

## Abuse Reporting/Guardianship/Conservatorship/Healthcare Decisions

### HIPAA preemption

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Statute	Summary	Preempted?	Policy Issues
124.060	Duty of officials to report elder abuse. Report may be to either law enforcement or DHS.	<p>No. Requires physician to report evidence of abuse. Excepted from HIPAA:</p> <ul style="list-style-type: none"> <li>- Required by law. Sec. 164.512(a); 164.501</li> <li>- Disclosure about victim of abuse. Sec. 164.512(c)</li> <li>- Public health activity. Sec. 164.512(b).</li> </ul> <p>Also saved from preemption as a law providing for reporting of disease or injury, child abuse, birth, death, or for conduct of public health surveillance, investigation or intervention. Sec. 160.203.</p>	No.
124.065	Oral report to DHS or law enforcement agency.	No. Allowed pursuant to Sec. 164.512(c) and also saved from preemption under sec. 160.203.	No.
124.075	Immunity of person making report in good faith; identify confidential	No. See above analysis	No.
124.080	Photographing of victim	No. Saved from preemption under sec. 160.203(c)	No.
124.085	Catalogue of abuse records	No. Saved from preemption under sec. 160.203(c); also allowed under public health activity authorized in sec. 164.512.	No. Information from catalogue may only be released with permission of victim or judicial process

124.090	Confidentiality of records; exceptions	No. DHS required to keep complaint, names of witnesses and elderly person confidential except shall release to law enforcement, appropriate public or private agency as necessary for protection of elderly person. Likely allowed under sec. 164.512(b) (public health). Saved from preemption under sec. 160.203(c).	
125.005	Protective Proceedings definitions	No. "Guardians" and "Conservators" as defined may act as personal representatives under sec. 164.502(g).	No.
125.010	Petition for appointment of fiduciary or entry of other protective order.	No.	No confidentiality issues presented
125.025	Authority of court	No. Compels release of documents that may contain PHI. <ul style="list-style-type: none"> <li>- Person compelled to release PHI not necessarily covered entity.</li> <li>- Release is compelled by the court, presumably pursuant to a court order. Meets requirements of sec. 164.512(e).</li> </ul>	No.
125.055	Petitions in protective proceedings	No. Requires petition to allege facts supporting the petition. Petition must contain facts supporting request for fiduciary, which could include PHI. But, person filing petition likely not a covered entity. Sec. 164.104.	No. Confidentiality issues are presented, but the person filing the petition not covered under HIPAA. Person from whom the filer obtains information to complete the petition may be covered entity, however; likely a healthcare provider. This person will need either patient authorization,

			<p>subpoena or court order to release information.</p> <p><b>The Advisory Committee may want to consider amending the statute, or creating a stand alone statute governing protective proceedings generally, to provide a method for healthcare providers to respond in a timely manner to requests for information necessary to submit a petition without violating HIPAA. For example, we could amend the statute or create a new statute that <u>requires</u> a healthcare provider to provide information in response to a written request, thereby picking up the "required by law" exception provided in sec. 164.512(g). Any amendment must limit the information released to only that information necessary to support the petition.</b></p>
125.060	Who must be given notice	No.	No confidentiality issues presented
125.065	Manner of giving notice	No.	No confidentiality issues
125.070	Contents of notice	No	No confidentiality issues
125.075	Presentation of objections	No	No confidentiality issues
125.150	Appointment of visitors	<p>No. Allows court appointed visitor to interview physician or psychologist, likely eliciting PHI, but:</p> <ul style="list-style-type: none"> <li>- Visitor likely not covered entity so may use the information received. (unless the</li> </ul>	<p>The statute is not preempted, but implementation after HIPAA may be difficult. Healthcare providers interviewed pursuant to the statute likely will require patient authorization, subpoena or court order before they are willing to</p>

		<p>visitor is a physician, psychologist or other healthcare provider).</p> <ul style="list-style-type: none"> <li>- Right to interview the physician or psychologist is "subject to any law relating to confidentiality."</li> </ul>	<p>divulge PHI.</p> <p><b>See the discussion under ORS 125.055 in this matrix about amending the law to require providers to release necessary information.</b></p>
125.155	Visitor's report	<p>No. Visitor required to file report with court. Report may contain PHI.</p> <ul style="list-style-type: none"> <li>- Visitor not covered entity</li> <li>- Report is required by law, excepted from HIPAA under sec. 164.501; 164.512(a).</li> </ul>	No.
125.300	Guardians in general	No.	Makes clear the subject of the guardianship retains all legal and civil rights provided by law.
125.305	Order of appointment	No.	Provides that the court shall make a guardianship order that is no more restrictive upon the liberty of the protected person than is reasonably necessary to protect the person.
125.315	General powers of guardian	<p>No. Allows guardian to make anatomical gift.</p> <ul style="list-style-type: none"> <li>- HIPAA allows personal representative to stand in place of individual. Sec. 164.502(g).</li> </ul>	
125.325	Guardian's report	<p>No. Report may contain PHI.</p> <ul style="list-style-type: none"> <li>- Guardian acting on</li> </ul>	No.

		<p>behalf of individual. Not otherwise a covered entity</p> <ul style="list-style-type: none"> <li>- Report required by law. Sec. 164.501; 164.512(a)</li> </ul>	
125.400	Order appointing conservator	No.	No confidentiality issues.
125.420	Power of conservator over property of protected person	No.	No confidentiality issues.
125.425	Power of conservator to pay expenses of protected person.	No. Conservator may have access to PHI through payment of medical bills, but is standing in the place of the individual in that circumstance.	No.
125.475	Conservator's accounting to court	<p>No. Requires accounting of disbursements made, including medical bills. Allowed:</p> <ul style="list-style-type: none"> <li>- Conservator acting in place of individual.</li> <li>- Accounting to court excepted from HIPAA as required by law. Sec. 164.512(a).</li> </ul>	No.
125.600	Appointment of temporary fiduciary	No. Court must make finding of immediate and serious danger to the estate of respondent, likely relying on PHI. The statute does not expressly require disclosure of PHI, however, or dictate how any PHI disclosed must be obtained. Statute not contrary to HIPAA.	<b>This statute presents implementation problems similar to ORS 125.055 and 125.150. Access to information necessary to support a court finding will require patient authorization, subpoena or court order.</b>
125.605	Procedure for appointment of temporary fiduciary	No. While the statute requires submission of a petition likely containing PHI, it does not require release of PHI or dictate	<b>The Advisory Committee may want to consider amending this statute, or creating a new statute in the manner discussed</b>

		how PHI must be obtained. Statute not contrary to HIPAA.	<b>under ORS 125.055 in this matrix.</b>
125.650	Court entrance of other protective orders	No. Same issues as ORS 125.600 and 125.605	Same policy issues as above
125.710	Powers and duties of public guardian and conservator	No. Same analysis as for private guardian or conservator.	No.
Note following 125.730	Multnomah County Protective Proceeding Pilot Project	No. Same analysis as for standard guardian/conservator	Appears to call for greater use of court visitor in evaluation of protected person and greater protections to protected person.

**The following analysis of ORS chapter 127 is prepared with the assistance of Kelly Hagan and Robert Joondeph**

127.510	Designation of attorney-on-fact	No. Sec. 164.502(g) allows personal representative to exercise rights of individual.	
127.531	Form of Advance Directive	No. Arguably does not disclose PHI. If deemed to disclose PHI, use and disclosure allowed for treatment purposes pursuant to consent process (or acknowledgement under proposed rules)	
127.535	Authority of health care representative	No. Gives health care representative authority to exercise rights of individual. Allowed under sec. 164.502(g).	
127.565	Independent medical judgment of provider; effect of advance directive on insurance.	No.	No confidentiality issues presented.
127.635	Selection of health care representative in certain circumstances. Priority list for who may serve as health care representative.	No. Sec. 164.402(g) allows personal representative to exercise rights of individual. Does not specify who may be personal representative.	

127.649	Health care organizations required to have written policies and procedures on providing information on patient's right to make health care decisions.	No.	No confidentiality issues presented.
127.700	Definitions.	No.	No confidentiality issues presented.
127.702	Persons who may make declaration for mental health treatment; period of validity.	No.	No confidentiality issues presented.
127.703	Required policies regarding mental health treatment rights information declarations for mental health treatment.	No.	No confidentiality issues presented.
127.705	Designation of attorney-in-fact for decisions about mental health treatment	No. 45 CFR § 164.502(g) extends to "personal representatives" of a person the ability to exercise rights regarding PHI.	.
127.712	Power of attorney-in-fact designated in a Declaration for Mental Health Treatment	No. Sec. 164.502(g) requires a covered entity to treat a personal representative as the individual	
127.815	Disclosure to pharmacist required for assisted-suicide prescription	No. The statute requires disclosure of the purpose of the PAS prescription to the pharmacist, thereby facilitating the pharmacists' right of conscience to refuse participation in PAS. The "catch all" HIPAA exception for "uses and disclosures otherwise permitted by law" would seem to apply.	
127.865	Reporting requirements for physicians assisting suicide	No. Proposed 45 CFR § 164.512(b) and (g) permit disclosure without patient authorization for "public health" and "governmental health data	

		systems.” Either exception might apply.	
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