



Finding the evidence for heightened remedies under The Elder Abuse Act

IN THE DIGITAL AGE, THERE IS NO SUBSTITUTE FOR INSPECTIONS. HERE ARE THE BASICS FOR NURSING HOMES

The use of inspections, public-records requests, and online records can be critical to discovering clear and convincing evidence of reckless neglect against long-term-care providers in California. Most attorneys representing elder-abuse victims against long-term-care providers are well versed in traditional written discovery and deposition notices aimed at obtaining standard evidence such as medical records, policies and procedures, job descriptions, etc.

While an entire article could be written on any one of the discovery tools discussed below, the point of this article is to highlight more generally the options available so that attorneys can decide which, if any, to pursue in their particular cases.

Inspections

In the digital age, there is no substitute for inspections. When I first began exclusively practicing elder-abuse law in 2012, I was tasked with the physical inspection of a nursing home's hardcopy records that were stored in ten trailers located on corporate's parking lot. Fortunately, circumstances led me to know which trailer most likely contained the "good stuff," and after six hours of opening countless banker boxes and sifting through thousands of pages of seemingly random documents, I opened a box deep within "Trailer 10" containing the "gotcha" documents. Suffice to say, the case settled shortly thereafter.

Nowadays, such an inspection seems like a relic of the past, given the digitalization of information. All the paper records I searched through would now be PDF or Excel documents stored in electronic folders accessible through computer terminals. And that is exactly where one must look.

Inspection of electronic medical records

Make no mistake, if you rely solely on requests for production of documents and/or subpoenas to obtain your client's medical records, you will not get a complete record. For example, if you subpoena the records from almost any nursing home in California, the

records you receive will contain only the "effective" time and date next to entries, not the "creation" time and date showing when entries were actually made. Similarly, you will almost never receive records that show edits and deletions to the records if you rely on traditional discovery methods. Indeed, the companies that made the software used in long-term-care facilities design the software so that the default setting for standard records production does not include data such as creation time stamps, edits, or deletions.

If you want to see when exactly charting was done in your client's records, and if you want to see whether someone concealed wrongdoing after the fact by editing and/or deleting information, there is simply no substitute for an inspection.

Residents of long-term care facilities have "the right to access personal and medical records pertaining to him or herself." (42 C.F.R. § 483.10(g)(2).) California Health & Safety Code provides that, "every person ... possesses a concomitant right of access to complete information respecting his or her condition and care provided." (§ 123100.) In addition, "[a] party may demand that any other party produce and permit the party making the demand, or someone acting on the demanding party's behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made." (Code Civ. Proc., § 2031.010, subd. (e).)

Generally, the notice of inspection should be structured to include inspections of any software and hardware necessary to collect all of the plaintiff's electronic health information, including the complete "Audit Log" that should be defined to encompass all the content specified in 45 Code of Federal Regulations part 170.210(e) and (h), and the standards referenced therein.

There are many ways to conduct an inspection, but it's important to ensure that someone with adequate security clearance is present during the inspection so that you can actually collect

the complete information; if the user login used doesn't have access to certain information, you won't be able to get it. As for logistics, one of the best methods of collecting the data is to save the various reports you collect to an external hard drive as the inspection takes place so that you are able to leave with the data in hand. Also, consider requesting that the inspection be recorded using screen-recording software that can temporarily be installed on the computer used to perform the inspection and then removed at the end of the review session.

Without fail, you will find that you collect far more in terms of medical records – i.e., data – in an inspection that you conduct versus relying on defendants to produce on their own.

Inspection of time detail reports

Staffing ratios play a huge role in many of the elder-abuse cases against long-term care facilities, as understaffing to maximize profit is one of the leading causes of systematic neglect. Evidence of this type of understaffing can support a finding of recklessness in connection with obtaining heightened remedies under the Elder Abuse and Dependent Adult Civil Protection Act.

Indeed, in the document which the Centers for Medicare & Medicaid Services (CMS) regularly publishes its criteria for rating nursing homes in the U.S., it stated that, "There is considerable evidence of a relationship between nursing home staffing levels, staffing stability, and resident outcomes. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems." (*Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide* (July 2012), p. 6-7.) (The terms "nursing home" and "skilled nursing facility" are used interchangeably herein.)

To establish that a defendant facility was understaffed, it will be essential to show what the actual level of staffing

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for nurses and caregivers was for any relevant period. Traditionally, plaintiffs' counsel would send a request for production of documents that included a request for something along the lines of "time detail" or "payroll" records, and invariably this would eventually lead to the production of thousands of pages of data showing clock-in and clock-out times for facility staff (usually, without job title designations). This would result in several problems, most notably the issue of how to tabulate such an enormous amount of data to calculate the hours per patient day (HPPD) for nurses and caregivers.

A much more effective way of determining the HPPD of caregivers is to conduct an inspection of the time-keeping software, which can be performed either at the facility, corporate headquarters, or, frequently, even by remote login. In such an inspection, the software will allow you to run reports by job title (e.g., registered nurses) for a specific period of time which aggregates the data for you so that you instantly have the total productive hours worked for that type of caregiver. In less than an hour, you can have the total productive hours for registered nurses, licensed vocational nurses, and certified nurse assistants, among others, for the relevant time period. With this information, if you know the average census, you can quickly calculate the HPPD and know exactly how many hours per patient day the facility actually staffed.

Public records requests

Long-term care facilities are required to regularly submit vast amounts of information to federal and state governmental agencies, much of which the defendants are unlikely to produce; and, in the case of all-important financial data, sometimes courts are reluctant to compel. However, the good news is that much of this information is legally required to be made available to you if you know who and how to ask.

Freedom of Information Act

The Freedom of Information Act (FOIA) is a federal law that generally

provides that any person has a right, enforceable in court, to obtain access to federal agency records, which includes records maintained by CMS. (5 USC § 552 et seq.) All the information needed to make FOIA requests to CMS, including sample requests, can be found at <https://www.cms.gov/Regulations-and-Guidance/Legislation/FOIA>.

With respect to nursing homes, the key request is for the subject facility's CMS-2540 Cost Reports (including copies of the signed certification pages). These cost reports are required filings that nursing homes must submit to CMS on an annual basis and include the statistical data necessary for calculating the HPPD staffing ratio for caregivers based on data reported therein (i.e., inpatient days, hourly wages, and paid hours). The resulting HPPD can then be compared against the actual HPPD calculated based on the time detail reports for possible discrepancies.

The 2540 Cost Reports also include corporate and financial information useful for establishing corporate liability (e.g., Related Party Transactions, Home Office ID, and allowable home office costs which have been allocated to the SNF).

Note that all the 2540 Cost Report data for all facilities in the U.S. is available online, but it's such a large amount of data that one must essentially build a database and program it according to CMS specifications in order to actually make sense of the information.

In addition, an FOIA request can be made for a client's Minimum Data Set (MDS) if this is something that is not otherwise obtained through an inspection. The MDS will contain valuable assessment information about your client (e.g., information regarding falls, pressure ulcers, acuity, etc.), and by obtaining it through an FOIA request, you can be sure you collect the data that was actually reported to CMS (i.e., unmodified).

As with any public records request, I recommend doing a separate request for each request – i.e., one request for cost reports, and a separate request for MDS, as this makes it much easier to track on both ends. Finally, be prepared to be

persistent; as a practical matter, it can take much follow-up in order to get the information sought, but it is well worth the effort.

Public Records Act

California Public Records Act section 6250 et seq. (PRA) generally provides that any person has a right, enforceable in court, to obtain access to state agency records. Subject to some exceptions, the California Public Records Act requires a response within ten business days. (Gov. Code, § 6253, subd. (c).) PRA requests for the regulatory agency files for defendant facilities can yield valuable information relating to corporate liability as well as liability for the underlying allegations in your case if a complaint and investigation were documented.

With respect to hospitals, skilled nursing facilities, hospice providers, and other health care facilities, a PRA request can be considered for all California Department of Public Health (DPH) files regarding the defendant facility. DPH regulates and issues certificates, licenses, permits, and registrations to over 10,000 health care facilities in the state. A request should include the entire DPH file for the subject facility, including all certificates, licenses, permits, and registrations, as well as all information regarding facility ownership, certification status (acceptance of Medicare and/or Medi-Cal), and performance history including complaints, facility self-reported incidents, state enforcement actions, and deficiencies.

Additionally, with respect to health care facilities such as nursing homes, consider making a request to the Department of Health Care Services for the following:

- Medi-Cal Home Office Cost Reports, including copies of the signed certification pages;
- Audited Medi-Cal Home Office Cost Reports; and
- Reports on the Home Office Audits.

These reports will encompass information about your specific facility as well as the corporate overseer.

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In some cases, this will include valuable information about corporate bonuses and disallowed costs submitted to the state.

All the information needed to make PRA requests to DPH can be found at <http://www.dhcs.ca.gov/formsandpubs/Pages/PublicRecordsAct.aspx>.

With respect to Residential Care Facilities for the Elderly (including assisted living facilities, board and care homes, rest homes, and Continuing Care Retirement Communities), a PRA request can be made for all Department of Social Services (DSS) files regarding the subject facility covering the same list of items covered for health care facilities discussed above. All the information needed to make such a request can be found at <https://www.cdss.ca.gov/public-record-requests>.

Online records

After discussing several highly technical discovery tools, it may come as a surprise that some of the most important evidence in an elder abuse case is available online.

State cost reports

Much like the federal 2540-10 Cost Reports discussed above, long-term care facilities licensed in California must annually report detailed financial data on facility information, ownership

information, patient days and discharges, balance sheet, equity statement, cash flows, income statement, revenue by type and payer, expense detail, and labor detail. The data includes the patient days, caregiver wages, and caregiver paid hours necessary for calculating the HPPD staffing ratio for registered nurses, licensed vocational nurses, and nursing assistants, which in turn can be compared to the actual staffing levels found in the time detail reports and the staffing levels reported in the federal 2540-10 Cost Reports. The information is also very useful for establishing corporate liability (e.g., for factors supporting alter ego and/or joint venture). These state cost reports can be found at <https://reports.siera.oshpd.ca.gov/>.

Similar information is available for home health agencies and hospice providers, both of which are required to submit annual utilization reports to OSHPD which are then made available to the public. These can be found at <https://alirts.oshpd.ca.gov/AdvSearch.aspx>.

Nursing home compare

For any case involving a nursing home, CMS' website is a vital source of information, particularly as it relates to establishing understaffing. That's because CMS makes the "expected" staffing

levels available, which means you can look up any nursing home in the country and find out the amount of staffing in HPPD that CMS expected a facility to staff at for nurses and nursing assistants in any given year. The information can be found at <https://www.medicare.gov/nursinghomecompare/search.html?>.

Naturally, a comparison of CMS' expected staffing HPPD value to the facility's federal and state cost reported staffing and time detail actual staffing makes for a compelling case when the numbers don't match up.

In addition, information regarding a nursing home's deficiencies and Five Star Rating can be found on the Nursing Home Compare site.

Used in combination with traditional methods of discovery, the above tools can be a powerful source of evidence to establish your client's entitlement to heightened remedies under the Elder Abuse Act.

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