



by Melissa Biederman Zubi

# PRESERVING *the Golden Years*

Theft, neglect, and physical abuse, including sexual assault, are among the most frequent crimes that occur in nursing facilities

**THE AGING** population, as well as the settings in which long-term care services<sup>1</sup> are administered, have exploded since California's enactment of criminal elder protection laws in the 1980s.<sup>2</sup> In California, more than 400,000 individuals reside in licensed skilled nursing facilities (SNF) and nursing homes, assisted living facilities (also known as licensed residential care facilities for the elderly (RCFE)), or unlicensed living facilities that may or may not be able to care for them.<sup>3</sup> Women make up 60 percent of the residents in nursing homes.<sup>4</sup> The California Department of Finance projects that between 2010 and 2030 the number of Californian residents who are likely to need nursing home care or other long-term care—those aged 65 and older—will nearly double.<sup>5</sup>

Given the increasing number of elders aging in community and home-based settings, application of elder mistreatment

protection laws and programs to these settings is crucial. Elders are a vulnerable population, and, as they age over 65, they are more at risk for developing Alzheimer's disease<sup>6</sup> and other forms of dementia.<sup>7</sup> Many existing elder protection laws stem from abuse, neglect, and financial exploitation cases reported in nursing homes and SNFs. Since these institutional settings generally receive federal reimbursement funds for long-term care services, they must comply with federal Medicaid-Medicare oversight laws and regulations,<sup>8</sup> in addition to state licensing laws. In California, 66 percent of SNF residents rely solely on Medi-Cal (the state's Medicaid program) to pay for their care.<sup>9</sup> In stark contrast, most RCFEs are for profit,<sup>10</sup> and, in general, residents pay privately for long-term personal care services.<sup>11</sup> Absent state participation in the Assisted Living Waiver program that allows reimbursement for "nursing facility services" provided to Medicaid-eligible, low-income seniors in RCFEs or subsidized

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public housing,<sup>12</sup> RCFEs and subsidized public housing are not subject to Medicaid and Medicare laws and regulations. In California, only 14 of California's 58 counties participate in the Assisted Living Waiver program—and not all of these counties have participating providers.<sup>13</sup>

Irrespective of federal oversight, RCFEs remain subject to state licensing laws and regulations. In California, RCFEs are mandated to provide basic services<sup>14</sup> to ensure safe and healthful living accommodations. Recent licensing reforms—including a Resident's Bill of Rights<sup>15</sup> substantial daily fines, program exclusion, and licensure exclusion—have the potential to deter elder mistreatment.<sup>16</sup> Under existing law, penalties for violating any provision of the act concerning RCFEs include misdemeanor conviction and incarceration. Critics<sup>17</sup> contend that licensing laws do not go far enough to strengthen elder protections. Yet, these laws impact the criminal prosecutions for elder abuse and neglect in that the looming possibility of exclusion from the Medi-Cal or Medicare program and loss of license to practice—or to function as a nursing facility—results in many of these cases proceeding to trial. Even though license revocation or program exclusion does not drive the decision to charge a crime, it may have an impact on the provider's decision to plead to criminal charges.<sup>18</sup>

Licensing laws for RCFEs, however, do not extend to subsidized public housing, private homes, or senior housing complexes that provide only housing, housekeeping, and meals. Whether elders live in these settings by choice or necessity,<sup>19</sup> these facilities are unlicensed. Elders living in private retirement villages, retirement hotels, or subsidized public housing frequently employ unlicensed individuals or agencies to provide assistance with daily living activities, although skilled nursing services provided in the home by a home health agency<sup>20</sup> and hospice facilities<sup>21</sup> are subject to California's licensing laws and regulations. In 2016, California began licensing home care organizations (HCO)<sup>22</sup> that “arrange home care services”<sup>23</sup> by a registered home care aide (HCA).<sup>24</sup> Under the Home Care Services Consumer Protection Act (HCSCPA), which is administered and enforced by the Department of Social Services (CDSS),<sup>25</sup> HCAs working independently of an HCO are not required to be registered,<sup>26</sup> and individuals may employ HCAs “not listed on the home care registry”<sup>27</sup> maintained by CDSS. Since many of the basic services that HCAs provide in the home overlap with the basic services that RCFEs provide in the community,<sup>28</sup> and the HCSCPA lacks the deterrent impact of the criminal and civil enforcement penalties of the RCFE act, there is a risk that abuse and neglect in the home will remain undetected.

The degree of elder abuse, neglect, and financial exploitation in private and subsidized public housing is unknown, but the unfortunate reality is that serious and widespread abuse, neglect, abandonment, and exploitation persist in all long-term care facilities.<sup>29</sup> In 2009, the California Senate Office of Oversight and Outcomes found that 13 percent of complaints to the California Office of the State Long Term Care Ombudsman alleged abuse, gross neglect, and exploitation, more than twice the national rate of 5 percent.<sup>30</sup> In 2014, the number in California rose to 18 percent.<sup>31</sup> Elder abuse complaints for SNFs were twice, and in some instances more than three times, that for RCFEs with respect to physical, sexual, and verbal or psychological abuse, as well as gross neglect and resident-to-resident physical or sexual abuse.<sup>32</sup> Both SNFs and RCFEs had the same number of financial abuse complaints.<sup>33</sup>

These numbers likely underrepresent the actual instances of abuse and neglect. Vulnerable seniors and people with disabilities often are unable to report abuse and neglect because of limited communication skills, physical or cognitive impairments, or reluctance to report the attendant upon whom they depend for care.<sup>34</sup> Forty-three percent of Californians residing in RCFEs suffer from Alzheimer's or other forms of dementia,<sup>35</sup> as do an unknown number living in unlicensed residences (e.g., senior housing complexes) that provide only housekeeping, meals, and housing. These residents may be given “dangerous antipsychotic drugs to sedate or restrain them improperly.”<sup>36</sup> Reported cases of abuse and neglect of Medicaid recipients include death, hospitalization, and fraud.<sup>37</sup> Other cases involve attendants providing care while impaired—sometimes by the drugs prescribed to their care recipients.<sup>38</sup>

### Criminal Penalties for Elder Abuse

Since 1986, California has recognized that elders and dependent adults are “deserving of special consideration and protection, not unlike the special protections provided for minor children, because [they] may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.”<sup>39</sup> Elders, 65 years and older, and dependent adults, 18 to 64 years, are defined as those persons who have “physical or mental limitations that restrict [their abilities] to carry out normal activities or to protect [their] rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.”<sup>40</sup> To enable the number of agencies to whom suspected

abuse must be reported to investigate suspected abuse, criminal elder and dependent adult abuse prosecutions are subject to a five-year statute of limitations.<sup>41</sup>

Among the various crimes that occur in nursing facilities, the most frequent elder crimes prosecuted are theft,<sup>42</sup> neglect by others,<sup>43</sup> and physical abuse.<sup>44</sup> In addition to prosecutions for murder, rape, and lewd acts that carry death and felony prison sentences up to twenty-five years to life,<sup>45</sup> willful infliction of physical pain or mental suffering on an elder under circumstances or conditions likely to produce great bodily harm or death results in incarceration in county jail for one year to four years in state prison. Enhancements for great bodily injury and death are increased even further when the victims are over 70 years of age.<sup>46</sup> Misdemeanor convictions for willfully causing or permitting an elder to suffer unjustifiable physical pain or mental suffering under circumstances or conditions other than those likely to produce great bodily harm or death carry a maximum sentence of six months county jail.<sup>47</sup> Misdemeanor and felony penalties also apply to caretakers and non-caretakers who embezzle or steal property of an elder.<sup>48</sup> Willfully or repeatedly violating the licensing regulations and rules relating to operating and maintaining long-term care facilities subjects the provider to a misdemeanor incarceration of up to six months.<sup>49</sup>

**Abuse.** Staff and facilities who cause or permit a resident to die may also face potential charges for manslaughter if it can be proven that their action or negligence was the proximate cause of the resident's death.<sup>50</sup> Negligence is contemplated within the manslaughter statute, described as action “without due caution and circumspection.”<sup>51</sup> Such negligence is judged on an objective, reasonable person standard.<sup>52</sup> Manslaughter charges have been brought against staff and facilities for neglecting to treat or improperly treating pressure ulcers which resulted in septicemia, for permitting or for not attempting to prevent severe weight loss and dehydration, and for failure to provide the proper medication or for giving the wrong medication that led to the resident's death. Also, there are three- and five-year enhancements for elder abuse victims who are under 70 and over 70,<sup>53</sup> respectively. The same age split occurs with enhancements for injuries resulting in death.<sup>54</sup>

Incidents of sexual assault abuse in long-term care facilities include both patient-to-patient and staff-to-patient assaults. Cases of sexual abuse have included the attempted sexual assault of an autistic 21-year-old woman by a fellow resident who was a known sex offender and was not properly supervised;<sup>55</sup> sexual conduct between staff members and long-term care residents;<sup>56</sup> and staff engag-

# MCLE Test No. 268

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education ethics credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at <http://www.lacba.org/mcseselftests>.

1. Residential care facilities for the elderly (RCFEs) are not subject to state licensing laws and regulations.  
True  
False
2. A dependent adult is a person between 18 and 65 who has physical or mental limitations that restrict the individual's abilities to carry out normal activities or to protect his or her rights.  
True  
False
3. The statute of limitations on theft does not begin to run until the crime is discovered.  
True  
False
4. There is a five-year enhancement for felonies against elders over 70.  
True  
False
5. Reportable incidents of abuse need only be reported to law enforcement.  
True  
False
6. Both the Health Insurance Portability and Accountability Act (HIPAA) and California law require disclosure of privileged information to law enforcement.  
True  
False
7. Only the staff of RCFEs, and not the facilities themselves, who cause or permit a resident to die may face potential manslaughter charges.  
True  
False
8. A charge of sexual battery on an institutionalized victim requires that the victim be an in-patient receiving medical or psychiatric care and either seriously disabled or medically incapacitated.  
True  
False
9. Criminal neglect of an elder or dependent adult is defined as simple negligence.  
True  
False
10. HIPAA forbids all sharing of private information.  
True  
False
11. A criminal jury may be instructed on the theory of undue influence.  
True  
False
12. Long-term facility patient records are not obtainable by search warrant per HIPAA.  
True  
False
13. In a case of felony elder abuse, juries need not unanimously agree on one action that was likely to produce great bodily harm or death.  
True  
False
14. Chemical restraint is a form of false imprisonment.  
True  
False
15. Negligence in a manslaughter case is judged subjectively.  
True  
False
16. Neglect is defined, in part, as permitting an elder or dependent adult to endure mental suffering.  
True  
False
17. Falsification of medical records is a specific intent crime.  
True  
False
18. It is a defense to a charge of criminal neglect that the victim was resistant to care.  
True  
False
19. Licensing laws for RCFEs extend to subsidized public housing, private homes, and senior housing complexes.  
True  
False
20. A facility that does not comply with records requests from law enforcement is immune from charges of obstruction of justice.  
True  
False

## MCLE Answer Sheet #268



### PRESERVING THE GOLDEN YEARS

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

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1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.
5. For future reference, please retain the MCLE test materials returned to you.

#### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  True  False
2.  True  False
3.  True  False
4.  True  False
5.  True  False
6.  True  False
7.  True  False
8.  True  False
9.  True  False
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  True  False
15.  True  False
16.  True  False
17.  True  False
18.  True  False
19.  True  False
20.  True  False

ing in sexual acts with residents who are comatose or in stages of advanced dementia. A recent prosecution involved patient-to-patient sexual assault caught on video surveillance, in which the video also established the facility's failure to conduct the required status checks every 15 minutes on the suspect.<sup>57</sup> In this type of case, the state may charge sexual battery on an institutionalized

“focused on the effect of the crime on the victim: unjustifiable physical pain or mental suffering.”<sup>62</sup> Staff have been known to slap residents who throw juice at them; to hit residents with clipboards for noncompliance with care; even to throttle a resident who was resisting being put to bed.<sup>63</sup> If the assault occurs “under circumstances or conditions likely to produce great bodily harm or death,”



victim, which requires that the victim be an in-patient receiving medical or psychiatric care and either “seriously disabled or medically incapacitated.”<sup>58</sup>

Inadequate staffing exacerbates elder mistreatment. Regulations mandating nurse-patient hours are a preventative step, but these apply only to SNFs,<sup>59</sup> not to RCFEs, even though similar care may be provided in both settings. Federal law requires long-term care facilities receiving Medicare or Medicaid funds to have a registered nurse (RN) as the director of nursing (DON), an RN on duty at least eight hours a day, seven days a week, and a licensed nurse (RN or LVN) on duty the rest of the time. California requires 3.2 hours of a patient's day to be covered by direct care staff, which includes all staff except the DON.<sup>60</sup> Despite these requirements, facilities are historically understaffed, getting by on the bare minimum or less.

Adequate staffing is not necessarily a guarantee of freedom from abuse as an overwhelming number of alleged perpetrators have been facility staff members.<sup>61</sup> The legislature set forth enhanced penalties for assault on an elder or dependent adult to address this situation, in which the statutes have

the suspect may be charged with a felony.<sup>64</sup> In felony elder abuse, juries need not unanimously agree on one action that was likely to produce great bodily harm or death, but “may consider all the ‘circumstances or conditions’ that were likely to produce great bodily harm or death.”<sup>65</sup>

Another symptom of understaffing, inadequate training, or staff inertia is the improper and illegal restraint of a resident, which may constitute felony false imprisonment.<sup>66</sup> Restraints may be physical as in ties, belts, leather restraints, or chemical as in psychotropic or sedating medications. The most common defense to the charge of improper restraint is the resident's need for safety. Safety concerns, however, do not justify restraining a resident in a wheelchair for hours and ignoring the resident's pleas to be allowed to go to the bathroom or to go to bed.<sup>67</sup> Residents have been tied to their beds with stray pieces of rubber, supposedly for their safety but without the required doctor's order.<sup>68</sup>

False imprisonment through chemical restraint also may occur when the administration of sedating drugs is for staff convenience, as a disciplinary measure, or for any other nonmedical reason.<sup>69</sup> Another misuse

of medications is the diversion of controlled substances, such as pain medication, for a staff member's personal use. In one egregious case, a nurse used a syringe to drain the narcotic pain medication from a dying resident's pain pump, and she pocketed the IV prescription narcotic for her own use, even though the patient was riddled with cancer.<sup>70</sup>

**Neglect.** Not an uncommon charge in long-term care facilities, neglect is defined as “causing or permitting a resident to experience unjustifiable pain or mental suffering,” or in the felony context, causing or permitting the resident to face great bodily injury, to actually suffer great bodily injury, or to have his or her health endangered.<sup>71</sup> Neglect is somewhat harder to prove, as the standard is not simple negligence but gross negligence, or an unreasonable and “reckless” disregard for the victim's health or safety.<sup>72</sup> However, the People may bring evidence (subject to Penal Code section 352 analysis for undue prejudice or consumption of time) of uncharged elder or dependent adult abuse to help make its case.<sup>73</sup>

Elderly or dependent residents with limited mobility are at risk for developing opportunistic infections, dehydration, or malnutrition, or for developing pressure sores (typically found on an area of the body subjected to pressure for long periods of time, e.g., the ankles and buttocks).<sup>74</sup> The injury is often not the result of one instance of neglect; rather, it is a course of conduct, a series of wrongful acts that were “successive, compounding, and interrelated.”<sup>75</sup> In one instance, staff were given instructions on the treatment of a resident's pressure sores, which included keeping the area clean and dry and providing pressure-relieving devices such as air mattresses and boots. They failed to install the mattress and did not try alternatives when the resident removed the pressure-relieving boot the doctor prescribed for her. They also failed to properly monitor and treat her malnutrition. When the resident became unresponsive, she was taken to an emergency room, where the necrotic heel fell off and the smell cleared the ER.<sup>76</sup> Not all cases are that severe, but something as seemingly benign as failing to replace a device used to alarm staff when a resident walks out of the facility has resulted in residents' leaving the facility, falling outside, and breaking a hip.<sup>77</sup> It should be noted that it is not a defense that the elder or dependent adult was resistant to care.<sup>78</sup>

**Theft.** Institutionalized adults are prime targets for all manner of theft. Many of these cases, while constituting theft from an elder,<sup>79</sup> carry a host of separate charges from forgery to unauthorized use of an access card and grand theft. There have been cases of a staff member's stealing a resident's checkbook and forging checks,<sup>80</sup> a certified nurse's aide's stealing ATM cards and obtaining the pin

number from the vulnerable resident,<sup>81</sup> and an assistant administrator's squatting in a resident's house while the resident was unable to leave the facility.<sup>82</sup> One of the most troubling, yet not uncommon, acts of fraud and theft occurred in Pasadena to a resident who was not oriented to time or person and was instructed by a friend to sign five blank checks, which were eventually negotiated for over \$11,000. The suspects went a step further and brought along a notary who witnessed the resident signing a new power of attorney and new will in which all powers and all her estate were given to the friend's caretaker.<sup>83</sup> Residents with cognitive limitations are especially vulnerable. They are easily led to believe the story given by the suspect (e.g., needing an operation or in danger of losing a home), or they may be so impaired as to be wholly unaware that money is being stolen from them at all. The civil law concept of undue influence<sup>84</sup>—defined as an “unfair advantage taken of another's weakness or distress”<sup>85</sup>—may be used in prosecuting these cases; however, the court must be careful not to instruct on that issue and it must not be the sole theory upon which the prosecutor rests. Courts have found that undue influence is “not a rule of evidence”<sup>86</sup> and therefore not a legally supportable theory when used as a theory of guilt in criminal cases.<sup>87</sup> The court's determination does not prevent the prosecution from raising the issue of undue influence, but it must not be the basis upon which guilt is determined.<sup>88</sup>

**Fraud.** Many times additional charges emerge from an initial investigation into suspected elder or dependent adult abuse, such as false charting or failure to report. In a false charting case, the People must prove not only that the material placed in the patient's chart was inaccurate but also that the person charting did so with fraudulent intent.<sup>89</sup> This can take the form of charting care that was not provided when it was later found that the resident was dying unattended in his or her room,<sup>90</sup> charting that a patient had no complaints of pain and was lying in bed when video surveillance shows him or her sitting motionless in the hallway after having thrown up from discomfort,<sup>91</sup> and charting that full measures were taken for a resident who requested all measures be taken to save his or her life when, as was later determined, staff made the independent decision to let the patient die and not to resuscitate him.<sup>92</sup> As false charting is a specific intent crime, proof may be hard to come by, although the advent and increasingly common practice of electronic charting makes detecting false charting easier than ever before.<sup>93</sup>

There are also potential fraud charges for false claims to the Medi-Cal program. A pharmacist, for example, faced criminal

charges for Medi-Cal false claims for drugs purportedly ordered for and distributed to a resident which, in fact, were kept in the pharmacy's inventory.<sup>94</sup>

### **Mandated Reporters of Elder Abuse**

A mandated reporter of elder abuse includes any person who has assumed full or intermittent responsibility for the care or custody of an elder, whether or not the person receives compensation, as well as “administrators, supervisors and any licensed staff or a public or private facility that provides care or services for elders, or any elder care custodian, health practitioner, clergy, or employee of a county adult protective services agency or local law enforcement agency.”<sup>95</sup> Reportable incidents include physical abuse,<sup>96</sup> abandonment, abduction, isolation, financial abuse, and neglect.<sup>97</sup> Mandated reporters who observe or have knowledge of such a reportable incident, or are told by an elder that he or she has experienced such an incident—whether by commission or omission—must report the known or suspected abuse immediately by telephone, followed by a written report, or through the confidential Internet reporting tool.<sup>98</sup> If the suspected abuse is physical abuse that resulted in serious bodily injury and it occurred in a long-term care facility, the report must be made immediately to a local law enforcement agency and, within two hours, in writing to the local ombudsman.<sup>99</sup> When the suspected physical abuse does not result in serious bodily injury, reports to both law enforcement and the long-term care ombudsman must be made within 24 hours.<sup>100</sup> Where the suspected or alleged abuse is other than physical abuse occurring in a long-term care facility, a telephone and a written report must be made to either the local ombudsman or law enforcement, which requires further reporting by these entities to other state and local agencies, depending on the category of abuse alleged.<sup>101</sup> Reportable incidents in nursing homes are reported to local law enforcement and the county adult protective services agency.<sup>102</sup>

Inadequate or untimely reporting allows abuse and neglect to flourish, and impedes the provision of services to the elder population in need of help. Failing to report, or impeding or inhibiting a report of physical abuse, abandonment, abduction, isolation, financial abuse, or neglect of an elder also may lead to a misdemeanor conviction, punishable by a maximum six-month county jail sentence, or a felony conviction with an enhanced one-year sentence<sup>103</sup> for a willful failure to report abuse that results in death or great bodily injury.<sup>104</sup>

The California Department of Justice designed three programs to combat elder abuse. The Violent Crimes Unit prosecutes physical elder abuse committed by individual employ-

ees against patients in elder care facilities. The Facilities Enforcement Team prosecutes corporate entities, including SNFs, residential care facilities, and hospitals for adopting or promoting policies that lead to neglect and poor quality of care. The Operation Guardians program helps protect and improve the quality of care for California's elder and dependent adults residing in California's SNFs. The Operation Guardians team identifies instances of abuse or neglect for civil and/or criminal prosecution by the Bureau of Medi-Cal Fraud and Elder Abuse.<sup>105</sup>

### **Privacy Concerns**

Upon receiving an allegation of elder abuse, law enforcement often comes upon the concern of facilities and their owners with their obligations regarding patient privacy under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>106</sup> and the Lanterman Developmental Disabilities Act.<sup>107</sup> The former act requires facilities to protect their patients' “individually identifiable health information,” including the patients' past, present, and future physical or mental health or condition.<sup>108</sup> This not only includes actual identifying information but also information that would provide a “reasonable basis” to identify the individual, such as a patient's address, birth date, or Social Security number.<sup>109</sup> This act is not a blanket prohibition on sharing identifying information but does prohibit sharing that information unnecessarily.<sup>110</sup>

It may appear that HIPAA throws a road block in front of investigators; however, there are express exceptions within HIPAA that permit law enforcement to obtain information necessary for their investigations.<sup>111</sup> Covered entities “may disclose” protected information to government authorities looking into cases of abuse, neglect, and domestic violence.<sup>112</sup> Facilities concerned about safeguarding patient information may ask for a court to review the information to ensure the patient's privacy is being preserved. A court will then determine what information, if any, may be disclosed, and if there is a need for a protective order.<sup>113</sup> Law enforcement may obtain protected information through court order or subpoena, through grand jury subpoena, or through written authorization from the patient.<sup>114</sup> This information may then be used for identifying or locating a suspect, fugitive, material witness, or missing person,<sup>115</sup> or for obtaining information about a crime victim.<sup>116</sup> Facilities may also disclose otherwise protected information to law enforcement if there is suspicion a death is the result of criminal conduct.<sup>117</sup>

Further, a facility may reveal protected information if it believes, in good faith, that a crime occurred on the premises that included the covered patient or other patients.<sup>118</sup> Any emergency medical care provided off premises

may also be shared with law enforcement when necessary to inform them about a crime that occurred on the premises.<sup>119</sup> This information includes the nature of the crime, location of victims, and identification, description, and location of the suspect. Lastly, facilities may safely disclose information to law enforcement to help avert a serious threat to health or safety.<sup>120</sup> In this instance, sharing the information is permitted if it will “prevent or lessen” a serious threat, or it must be critical to the ability of law enforcement to identify or apprehend an escapee or someone who made an admission to a violent crime.<sup>121</sup> This can be done without the patient’s prior approval so long as the facility shows reasonable efforts to contact the patient or his or her legal guardian.<sup>122</sup> In this last instance, the prosecutors or law enforcement may agree to a protective order and an agreement to not disseminate the information and to destroy the information at the conclusion of litigation.<sup>123</sup> Although litigation is anticipated, the Code of Federal Regulations currently is silent on what constitutes dissemination and what can be considered the end of litigation.

While HIPAA does not require disclosure to law enforcement (covered entities “may disclose”), California law requires disclosure under certain circumstances. Any mandated reporter, such as a facility and all health care and administrative staff, must report suspected elder abuse. The report must include, but is not limited to, the name of the injured person, where the injured person resides, the nature and extent of any injuries, and the identity of any suspect, if there is one.<sup>124</sup>

Other code sections require that mandated reporters report not only cases of actual physical injury but also any situation in which there is a reasonable belief that abuse has occurred.<sup>125</sup> No subpoena is required. In situations in which a mandated reporter is not involved, law enforcement may reach the necessary information without patient consent if a court so orders it after finding good cause and after the facility has had notice and an opportunity to appear.<sup>126</sup> The disclosure may only be made to law enforcement—including prosecutors—and encompasses all identifying information about the patient as well as his or her prognosis or treatment. Of course, records are also obtainable via search warrant, although records of a physician may require a special master (as defined in the statute) to review the seized documentation.<sup>127</sup> If the facility receives Medi-Cal funds, it must retain records and make them available to the Bureau of Medi-Cal Fraud and Elder Abuse.<sup>128</sup> Failure to do so exposes the facility to potential sanctions.<sup>129</sup> There is also the potential for criminal charges for obstruction.<sup>130</sup>

With the population of elderly Californians growing exponentially, the need for pro-

tection from and prevention of abuse and neglect takes on increasing importance. California’s licensing and criminal laws strike the balance between the competing issues of privacy of and protection for the elderly. The role of long-term care providers, law enforcement, and regulatory agencies in combatting elder mistreatment requires reporting and enforcement of elder protection laws in long-term care settings. ■

<sup>1</sup> Long-term care historically referred to services and supports to help frail older adults and younger person with disabilities maintain their activities of daily living such as bathing, dressing, eating, toileting, medication management, and health maintenance tasks. The U.S. Department of Health and Services now uses the term to include both health care-related and nonhealth care-related services. LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES: DATA FROM THE NATIONAL STUDY OF LONG-TERM CARE PROVIDERS, 2013-2014, CENTERS FOR DISEASE CONTROL AND PREVENTION, at n.1, available at <http://www.cdc.gov> [hereinafter DHHS NATIONAL PROFILE]. The US Department of Health and Human Services’ Office of Inspector General refers to nonmedical assistance to the elderly and persons with disabilities as “personal care services.” Investigative Advisory on Medicaid Fraud and Patient Harm Involving Personal Care Services, Office of Inspector General, U.S. Dep’t of Health and Human Servs., at 2 (Oct. 3, 2016), available at <https://oig.hhs.gov> [hereinafter Investigative Advisory].

<sup>2</sup> WELF. & INST. CODE §15600(a).  
<sup>3</sup> Elder Abuse, Xavier Becerra - Attorney General, State of California Dep’t of Justice, <http://oag.ca.gov> [hereinafter Elder Abuse]. See also ERIC CARLSON & FAY GORDON, WEBINAR: PROGRESS AND CHALLENGES IN CA ASSISTED LIVING (May 25, 2016), available at [www.justiceinaging.org](http://www.justiceinaging.org) [hereinafter CARLSON & GORDON].  
<sup>4</sup> Facts and Statistics, Media Center, Cal. Ass’n of Health Facilities, <https://www.cahf.org> (last viewed Apr. 18, 2017) [hereinafter Facts and Statistics].

<sup>5</sup> *Id.*  
<sup>6</sup> 2016 ALZHEIMER’S DISEASE FACTS AND FIGURES, ALZHEIMER’S ASS’N, at 54-55 (2016), available at [https://www.alz.org/documents\\_custom/2016-facts-and-figures.pdf](https://www.alz.org/documents_custom/2016-facts-and-figures.pdf) [hereinafter ALZHEIMER’S FACTS AND FIGURES].

<sup>7</sup> See Alzheimer’s Disease, FastStats Homepage, Centers for Disease Control and Prevention, <http://www.cdc.gov>.

<sup>8</sup> The Centers for Medicare and Medicaid released a comprehensive revision of nursing home regulations in September 2016, which include a prohibition against employing an individual whom a court has found guilty of elder abuse, neglect, exploitation, misappropriation of property, mistreatment, or a person entered into the state registry for the same, or a licensed individual with a pending disciplinary action. 42 C.F.R. §483.12(a)(3)(i)-(iii).

<sup>9</sup> Facts and Statistics, *supra* note 4.  
<sup>10</sup> DHHS NATIONAL PROFILE, *supra* note 1, at 8 n.13 (citation omitted).

<sup>11</sup> A facility in one of the states participating in a waiver program allowing Medicare-Medical reimbursement for community- and home-based residential care and accepting federal reimbursement as a source of payment is subject to federal oversight.

<sup>12</sup> The goal of the Assisted Living Waiver Program is to enable low income, Medi-Cal-eligible seniors to remain in a SNF or to relocate to a community setting in a RCFE or subsidized public housing. California’s Assisted Living Waiver, California Advocates for Nursing Home Reform, [www.canhr.org](http://www.canhr.org). See also Assisted Living Waiver Program Participating Facilities, Cal.

Dep’t of Health Care Servs., <http://www.dhcs.ca.gov/services/ltr/Documents/ListofRCFEfacilities.pdf> (last viewed Apr. 24, 2017).

<sup>13</sup> *Id.*  
<sup>14</sup> CAL. CODE REGS. tit. 22, §87452(f)(1)-(6).

<sup>15</sup> HEALTH & SAFETY CODE §1569.269(a)(1)-(30).  
<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., CARLSON & GORDON, *supra* note 3.

<sup>18</sup> A mandated reporter who fails to report suspected abuse may be classified as an “excluded individual” under the Social Services Act. Any facility employing him or her after the exclusion is not eligible to receive federal funds. Nursing Facilities’ Compliance with Federal Regulations for Reporting Allegations of Abuse or Neglect, Office of the Inspector General, U.S. Dep’t of Human & Health Servs., OEI-07-00010 (Aug. 2014), available at <https://oig.hhs.gov>.

<sup>19</sup> ALZHEIMER’S FACTS AND FIGURES, *supra* note 6.

<sup>20</sup> HEALTH & SAFETY CODE §1725(b).

<sup>21</sup> *Id.* §§1339.40-.44.

<sup>22</sup> *Id.* §1796.12(j).

<sup>23</sup> *Id.* §1796.12(n).

<sup>24</sup> *Id.* §11796.12(o).

<sup>25</sup> *Id.* §§1796.10, 11796.12.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* §1796.15.

<sup>28</sup> Compare definition of basic services for RCFEs, HEALTH & SAFETY CODE §1569.312 with the definition of basic services for HCOs, HEALTH & SAFETY CODE §1796.12(n).

<sup>29</sup> Elder Abuse, *supra* note 3, at vi (Executive Summary).

<sup>30</sup> John Adkisson et al., California’s Elder Abuse Investigators: Ombudsmen Shackled by Conflicting Laws and Duties California Senate Office of Oversight and Outcomes, A report prepared for the California Senate Rules Committee at the request of the Subcommittee on Aging and Long-Term Care (Nov. 3, 2009) at 7, available at <http://tcombudsman.org>.

<sup>31</sup> Long-term Care Ombudsman: Annual Report - FFY 2015, Cal. Dep’t of Aging (July 2016) at 7, available at <https://www.aging.ca.gov>. The Long-Term Care Ombudsman program identifies, investigates, and resolves complaints in long-term care facilities. WELF. & INST. §9712.5(a). The office gives priority to investigations of complaints by residents in 24-hour, long-term care facilities. *Id.* §9720.5.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Investigative Advisory, *supra* note 1, at 5.

<sup>35</sup> Elder Abuse, *supra* note 3.

<sup>36</sup> *Id.*

<sup>37</sup> Investigative Advisory, *supra* note 1, at 5.

<sup>38</sup> *Id.*

<sup>39</sup> PENAL CODE §368(a); *People v. Matye*, 158 Cal. App. 4th 921, 924 (2008).

<sup>40</sup> Should an elder or dependent adult testify at trial, CALCRIM 331 instructs the jury that “that does not mean he or she is any more or less credible than another witness.” Jurors are instructed that they should not discount or distrust the testimony of an impaired individual “solely because he or she has...a disability or impairment.” *People v. Catley*, 148 Cal. App. 4th 500, 508 (2007).

<sup>41</sup> PENAL CODE §§801.6, 803(c). The statute of limitations on theft does not begin until the crime is discovered.

<sup>42</sup> Theft includes fraud. *People v. Cleaver*; see also Robin Allen, *Protecting Our Elders*, L.A. LAWYER, Feb. 2009, at n.5 [hereinafter Allen].

<sup>43</sup> *People v. Hong*, No. KA073441 (L.A. County Superior Ct. Apr. 10, 2007); see also Allen, *supra* note 42, at n.13

<sup>44</sup> Allen, *supra* note 42, at 14.

<sup>45</sup> Elder Abuse Laws, Xavier Becerra - Attorney General, State of California Dep’t of Justice, <http://oag.ca.gov>.

<sup>46</sup> *Id.*

<sup>47</sup> PENAL CODE §368(c).

48 *Id.* §368(d).  
 49 HEALTH & SAFETY CODE §1290(c).  
 50 PENAL CODE §192(a) or (b).  
 51 *Id.* §192(b); *People v. Butler*, 187 Cal. App. 4th 998, 1007 (2010).  
 52 *Walker v. Superior Court*, 47 Cal. 3d 112, 135 (1988); *People v. Rippberger*, 231 Cal. App. 3d 1667, 1682 (1991).  
 53 PENAL CODE §368(b)(2)(A), (B).  
 54 *Id.* §368(b)(3)(A), (B); *People v. Adams*, 93 Cal. App. 4th 1192, 1197 (2001).  
 55 *People v. Hirepan*, No. RIF1400054 (Riverside County Superior Ct. Feb. 6, 2014).  
 56 *People v. Sebastian*, No. RIF1501219 (Riverside County Superior Ct. July 27, 2015).  
 57 *People v. Canaman*, No. 15NM02297, (Orange County Superior Ct. Mar. 10, 2016).  
 58 PENAL CODE §243.4(b).  
 59 WELF. & INST. §14110.7(a).  
 60 *Id.*; CAL. CODE REGS. tit. 22, §72329.1.  
 61 In a 2000 study of nursing home residents, 44 percent said they had been abused and 95 percent said they had been neglected or seen another resident abused. K. Broyles, *The silenced voice speaks out: A study of abuse and neglect of nursing home residents. A report from the Atlanta Long Term Care Ombudsman Program and Atlanta Legal Aid Society to the National Citizens Coalition for Nursing Home Reform* (2000).  
 62 PENAL CODE §243.25; *People v. Rae*, 102 Cal. App. 4th 116, 121 (2002).  
 63 PENAL CODE §§368 *et seq.*  
 64 *Id.* §368(b)(1); *People v. Racy*, 148 Cal. App. 4th 1327, 1332 (2007).  
 65 *Racy*, 148 Cal. App. 4th at 1334.  
 66 PENAL CODE §368(f) (felony false imprisonment); *id.* §236 (misdemeanor false imprisonment).  
 67 *People v. Santos*, No. 2012015861 (Ventura County Superior Ct. Nov. 1, 2012).  
 68 *People v. Ramsay*, No. 10NM14357 (Orange County Superior Ct. Aug. 17, 2012).  
 69 Rhidian Hughes, *Chemical restraint in nursing older people*, NURSING OLDER PEOPLE, Apr. 2008 at 33.  
 70 *People v. Hamernik*, No. RIF124202 (Riverside County Superior Ct. Nov. 14, 2014), *overturned on appeal*, judge's instructions.  
 71 PENAL CODE §368.  
 72 CALCRIM No. 831.  
 73 EVID. CODE §1109(d)(1); *People v. Williams*, 159 Cal. App. 4th 141, 148 (2008); CALCRIM No. 853.  
 74 *People v. Rae*, 102 Cal. App. 4th 116, 118 (2005).  
 75 *Id.* at 124.  
 76 *People v. Braswell*, No. FSB1105413, (San Bernardino County Superior Ct. Jan. 5, 2015).  
 77 *People v. Villalba et al.*, No. KA107150, (L.A. County Superior Ct. Jan. 4, 2016).  
 78 *People v. McKelvey*, 230 Cal. App. 3d 399, 403 (1991).  
 79 PENAL CODE §§368(e) *et seq.*  
 80 *People v. Eastburn*, 189 Cal. App. 4th 1501, 1505 (2010).  
 81 *People v. Chambers et al.*, No. FSB1402937, (San Bernardino County Superior Ct. July 28, 2014).  
 82 *People v. Catley*, 148 Cal. App. 4th 500, 503 (2007).  
 83 *People v. Johnson*, No. GA081845-02, (L.A. County Superior Ct. Feb. 17, 2011).  
 84 CIV. CODE §1567.  
 85 *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 130 (1966).  
 86 *People v. Brock*, 143 Cal. App. 4th 1266, 1278 (2006).  
 87 *Id.*, at 1282.  
 88 *Id.* n.13. The appellate court's concern in *Brock* was not the presentation of the concept of undue influence but the additional instruction given by the court: "If you find, beyond a reasonable doubt, that defendant

exerted undue influence over...Roussey, you may but are not required to find that...Roussey did not consent to the subject transactions. Your finding that...Roussey did not consent to the subject transactions must be found beyond a reasonable doubt." The court held that "These instructions are far too inclusive to act as a standard for negating apparent consent in a criminal prosecution for theft by larceny." *Id.*  
 89 PENAL CODE §471.5.  
 90 *People v. Cull et al.*, No. MSB1505177, (San Bernardino County Superior Ct. Dec. 5, 2016).  
 91 *People v. Adriano*, et al., No. GA092050, (Los Angeles County Superior Ct. Mar. 11, 2016).  
 92 *People v. Phan*, No. 12WM02616 (L.A. County Superior Court May 8, 2012).  
 93 PENAL CODE §471.5.  
 94 PENAL CODE §550(a)(6); Social Security Act, codified at 42 U.S.C. §§1320(a) *et seq.* Depending on the case facts, facilities or individuals may also be charged under PENAL CODE §487(a) for taking funds improperly under the Medicare program. Potential federal charges that also may be brought are not discussed herein.  
 95 WELF. & INST. CODE §15630(a).  
 96 *Id.* §15610.63. Physical abuse is defined as assault, battery, assault with a deadly weapon or force likely to cause great bodily injury, unreasonable physical constraint, deprivation of food and water, and physical and/or chemical restraint or psychotropic medications used for punishment, after the time period prescribed, or for a nonprescribed purpose. *Id.* §15630 (a)-(f).  
 97 *Id.* §15630(b) (1).  
 98 *Id.*  
 99 *Id.* §15630(b)(1)(A)(i).  
 100 *Id.* §15630(b)(1)(A)(ii).  
 101 *Id.* §§15630(b)(1)(C), (D).  
 102 *Id.* §§15630(c) (2), (3), (4).  
 103 *Id.* §15630(h).  
 104 *Id.* §15610.67. Serious bodily injury is any injury

1) involving extreme physical pain, substantial risk of death, protracted loss or impairment of function of a bodily member, organ or of mental faculty or 2) requiring medical intervention, such as hospitalization, surgery and physical rehabilitation.  
 105 Elder abuse, *supra* note 3.  
 106 C.F.R. §§164.512 *et seq.*  
 107 Codified in WELF. & INST. CODE §§4400 *et seq.*  
 108 C.F.R. §§164.512 *et seq.*  
 109 *Id.*  
 110 *Id.*  
 111 *Belinda K. v. Baldovinos*, No. C-10-02507 PSG, 2011 U.S. Dist. LEXIS 11692, at \*1 (N.D. Cal. Mar. 28, 2011); *Sterner v. DEA*, No. 05cv196JH, 2005 U.S. Dist. LEXIS 18467, at \*14 (S.D. Cal. Oct. 11, 2006).  
 112 45 C.F.R. §164.512(a); *Rosales v. City of Bakersfield*, No. 1:05-cv-0237 REC TAG, 2006 U.S. Dist. LEXIS 22382 (E.D. Cal. Apr. 31, 2006).  
 113 45 C.F.R. §164.512(e); *Kelso v. Redding Police Dep't*, No. CIV 5-11-1960-KJM-CMK, 2012 U.S. Dist. LEXIS 178250, at \*3 (E.D. Cal., Jan. 27, 2012).  
 114 45 C.F.R. §§164.512(f)(1)(ii)(A),(B); 164.508.  
 115 45 C.F.R. §164.512(f)(2)(i-ii).  
 116 45 C.F.R. §164.512(f)(3).  
 117 45 C.F.R. §164.512(f)(5).  
 118 *Id.*  
 119 45 C.F.R. §164.512(f)(6).  
 120 45 C.F.R. §164.512(j).  
 121 *Id.*  
 122 45 C.F.R. §164.512(e).  
 123 *Id.*  
 124 PENAL CODE §11160.  
 125 WELF. & INST. CODE §15610.63.  
 126 PENAL CODE §1543.  
 127 *Id.* §1524(c)(1)-(e).  
 128 CAL. CODE REGS. tit. 22, §51458.1; *id.* §51476.  
 129 *Id.* §51458.1.  
 130 PENAL CODE §148.



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