

"OF COUNSEL"

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"LAW OR SAUSAGE?"

We're pleased to return in this issue with Part 2 of our examination of the many laws relating to the timely topic of Elder Abuse. In Part 1 this past May, we discussed this state's varied statutory approach to this topic, whether it be physical, emotional or financial elder abuse. We pointed out that many, if not most, of those of us involved in senior care and housing are "mandated reporters" of suspected elder abuse. If you didn't receive our first issue on state law in this field, or would like additional copies, please contact us at the addresses listed below and we'll be happy to get the May issue to you.

This issue focuses on recent federal approaches to this issue. Although less specific, perhaps, than state regulatory efforts, Congress' reaction to instances of elder abuse are no less noteworthy to professionals in the field. After reading Ms. Reiser's and my

ELDER ABUSE: A PRIMERⁱ

PART II: FOCUS ON THE FEDERAL RESPONSE

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and

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(Editor's Note: In our inaugural May issue we focused on California law regarding the serious problems of elder abuse, including the responsibilities of providers to recognize and report such abuse. This article looks at the response of Congress and the federal government to this problem. Please contact us if you would like reprints of our May issue.)

I. INTRODUCTION.

Every year, millions of older people are at risk of physical, psychological, medical and financial abuse, yet elder abuse remains a largely hidden problem. Why? The reasons are many and varied, ranging from fear or shame of the victims to lack of training in detection and prevention. But part of the problem also stems from the fact that not only do the laws on elder abuse vary from state to state, but **there is no specific federal level elder abuse protection statute.** This article is intended to provide a broad overview of recent developments in elder abuse at the federal level.

II. FEDERAL RESPONSE TO ELDER ABUSE.

For the most part, federal level laws on elder abuse have traditionally been couched within budgetary acts. There are five major acts that address the most widely recognized forms of abuse.



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article, if you have questions please forward them to me.

Recent state legislation sponsored by the California Continuing Care Residents Association (“CALCRA”) reminds one of the adage that “those who love law and sausage should watch neither being made”. CALCRA’s bill focused on the association’s perceived need for more “financial transparency” in dealings between CCRC residents and management, especially within communities owned and managed by non-profit organizations. The bill in question, A.B. 1169 by Assemblyman Ruskin (D., San Mateo) began its legislative life as an attempt to preclude the use of “resident funds” generated at a non-profit CCRC for anything not benefitting the residents of the community generating the funds. Under this approach, entry and monthly fees emanating from Community “A” could not be used at Community “B”, even though both facilities were owned by the same non-profit provider.

Not surprisingly, this generated understandable opposition from non-profit multi-facility organizations owning two or more CCRCs

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within California and from their

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A. OLDER AMERICANS ACT.

The Older Americans Act of 1965 (OAA) provides grant funding to state programs that help older people maintain freedom, independence, and the free exercise of individual initiative in planning and managing their own lives.ⁱⁱ Every county has free legal services for seniors age 60 or older under the OAA; however, there is no uniformity to the programs or criteria for accepting cases. Typically, the programs assist those with the greatest need such as those facing eviction or loss of public benefits.

B. LONG TERM CARE OMBUDSMAN PROGRAM.

The Long-Term Care Ombudsman Program was created under the Older Americans Act in response to the need for a neutral third party to protect nursing home residents by advocating for resident rights, and investigating and resolving issues or complaints that adversely affect a resident’s health, welfare, safety or rights.ⁱⁱⁱ Ombudsman programs usually receive funding from both federal and state programs.

C. ADULT PROTECTIVE SERVICES PROGRAMS.

Adult Protective Services (APS) programs were started in 1974 as part of Title XX of the Social Security Act.^{iv} APS investigates elder abuse in the home, community and institutions and provides social, legal, financial, medical or psychiatric services to victims of abuse. The programs receive federal social services block grant funds but are largely state funded and run by state human services agencies. APS has no federal office, oversight or data collection.

D. NURSING HOME REFORM ACT.

Congress passed the Nursing Home Reform Act (NHRA) as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA) to combat abuse in nursing homes.^v The act established a national

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trade association, Aging Services of California. Why have a “system”, these opponents countered, if the managing entity cannot utilize funds from communities enjoying a good year for the benefit of CCRCs not doing well? The whole idea of a “system” is to balance the financial risk and reward among the communities in the group.

CALCRA evidently saw the wisdom of this argument (or read the political inevitability on the wall), and thus amended the bill. The amendments required a contract disclosure to the effect that “resident funds” (as defined above) could be transferred from one CCRC to another CCRC within a system “to benefit residents”, or could be used “to meet community needs” as required by non-profit federal tax requirements, but only if the non-profit provider was meeting its statutory reserve requirements. The amended bill failed to specify what kinds of expenditures might “benefit residents”. The legislation then went on to significantly expand the definition of financial “reserves” in a non-profit system by defining them as “the entire excess of assets over liabilities”. For-profit CCRC companies were not so limited.

It’s no secret that several multi-CCRC non-profits in this state have

standard of care and a Nursing Home Bill of Rights applicable to nursing home care for residents of Medicare and Medicaid certified facilities. The act basically states that residents have the right to be free from physical and mental abuse.

E. MEDICAL FRAUD CONTROL ACT.

Under the Omnibus Budget and Reconciliation Act of 1993, each state attorney general’s office is to establish a Medicaid Fraud Control Unit to detect, investigate and prosecute Medicaid fraud and resident abuse in nursing homes that participate in the Medicaid program.^{vi}

III. RECENT CONGRESSIONAL INVOLVEMENT IN ELDER ABUSE ISSUES.

On Thursday, April 2, 2009, the Elder Justice Act was reintroduced in the Senate. The bill, S. 795, is identical to the Elder Justice Act that was passed unanimously by the Senate Finance Committee in 2008.^{vii} The House reintroduced its version of this bill as H.R. 2006 on April 21, 2009. This legislation was first introduced in 2003, but has failed to pass through the years. As of June 4, 2009, the bill had been referred to the Senate Finance Committee, and House Subcommittee on Healthy Families and Communities, for further review.

The key points of the Elder Justice Act are:

- * Establish an Elder Justice Coordinating Council to make recommendations to the Secretary of Health and Human Services on the coordination of activities of the federal, state, local and private agencies and entities relating to elder abuse, neglect and exploitation.
- * Improve the quality of information and research related to elder abuse.
- * Create new forensic expertise in elder abuse (similar to that in child abuse) that will promote detection and increase the capacity to prosecute offenders. New programs will train health professionals in both forensic pathology and geriatrics.
- * Establish penalties and prosecution for failure to promptly report crimes in long-term care facilities. The act will require reporting of crimes in nursing homes on an official federal website.
- * Provide a first-time direct funding stream for Adult

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developed and

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operate a number of affordable housing projects designed for seniors without the financial means to enter and maintain at a CCRC. These organizations believe that part of their charitable mission is to provide senior care and housing to all elders, without regard to their financial abilities. The use of resident-generated funds, and earnings on corporate investments, have been and continue to be used to develop low income housing projects for seniors, usually in conjunction with federal HUD assistance. These facts were pointed out to members of the state Senate Committee on Human Services by the able public policy staff of Aging Services and its lobbyist. Bottom line: CALCRA was informed there were not sufficient votes on the committee to move the bill forward.

As is so often the case “under the capitol dome”, proponents of legislation are permitted to come away with something that lets them proclaim victory, even if it is meaningless. In the case of A.B. 1169, the bill now simply requires a non-profit CCRC operator to state, in its annual report to the Department of Social Services, how a non-CCRC project it intends to finance “is consistent with the provider’s tax exempt status”. A report like this is probably

Protective Services (APS) - \$100 million a year for four years.

- * Establish an advisory board to create a short- and long-term multidisciplinary strategic plan for the developing field of elder justice.
- * Authorize \$72.5 million over four years for national organizations or states that represent or train long-term care ombudsman representatives to provide training, technical assistance, demonstration programs and research to improve ombudsman effectiveness in addressing abuse and neglect in nursing homes and assisted living facilities.
- * Authorize \$67.5 million over four years in grants to enhance long-term care staffing through training and recruitment to establish employee incentives including career and wage benefit ladders and programs to improve management practices.^{viii}

The introduction this year of the Elder Justice Act broadens Congressional involvement in elder justice issues. Including the Elder Justice Act, there are a number of other bills that have been reintroduced and are pending before Congress that relate to elder protection, including the following:

- * **H.R. 448 Elder Abuse Victims Act** Directs the U.S. Attorney General to: (1) study state laws and practices relating to elder abuse, neglect, and exploitation and report to Congress on such study; (2) develop a long-term plan for elder justice programs and activities; (3) award grants to support and train state and local prosecutors, courts, and law enforcement personnel handling elder justice-related matters; and (4) establish the Elder Serve Victim Grant Program to facilitate and coordinate programs to provide emergency services to victims of elder abuse. This is identical legislation that passed the House last year but did not pass in the Senate. Latest major action: Referred to the Senate Judiciary Committee February 2009.
- * **H.R. 632/S. 557 National Silver Alert Act** Directs the Attorney General to establish a national Silver Alert communications network to assist regional and local search efforts for missing seniors in coordination with states, local governments and law enforcement agencies throughout the nation. Latest major action: Referred to Senate Judiciary Committee March 2009.
- * **H.R. 973 Elder Serve Act** Legislation to create pilot programs in six communities, authorizing \$3 million over three years to establish Emergency Crisis Response Teams (ECRTs) to coordinate local law enforcement, short-term housing placement, bereavement services, adult protective services, legal

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something most multi-

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community non-profits normally provide anyway. All the disclosure provisions and reserve requirements were stripped from the bill. Realizing that the legislation now meant almost nothing, Aging Services withdrew its opposition and the bill moved out of committee.

Make no mistake, although the proponents of A.B. 1169 will no doubt take credit for a major legislative victory, the fact is, the amended bill represents a significant defeat for them. For those of you who wonder why the California statutes are so cluttered with meaningless trivia, A.B. 1169, if signed into law, will stand as an excellent example.

Give me the sausage!

*Michael A. Manley, Esq.
Editor*

**FAST FACTS ON THE
PREVALENCE OF ELDER ABUSE
AND
CONTINUED GROWTH OF THE
AGED POPULATION.**

A. NATIONAL STATISTICS.

* Information provided by the National Center on Elder Abuse estimates that the frequency of elder abuse in Americans age 65 or older ranges from 2% to 10% depending on the survey method.

* The U.S. Department of Health and Human Services Agency on Aging report "A Profile of Future

advocacy services, job placement assistance and health care to those who are victims of elder abuse. Latest major action: Referred to House Subcommittee on Crime, Terrorism and Homeland Security March 2009.

- * **H.R. 1237/S. 512 Fairness in Nursing Home Arbitration Act** This bill would invalidate mandatory arbitration agreements that nursing homes and assisted living facilities have residents sign on admission. The bill would not prohibit arbitration, but would ensure that the resident could voluntarily select the option of arbitration after a dispute arises. Latest major action: Referred to Senate Judiciary Committee and House Subcommittee on Commercial and Administrative Law March 2009.
- * **H.R. 2223/S. 631 Patient Safety and Abuse Prevention Act** Reintroduced to the Senate on March 18, 2009, this bill would create a national background check system to prevent those with criminal records from serving in a long-term care facility.^{ix} Latest major action: Referred to House Committee on Energy and Commerce April 2009.
- * **S. 647 Nursing Home Transparency and Improvement Act of 2009** Seeks to increase public transparency and accountability of nursing home owners and operators and has a provision to provide consumers information through improved reporting requirements on nursing staff levels, turnover and retention. Latest major action: Referred to Senate Finance Committee March 2009.

On an interesting side note, while Congress has failed to establish a federal law criminalizing elder abuse, federal sentencing guidelines do 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.^x

IV. CONCLUSION.

Current federal laws and resources dedicated to elder abuse are minimal at best. It is estimated that elders comprise approximately 12% of the U.S. population, yet the Senate Special Committee on Aging estimates that less than 2% of federal abuse prevention dollars (for all areas of abuse, including domestic violence and child abuse) go to elder mistreatment.^{xi} Federal regulations may mandate the reporting of alleged mistreatment, neglect or abuse, but the reporting is to be in accordance with state

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*Americans: 2008*⁸ states that the U.S. population age 65 and over will increase to 40 million in 2010 and then

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to 55 million in 2020 (a **36% increase** for that decade).

* The same report also indicates that people age 65+ represented 12.6% of the population in the year 2007, but are expected to grow to 19.3% of the population by 2030.

B. CALIFORNIA STATISTICS

* The California Department of Justice estimates that one of every 20 elders is a victim of neglect or physical, psychological or financial abuse.

* The United States Census Bureau projects that California's elderly population will nearly double within the next 20 years -- from 3.7 million to more than 6.4 million.

* The 2005-2009 State Plan on Aging produced by the California Department of Aging reports that between 1950 and 2000, older adults (age 60+) in California increased from 1.6 million to 4.7 million. By 2020, this number is expected to be 8.7 million, and expected to grow to 12.8 million by 2050 – **an increase of 172%** from 2000.

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.

law.^{xii} California is a leader in legislation to curb and prosecute elder abuse, but we still await the federal government stepping up and passing national level legislation for the equal protection of senior citizens in all fifty states. So, for now, it is up to the states to create adequate legislation, but we suggest you keep an eye on federal legislation because it may impact your business sooner rather than later. When that time comes, we stand ready to assist you with interpretation and guidance of the new laws.

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Tracking Current Federal Legislation

The 104th Congress directed the Library of Congress to make federal legislative information freely available to the public. In response, the Library of Congress launched its database, named “THOMAS” in January 1995. This website is very user friendly and allows visitors to search for bill text, summaries and status reports, as well as review activity from the previous legislative day, review House and Senate calendars and search for specific committee reports.

Website: <http://thomas.loc.gov>
User Support Tel: (202) 707-5079

The *U.S. Government Printing Office (GPO)* also provides free Internet access to a variety of legislative, regulatory and executive materials such as the text of congressional bills, committee calendars, selected congressional reports and documents and access to copies of federal laws.

Website: <http://www.gpoaccess.gov>

For additional information:

GPO Access User Support Team Tel: (202) 512-1800
Email: ContactCenter@gpo.gov
Superintendent of Documents Tel: (866) 512-1800

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 Diepenbrock Harrison policies. 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. §§3001 et seq.

ⁱⁱⁱ 42 U.S.C. §3058f

^{iv} Social Services Amendment of 1974, 42 U.S.C.A. §1397

^v 42 U.S.C. §1395i-3, 42 U.S.C.1396r, 42 C.F.R. 483

^{vi} Pub. L. No. 103-66 (OBRA 1993)

^{vii} For more information on the bill and to read the full text, please go to the Library of Congress website at www.thomas.gov. For additional watchdog information, please visit the Elder Financial Protection Network www.bewiseonline.org

^{viii} April 22, 2009, press release from the Congress of the United States, House of Representatives

^{ix} Federal regulations prohibit facilities from hiring individuals who previously have been found guilty of abuse, neglect, or mistreatment or who have a finding entered into the state nurse aide registry concerning abuse. 42 C.F.R. §483.13(c)(1)(ii). Federal law also requires facilities to report to state licensing authorities any knowledge of legal proceedings against an employee that indicates unfitness for service as a nurse aide or other facility staff. 42 C.F.R. §483.13(c)(1)(iii).

^x U.S. Sentencing Guidelines Manual §1.1(b) codified at 18 U.S.C.A. §3A1.1(b)

^{xi} Executive Summary for *Elder Abuse: A Women's Issue* prepared by The Center of Excellence on Elder Abuse and Neglect, University of California, Irvine, CA May 2009

^{xii} 42 C.F.R. §483.13(c)(2). This law also requires a nursing home to provide evidence that all alleged violations are thoroughly investigated and must prevent further potential abuse while the investigation is in progress. Investigation results must be reported to the nursing home administrator (or their designated representative) and to other officials in accordance with state law (including the state survey and certification agency) within five working days of the incident.

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