

“OF COUNSEL”

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WELCOME TO “OF COUNSEL”

This, our first issue of “*Of Counsel*”, Diepenbrock Harrison's newsletter directed to our clients and friends interested in senior care and housing issues, deals with a subject we often used to sweep under the discussion rug in the elder care and housing business: Elder Abuse.

Today, this topic has landed at the top of many agendas, particularly our elected officials. For years, California has had comprehensive laws governing this field but, as we will deal with in more detail in Part 2 of our feature article (due in 6 to 8 weeks), the feds are getting into Elder Abuse in an increasingly big way.

Are you aware of your responsibilities as one who cares for elders, or administers facilities which do so, in the event of suspected Elder Abuse? A quick review of this article (and the second half of the piece in our next issue) should bring you up to speed.

Knowing your legal responsibilities, however, is only

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ELDER ABUSE: A PRIMERⁱ

PART I: CALIFORNIA REPORTING REQUIREMENTS

By Julie V. Reiser, Esq.

and

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Consider ...

You are a licensed nursing home administrator, and you supervise a 145-bed nursing facility in California. One day, your Director of Nursing reports to you that Agnes, an 85-year old patient who has been at your facility for five months undergoing physical and occupational rehabilitation has been introverted and withdrawn recently. Her appetite is not what it was ... her physician has been consulted but she cannot come up with a reason for Agnes' changed behavior.

Your D.O.N. suspects elder abuse might be involved in Agnes' changes. What should you do? Should you initiate an investigation? Must you make a report of the D.O.N.'s suspicions and, if so, to who? What are the consequences if you lodge a report? And what could happen if you do not?

These every day questions confront the thousands of licensed health care personnel and administrators who staff California's nursing homes and other state-licensed elder care facilities. They are not simply esoteric issues: They raise genuine questions of action which must be dealt with. In this two-part article, we hope to answer these and other questions you have concerning elder abuse, an unfortunately constant companion in the business of caring for and housing our elders.

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part of it: Periodic, intensive in-service training of your care and housing staff is also essential. We at Diepenbrock Harrison can assist you in structuring and presenting such an education program for your employees. Give us a call if you think we can help.

We'll issue "*Of Counsel*" to you periodically throughout the year, and we hope to cover elder care and housing issues in a non-technical way so that you can make practical use of this newsletter. We earnestly solicit your advice on topics you'd like us to address.

We don't have to tell you there are many in this growing, demographically and technologically-challenged field. We're sending you Issue No. 1 in both printed and e-mailed format. Please let us know which way you'd like to receive "*Of Counsel*" in the future. We'll be happy to oblige. You can e-mail us at MMANLEY@DIEPENBROCK.COM or just call (916) 492-5066. We'll see you with Part 2 on Elder Abuse in a few weeks.

Michael A. Manley, Esq.
Editor

About Diepenbrock Harrison

Diepenbrock Harrison has roots in Sacramento, California's capital, which date back to the 1800s. Our practice focuses on acquisition, development and protection of property, permits and business opportunities, and resolving regulatory disputes.

I. WHAT IS ELDER ABUSE, NEGLECT OR MISTREATMENT?

The following are widely recognized signs of elder abuse:

- * Unexplained and/or multiple bruises, fractures, abrasions, lacerations or repeat injuries
- * Low self-esteem, loss of self-determination, withdrawal, passivity
- * Fear and distrust of others, depression, loss of hope
- * Soiled linen or clothing, inadequate living environment
- * Desertion, abandonment, social isolation
- * Dehydration and/or malnourishment
- * Over/under medication, lack of medical necessities or assistive devices
- * Missing property, or frequent property transfers or estate planning changes
- * Excessive or unexplained repair bills
- * Unexplained lack of funds or sudden relinquishment of control of finances

Unfortunately, there is no universally accepted definition or terminology used with regard to elder mistreatment, neglect or abuse.

Under federal law, the Older Americans Act defines elder abuse as the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by a person, including a caregiver, of goods or services necessary to avoid physical harm, mental anguish or mental illness.ⁱⁱ

California, a leader in legislation designed to curb abuse, has some of the strictest laws on the books. While the California Elder Abuse and Dependent Adult Civil Protection Act defines elder abuse as either of the following: (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering or (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental sufferingⁱⁱⁱ, it is important to note that the Penal, Health and Safety and Probate Codes also define forms of elder abuse.

II. WHO IS PROTECTED FROM ELDER ABUSE?

In California, members of the statutorily protected class are referred to as an "elder", which means any person residing in the State of California, 65 years of age or older.^{iv}

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III. TYPES OF PHYSICAL AND EMOTIONAL ABUSE.^v

Elder abuse may be intentional or unintentional. It may involve acts of commission or omission, and it may or may not constitute criminal misconduct.

A. Physical and Sexual Abuse.

According to federal regulation, each nursing home resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment and involuntary seclusion.^{vi} The term “abuse” is more specifically defined to mean the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.^{vii} In California, physical abuse includes, but is not limited to, assault, battery, unreasonable physical restraint, sexual assault, rape, incest or the unauthorized use of chemical restraints.^{viii}

B. Psychological or Emotional Abuse.

As stated in Section III.A., above, under federal law, each nursing home resident has the right to be free from verbal and mental abuse, with the definition of abuse including willful infliction of injury, intimidation, or punishment with resulting mental anguish. Under California law, psychological abuse is called “mental suffering” and means fear, agitation, confusion, severe depression or other forms of serious emotional distress in an elder person brought about by threats, harassment or other forms of intimidation made with malicious intent.^{ix}

C. Neglect.

The federal Older Americans Act defines neglect as the failure of a caregiver or fiduciary to provide the goods or services necessary to maintain the health or safety of an older individual or for oneself.^x A caretaker is defined as an individual who has the responsibility for the care of the older individual, either voluntarily, by contract, by receipt of payment for care, or by operation of law.^{xi} In the nursing home setting in particular, neglect means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.^{xii}

In California, any paid or unpaid caregiver could be guilty of neglect for failure to exercise that degree of care a reasonable person in a similar position would exercise. Examples include, but are not limited to, failure to adequately assist an elder person with personal hygiene or to provide food, clothing, shelter or medical care.^{xiii}

D. Abandonment.

It is no secret that abandonment issues are on the rise as society faces greater difficulty in caring for its elders.^{xiv} In California, abandonment is defined as the desertion or “willful forsaking” of an elder person by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody.^{xv}

E. Other Types of Physical and Emotional Abuse.

Many other acts may fall under the category of physical and emotional abuse, including, but not limited to, seclusion/isolation (preventing the senior from receiving mail or telephone calls, or from contact with family and friends), false imprisonment (when someone uses violence, menace, fraud or deceit to hold a senior against his or her will), and abduction.

IV. FINANCIAL ABUSE.

Exploitation of elder finances is the fastest growing form of elder abuse in the country. In general, exploitation of an elder person's financial situation involves the willful obtaining of an elder person's money or assets by someone with no legal right to them for their own use or benefit, as well as the improper use of conservatorship, guardianship, or power of attorney, fraud, embezzlement or undue influence. California Welfare and Institutions Code §15610.07 and §15610.30 define this type of exploitation as "financial abuse" and it occurs when anyone takes or keeps an elder's property for "wrongful use" or "with the intent to defraud" or both. The act can be as simple as signing a document when the person cannot write, or as complicated as an abuse of a power of attorney to transfer assets into the perpetrator's own account when the person does not have the capacity to understand what they are agreeing to or what documents are placed in front of them to sign.

V. PROTOCOL AND TRAINING FOR DETECTION OF ELDER ABUSE.

There are no laws that require individuals to establish a protocol for the detection of elder abuse in their private residence. There are laws that impose requirements for establishing a protocol for the detection of elder abuse in the health care and institutional settings.

A. DETECTION BY HEALTHCARE PROFESSIONALS.

1. Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) Standards.

The Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) has established standards that require hospital emergency departments and ambulatory care centers to have written policies and procedures for identifying, assessing and treating victims of elder abuse.^{xvi}

2. American Medical Association (AMA) Guidelines.

The *American Medical Association Diagnostic and Treatment Guidelines on Elder Abuse and Neglect* recommends that every clinical setting develop a protocol for the detection and assessment of elder abuse. The guidelines state that all personnel who come in contact with older patients should be familiar with the facility's protocol and should be alert to various types of mistreatment and possible risk factors.^{xvii}

B. DETECTION IN INSTITUTIONAL SETTINGS.

In 1999, California passed a law requiring long term health care facilities, community care facilities and residential care facilities for the elderly to provide training and continuing education to all of their staff in recognizing and reporting elder abuse.^{xviii} The law requires the training be given as soon as possible after receipt of training materials. For facilities that begin operating after July 31, 2000, the training is to be completed within six months of the date of the beginning of the operation of the facility. Employees hired at facility after June 1, 2001, are to be trained within 60 days of their first day of employment. (Federal law in this area will be covered in Part II of this article.)

VI. REPORTING ELDER ABUSE.

All 50 states have statutory provisions governing the reporting of elder abuse. Very few states only require “voluntary” reporting. In states that require “mandatory” reporting, reporting provisions fall into two categories: (1) Those requiring all citizens to report (sometimes called “universal reporting”) and (2) Those requiring only certain categories of individuals to report (“mandatory reporting”).

California is a mandatory reporting state for certain categories of individuals.

A. WHO IS MANDATED TO REPORT?

Federal regulation mandates all nursing homes to report and investigate allegations of abuse (nursing homes are deemed to have a “special relationship” with their clients that requires reporting).^{xix}

California law mandates reporting of elder abuse by any person who has assumed full or intermittent responsibility for care or custody of an elder adult, whether or not that person receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder adults, or any elder care custodian, health practitioner, or employee of a county adult protective services agency or local law enforcement agency.^{xx}

Certain professionals such as clergy, physicians, attorneys and therapists who have a professional-client relationship may be exempt by statute. The federal Older Americans Act exempts the long-term care ombudsman and area agency on aging personnel from state reporting requirements under specified circumstances. The ombudsman is prohibited from disclosing the identity of any complainant without written or oral consent from the complainant or by order of a court.^{xxi} Area agency on aging personnel may be exempt from reporting by the attorney-client privilege where they are gathering case information in a legal assistance program.^{xxii} Under California law, physicians and surgeons, registered nurses and psychotherapists are not required to report where (1) They have been told by the elder that they experienced behavior constituting physical abuse, abandonment, abduction, isolation, financial abuse or neglect; (2) they are not aware of any independent evidence that corroborates the statement that the abuse has occurred; and (3) the elder has been diagnosed with a mental illness or dementia or is the subject of a court ordered conservatorship because of mental illness or dementia.^{xxiii}

VII. HOW TO REPORT ELDER ABUSE.

California law states that if a mandated reporter, in their professional capacity, has knowledge of or observes an elder adult who the mandated reporter knows or reasonably suspects has been the victim of abuse, they shall make an abuse report.^{xxiv} Mandated reporters cannot hand over the duty to any other person and it is insufficient and unacceptable to simply make a report to another employee or facility administrator if you work in an institutional setting and are required to make a report of suspected abuse to an agency.

A. Deadlines for Making a Report.

With the exception of nursing homes (federal law requires they must report pursuant to state law within five working days of an incident^{xxv}) upon learning of elder abuse, California law states that a mandated reporter must: (a) Make an initial report immediately, or as soon as is

practicably possible by telephone and (b) make a follow-up written report within two working days.^{xxvi}

Employees of long term care facilities have additional requirements and should document elder abuse on the California Department of Social Services Form SOC 341. Every long term care facility has copies of this form and the facility is required to make the form available to its employees on request. Reports are confidential and their content may only be disclosed to investigators from Adult Protective Services, law enforcement, Department of Justice investigators and investigators from the Department of Consumer Affairs.

B. Where to Submit The Report.

For all persons, regardless of their status as a mandated or voluntary reporter, reports of suspected elder abuse should be submitted as follows:

1. Long Term Care Facility.

If the suspected abuse has occurred in a long-term care facility (except a state mental health hospital or a state developmental center) the law requires the report to be made to the local ombudsman or to the local law enforcement agency.^{xxvii} The Ombudsman phone number is to be posted conspicuously in every long term care facility. To otherwise locate an Ombudsman call 1-800-231-4024.

2. State Mental Hospital or State Developmental Center.

If the suspected abuse has occurred in a state mental hospital or a state developmental center, the law requires the report to be made to designated investigators of the State Department of Mental Health or the State Department of Developmental Services or to the local law enforcement agency.^{xxviii}

3. All Locations other than Long Term Care Facility.

If the suspected abuse has occurred any place other than a long term care facility (including a private home), the law requires the report to be made to Adult Protective Services or to the local law enforcement agency.^{xxix} If the number for Adult Protective Services is not listed under county services in the local telephone listings, contact the Area Agency on Aging for the number. A referral can also be obtained by calling the California Department of Aging at 1-800-510-2020.

TO REPORT SUSPECTED ABUSE OF ANY KIND AT ANY TIME, DIAL 9-1-1 IN CASE OF EMERGENCY OR CALL THE CALIFORNIA ATTORNEY GENERAL'S ELDER AND DEPENDENT ADULT ABUSE REPORTING HOTLINE AT 1-888-436-3600.

VIII. LIABILITY FOR FAILURE TO REPORT ELDER ABUSE.

A. Theories of Liability in General.

All perpetrators, regardless of relationship to the victim, should be aware that they may have exposure for civil and criminal liability (including, but not limited to, fines, injunctions, protective and restraining orders, misdemeanors or felony charges) based on any of the following theories of liability (this is far from an exhaustive list):

- * Negligence, negligent hiring, negligent supervision
- * Assault, battery, sexual assault, rape, murder
- * Fraud, theft, false advertising (scams)
- * Breach of contract for care or housing
- * Conversion of accounts or property

1. Liability of Mandatory Reporters.

In California, failure of a mandated reporter to report suspected elder abuse is a misdemeanor, punishable by up to six months in county jail or a fine of up to \$1,000.00, or both. However, any mandated reporter who *willfully* fails to report physical abuse, abandonment, isolation, financial abuse, or neglect of an elder where the abuse results in great bodily injury or death is punishable by not more than one year in county jail or by a fine of not more than \$5,000.00, or both.^{xxx}

California Business and Professions Code §490 further specifies that a mandated reporter that is a licensed professional may also be reported to the appropriate licensing authority for failure to report, and under the 2007 Financial Abuse Reporting Act (SB 1018), banks are subject to a fine of up to \$5,000.00 for failure to report an incident of elder abuse.^{xxxi}

2. Increased Penalties for Crimes Against An Elder.

There is no federal law criminalizing elder abuse, but federal sentencing guidelines provide increased penalties in situations where the defendant knew or should have known that the victim was unusually vulnerable due to age or physical or mental condition.^{xxxii} Similarly, in California, crimes against elders are worthy of special consideration.^{xxxiii} The state criminal framework increases the criminal penalty for causing physical pain, mental suffering, or willful endangerment of an elder to imprisonment in a county jail not to exceed one year, or by a fine of not more than \$6,000 or by both or imprisonment in a state prison for as much as four years.^{xxxiv} False imprisonment of an elder, where perpetrated by violence, menace, fraud, or deceit, likewise is punishable by up to four years of imprisonment in a state prison.^{xxxv}

B. Immunity From Civil Or Criminal Liability.

Every state has at least one statute providing immunity from civil and/or criminal immunity to anyone who makes a report of abuse in good faith. However, such immunity does not apply if the person making the report is also the one that committed the act of abuse.

IX. HOW TO DECREASE THE RISK OF LIABILITY AT YOUR FACILITY.

The first line of defense to preventing elder abuse is training and education so that staff – ALL staff, not just new hires or those with limited experience – can recognize and understand how to identify and properly respond to and report elder abuse.

Here are a few immediate steps that you can take to cut down on potential risk factors in your facility:

- * Analyze Your Abuse Prevention Policy. Confirm that your policy has information on staff training requirements, how to recognize abuse, detailed procedures for reporting suspected abuse (including a statement that staff will not be punished for reporting), and steps to take to stop the abuse, conduct investigation and properly report to agencies.
- * Review Education and Training Methods. Conducted frequently by competent individuals, training may not only improve the response to suspected abuse, but may also help reduce

- stress and result in an improved work environment.
- * Evaluate Facility Environment and Human Factors. Crowding, poor building maintenance and staffing issues (turnover, burnout) are often identified as contributing factors associated with abuse. Evaluate whether or not there are steps you can take to decrease the risk of abuse based on such factors.

X. CONCLUSION.

Whether or not it is your legally mandated duty to report elder abuse, everyone has a civic and humane obligation to do so. If you are a mandated reporter, failure to report is a crime and there are strong penalties attached to a failure to report.

When in doubt, err on the side of not only caution, but care for our elders. Pick up the phone and make a report. Follow the phone call with a written report (remember the adage: **If you don't write it down, it didn't happen!**). There is no punishment if the report is unsubstantiated or the suspicions are wrong. On the flip side, if your suspicions are right, the reward for reporting is immeasurable if even just one more instance of abuse is prevented from happening.

COMING IN PART II: CURRENT CONGRESSIONAL INVOLVEMENT IN ELDER ABUSE ISSUES – WHAT ARE THE FEDS UP TO NOW?

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Endnotes to Part I: California Reporting Requirements

i The purpose of this article is to provide general information and guidelines on the law. Points of view or opinions do not necessarily represent official policies of Diepenbrock Harrison. When using such an article as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained in this article.

ii 42 U.S.C. §3002(1)(A)-(B)

iii Cal. Welf. & Inst. Code § 15610.07(a)-(b)

iv Cal. Welf. & Inst. Code §15610.27; Cal. Penal Code §368(g)

v Definitions are derived from California's Elder Abuse and Dependent Adult Civil Protection Act – Cal. Welf. & Inst. Code §15600 et seq. Many of these types of abuse may also be categorized and recognized under other statutes which are not addressed in this article.

vi 42 C.F.R. §483.13(b)

vii 42 C.F.R. §488.301

viii Cal. Welf. & Inst. Code §15610.63

ix Cal. Welf. & Inst. Code §§15610.53

x 42 U.S.C. §3002(38)(A)-(B)

xi 42 U.S.C. §3002(18)(B)

xii 42 C.F.R. §488.301

xiii Cal. Welf. & Inst. Code §15610.57

xiv Even China, known for its tradition of extended families all residing together, is seeing an increase in abandonment. In December 2008, Fox News reported on an Associated Press story reporting that a Shanghai man who refused to care for his ailing 83 year old mother abandoned her in the busy public People's Square and received a sentence of 18 months in prison. The man was one of 7 siblings, none of whom were willing to take their mother in. See www.foxnews.com/wires/2008Dec18

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- xv Cal. Welf. & Inst. Code §15610.05
xvi See JCAHO Standard PC.3.10. See also www.jointcommission.org
xvii See www.ama-assn.org
xviii Cal. Welf. & Inst. Code §15655
xix 42 C.F.R. §483.13(c)(2)-(3)
xx Cal. Welf. & Inst Code §15630(a)
xxi 42 U.S.C. §3058g(d)(2)
xxii 42 U.S.C. §3026(e) and §3027(f)
xxiii Cal. Welf. & Inst. Code §15630(b)(3)(A)
xxiv Cal. Welf. & Inst. Code §15630(b)
xxv 42 C.F.R. §483.13(c)(4)
xxvi Cal. Welf. & Inst. Code §15630(b)(1)
xxvii Cal. Welf. & Inst. Code §15630(b)(1)(A)
xxviii Cal. Welf. & Inst. Code §15630(b)(1)(B)
xxix Cal. Welf. & Inst. Code § 15630(b)(1)(C)
xxx Cal. Welf. & Inst. Code § 15630(h)
xxxi Cal. Welf. & Inst. Code §15630.1(f)
xxxii U.S. Sentencing Commission Guidelines Manual §3A1.1(Nov. 2008)
xxxiii Cal. Penal Code §368(a)
xxxiv Cal. Penal Code §368(b)(1)
xxxv Cal. Penal Code §368(f)
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DID YOU KNOW...?

May is Older Americans Month. Starting with JFK in 1963, every president since then has issued a formal proclamation asking the nation to pay tribute to older persons in their communities during the month of May and throughout the year. The federal Department of Health and Human Services' Administration on Aging (AoA) issues a theme to help area agencies on aging and other community service providers plan activities to celebrate the occasion. This year's theme is:



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