state investigators to conduct all the inquiries needed to respond to complaints. Outnumbered by fraudulent operators and harassed by their lawyers into lengthy procedural fights, government is wary of taking on all the violators who could be targeted. Thus, a government investigation is rarely done without nagging from some individual or group complainant, who is persistent in seeking remedies. That's why so many criminals get away with a series of small frauds. Often, these criminals end up reaching too far, into a large scam, which results in prosecution. The answer then is that government cannot be relied upon to prevent fraud being done to elders.

So how can I use this book? If you have a concern about the way harm has been experienced by an elder, read the relevant chapter and decide if your situation warrants government action and/or a lawsuit brought against an entity that caused the harm. You will not need an attorney to file a governmental complaint, though that can improve the chances of a successful response and successful action by the government. But you will need a local attorney to file a lawsuit; you should consider lawyers specializing in elder cases, such as members of the National Association of Elder Law Attorneys (naela.org), who have probably encountered your situation before, as they worked with others. There are thousands of civil-litigation lawyers available; the reason for using a specialist is that Medicaid-Medicare liens for recovery of public-assistance benefits might take away much of the value of your efforts

when the governmental agency uses the proceeds from your lawsuit to pay back the federal or state funds from which care had been given to that elder. You need to recognize the peculiarities of this field; this book will give you sufficient knowledge to assess your situation before you arrive at the office of the attorney who can handle your specific situation under your state's laws.

CHAPTER 2:

WILL ANYONE HELP MY PARENTS?

It is a natural human feeling to want to safeguard our parents and elderly friends from harm. This book is about consequences and about remedies that will be available when adults seek to aid elders. This chapter will address some of the common questions that arise when people try to protect an elder from harm. Your personal efforts will be important for the elder you're helping, and for society in general as we try to assist those who need support and protection. You are not alone in this struggle for the right legal remedies; others have had the same experiences.

The natural first question is: Should I complain about what I see happening with this elderly person? If you are concerned about safety or risk, or about financial fraud against an elder, yes: express your concerns. The recipients of the complaint will vary according to the situation. If a person is living alone at home, and you believe is in some danger or difficulty after speaking with him or her, consider contacting the local office of your state "Adult Protective Services." To make it more likely that action will occur, call them with facts, names, or any other details that may facilitate their decision to investigate.

How will I know that the elder needs help? If an elderly neighbor comes to the door covered with bruises when you check in with her, this may be a signal of caregiver abuse. If you are a branch-bank manager and a confused elder comes in to withdraw cash, call the adult son or daughter responsible for this person, if you have that information from bank records. If you visit a nursing home and see deplorable treatment of one or more patients, request a meeting with the administrator. If this does not satisfy your concerns, then contact your health department or state long-term care officials; if you can find the ombudsman for nursing homes, that local person should be contacted.

Will anyone act on my complaint? Yes. If you act in a calm and businesslike manner, your complaint will receive respect and attention. The more specific you are, the more likely it is that an investigation will begin. Persistence matters, but keep your actions polite and firm.

When must the responding person act on your complaint? The response can vary depending on the person contacted; unfortunately, that person may choose to ignore your complaint entirely. Bureaucrats “must act” when the law requires a response. Ombudsmen for nursing-home patients must act in accordance with their government office’s standards for investigation. Private companies and persons may ignore the complaint, if they choose, but doing so is usually bad for public relations and may induce the person complaining to bring a lawsuit.

How should I best assert my complaint? Visit or call, and be specific; in some cases, be ready to write if the ombudsman or government office requires a particular letter or standard form to be submitted.

Should complaints be initiated locally, and made to the officials of the government agency or of the company affected? Yes. The first step is the nursing-home administrator, the seniors-housing director, or the human-services agency director. Physical-abuse cases should go to the local office of Adult Protective Services or its equivalent. If the offending entity is a provider of services receiving funds from the government, like a nursing-home chain, then consider a complaint letter to the headquarters of that entity, with a copy shown and sent to the federal Office of the Inspector General (oig.hhs.gov) or the state agency (listed in Appendix 1, below).

Has this type of harm happened before, or does my case show the necessity of new regulatory protections? Sad but true, the patterns of elder abuse are very well known. If abuse of your elderly friend or others in this nursing home looks very bad, the chances are that other situations have looked worse. Usually the shortcoming is not that the protections are missing from the rules or manuals or procedures—it’s that they are not actually being implemented. It takes time to discern what’s occurring behind the facade of dignity and caring.

What role does government have as the entity arranging or paying for services to elders? The benefit of government involvement is that its extensive paperwork requirements will create a record that specifies what happened, through what means, with what persons involved.

In practice, this means the possible civil case can be more readily proven. In some cases, the violation of the federal standard or state law will be negligence “per se,” so the injured person will win. Government