

Can Giving Up the Keys be Empowering?

Families, physicians and attorneys can take a collaborative approach to tackling the question of whether a senior should continue driving. By Nicole Li and Maureen Wickert



“If you get in the car with Nana—you drive,” my father told me. Although my grandmother attributed the scrapes and dents on her car to the carelessness of other drivers, the rest of us understood the more likely cause. None of us wanted to confront her, let alone suggest that she give up driving. She lived in a city with a complicated public transportation system that usually required transfers and wasn’t always safe. Moreover, we understood Nana’s ability to drive was part of her self image and an exercise of her independence. Luckily, Nana never caused injury to anyone during the time she probably should not have been driving.

For many senior citizens, the loss of their driving privileges leads to depression, a decreased social life, inactivity, and difficulty accessing necessities such as health care services and groceries. Taking away the car keys might prevent an accident and injury, but it does not ensure vitality. Is there a way to address concern about an elderly driver that respects both the individual and the safety of the public?

This issue is far from new. Every time a high-profile accident occurs involving an elderly driver, policy makers and others propose measures to detect and address the potential dangers. Many recall the 86-year-old man who mistook the accelerator for the brake pedal and killed 10 people at a Santa Monica farmer’s market in 2003. Despite proposals to purportedly prevent such accidents, few states actually impose any requirements or assessments specific to seniors.

Washington state’s Department of Licensing (DOL) does not have restrictions based on advanced age. However, Washington law clearly prohibits issuing a license to someone who cannot competently or safely operate

a car due to a physical or mental disability.¹ After issuance, a driver’s license can be revoked or suspended if the licensee becomes disabled in a way that impairs driving skills. Disabling conditions can include physical limitations of the neck or extremities of the body, dementia, uncontrolled epilepsy, or Alzheimer’s disease, among other ailments.

DOL reviews a driver’s ability to drive on Washington roads on an individual basis through an eye exam, questions about medical issues, or a road examination. This review is done at the time a person applies for or renews a license or upon a specific request from a third party.

A Driver Evaluation Request form,² available on the DOL website, can be submitted by any law enforcement officer, medical professional or concerned citizen. Based on the information within the Driver Evaluation Request, DOL may find just cause to request a medical evaluation of the reported individual. “Just cause” is usually based on a driver’s medical condition, vision condition, history of accidents, or poor driving skills. Following a medical evaluation, DOL may require the driver to submit to a practical re-examination.³

The information on the Driver Evaluation Request form—including the requester’s name—is not confidential and may be obtained by the driver. My family did not make use of this form for the same reason we did not directly address the matter with Nana: In the interests of maintaining peaceful family relations, and in recognition of the fact that no actual solution seemed feasible, it was simpler to try to prevent her driving whenever possible.

DOL explicitly notes on the Driver Evaluation Request form that, “Age is not

a consideration.” After all, age alone is not an indicator of competence to drive (or, indeed, competence in any area), and it does not necessarily signify the presence of a medical condition of concern. On the other hand, we know that physical, cognitive, and visual abilities generally decline with age and that individuals in their 70s are likely to be taking at least one prescription medication as a result of age that has more pronounced side effects. Many studies have been done comparing the rates of motor vehicle accidents involving fatalities, injuries, and property damage amongst various age brackets, but still no significant correlation or trend appears.⁴

This article does not propose a new analysis of that data,⁵ but rather focuses on how attorneys may complement the role and share the responsibility of physicians with regard to their elderly patients who drive.

Many people who are concerned about an elderly driver may hope that some authority will intervene, whether it is the police, the driver’s automobile insurance company, the state licensing agency, or a physician. Unfortunately, many of those entities often act only *after* an incident has occurred—or after someone is concerned enough to submit a Driver Evaluation Request.

1. RCW 46.20.031(7): Ineligibility. apps.leg.wa.gov/rcw/default.aspx?cite=46.20.031
2. www.dol.wa.gov/forms/500008.pdf
3. Report unsafe drivers. www.dol.wa.gov/driverslicense/reportunsafe.html
4. Comparing such rates based on miles-driven, for example, requires taking into account that older drivers often self-regulate, and drive fewer miles overall while mostly driving in-city, where collisions are more likely than on the highway.
5. The Insurance Institute for Highway Safety provides an excellent compilation of this data: www.iihs.org/research/qanda/older_people.aspx#cite-text-0-21

It is common for a senior's poor driving skills to be an open secret among those closest to him or her. Seniors often increase their car insurance limits because they know their driving skills have declined, and they are at a higher risk of being involved in a traffic accident. An increased car insurance limit may provide some financial protection, but it won't protect against the physical injuries a senior is at risk of sustaining or imposing on others. If a senior mentions increasing car insurance limits, it may be time for the family to have a serious talk about giving up the car keys.

Such proactive talks should be collaborative, including individuals the driver already knows and trusts. A senior approximately 75 years or older often has a great degree of trust in authorities such as his or her own physician or attorney.

Family members or friends sometimes bring their worries to the driver's health care providers. Physicians may feel a conflict here: Maintaining the trust of the patient as well as their duty of confidentiality can inhibit their intervention. Time constraints and a focus on the medical issues at hand pose practical difficulties. Physicians, however, are well-poised to broach the subject, perhaps in the context of a discussion about potential side effects of prescription medications or an acknowledgement of the subtle but progressive health effects of aging.

Still, in Washington, physicians are not required to report their concerns to DOL. At the same time, attempts have been made to hold physicians liable for injuries to third parties, on the grounds that the physician failed to advise a driver about the side effects of medications or the possible effects of medical conditions or devices.⁶

Here—as in many situations—proper, comprehensive documentation can be a defense to such claims. Physicians should document their efforts to address the potential hazards, including conversations with the patient and his or her family members. The American Medical Association provides a helpful resource, the

Physician's Guide to Assessing and Counseling Older Drivers,⁷ which includes additional guidance regarding documentation in the patient's medical records.

Most elderly drivers are aware of the hazards of driving and conscientiously impose limits on themselves, such as minimizing when, where, and how much they drive. Self-regulation is, at essence, self-determination, the exercise of which is empowering. Drivers who have voluntarily limited the risks associated with driving likely have taken other responsible actions, such as consulting with elder law attorneys about retirement or estate planning. Framed in the context of preserving their estate plans, seniors may regard surrendering the keys as taking increased control over their lives by protecting those plans. Elder law attorneys are well placed to discuss the serious—even catastrophic—consequences of an unfortunate accident. For physicians, in some situations, it may be appropriate to inquire whether the patient has discussed the topic of driving with his or her attorney.

At times, a family member may directly request that an elder law attorney talk to a senior about giving up the car keys. As with any other professional who has a relationship with a senior, an attorney must consider several perspectives.

Family members often worry when they see their senior relatives exhibit the effects of advanced age, incompetency, or mental or physical impairments. Under the Rules of Professional Conduct,⁸ attorneys are required to maintain as reasonably as possible a normal client-lawyer relationship, even if a client's capacity is somewhat diminished, and to respect a client's capacity for self-direction.

From the senior's perspective, a senior may feel targeted, labeled as old or senile, or discriminated against. Further, a senior may view giving up driving as the beginning of the last chapter of living, and may worry that the next change will be a compulsory move out of their home and into an assisted living facility. Emotional attachment to the car and a love of driving are also possible factors. Whatever the reasons, a senior's refusal to give up the car keys is more than likely rooted in the denial of their own decline in health.

An elder law attorney can provide many sound legal reasons why a senior should no

longer drive, such as tort liability, insurance issues, liability involving community property assets, or the personal safety of the driver and others. Presented this way, the message may be received more easily.

All of this also depends upon how well a senior views or comprehends his or her own personal risk analysis. Washington law imposes a legal duty upon a driver to other persons to drive in a safe manner. Unfortunately, this duty to others can conflict with seniors' desire to drive, perhaps leading them to rationalize that they won't go far.

Elder law attorneys are trained to provide sound advice based on legal reasoning for senior clients. Attorneys are counselors at law, not counselors in social work. However, this sensitive discussion with a senior can be framed in a context wholly independent of age. A lot of seniors are capable drivers. Many factors that might necessitate a senior giving up the car keys can affect drivers of any age: mental health issues, side effects from medications, after effects of medical treatments, physical disability, visual impairment, or even simple poor driving skills, for example. From this angle, the argument becomes less about the driver being old and more about individual circumstances. For many seniors, an important consideration is their retirement and/or estate plan.

Attorneys routinely advise clients on how to avoid liability and preserve assets as part of their future planning. In some cases, seniors will pay attorneys significant money to protect their estates so that they have something left over for their children. It would be tragic for a senior to lose his or her entire estate to tort litigation following an accident, particularly if time and effort had been expended to carefully construct an estate plan.

A senior can be overwhelmed when concerns about driving are compounded by issues of long-term care costs, Medicare, Social Security, staying in the home, or medical needs. In fact, a senior might be relieved to relinquish one source of stress (driving) given the other competing and complex life issues. Still, the decision to give up the car keys remains the senior's personal choice unless such choice is taken away by the state. Losing a license involuntarily—in addition to the

6. *Kaiser v Suburban Transportation System*, 65 Wash 2d 461, 398 P.2d 14 (Wash 1965).

7. www.nhtsa.gov/people/injury/olddrive/olderdriversbook/pages/contents.html

8. RPC Rule 1.14, Client with Diminished Capacity. www.courts.wa.gov/court_rules/?fa=court_rules.display&group=



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harm or injury that may have precipitated it—can be emotionally devastating to the driver. Electively giving up the car keys, by contrast, can be empowering, especially if doing so helps ensure that a retirement or estate plan remains intact.

We all have a stake, whether from personal affection or public interest, in keeping unsafe drivers from getting behind the wheel. All too often, however, when faced with an actual situation involving an older driver, we hope and pray—and sometimes pass the buck. Years after Nana passed away, it seems clear that my family should have been more proactive, rather than trust in luck. While law enforcement and DOL monitor general public safety, individual situations are best addressed by individuals.

Physicians are perhaps one of the most effective authorities to discuss giving up driving, due to their clinical analysis of impairments afflicting seniors. Elder law attorneys can provide the risk analysis seniors need from a financial, legal, and liability standpoint. Together, these professionals may empower seniors who pose risks on the road to pre-empt unfortunate accidents so that vitality, assets, and future plans are preserved. ■

Note: This article does not constitute a legal opinion, nor is it a substitute for legal advice. Legal inquiries about topics covered in this article should be directed to the authors of this article or to an appropriate attorney of your choosing.

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