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Discovery in nursing-home abuse cases

THE ELDER ABUSE ACT PROVIDES ENHANCED REMEDIES, BUT THE COMPLEXITY OF DISCOVERY REQUIRES A VIGILANT AND THOROUGH APPROACH

Discovery in nursing-home abuse cases can be a minefield for the untrained practitioner. There are myriad rules, regulations and standards, with some applying to only skilled-nursing facilities and others applying to hospitals and/or residential care facilities for the elderly (RCFEs). We will provide an overview of the types of discovery to consider in most abuse cases involving a skilled-nursing facility, or for purposes of this discussion, a nursing home.

It is imperative that plaintiffs' lawyers who take a nursing-home case familiarize themselves with all regulations that govern the facility's operation, including those contained in California's Health and Safety Code, Title 22 and the Code of Federal Regulations. It is also *as* imperative to understand the Elder Abuse and Dependent Adult Civil Protection Act's (the Elder Abuse Act) applicable burden of proof and the remedies it provides. (Welf. & Inst. Code, §§15600-57.) It is the former that governs this discussion because the heightened burden of proof provides the basis to argue for broader parameters in discovery.

Burden of proof under Elder Abuse Act

The Elder Abuse Act provides enhanced remedies, including the recovery of attorney fees and costs, to elderly and dependent adult victims of physical abuse (or neglect), where the abuse is proven by clear and convincing evidence and when the defendant is guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. (*Id.*, at § 15657, subds. (a)-(c).) In order to recover punitive damages in a nursing-home case, a plaintiff must prove either direct harm by the employer, or that the conduct was ratified by a managing agent of the employer; a plaintiff must

also satisfy section 3294(b) of the Code of Civil Procedure. Although the heightened proof standards may seem daunting, they can create an advantage in the discovery process.

Plaintiffs' lawyers should argue that the heightened burden of proof requires an expanded universe of relevant documents, information and witnesses. For example, one way to prove recklessness (and ratification) in a nursing-home abuse case is to show that the conditions of the facility were so egregious that they injured other residents. You do this by seeking the contact information of any other residents who suffered some of the same injuries at the facility during the time of your client's residency. The most compelling witness is one who can testify about the conditions at the facility that ultimately caused your client's harm (i.e., understaffing and undertraining).

Relevant documents and information

The rules governing the discovery process are codified under California Code of Civil Procedure section 2019.010. The statute authorizes a variety of discovery devices, with which the reader will be presumed to be familiar, including depositions, interrogatories, inspection demands, and requests for admissions.

This article will only discuss written discovery (interrogatories, requests for production, requests for admissions) and oral depositions.

Interrogatories in a nursing-home case

In a nursing-home case, interrogatories are prepared and served to gather relevant information that could prove or disprove a claim. Per Code of Civil Procedure section 2030.030, interrogatories come in two forms (i.e.,

Special and Form (Judicial Council) interrogatories). Special interrogatories are drafted by counsel or the pro per plaintiff to ask questions that are fact-specific to the case. Form interrogatories are pre-drafted questions prepared by the Judicial Council and available online for each party to serve. The form interrogatories seek basic information of the parties relevant to all cases (i.e., name, address, insurance information, provider information, etc.) and are useful to gather preliminary facts and contentions. As a practice pointer, special interrogatories in a nursing-home abuse case should consider encompassing the following topics (the list below is illustrative only; not exhaustive):

Identification interrogatories

These interrogatories seek the identification of individuals who may be percipient witnesses to depose and/or call during trial. Examples of identification interrogatories are as follows:

- Employee(s) (current and former) of the facility during the relevant time period;
- Person(s)/employee(s) of the facility who were assigned to provide care and/or services during relevant time period;
- Person(s)/employee(s) who were members of the governing body of the facility during the relevant time period; and
- Person(s)/employee(s) who had any interaction with the Plaintiff during the relevant time period.

Other residents/responsible party interrogatories

These interrogatories seek the contact information of other Residents and/or their Responsible Party who may have information about the facility's care

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and operations. Examples of responsible party interrogatories are as follows:

- Please **IDENTIFY** each and every resident of the **FACILITY** who suffered from decubitus ulcers during **PLAINTIFF'S** residency at the **FACILITY**; and
- Please **IDENTIFY** the **RESPONSIBLE PARTY** for each and every resident of the **FACILITY** who suffered from decubitus ulcers during **PLAINTIFF'S** residency at the **FACILITY**.

Description interrogatories

These interrogatories seek information such as job titles or descriptions, facility lay outs/plans, or specific care provided at the facility. Examples of description interrogatories are as follows:

- Description of every job title provided by management and/or employee(s) of the facility during the relevant time period;
- Description of each and every service provided by management and/or employee(s) of the facility during the relevant time period; and
- Description of the care and/or services provided by management and/or employee(s) of the facility during the relevant time period.

Contention interrogatories

These interrogatories ask an opponent to state whether they make a particular legal contention, to state the factual basis for the contention, and to identify any witnesses or documents supporting the contention. Examples of contention interrogatories are as follows:

- Do **YOU** contend that during the time period in which **PLAINTIFF** was a resident in the **FACILITY**, the **FACILITY** met the legally mandated minimum staffing ratios and requirements as set forth in Health and Safety Code section 1276.5 pursuant to the provisions of Title 22 C.C.R. §§ 72329 and 42 C.F.R. § 482.30?;
- If **YOU** contend that during the time period in which **PLAINTIFF** was a resident in the **FACILITY**, the **FACILITY** met the legally

mandated minimum staffing ratios and requirements as set forth in Health and Safety Code section 1276.5 pursuant to the provisions of Title 22 C.C.R. §§ 72329 and 42 C.F.R. § 482.30, please provide all facts which support this contention;

- If **YOU** contend that during the time period in which **PLAINTIFF** was a resident in the **FACILITY**, the **FACILITY** met the legally mandated minimum staffing ratios and requirements as set forth in Health and Safety Code section 1276.5 pursuant to the provisions of Title 22 C.C.R. §§ 72329 and 42 C.F.R. § 482.30, please **IDENTIFY** all witnesses which support this contention; and

- If **YOU** contend that during the time period in which **PLAINTIFF** was a resident in the **FACILITY**, the **FACILITY** met the legally mandated minimum staffing ratios and requirements as set forth in Health and Safety Code section 1276.5 pursuant to the provisions of Title 22 C.C.R. §§ 72329 and 42 C.F.R. § 482.30, please **DESCRIBE WITH SUFFICIENT SPECIFICITY TO SATISFY A SUBPOENA DEUCES TECUM** any and all **DOCUMENTS** which support this contention.

Inspection of documents, things, and places in nursing-home cases

While interrogatories seek relevant information, a demand for the production of documents in a nursing-home abuse case is prepared to obtain copies of *every* relevant piece of paper that could prove or disprove a claim. It is important to analyze the facts in your case and propound document requests that support or deny every allegation of the complaint. Document-production demands are authorized by section 2031.010 of the Code of Civil Procedure. As a practice pointer, demands for the production of documents in a nursing-home abuse case should encompass the following topics, *by way of example*, to gather relevant information:

- 1. Documents relating to the facility:**
 - Insurance agreements and any

applicable policies during the relevant time period (be sure to determine if coverage is eroding);

- Documentation of in-service education or training classes conducted at the facility during the relevant time period;
- Questionnaires, inquiries and/or surveys of employees of the facility during the relevant time period;
- Exit interviews of the facility during the relevant time period;
- All management agreements, consulting agreements or administrative services agreements between the facility and any third parties;
- Minutes of all meetings of the facility during the relevant time period;
- Documentation to evidence staffing levels for all nurses and medical professionals at the facility during the relevant time period;
- Any and all time cards and other time recordings for all personnel, (including relief or pool personnel) who worked in the facility during the relevant time period;
- Documents constituting the facility's policies, procedures, employee handbooks, employee code of conduct, corporate structure, and organizational chart during the relevant time period;
- The brochures and/or marketing materials of the facility intended for dissemination to the public during the relevant time period; and
- Floorplans, preventive maintenance schedules, patient safety plans, and any safety committee meeting minutes or documents.

2. Documents specific to the plaintiff(s):

- All medical records, clinical records, charts, business office records, admission agreements, bills, statements of account, requests for payment;
- All written agreements and/or contracts between the facility and Plaintiff;
- Statements from any person(s) by the facility relating to Plaintiff during the relevant time period;

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- Job performance evaluations (including disciplinary documentation) of any employees of the facility and/or hospital who provided care to Plaintiff during the relevant time period;
- Any statements of deficiencies the facility received relating to Plaintiff from any governmental agency and any plans of corrections implemented as a result of said deficiencies;
- Any “Incident Report(s)” and/or “Unusual Occurrence Report(s)” utilized by the facility to report or memorialize any occurrence relating to a resident which in any fashion mentions or relates to the Plaintiff;
- Any and all work schedules, employee sign-in sheets and time sheets which show the identity, number (quantity) and/or classification of staff (including but not limited to R.N., L.V.N., nurses’ aides, orderlies, medication aides) who worked in facility during the relevant time period;
- Any and all time cards and other time recordings for all personnel, (including relief or pool personnel) who worked in the facility during the relevant time period;
- Any and all video recording and/or photographs taken by the facility pertaining to Plaintiff during the relevant time period.

Requests for admission

Requests for admissions are authorized by section 2033.010 of the Code of Civil Procedure. Although requests for admission are straightforward, they have a potentially huge impact if *not* responded to timely by the defendant. Specifically, a failure to respond to requests for admission can result in a motion by the propounding party seeking the court to order that all requests for admissions be deemed admitted. If granted, the non-responding party has lost their opportunity to deny certain allegations or facts which could be devastating to the outcome of the case.

As a practice pointer, a plaintiff’s requests for admissions in a nursing-home case should address certain facts

that, if admitted, would support a specific element of a claim under the Elder Abuse Act. These discovery requests should be drafted to relate specifically to the alleged allegations in the complaint. This is illustrated as follows and is dependent on the specific facts of the case:

- Please admit that, during the time periods in which **PLAINTIFF** was a resident of the **FACILITY**, the **FACILITY** did not meet the legally mandated minimum staffing ratios;
- Please admit that **YOU** did not reprimand or discipline any **FACILITY** employee relating to the care provided to **PLAINTIFF**;
- Please admit that given **PLAINTIFF**’s prior medical history and assessments, **YOU** knew his health and safety would be put at great risk if he was not provided with needed medical care and services.

These examples regard material facts in a plaintiff’s case in chief. Specifically, request number one involves whether the facility was understaffed, request number two concerns whether defendant ratified the alleged abuse for failure to discipline any employees who committed the abuse, and request number three establishes the foreseeability of harm to your client based on their underlying medical conditions and needs.

Oral depositions

Oral depositions authorized by section 2025.450 are an integral part of preparing your nursing-home case for settlement or trial. Although any relevant witness who can assist your case should be deposed, there are certain categories of witnesses you’ll want to consider.

The client

As a general matter, your elderly or dependent client may be the only witness to the actual abuse. If competent and presentable, get their testimony as soon as possible. However, many victims of nursing-home abuse make poor witnesses. Be careful to evaluate their ability to recall events accurately. Most, if not all, of our nursing-home clients have some form of mild or severe cognitive impairment

which causes short-term memory loss; and many of our clients have dementia or Alzheimer’s disease. If your client’s testimony will not be credible to a jury, it may not be worth the risk of deposing them (or presenting them for deposition).

Facility staff

Person Most Knowledgeable (“PMK”) depositions are helpful to authenticate and discover records and can help focus some of the issues underlying your claims. In many nursing-home cases, a specific harm or injury will form the basis of your complaint such as bedsores and/or infections. In the latter example, you would depose, for example, the PMK regarding infection control, infection control policies and procedures, as well as any clinical documents related to your client’s infection; be sure to include specific document requests with each notice. The individual facts of your case will determine which PMK witnesses to pursue.

In almost *every* nursing-home case, you will want to depose the Administrator and/or the Director of Nursing (DON). These witnesses can guide you through how the facility operates and how those operations affect resident safety and care; they are also managing agents who can establish your corporate ratification elements. The following areas of inquiry should be considered in any managing agent deposition:

- **Who’s in Charge?** Who controls the money? Who manages Human Resources? And who controls the clinical care processes?;
- **Governance** questions regarding which entities are the licensee and/or the management company; the relationships between the DON and the Management company, the procurement and provision of administrative (and other) services;
- **Operational** questions regarding who carries what authority, how money is spent, bonus plans and incentives for the DON or Administrator and whether those bonus plans are determined by meeting certain targets, and what those targets are;

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- **Staffing** questions regarding the daily staffing levels, census levels, acuity levels, who authorizes the staffing budget, and how the facility's labor hours per patient per day are calculated; reporting staffing levels;

- **Human Resource** questions regarding time card policies and procedures, overtime procedures, which entity issues employee paychecks, collective bargaining agreements, union negotiations, employee transfers, background checks and the employee handbook;

- **Regulatory** questions regarding any surveys, complaint visits, ombudsmen, plans of correction, Citation Review Conferences, the payment of regulatory fines or citations;

- **Financial and Administrative** questions regarding payroll accounts, which entity is the landlord, property taxes, leasehold improvements, license renewal fees, Medicare cost reports, management fees, census targets;

- **Contractual** questions regarding management company agreements, the distributor of nursing supplies, insurers/HMOs that refer patients to the facility, employee healthcare providers, employee retirement plans, and the workers' compensation policy and carrier;

- **Legal** questions regarding the notification of claims, the payment for legal services, and the handling of legal complaints;

- **Clinical** questions regarding resident admittance, clinical policies and procedures, and the ordering of clinical supplies; and

- **Case-specific** questions which establish elements of ratification, including but not limited to, citations levied on the facility, other resident complaints and disciplinary practices.

Connecting the dots between how the facility operates and determines their budget, and the harm your client suffered is critical to proving corporate ratification. The failure to adequately fund, adequately staff, adequately train and adequately supervise, in order to increase the bottom line, is the definition

of knowingly disregarding resident safety and care.

In addition, after a thorough review of your client's medical chart, determine which staff are most relevant to testify about the care (or lack thereof) provided. These witnesses can not only testify about clinical and/or custodial care at the facility, but can also provide information about staffing, cleanliness and supervision practices.

Former employees ("former(s)") can also provide powerful testimony for your case. After what is sure to be a fight with defense counsel over the production of the last known contact information for each former, be sure to contact as many formers as possible – they can guide you through some of the practices at the facility that current employees may be reluctant to share for fear of retaliation by facility managers or directors.

Corporate officers may or may not be necessary, depending on discovery and the facts of your case. If necessary, be sure to inquire about profit margins and previous complaints or lawsuits, as well as who makes decisions regarding funding, services, staffing, training and care.

Family and friends

Family and friends are effective witnesses if they can testify about the conditions of the facility, or if they can testify about your client's activities prior to the abuse. Regarding care at the facility, be sure to investigate what friends and family saw, such as soiled bedsheets, cleanliness, or whether staff failed to respond to call requests in a timely manner. Also be sure to interview friends and family about your client's quality of life prior to the abuse, including but not limited to, daily activities, hobbies and relationships.

Other residents and/or their responsible parties

Other residents and/or their responsible parties often provide information that corroborates your client's claims. Specifically, staffing levels, the care provided, the services provided, and, most importantly, whether other residents suffered from the same injuries

as your client is relevant to recklessness and (possibly) ratification. For example, in a nursing-home case involving bedsores, other residents who suffered from bedsores because the facility failed to adequately reposition and turn, is probative of the failure to adequately staff the facility, increasing the likelihood that the facility also failed to reposition and turn your client; again, due to underfunding and understaffing.

Third-party witnesses

You will want to inquire with your client or their family about who witnessed your client's condition as a result of the abuse; you may also derive some of this information from your client's medical chart. These witnesses can be anyone from emergency medical technicians (EMTs) who transported your client from the facility to an acute care hospital, to social workers or hospital staff. The important factor to consider is whether the proposed witness can either contradict the defendant facilities' medical charting and/or defenses, or who can better illustrate for the jury your client's condition as a result of the abuse. In all nursing-home cases, however, *always* confer with any physicians who treated your client to determine if they suspected or reported any abuse, or if they can contradict information documented or provided by the facility.

Mandated reporters

Pursuant to California's Welfare and Institutions Code section 15630(a), "any person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult... is a mandated reporter." Determine who are relevant mandated reporter witnesses to determine if any suspected abuse reports were submitted to the appropriate authorities. (Welf. & Inst. Code, §§ 15630, subds. (b-f) .)

Conclusion

The complexity of discovery in nursing-home abuse cases requires a vigilant and thorough approach. The nursing home defense bar is well adept
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at convincing unassuming judges that privacy and peer review concepts should prevent the disclosure of damaging information. It is imperative that attorneys be aware of some of the effective defense tactics that have been successful in defending many a nursing-home case. It is even more important that attorneys who take nursing-home cases know what they're looking for... and know how to get it.

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