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# Meeting the Challenge OF ELDER ABUSE LITIGATION

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The topic of how to successfully prosecute an elder abuse/neglect case warrants a complete book. However, the purpose of this article is to share with you a brief outline of the law and resources to assist you with these cases. Most importantly, I want to emphasize that should you chose to prosecute an elder abuse case, do not undervalue the case simply because your client is elderly. Age does not define the value of life nor the pain and suffering a person endures from neglect. Age is just a number.

## ***A. Death By Asphyxiation Through The Use Of Physical Restraints - A True Story***

Lydia Averill had a "pioneer" spirit and was filled with boundless energy. Born on June 19, 1911, Lydia survived the Depression, raised three beautiful children, and at age 86 was still driving and traveling across the country pulling a motor home. Lydia's freedom was priceless. That is why her slow death (asphyxiation due to being physically restrained) was so tragic.

In November of 2001, Lydia was admitted to a local nursing home for rehabilitation and physical therapy following hip surgery. For a 91 year old nursing home resident she was in good physical condition. For staff convenience, the nursing home placed her in physical restraints while in bed (via the use of a Posey belt) and chemically restrained her with medications. She was restrained like this for the next four months. In March, she died of asphyxiation (a slow death) from the physical restraints. There was evidence that this facility was understaffed and her escape occurred on a shift change when few people were around. Before she died she had "Sentinel Events" or other near misses at attempts to escape from restraints.

The nursing home was given a AA citation and fined \$90,000 by DHS for regulatory violations. This same nursing home has been cited on previous occasions for other regulatory violations involving resident care. Later in trial preparation plaintiffs discovered forged and falsified key documents the state did not notice.

Lydia Averill's case exemplifies the consequences of understaffing and demonstrates how a facility's history of repeated regulatory violations is critical for establishing punitive damages.

## ***B. The Elder Abuse and Dependent Adult Civil Protection Act***

To help protect vulnerable elders and address widespread elder abuse, California enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in 1991, Welfare and Institutions Code Sections 15600 *et. seq.* Until that time, Californian's protections from elder abuse were weak and difficult to enforce. Despite the prevalence of abuse and neglect, nursing homes were rarely

sued and faced few consequences for their notorious misconduct. EADACPA gives elder and disabled Californians enhanced protection from elder abuse with additional categories of damages that provide access to the court they never had prior to its enactment in 1991. However, there are procedural hurdles that must be satisfied to obtain these enhanced remedies.

The plaintiff must be an elder or dependent adult. An elder is anyone 65 years or older (WIC § 15610.27) and dependent adult is either a resident of a 24-hour a day inpatient health facility or someone so disabled they are unable to carry out normal activities of daily living and protect their rights. (WIC § 15610.23) Potential defendants are anyone that has intentionally abused (either physically or financially) an elder or dependent adult. However, EADACPA also provides enhanced remedies against a care custodian who withholds goods and services necessary to avoid physical harm or mental suffering. "Goods and services" refer to nutrition, protection from safety hazards, not assisting with personal hygiene or providing transportation for needed services. (WIC § 15610.35) Neglecting to provide essential goods and services is what usually leads to legal action against health care providers, who are just one of several care custodians defined per statute. (WIC § 15610.17)

Vulnerable victims can receive enhanced protection from EADACPA because potential defendants have a greater exposure for damages which include attorney's fees, costs of suit and pre-death pain and suffering recovery. Attorney's fees and costs of suit are allowed if there is clear and convincing evidence of recklessness, fraud, oppression, or malice. (WIC § 15657). This heightened standard of proof must also be met for the estate to recover pain and suffering when the victim dies before final judgment. (WIC § 15657.3) Before these enhanced damages can be allowed, the clear and convincing standards must be met (which are the same requirements for punitive damages) and there must also be a showing of management ratification of the abuse or neglect. (WIC § 15657(c).)

However, despite these enhanced remedies, attorneys are unlikely to take on any case that cannot meet the high burden imposed under the Elder Abuse statute, much less one of a "frivolous" nature because elder abuse cases are extraordinarily complex and expensive to pursue, often involving thousands of dollars in out-of-pocket expenses.

## ***C. How to Investigate These Cases/Resources Available To You***

### **1. File A Complaint With The Appropriate State Agency**

When a family or elderly resident first contacts you with a potential claim of abuse or neglect, immediately file a complaint with the appropriate State Agency and/or Ombudsman's Office.

Complaints against nursing homes in the Sacramento area are handled by the Sacramento District office of Licensing & Certification, Department of Health Services at (916) 341-6845 or (800) 554-0354.

Complaints against Residential Care Facilities or Assisted Living Facilities in Sacramento are handled by the Chico Senior Care Local Unit of the Community Care Licensing Division, Department of Social Services at (530) 895-5033.

### **2. Obtain a complete copy of your client's records.**

Unlike other types of records, nursing home records must be provided to a resident, or duly authorized resident representative, within 24 to 48 hours of the request.

Resident records from nursing homes should include the following:

(i) face sheet; (ii) H&P; (iii) MDS sheets; (iv) Nursing Admission Assessment; (v) transfer forms; (vi) physician orders; (vii) physician's chart notes; (viii) nursing notes; (ix) ADLs; (x) Inputs and Outputs; (xi) IDT notes; (xii) Care Plans; (xiii) Medication Records; and (xiv) Social Service Notes. In RCFE's there are 40 different types of documents that are legally required.

### **3. Obtain The Nursing Home's Prior Citation History, Plan of Corrections and State Surveys.**

The Department of Health Services (also referred to as "DHS") and the Department of Social Services (also referred to as "DSS") conduct surveys of elderly care facilities. These surveys are a matter of public record. Likewise, when the State receives a complaint of abuse or neglect, the State conducts an investigation and may issue a "Statement of Deficiencies," also referred to as a Citation, which then results in the facility filing a document titled "Plan of Correction."

Obtain the above-referenced documents to determine if the facility has previously been cited for regulatory violations. A history of citations can help you establish a "pattern and practice" of neglect ratified by management for purposes of proving fraud and/or seeking enhanced remedies and punitive damages under EADACPA.

### **4. Be Familiar With the Applicable Regulations**

The Nursing Home industry is subject to both state and federal regulations. Likewise, residential care facilities (also referred to as "RCFEs") are also subject to state regulations. These regulations can

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be used to establish the applicable standard of care and to obtain a Negligence Per Se jury instruction. Below is a quick reference to the applicable regulations to assist you.

- EADACPA, Welfare & Institutions Code § 15600 *et. seq.*
- Federal Regulations, 42 CFR § 483, *et. seq.* govern Skilled Nursing Facilities
- California Regulations, Title 22, § 72001, *et. seq.* govern Skilled Nursing Facilities
- California Regulations, Title 22, § 87100, *et. seq.* govern RCFEs

### 5. Obtain Experts Early

Medical and Industry experts can help you evaluate the case early on to identify regulatory violations and other violations of patient care that the State Agency overlooked. Likewise, experts can assist with preparing you for what type of deposition or witness testimony you need to elicit to prove up your case. A good nurse expert can identify false, inconsistent charting. A board certified geriatric expert will identify any medical and causation issues unique to the elderly.

### 6. Pre-litigation Investigation.

Often times the people who know most about the abuse and neglect in a facility are the caregivers themselves. Because the nursing home industry pays the bottom line caregivers and CNAs low hourly rates, the employee turn over can be quite high. A good private investigator will locate former

employees who are often times more than willing to tell you about deficiencies, neglect, abuse, and mismanagement by the facility. Because CNAs change jobs frequently, they can be hard to locate, thus it is important to interview and/or depose witnesses early on.

### 7. Other Useful Resources

The following is a list of organizations and websites that has useful information.

- **National Coalition for Nursing Home Reform** – A clearinghouse for the latest developments at the federal legislative level. <<http://www.nccnhr.org/>>
- **California Advocates for Nursing Home Reform** – Information on state policy and patients rights Plus valuable information on individual nursing homes [www.canhr.org](http://www.canhr.org) <<http://www.canhr.org/>>
- **American Medical Directors Association** – Standards and Guidelines for Long Term Care <<http://www.ama.com/>>
- **Board of Registered Nurses** <<http://www.rn.ca.gov/npa/npa.htm>>
- **California Board of Vocational Nursing and Psychiatric Technicians (Board)** – Link to the Nurses Practice Act and LVN regulations showing standards and grounds for complaints against licensed nurses <<http://www.bvnpt.ca.gov/laws.htm>>
- **FDA, Center for Medical Devices and Radiological Health** – Search site for defective products or incidents reports on medical devices <<http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfMAUDE/search.cfm>>

- **Community Care Licensing, Department of Social Services** – List of senior care program offices where public files can be found and complaints filed For senior assisted living or RCFEs <<http://cclcd.ca.gov/res/pdf/SCPO.pdf>>
- **Licensing & Certification, Department of Health Services** – All the telephone numbers for the district offices are on this webpage <<http://www.dhs.ca.gov/lnc/org/default.htm>>
- **Centers for MediCare and Medicaid Services** – Nursing Home Comparisons. Gives citation and annual survey historical data, plus staffing levels [www.medicare.gov/NHCompare/home.asp](http://www.medicare.gov/NHCompare/home.asp) <<http://www.medicare.gov/NHCompare/home.asp>>
- **Surveyors Manual with Interpretive Guidelines** – Contains practical tips on how to apply the federal regulations to show negligence and causation

(Note: there are Word and PDF versions of this reference material)

<[http://www.cms.hhs.gov/manuals/107\\_som/som107ap\\_pp\\_guidelines\\_ltc.pdf](http://www.cms.hhs.gov/manuals/107_som/som107ap_pp_guidelines_ltc.pdf)>

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