

**Ohio Elder Abuse Commission
February 22, 2010 Meeting
Public Comment**

OVERVIEW

Today's comments are intended to supplement the comments which I addressed to this Commission on September 21, 2009, as reported by the materials from that meeting which have been posted on the Commission's website.

To begin with, I wish to bring to this Commission's attention the November 4, 2009 and December 11, 2009 ABC broadcasts which are reported online at <http://abcnews.go.com/2020/mary-ellens-mansion-elder-abuse/story?id=8976473&page=1> and <http://www.abcnews.go.com/2020/mary-ellens-mansion-elder-abuse/story?id=8974477> respectively. These reports graphically demonstrate the need for what was previously recommended, namely a protocol for use in circumstances like that captured on video in this case.

Following a brief discussion of these ABC reports, I will recommend for this Commission's consideration a checklist and other protocol details.

Sincerely,

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ABC's REPORTS

Central to these reports are the videos of an aged, ailing woman signing legal documents, including a power of attorney and Will, under a lawyer's supervision.

These videos were made by the lawyer and those who stood to benefit from these documents. They were made for the purpose of arguing that this woman was competent and acting of her own free will while signing these documents.

The making of such videos by lawyers is a practice which has become increasingly common over the past decade. It was first brought to my attention several years ago by Dr. Diane Armstrong, the author of a highly acclaimed book on the abuse of involuntary guardianships and an expert witness who was called upon to testify by the U.S. Senate Committee on Aging in 2003.

In the case reported by 20/20, authorities were not convinced by these videos. Following the victim's death, a judge threw out the Will, saying it had not been executed properly. The lawyer was accused of professional misconduct in his dealings with the victim, forced to surrender his law license and indicted by a grand jury for attempted theft.

These ABC reports demonstrate the need to develop and mandate protocols of the kind previously recommended to this Commission. If such a protocol existed, and if the attorney in the case reported by ABC had followed it, he could have at least used his compliance with the protocol as an argument for why he shouldn't have been disbarred and indicted on criminal charges.

CHECKLIST and OTHER PROTOCOL DETAILS

One of the first steps in applying the proposed protocol to any specific situation requires someone to recognize that the situation is such that the protocol needs to be implemented. This person could be, in the case of what has been proposed in re. Section 21351 of the California Probate Code, an independent examiner, who could make use of a simple form which lists at-risk circumstances and conditions, including the following

Criteria	Yes	No	Unknown
There exists any complaint, record or evidence of the transferor having been abused and/or neglected within the past 6 months Note: This would require a check of APS, law enforcement and court records. This check could be initiated as needed and/or when clients are admitted to a hospital, ambulatory health facility, nursing home, residential care facility, community mental health facility or other adult care facility,			
Transferor requested this safeguard upon admission to facility (supra) or as subsequently noted in his chart			
Transferor is under a Do Not Resuscitate order			
Transferor has been administered a psychoactive drug, psychopharmaceutical or psychotropic within the past 24 hours Note: A psychoactive drug, psychopharmaceutical or psychotropic is a chemical substance that acts primarily upon the central nervous system where it alters brain function, resulting in changes in perception, mood, consciousness and behavior. (ref. http://en.wikipedia.org/wiki/Psychoactive_drug) Note: This criterion applies to anyone on a morphine drip			
Transferor has been declared mentally incompetent or mentally challenged by a court			
Transferor has been diagnosed by a physician as suffering from memory loss, impaired judgment, or other cognitive disorder Note: This criterion applies to anyone who is diagnosed with Alzheimer's disease			
Transferor is a ward for whom a guardian has been appointed			

If Yes is checked for any criterion in this checklist, then this protocol would require further examination/investigation before the business at hand can proceed.

Because checking Yes would require further examination/investigation before the business at hand can proceed, any business conducted while an examination/investigation is pending could be summarily voided, depending upon details of protocols which still need to be worked out.

The same or similar checklists and protocols would be applicable in both institutional and non-institutional settings. For example, they are needed when a lawyer visits the transferor in the transferor's home, or when the transferor visits a lawyer in the lawyer's office. In such cases, there is a need to require attorneys who know, suspect or should suspect that the transferor is in such a condition to follow this protocol.

In order to preclude an attorney from relying on the excuse that he didn't know or see anything to raise his suspicions, attorneys would be required in such cases to complete, on the basis of their interview with the transferor, a checklist similar to the one which is included above. If Yes is checked for any criterion in this checklist, then the attorney would need to contact APS, for example, which would then be required to arrange for an independent examination similar to what is required in a clinical setting. If Yes is not checked for any criterion that should have been checked, then the business that is transacted would necessarily be voided on the grounds that the transferor failed to have sufficient capacity to ensure that the form was filled in correctly even after the attorney carefully explains to the transferor its importance.

Any attorney who is concerned for any reason that this checklist might inadvertently be completed inaccurately can always resolve this concern by submitting the transferor to the independent examination regardless of what he and the transferor check off on the form. Any transferor who has such a concern can resolve it similarly.

Finally, anyone who does not want to submit to such a protocol in the future can presently submit to examination by contacting APS, for example, and arranging an independent examination so as to execute an exemption applicable to future transfers.

ADDITIONAL PROTOCOL DETAILS

As applicable in clinical and institutional settings, including hospitals, ambulatory health facilities, nursing homes, adult care facilities, residential care facilities, and community mental health facilities

- Any attorney who intends to present an instrument to a transferor for his review and/or signature must first notify a facility representative (ex. hospital risk manager or ombudsman) who has been trained to arrange in such circumstances an independent examination of the transferor before the attorney (or others) has any further contact with the transferor.
- The independent examiner must have no acquaintance whatsoever with any of the parties or lawyers involved in the matter.
- The independent examiner must follow a forensic protocol especially designed to determine the transferor's condition and protect the transferor's condition from being exploited.

The independent examiner's protocol must require the independent examiner to

- Sequester the transferor while the protocol is being executed.
- Fill out a form (supra) similar to the checklist which doctors often ask patients to complete while waiting to see them in their offices. Rather than list childhood diseases like measles, this form would screen for circumstances and conditions, including medications like morphine, which should raise doubts about the transferor's ability to conduct the business at hand. This form would be completed on the basis of the independent examiner checking the transferor's medical record and interviewing the patient.

If the transferor's circumstance or condition matches one of those listed on the form, then the independent examiner's protocol must require additional precautions (including the notification of appropriate authorities, such as law enforcement and/or APS, and family members). However, if the transferor suffers from none of these conditions, then this protocol must allow the business at hand to proceed with fewer restrictions.

If the transferor's circumstance or condition matches one of those listed on the form, then also

- The independent examiner, before asking the transferor any questions specifically relating to the business at hand, must ask the transferor if there is any business that he wants to conduct at that time, or any document that he wants to review and/or execute at that time. If the transferor replies that there is none that he wishes to review and/or sign, even after the independent examiner carefully explains to the transferor this consequence of his answer, the courts must void (preferably by summary judgment, so as to minimize court-related expenses) whatever the transferor might subsequently sign in his current condition.

- If the transferor indicates that there is some business that he wants he wants to conduct, then the independent examiner must
 - Follow a protocol according to which he asks the transferor questions specifically relating to the business at hand.
 - Ask the transferor to provide specific details about whatever documents await his signature.
 - Ask the transferor to resolve any and all differences between what the document provides and what the transferor believes the document provides.
 - Ask the transferor questions like those recommended by Drs. Hall et. al. in Table VIII of their June 2009 Clinical Geriatrics Journal article.
 - Fill out a form like the Undue Influence Worksheets for Police, APS, and Probate Investigators created by Dr. Bennett Blum and Police Inspector Tom Feledy.
- The independent examiner must record without interruption his interviews and consultations with the transferor and others, including legal representatives and family members. The recordings of face-to-face interviews must include both video and audio. The recordings of all other interviews must include audio.

When contacted by an independent examiner, law enforcement and APS would each need to follow their own protocol. For example, they would be required to record the contact in a database and search that database for other reports concerning the transferor.

OTHER CASES DEMONSTRATING THE NEED FOR THESE PROTOCOLS

The 20/20 broadcast reports just one of many cases which demonstrate the need for such safeguards. Numerous others have been reported by the media, experts and advocates who host websites such as

<http://lisanerenberg.com/learn/undueInfluence.html>,

<http://www.markedfordestruction.com/>,

<http://www.exploitationelderly.com/>,

<http://www.estateofdenial.com/involuntary-redistribution-of-assets-ira>,

<http://nasga-stopguardianabuse.blogspot.com>, and

<http://www.thepetitionsite.com/2/stop-elder-abuse-and-guardianship-abuse-in-our-courts>.

In order to make crystal clear the need for these protocols, I will recall here some of what took place in my father's hospital room, as testified to under oath by doctors, attorneys and others (whose testimony is reproduced online and linked to other evidence by <http://home.roadrunner.com/~tvfields/dir.htm> and http://home.roadrunner.com/~tvfields/ILF_Links/Frameset001.htm).

To begin with, Ryna Mehr's law partner David Riggs testified under oath that, following my father's surgery to remove a cancerous kidney, roughly four months before my father died, Riggs repeatedly prepared and presented on behalf of Ryna's mother legal/financial documents for my father to sign, all dozen or so of which my father refused to sign. Had the protocol which I've described been mandated, events would almost certainly have unfolded much differently.

Without a protocol of the kind which I've described, the first opportunity to protect my father from Mehr, Riggs and others was missed. Had the protocol which I've described been mandated and followed, these attorney contacts would have been recorded in an APS (and/or law enforcement) database. This record would have subsequently raised a red flag on the day my father died, when Mehr and Riggs presented my father another document to sign, one which took much more from my father than any of the documents that he had refused to sign.

Next, two days before my father died, Paige Lewis (my sister) and Jim Davis (my uncle) sent two attorneys (Allan Schwartz and Ron Zakarin) to my father's bedside for the purpose of obtaining for Paige a deed to a property that my father owned. After this meeting, Schwartz dictated a memo to which he subsequently testified under oath. According to this memo, my

father informed these attorneys that he “has extreme distrust for Shirley's daughter, Ryna Mehr, a Boca Raton attorney. He further indicates that Ryna prepared a document requesting that he sign it pertaining to the revocation of the Florida residence. He refused to sign it.”

This was another missed opportunity to protect my father against those who took advantage of his condition. In addition to being involved directly in the events which were unfolding, weren't Schwartz and Zakarin also mandatory reporters who had reasonable cause to believe that others were trying to take advantage of my father? So this instance actually provides two missed instances to respond as needed to protect my father from being exploited.

Next, on the day my father died, a nurse (Elizabeth Nemeth) called Dr. Steinmetz to my father's bedside when she found my father writhing in pain. Dr. Steinmetz determined that my father's stomach had ruptured and responded as needed to alleviate my father's suffering. This response included starting my father on a morphine drip and writing a Do Not Resuscitate order into my father's medical record. Dr. Steinmetz also called next of kin, including me, to notify us that he did not expect my father to make it past the end of the day. This led to Paige calling my father and dictating to Dr. Steinmetz her wishes, which Dr. Steinmetz recorded in my father's medical record as a “Last Will” which my father signed.

This represents at least the fourth opportunity to protect my father against those who took advantage of his condition. And this missed opportunity provides a lesson with very significant ramifications for what needs to be included in the protocol. In order to make this lesson as clear as possible, I will point out from the evidence which I have shared with you and others the following facts:

- (1) My father had in his safe-deposit box a Will and Trust totaling more than a dozen pages which he had carefully prepared and executed two years earlier;
- (2) The “Last Will” which Dr. Steinmetz recorded in my father's medical record was less than a page long and omitted mention of most of his estate;
- (3) Dr. Steinmetz testified that my father told him that he did not have a Will;
- (4) Dr. Steinmetz testified that he believed my father was competent;
- (5) Nurse Nemeth testified that she believed my father was competent;
- (6) No one, not even Paige, submitted for probate the “Last Will” which Dr. Steinmetz recorded in my father's medical record.

The facts, except for #s 4 and 5, make it very clear that my father was not competent when he signed the document which Dr. Steinmetz prepared.

Furthermore, Dr. Steinmetz apparently had enough cause to believe that my father's condition had been exploited so as to subsequently point out what he had done to Ryna Mehr and others who subsequently showed up at the hospital. Like attorneys Schwartz and Zakarin, Dr. Steinmetz was a mandatory reporter who should have reported but didn't, thereby giving attorneys Ryna Mehr and David Riggs one more opportunity to take advantage of my father.

If Dr. Steinmetz believed he needed to point out what he had done to Ryna Mehr and others, why did he do what he did? And why didn't he report what had taken place to APS and/or other authorities?

These facts make it clear that Dr. Steinmetz and Nurse Nemeth exercised very poor judgment.

Similarly, Schwartz and Zakarin exercised poor judgment when they ignored their duty to report. But whereas Dr. Steinmetz had nothing to gain from what he did or didn't do, Schwartz and Zakarin clearly did, even if those interests weren't the same as the interests held by attorneys Mehr and Riggs.

These facts also make it clear that our protocols need to depend less on such subjective judgments and/or allegations – and more on the objective criteria which are included in the checklist.

(End)