

Ten Legal Tips for Caregivers

from the ABA Commission on Law & Aging

Family caregivers face a surprising mix of legal, financial, and practical issues every day. Here are ten tips to help you understand and manage those issues.



1. Understand Decisional Capacity

Be aware that capacity is not an all-or-nothing thing. A family member may have some capacities at some times but are gradually losing others. Financial capacity and financial judgment often decline before other functions. So it is important to get help to evaluate capacity. It will help give you a clearer picture of the current level of functioning, underlying diagnoses, ways to improve capacity, and the likely progression of symptoms. Find your local resources through the Eldercare Locator at www.eldercare.gov or call 1-800-677-1116.

2. Know What Legal Authority You Have

Caregivers often have to assist a loved one with decision-making, sometimes informally by helping write out checks, providing helpful reminders, and sometimes formally by assuming legal responsibility for decisions. Legal authority comes in three ways: (1) through a powers of attorney for financial decisions and for health care decisions (see below); (2) for health-care decisions only, many states authorize a close family member to step in as surrogate decision-maker for some or all treatment decisions, typically in a next-of-kin order of priority; and (3) through a guardianship or conservatorship proceeding in the local courts. This should be a last resort, where good planning was not done ahead of time.

3. Appoint a Health Care Agent

Your loved one and you should complete a Health Care Power of Attorney. This legal tool appoints someone to make health-care decisions for you when you are unable to make them. You can also provide guidelines for how decisions should be made. Forms are available from many sources, but don't just grab one and fill out a form. Completing them requires thoughtful reflection and conversation about one's values and priorities in life. Look over the resources listed at <http://ambar.org/healthdecisions>.

4. Complete a Financial Power of Attorney

Don't rely only on joint bank accounts. They can be fine for limited amounts of money for daily bill paying, but not as the primary tool of financial management. Joint bank accounts raise questions about intended ownership, gifting, misuse of funds, rights of creditors, and inheritance that can make a mess of family finances.

You and your loved ones should designate someone trustworthy to manage your financial affairs through a power of attorney. Be careful not to assume that powers of attorney are simple, standardized documents. They are not. They need to be tailored to individual needs and circumstances. Without that, a power of attorney can be a blank check for financial exploitation. Certain powers need special consideration in drafting, such as powers to make gifts, change beneficiaries of insurance, or to sell one's home. Financial reporting to another family member is an important option to consider.

Look for an attorney experienced in elder law. This is one matter in which the legal costs will be worth it. See "Find a Lawyer" at www.NAELA.org.

5. Manage Social Security/Veterans Benefits

Managing someone else's Social Security benefits requires being appointed as a representative payee. Powers of attorney are not recognized by the SSA. Once approved, checks are paid to the caregiver, to be managed on behalf of the beneficiary. The Veterans Administration has a similar procedure for appointing what they call a VA fiduciary. Other government entities may have similar procedures.

To find more information, go to www.ssa.gov or www.va.gov.

6. Know Your Rights of Access to Health Information

Health care providers can't disclose a patient's personal health information without consent, except in limited circumstances. While your loved one has capacity, they can consent to your access to information. But being an agent under a health care power of attorney legally authorize access to health information when your loved one lacks capacity. Without that, health care providers have broad discretion under the law to determine whether it is in the patient's best interest to share information with you or any other family member.

To learn more, see www.hhs.gov/hipaa/for-individuals.

7. Know the Signs of Abuse, Neglect, and Exploitation

Caregivers are the front line of protection against abuse and neglect and financial exploitation of loved ones. Individuals with diminished capacity are an especially vulnerable group. Be knowledgeable of the sign of abuse and exploitation and take action when you see red flags.

See the National Center on Elder Abuse for more information about spotting and responding to elder abuse, neglect, and exploitation: <https://ncea.acl.gov>.

8. Know Your Rights if You Face Family Responsibilities Discrimination (FRD)

Working and caregiving places enormous demands on caregivers. Being criticized, downgraded, or fired because of a need to take periodic and sometimes unplanned time off to care for a loved one may constitute family responsibilities discrimination or FRD. FRD is employment discrimination based on one's caregiving responsibilities and not based on quality of work.

Most federal and state statutes don't prohibit FRD, but legal protections based on other laws may, such as laws prohibiting sex discrimination, hostile work environment, or discrimination based on association with a person with a disability.

If you think you are encountering FRD, complain to the Equal Employment Opportunity Commission, www.eeoc.gov.

9. Understand your rights under the Family and Medical Leave Act (FMLA)

The FMLA entitles you to up to 12 weeks of unpaid job-protected leave per year to care for one's parent, spouse, or child. But the Act applies only to employers with more than 50 employees and requires you to have worked more than a year. Some employers voluntarily provide family and medical leave even though not required, and some even provide paid leave. Check your employee benefits.

To learn more, see www.dol.gov/whd/fmla.

10. Consider a Personal Care Agreement

Caregiving often requires a financial sacrifice, especially if work must be cut back or given up because of caregiving responsibilities. Loved ones with financial means who receive care from a family member sometimes wish to provide compensation for the caregiver. This sounds like it should be a pretty simple arrangement, but it is not. It can create serious problems with health benefits such as Medicaid, tax questions, and family conflict. Use a formal personal care agreement to spell out terms and expectations. To do this, consult with a lawyer experienced in elder law.

See "Find a Lawyer" at www.NAELA.org.

Valuable resources for more information:

- ***Alzheimer's and the Law: Counseling Clients with Dementia and their Families*** by Peck & Law (Chicago: American Bar Association, 2013, www.shop.americanbar.org).
- Four ***Managing Someone Else's Money*** free guides from the Consumer Financial Protection Bureau. These explain in plain language your legal obligations as a guardian or conservator; an agent under a power of attorney; a family trustee; or a representative payee or VA fiduciary. See www.consumerfinance.gov/blog/managing-someone-elses-money.
- **ABA Commission on Law and Aging website:** www.americanbar.org/aging