


# Contra Costa Lawyer Online

## CONTRA COSTA LAWYER






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### The Many Faces of Financial Elder Abuse

Many people think elder law is a stand-alone set of laws that pertain only to probate. Not true. Elder financial abuse cases often cross over into other areas of the law in interesting ways. Below are some examples of

### Spotlight

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**Skilled Nursing Facilities: A Personal Perspective**

After my mother was hospitalized for a broken hip, I had 24 hours to place her in a skilled nursing facility. One would think that with a growing population of seniors, there would be a wealth of information, but I learned that some of the key information could only come from others with personal experience.


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**Who Shops for the Shoes?**

Who shops for the shoes? I never considered the question until becoming a professional fiduciary. Attorneys often recommend professional, neutral fiduciaries to help and protect elderly clients when family conflict threatens or there is no immediate family living in the area. To get a glimpse into a

### News & Updates

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**2013 Annual Officer Installation Lunch [Video and Photos]**

On January 25, the 2013 Board of Directors and Section Leaders of the Contra Costa County Bar Association were officially installed during a luncheon honoring Richard Frankel for nearly two decades of

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**Deadline Fast Approaching: Renew Your Membership Today**

The [Membership Renewal Drive](#) is ending on March 1, 2013. Don't miss out on being included in the 2013-2014 membership directory. Here's a few benefits of the directory:

- Membership-wide distribution increases

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year – in 6 print and 12 online issues.



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# The Many Faces of Financial Elder Abuse

Friday, February 01, 2013

Many people think elder law is a stand-alone set of laws that pertain only to probate. Not true. Elder financial abuse cases often cross over into other areas of the law in interesting ways.

Below are some examples of matters successfully handled by Elder Law Center attorneys.[1] These cases illustrate the various and subtle ways that financial elder abuse manifests itself and why it is so important that attorneys from all practice areas be aware of the many forms it takes.[2]

## The Bait and Switch

Jill Smith is a 70-year-old single woman. One of her most prized possessions is her older model Mercedes. Ms. Smith took her Mercedes into ABC Mechanic (“ABC”) for an oil change. She advised the owner that she would be back the next day to get the car. The next day, the owner seemed rather chatty, but Ms. Smith concluded it must be a part of ABC’s warm and friendly customer service. Upon leaving, Ms. Smith realized the bill seemed a bit expensive, but she decided it was the price she had to pay for owning a luxury car. She also thought that maybe she requested ABC to perform additional work that she forgot about.

Approximately one month later, and in an effort to try something new, Ms. Smith took her car to a different mechanic. When she arrived at XYZ Mechanic (“XYZ”), a young gentleman walked up with a big smile and stated, “I remember your car.” Assuming he was mistaken, Ms. Smith responded that he must be confusing her car with someone else’s. The young man was adamant that he knew he worked on her car in the past. They walked into the office and he showed her a work order for service on her car. It appeared that when Ms. Smith took her car to ABC for an oil change, they brought it to XYZ to have the work done. XYZ charged ABC \$84.00 for the service.

Afterward, Ms. Smith went home to check her records. She had paid ABC approximately \$500 for the oil change and it did not appear that any additional work was done. ABC’s owner refused to refund Ms. Smith any money and denied any wrongdoing.

Ms. Smith retained the services of the Elder Law Center. The Elder Law Center attorney determined the owner of ABC had recently lost his license and was not authorized to perform mechanic services. The attorney contacted the California Bureau of Automotive Repair, which conducted its own investigation. ABC was in violation of various legal business practices. It is not uncommon for people who engage in financial elder abuse to utilize flattery and create the impression of a positive relationship to put the victim at ease and then create just enough confusion about the bill that they do not feel comfortable questioning these “nice people.” The Elder Law Center helped Ms. Smith with a legal action, where she prevailed. Afterward, the owner of ABC immediately paid Ms. Smith.

## The Gym Membership

Barbara Jones is a 70-year-old married woman battling cancer. A few months before her diagnosis, Ms. Jones believed that she was not feeling well because she was not getting enough exercise. One day, she decided to visit the local gym. The sales representative,

John, advised her that she would greatly benefit from the gym's new membership promotion program. He further stated that exercise would be the best medicine for what ailed her. Enticed by all of the benefits and convinced that John was right about her need for exercise, Ms. Jones signed up for a 12-month membership for an annual fee of \$1,500, which was to be deducted monthly. This membership fee also included meeting with a personal trainer three times a month.

When Ms. Jones went to her first personal training session, the trainer terminated the session half an hour early. During the second and third sessions, the trainer never even showed up.

After her health began to further deteriorate, Ms. Jones went back to the doctor who noticed a substantial weight loss and advised that she should immediately stop going to the gym. Upon contacting the gym about her medical issues, the representative advised her to have the doctor write a letter to the corporate office and assured her that "everything would be okay."

Ms. Jones' doctor submitted a letter to the gym stating that Ms. Jones could no longer exercise due to her medical condition. Ms. Jones followed up with the gym and requested that they immediately stop taking money from her account and to cancel the contract.

The next month, not only was the gym's monthly payment taken from her account, but she received an invoice from the gym in the amount of \$750 for prematurely terminating her membership. Upon calling the gym, they advised Ms. Jones that she was in breach of the contract if she didn't pay the termination fee. They further advised her that the gym may sue her for the money if she failed to pay.

While this kind of unsavory business practice is certainly not confined to the elderly, they are particularly vulnerable to it, particularly when they are in ill health, because they frequently do not have the resources to fight against it properly. Luckily, Ms. Jones retained the services of the Elder Law Center. Upon learning she was represented, the gym immediately refunded Ms. Jones money and mailed her a zero-balance invoice.

## Telemarketers

A married couple Jim and Karen Brown, who are both in their 80s, rent an apartment in Contra Costa County. Upon answering the phone one day, Mr. Brown was offered the "best deal retirement could offer." The telemarketer advised Mr. Brown that he and his wife were invited to move into a beautiful retirement community in a neighboring county. After the telemarketer described all of the luxuries the community provided, the Browns traveled approximately one hour to visit.

The staff greeted the Browns warmly and took them on a two-hour tour of the community. Afterward, everyone sat down to review the cost of living in the community. The representative of the community repeatedly urged the Browns to move into one of their furnished units for at least one month. It was represented to be a free trial offer. The representative said that all the Browns had to do was pick up some personal belongings and come back. Mr. Brown was resistant at first, but as the conversation prolonged, he agreed it was worth the free trial. However, he advised the representative that they could not move into the unit for another couple of months as he had some business to finish in Contra Costa County. The representative advised Mr. Brown that they would hold the furnished unit for him. To do so, all he had to do was initial and sign some agreements.

Nearing the sixth hour of the appointment, Mr. Brown relied on the verbal promises of the agent and began signing and initialing where and when he was told. He was repeatedly assured he was signing up for the free trial offer.

For the next few weeks the Browns received calls from the retirement community asking when they were coming to move in. Approximately two months later, Mr. and Mrs. Brown moved into the furnished unit with a few of their clothes and needed belongings. Believing it to be their free trial period, the Browns quickly determined that although the community was beautiful, it did not meet their needs. Ten days into their trial period, they returned the keys to the management office, gathered their minimal belongings and moved back to Contra Costa County.

The following month, they received a bill from the retirement community in the amount of \$8,000. The retirement community had billed for the two months it took the Browns to move in and for terminating the lease. The free trial was for 30 days, but only if the tenants remained in the unit for the entire duration of the one-year lease.

The Browns eventually retained the Elder Law Center. The Elder Law Center attorney identified the legal issues with the formation of the contract and was able to obtain a zero-balance invoice for the Browns. It is important to note that not only did the Browns receive the hard sell and were given complex documents that they were pressured into signing without reading and without legal advice (and which were fraudulently represented to boot), but also to identify why this worked. One of the reasons they were susceptible to this type of practice is that the perpetrators obviously understood that many times, elderly people do not have the ability to concentrate on complex documents for hours at a time. The representative dragged the appointment out for six hours, after walking them all around the community and having them sit through their promotional presentation. When it should have been clear that the victims were not able to properly consider the materials and contracts in front of them, the representative should have backed off and allowed them some time to consider the contracts properly.

As you can see, financial elder abuse takes many forms and sometimes looks exactly like shady business practices that would occur against anyone, of any age. From the viewpoint of an attorney, it is important to keep in mind that when they occur against elders, which California defines as aged 65 years or older, there are enhanced remedies that are available, including attorney's fees and punitive damages (see Welfare and Institutions Code Section 15657.5). To learn more about California's elder abuse statutes, or for leisurely reading, see Welfare and Institutions Code Section 15600 et. seq.

Although the amount in controversy for these disputes is nominal to some people, the end results are invaluable to the clients. Elder Law Center clients are extremely grateful for their ability to access justice within our community. Seeing the proud expressions on their faces when they tell people they have an attorney or when they are advised that the matter has settled in their favor is a reward in and of itself.

For more information or to donate either your time or funds to help keep its programs running for the benefit of our community please visit our website: [www.thelawcenter.cc/the-elder-law-center](http://www.thelawcenter.cc/the-elder-law-center).

Samantha Sepehr, Former Director of the Elder Law Center, is Of Counsel to Steele, George, Schofield, and Ramos LLP and also solo practitioner in Walnut Creek.



[1] The Elder Law Center provides pro bono representation to low-income seniors, age 65 and older, who reside in Contra Costa County and who have been the victim of a financial abuse or fraud.

[2] All names have been changed to protect the identity of the parties.

## New Senior Financial Abuse Protection Statutes for Annuity Sales Pr...

Friday, February 01, 2013



As of January 1, 2013, new senior protection statutes came into effect. These statutes outlaw certain practices of insurance agents who have been plying the senior annuity market. The new laws make it illegal for an insurance agent to use the delivery of legal documents as a means for gaining entrance into a senior's home. They also make it illegal for an insurance agent to receive any direct financial incentives for any transaction that leads to a senior acquiring veterans' benefits and severely restricts certain sales practices.

### Area of Concern: The VA Aid and Attendance Benefit Program

The Veteran Administration has a benefit called the Aid and Attendance Pension Program that is designed to act as a lifeline for low wealth veterans or their spouses when they cannot afford to pay for medical supplies, assisted living, or in-home care workers. It is a benefit available to those with limited income who served in the military during a time of war. The VA does not charge seniors to apply for this benefit.

### The Problem

This benefit is not an entitlement. Seniors with excess assets are ineligible for the benefit. It was not meant for every veteran who ever served in a time of war. Despite this, financial predators have been seeking out modest and high wealth veterans and convincing them to "artificially impoverish themselves" in order to qualify for the benefit. The seniors end up being manipulated into purchasing irrevocable trusts and annuities that have high surrender penalties. Ultimately, the seniors who become involved with



some of these “estate plans” end up having their money taken from them and put out of their reach for the rest of their lives.

## The New Laws: Insurance Code 785.5 and California Civil Code 1770 (a)(25)

1. Insurance Code 785.5 prohibits an insurance broker or agent from participating in, being associated with, or employing any party that participates in the business of obtaining veterans' benefits for a senior unless the insurance agent or broker maintains procedural safeguards designed to ensure that the agent or broker has no direct financial incentive to refer the policyholder or prospective policyholder to any government benefits program. This law makes sure insurance agents do not deceptively peddle their products if they are working with other groups or individuals who are assisting veterans with qualifying for benefits.

2. California Civil Code 1770 (a)(25) requires that persons or groups that are promoting events or presentations to educate seniors about the VA benefits program must not mislead interested parties about their services and must clearly inform any interested party that their events and presentations are not sponsored by, or affiliated with, specified veterans' organizations, including the United States Department of Veterans Affairs.

## Area of Concern: Discount Legal Services

Certain groups selling discounted senior legal services also have business arrangements with insurance agents. The groups selling the legal services first gather a senior's personal and financial information, then charge a “discounted fee,” then give the discount attorney the senior's information with instructions to develop estate planning documents. After the attorney develops the senior's documents (typically a living trust, will, or durable powers of attorney), the attorney will send the senior's documents back to the group. The group then turns the documents over to an insurance agent. Once the agent has the documents, the agent phones the senior to notify him or her that the agent has been “retained” to deliver the legal documents. The agent then sets up a time for the delivery of the senior's pre-paid documents.

## The Problem

The personal documents now in the hands of the insurance agent contain invaluable information. Allowing an agent to intercept that information is grossly unfair to the senior. The senior's pre-paid legal documents become a trojan horse in the hands of the insurance agent. Once inside the senior's home, the agent will try to wear the senior down. Agents can be aggressive and it is not uncommon for them to make false or deceptive statements. A senior has no way of knowing the truth of the matters being discussed. If the agent is unscrupulous, things can become very difficult for the senior. Once the agent gets into the home, the senior is basically defenseless. It is not at all uncommon for a commission-driven agent to sell a senior a completely unsuitable annuity.

## The New Laws: Insurance Code 789.10(b) and Insurance Code 785.4 (a)

1. Insurance Code 785.4 (a) makes it unlawful for an insurance agent who is not licensed as an attorney to deliver a living trust or other legal document into the home of a senior if a purpose of the delivery is to sell an insurance product.

2. Insurance Code 789.10(b) specifies what information must be contained in the notice delivered to the senior no more than 14 days prior to the meeting with the insurance agent. The law now requires that the notice be a stand alone document in 16-point, rather than 14-point type, that the notice include specified information regarding the agent, including his or her full name and license number, and that the notice include a specified statement about the purpose of the visit.

While these changes won't end financial elder abuse, they create bright lines for prosecutors and litigators to use in financial elder abuse cases.

Prescott Cole has been a staff attorney for California Advocates for Nursing Home Reform (CANHR) for the past eighteen years. Through his role at CANHR, Prescott counsels individuals and family members who have questions about elder law. He facilitates CANHR training programs that educate law enforcement; legal services programs, attorneys and seniors about elder abuse, neglect and senior-targeted financial scams. Prescott has written several pieces of legislation and is a passionate and effective advocate for consumer protection laws in Sacramento. Among his achievements, Prescott has testified before the U.S. Senate Special Committee on Aging about financial elder abuse. He has received the 2003 Alumnus of the Year award from JFK University and the 2010 Elder Law Attorney of the Year Award from California Lawyer Magazine.

## Financial Elder and Dependent Adult Abuse – A Primer For Litigators

Friday, February 01, 2013

Financial abuse of an elder or dependent adult is proscribed by the Elder Abuse and Dependent Adult Civil Protection Act, codified in Chapter 11 of the California Welfare and Institutions Code ("the Act"). Passed in 1982, the focus of this Act, sometimes referred to as EADACPA, is "to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect."<sup>[1]</sup> Historically, elder or dependent adult abuse was rarely litigated "due to problems of proof, court delays, and the lack of incentives to prosecute these suits."<sup>[2]</sup> With the passage of the Act, the California legislature created a broad, powerful statute that "enable[d] interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."<sup>[3]</sup> Although the stated purpose of the Act is to prevent specific, quasi-secretive abuse of elderly persons or disabled adults, its broad wording, coupled with the near automatic award of attorney's fees and costs, makes this Act not only a necessary addition to an appropriate complaint, but an invaluable tool in increasing the defendant's exposure.

This article is designed to provide an overview of the usefulness of EADACPA. It will discuss the elements of a claim, the remedies available, and most importantly, practical applications of financial elder and dependent adult abuse beyond the realm of typical elder abuse cases. This article is not a comprehensive analysis. However, it will hopefully provide a primer for attorneys not versed in this area of law, and will add to their litigation toolbox.

## What is Financial Abuse?

Financial abuse occurs when a person (1) takes, secretes, appropriates, obtains, or retains; (2) the real or personal property; (3) of an elder or dependent adult; (4) for a wrongful use or with intent to defraud, or both.[4] A person is equally liable for financial elder abuse if they “assist” another in doing any of the above.[5]

The first two elements, taking, secreting, appropriating, obtaining, or retaining the real or personal property, are straightforward. In a common scenario, this would occur when a caregiver forges a check to herself from the elder’s account or a sibling misappropriates the inheritance of his disabled adult sibling. However, as discussed *infra*, these two elements can lead to broad-reaching applications of this statute.

The third element is also straightforward. An elder is “any person residing in [California], 65 years of age or older.”[6] A dependent adult is more broadly defined. The definition includes:

any person residing in [California], between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.[7]

Thus, under California law, a person is a dependent adult if he is within the stated age range and suffers from “chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease” provided the mental or psychological problem creates a “limitation” upon a major life activity.[8] While this definition permits broad inclusion of disabled or otherwise dependent plaintiffs to recover for abuse, at least one court has limited the interpretation of dependent adults “only to persons whose disabilities and needs are comparable to persons who are compelled to live in nursing homes and other health care facilities.”[9]

The fourth and final element is the most complex. To demonstrate that property was taken, secreted, appropriated, obtained, or retained for a wrongful use or with intent to defraud, or both, a plaintiff can proceed two ways. First, the plaintiff can attempt to demonstrate fraud, in which case he must plead fraud with particularity. Second, and much more simply, the statute provides that “wrongful use” can be established by demonstrating that the person “knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.”[10]

In order to avail oneself of the remedies under these statutes, a demand for the return of property should first be sent.[11] While there do not appear to be any cases directly discussing this requirement, the language of the statute, as well as the California Civil Jury Instructions, suggest that a formal demand is a prerequisite to establishing liability.[12]

## What are the Remedies for Financial Elder or Dependent Adult Abuse?

There is both pre-judgment and post-judgment relief for financial elder or dependent adult abuse.

The Legislature, in furthering the purpose of protecting elders and dependent adults from financial abuse, authorized the use of writs of attachment in cases of financial elder abuse.[13] While writs of attachment are generally limited in the types of claims to which they can be applied,[14] plaintiffs may seek a writ of attachment “whether or not other forms of relief are demanded.”[15] Thus, the exclusion of the availability of writs of attachments in certain cases, such as those described in California Code of Civil Procedure section 483.010, is superseded by the language of California Welfare and Institutions Code section 15657.01, making writs of attachment available on all property in financial elder and dependent adult abuse actions in which damages are sought pursuant to California Welfare and Institutions Code section 15657.5.

Post-judgment relief also favors the elder or dependent adult: “in addition to compensatory damages and all other remedies otherwise provided by law, the court *shall* award to the plaintiff the reasonable attorney’s fees and costs” to an elder or dependent adult who prevails on a claim of financial abuse.[16] The award of costs includes the costs of a conservator for purposes of the litigation.[17]

Further, if it is shown by clear and convincing evidence that the defendant is guilty of “recklessness, oppression, fraud, or malice in the commission of the abuse,” the limitation on damages recoverable in actions by personal representatives and successors in interest imposed by California Code of Civil Procedure section 377.4 do not apply.[18] This section means that damages are not limited to “the loss or damage that the decedent sustained or incurred before death,” and include damages for “pain, suffering, or disfigurement.”[19]

Moreover, the statute authorizes punitive damages pursuant to California Civil Code section 3294,[20] and permits an award of attorney’s fees and costs against an employer even absent a showing of “knowledge of unfitness of the employee” or “conscious disregard, authorization, or ratification” otherwise required to obtain punitive damages against an employer.[21]

## Application of Financial Elder or Dependent Adult Abuse Beyond “Traditional” Cases

When applicable, the ease with which powerful remedies can be accessed makes the claims for financial elder or dependent adult abuse nearly indispensable. But these causes of action are not limited to the specific, quasi-secretive abuse of elderly persons or disabled adults that come to mind when envisioning such abuse. Rather, due to the broad language of the statute, nearly any instance in which the plaintiff is over the age of 65 or is otherwise a dependent adult warrants the inclusion of this claim.

For instance, in *Estate of Lowrie*, 118 Cal. App. 4th 220 (2004), the court held that a trustee of a trust held for the benefit of a deceased elder committed financial elder abuse by exploiting his relationship with the deceased elder resulting in large gifts and the alteration of the decedent’s testamentary documents to leave the trustee substantially of the decedent’s estate. Not only were actual damages, punitive damages, and attorney’s

fees awarded, but, pursuant to California Probate Code section 259, the trustee was “deemed to have predeceased [the] decedent,” and was thereby disinherited.

In *Wood v. Jamison*, 167 Cal. App. 4th 156 (2008), the court upheld a trial court ruling that an attorney committed financial elder abuse, holding that the receipt of a \$4,000 finder’s fee from the proceeds of a loan made to an elder is elder abuse and, in and of itself, warranted an award of attorney’s fees. The fact that the funds were transferred directly from the loan provider to the attorney, without ever being held by the elder, did not prevent the court from finding elder abuse. While the amount of attorney’s fees awarded was not discussed, and the plaintiff was awarded over \$180,000 on other grounds, the opinion supports an award of attorney’s fees for even minimal recoveries.

In *Bonfigli v. Strachan*, 192 Cal. App. 4th 1302 (2011), the court, in reversing a directed verdict for the defendant, held that the plaintiff stated a cause of action for financial elder abuse when he alleged that a developer effected a lot line adjustment reducing the size of the elder’s parcel and encumbering the elder’s property without a valid power of attorney, and without compensating the elder.

These three examples, although by no means exhaustive, illustrate the broad application of EADACPA beyond traditional cases of elder abuse.

The financial elder and dependent adult abuse statute has broad application. It is a key tool for the civil litigator, and its interpretation by courts serves only to bolster its strength. Look closely to determine whether an elder or dependent adult is involved at the inception of a case. An EADACPA claim raises the stakes in a lawsuit, including attorney’s fees. The relief potentially available may also provide an impetus for earlier resolution.

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[1] *Delaney v. Baker*, 20 Cal. 4th 23, 33 (1999).

[2] Cal. Welf. & Inst. Code § 15600(h).

[3] *Id.* at § 15600(j).

[4] *Id.* at § 15610.30(a)(1).

[5] *Id.* at § 15610.30(a)(2).

[6] *Id.* at § 15610.27.

[7] *Id.* at § 15610.23(a). The definition also includes persons between 18 and 64 who are admitted as an inpatient to a 24-hour health facility. *Id.* at § 15610.23(b).

[8] Cal. Gov. Code § 12926.1.

[9] *Jay v. Kubly*, 2008 WL 77572, at \*5 (Cal. Ct. App. 2008) (unpublished).

[10] Cal. Welf. & Inst. Code § 15610.30(b).

[11] *Id.* at § 15657.6.

[12] *See, id.*; *see also* BAJI 7.43.1 Financial Abuse – Elder/Dependent Adult – Lacks Capacity/of Unsound Mind (Spring 2009 New) (“Financial abuse of an elder or dependent adult . . . occurs when a person [*inter alia*] . . . refuses to return the property, upon demand by the elder or dependant adult or a representative of the elder or dependent adult.”).

[13] *Id.* at § 15657.01

[14] *See* Cal. Civ. Proc. Code § 483.010

[15] Cal. Welf. & Inst. Code § 15657.01.

[16] *Id.* at § 15657.5(a) (emphasis added).

[17] *Id.*

[18] *Id.* at § 15657.5(b). Inclusion of “recklessness” expands the scope of available damages beyond that of fraud, which requires a demonstration of oppression, fraud, or malice. *Compare* Cal. Welf. & Inst. Code § 15657.5(b) *with* Cal. Civ. Code § 3294.

[19] Cal. Civ. Proc. Code § 377.4.

[20] Cal. Welf. & Inst. Code § 15657.5(d).

[21] Cal. Welf. & Inst. Code § 15657.5(c); *cf.* Cal. Civ. Code § 3294(b).

## Skilled Nursing Custodial Care – Options for Payment

Friday, February 01, 2013

Earn one hour of General MCLE credit by reading the article below and answering the questions of the Self-Study MCLE test. Send your answers, along with a check for \$20 (\$30 for non-members), to the address on the test form.



The scenario is all too familiar – mom has been living alone, has dementia and is no longer able to live by herself or care for herself. Her physician has indicated that it is time

to consider a facility to provide for her ongoing needs because providing in-home care is not feasible due to cost or the level of care needed. The doctor has recommended skilled nursing care for her.

So, now that a skilled nursing home appears necessary, how is mom going to pay for this care? The average private pay rate for skilled nursing homes in California is \$7,092.00 a month.[1] But the sad truth of the matter is that skilled nursing care in our area can easily exceed \$8,000.00 a month. Mom has some assets, a home and maybe a limited amount of money in the bank. What are Mom's options for paying for the medical care she requires?

When this issue arises, inevitably the family asks about Medicare, which is really of little or no assistance.

Medicare is a federal program that serves the health care needs of the elderly and some non-elderly individuals with disabilities without regard to their financial circumstances.[2] The program covers individuals over the age of 65 that have paid into Social Security, or those under 65 who are eligible for Social Security by being disabled for the past two years. Under the Medicare program, if mom had been admitted to an acute care facility (hospital), her doctor might discharge her to a skilled nursing facility for rehabilitation for a brief period of time. Medicare will pay 100% of the skilled nursing home cost for the first 20 days and, thereafter, the patient becomes responsible for a co-payment for the time spent in the facility up to 100 days.[3] This coverage is for rehabilitation only and not custodial care.

It is not uncommon for a patient to be admitted to a hospital following a medical episode such as a stroke, a fall or heart problem and then be discharged to a skilled nursing facility for rehabilitation for a limited period of time. The patient will receive a notice from the skilled nursing facility that the Medicare benefit will terminate after the first 20 days and that the patient will then be a "private pay" patient. If the patient cannot or chooses not to private pay they will have to leave the facility. If the patient suffers from dementia or Alzheimer's and the doctor has indicated that a return home is not possible, the family is left scrambling for alternatives.

Essentially, the family has two options for payment – private pay to the facility at its going rates or applying for the Medi-Cal Long-Term Health Care Benefit.

Medicaid, which is different from Medicare, is the primary federal program that provides health care benefits to individuals with low income and limited assets, including children, parents, pregnant women, elderly people and those with disabilities.[4] Medi-Cal is California's version of the Medicaid program and is a federal and state cooperative program. While the Medicare and Medi-Cal programs are not related, some people may qualify for both. Medi-Cal is means tested and is generally available for public assistance recipients and other persons of very limited resources. While people from a varied number of categories can be eligible for Medi-Cal, for purposes pertinent to this discussion, Medi-Cal covers individuals that are "medically needy," such as medically indigent adults who are in skilled nursing, so long as their income and resources are within the Medi-Cal limits.[5] To be eligible for Medi-Cal, the individual may not have "countable" resources in excess of \$2,000.00.[6]

Unlike Medicare, Medi-Cal is available to pay for custodial care in a skilled nursing facility if the patient meets eligibility requirements.[7] Medi-Cal does not, however, cover



custodial care in an assisted living or board and care facility. Under current law, there are various legal strategies available to assist people in meeting those eligibility requirements that make them medically indigent. Traditional estate planning vehicles such as revocable living trusts are generally not of assistance in implementing these strategies. If it is possible that a client or family member may need to utilize the long-term care benefit, an elder law attorney familiar with the Medi-Cal requirements should be consulted.

To complicate matters further, the Medi-Cal eligibility requirements will change at some point in the not so distant future. In 2005, Congress passed on a partisan vote, the Deficit Reduction Act (DRA).[8] The DRA mandated states to modify their Medicaid (Medi-Cal in California) regulations and statutes in ways that will make qualifying for the long-term care benefit exponentially more difficult. At this time, California has not yet implemented the DRA provisions, but it is expected that regulations implementing the provisions will occur sometime later this year. The likely effect of such implementation is that the process for qualifying for the long-term care benefit in California will become substantially more difficult and complex.

Getting a client or their loved one eligible for the Medi-Cal long-term care benefit is really only half the battle. After the death of one that received benefits, the Department of Health Care Services (DHCS), the state agency that administers the Medi-Cal program, may have the ability to recover the sums paid to the recipient by initiating an action to enforce an Estate Recover Lien against the decedent's estate.[9] The DHCS has a long history of being fairly aggressive about recovering benefits that have been provided to Medi-Cal long-term care benefit recipients.

Many families who are able to obtain eligibility for their loved one are shocked after the loved one passes away to find that the family home or other assets are subject to an Estate Recovery Lien by DHCS in the hundred- thousand dollar-plus range. They usually find out about the existence of the lien when they are served with a complaint for recovery by the California Attorney General's Office on behalf of DHCS. The lien attaches to the real property even though it is not recorded, and if the property was in a living trust or in joint tenancy, the lien follows the property to the owner post death.[10] The only way to avoid the lien is for the property not to be in the recipient's name as of the date of death. This issue alone should point out the importance to estate planners to make sure that there are very good gifting provisions in trusts and durable powers of attorney that allow gifting for medical eligibility and Estate Recovery Lien avoidance.

But be wary! If the gift of the recipient's property is construed to be an ineligible gift, it can create periods of ineligibility equal to the value of the ineligible gifts per day divided by the Average Private Pay Rate for nursing home care in California – currently \$7,092.00.[11]

While we can always argue about whether people should be allowed to escape the requirement to pay back the State for the Medi-Cal benefits they receive, few would argue with the notion that all of us should explore and be able to claim every legitimate tax deduction which is allowable to reduce the amount of our taxes. This is what elder law attorneys do – they assist clients and their loved ones in utilizing allowable and legitimate strategies to create eligibility for the Medi-Cal long-term care benefit and to legally avoid the Estate Recovery Lien for benefits which they have received.

**Download the MCLE Self-Study test form here: Earn one hour of General MCLE credit by reading the article above and answering the questions of the Self-Study MCLE test. Send your answers, along with a check for \$20 (\$30 for non-members), to the address on the**

**test form.**

Ron Mullin, past president of CCCBA and a lawyer in this county for over 30 years, dedicates a significant amount of his practice to estate planning, wills, trusts and elder law. He is also a mediator and arbitrator for disputed cases serving on ADR panels for the First and Third District Courts of Appeal as well as Alameda and Contra Costa Counties.

[1] All County Welfare Directors Letter No: 12-14 (March 26, 2012)

[2] See Title XIX of the Social Security Act, codified at 42 U.S.C. § 1395 *et seq.*

[3] 42 C.F.R. §409.31, *et seq.*

[4] See Title XIX of the Social Security Act, codified at 42 U.S.C. § 1396 *et seq.*

[5] Medi-Cal Eligibility criteria available online at: [http://www.canhr.org/factsheets/medi-cal\\_fs/html/fs\\_medcal\\_overview.htm#B](http://www.canhr.org/factsheets/medi-cal_fs/html/fs_medcal_overview.htm#B)

[6] *Id.*

[7] *Id.*

[8] Pub.L. 109-171, S. 1932, 120 Stat. 4, enacted February 8, 2006

[9] See California Code of Regulations, Title 22 provisions available online at: <http://www.canhr.org/medcal/PDFs/RecoveryCurrentRegs0607.pdf>

[10] Medi-Cal Recovery FAQs available online at: [http://www.canhr.org/factsheets/medi-cal\\_fs/html/fs\\_medcal\\_recovery\\_FAQ.htm](http://www.canhr.org/factsheets/medi-cal_fs/html/fs_medcal_recovery_FAQ.htm)

[11] Spending Down/Gifting Assets discussion available online at: [http://www.canhr.org/factsheets/medi-cal\\_fs/html/fs\\_medcal\\_overview.htm#E](http://www.canhr.org/factsheets/medi-cal_fs/html/fs_medcal_overview.htm#E)

## In the Beginning...the Homeowner Bill of Rights and EADACPA

Friday, February 01, 2013



The Great Real Estate Meltdown of 2008 generated numerous attempts to address the massive uptick in real estate foreclosures. The all-too-common scenario that needs to be addressed is when a borrower is told by a nameless mortgage servicer's phone representative that they can qualify for a loan modification if they just stop making payments on the loan. The borrower stops making payments, but there is no record that the borrower did so in reliance on a verbal recommendation from the mortgage servicer. The loan modification never happens, and the home is foreclosed upon.

New legislation will hopefully put an end to this injustice. The website of the State of California Department of Justice Office of the Attorney General states that the passage of these new laws means that the "California Homeowner Bill of Rights became law on January 1, 2013, to ensure fair lending and borrowing practices for California homeowners. The laws are designed to guarantee basic fairness and transparency for homeowners in the foreclosure process."

Now that the California Homeowner Bill of Rights (SB 900 and AB 278) has become law, an entire new set of revisions to the real estate foreclosure statutes will affect all homeowners in California whose homes face the threat of foreclosure. The California Homeowner Bill of Rights amends multiple sections of the California Civil Code and adds more than a dozen new laws. Although many of the provisions of the California Homeowner Bill of Rights sunset on January 1, 2018, there are also provisions that come into effect to extend the reach of this Bill of Rights past its sunset provisions.

The California Homeowner Bill of Rights compels the parties driving foreclosures to engage in a new process requiring much more contact with the owners being foreclosed upon long before the actual default and sale of the property. Lenders and servicers are required to contact the "defaulting" owners and to seriously engage in the restructuring of the mortgage loans. Lenders and servicers must comply with very specific procedures and *must demonstrate compliance* before starting the actual foreclosure proceeding itself.

Adding to this new compliance requirement is the question of proving such with the fact that defaulting elders may have competency and life expectancy issues, that for all practical purposes, the Homeowner Bill of Rights may stop or dramatically slow foreclosures on elders.

The California Homeowner Bill of Rights has broader application than prior law through an expansive definition for “mortgage servicer”:

(1) Any “person or entity who directly services a loan, or who is responsible for interacting with the borrower, managing the loan account on a daily basis including collecting and crediting periodic loan payments, managing any escrow account, or enforcing the note and security instrument, either as the current owner of the promissory note or as the current owner’s authorized agent.”[1]

(2) A subservicing agent to a master servicer by contract.” [1]

The only exception to this broad-brush definition is that the term “mortgage servicer” does not include a trustee, or a trustee’s authorized agent, acting under a power of sale pursuant to a deed of trust. This may lead to the exclusion of the Mortgage Electronic Registration Systems, Inc. (MERS) which has been one of the thorns in the side of lawyers trying to deal with foreclosure issues. (Ibid.).

But where the California Homeowner Bill of Rights gives, it also takes away. A “borrower” excludes those who have already “surrendered the secured property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent” or “has contracted with an organization, person, or entity whose primary business is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries” or “an individual who has filed a case under Chapter 7, 11, 12, or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case, or granting relief from a stay of foreclosure.” The law will apply only to first lien loan mortgages or deeds of trust secured by owner-occupied residential real property containing no more than four dwelling units.

So the process begins. Contacting the borrower is now the responsibility of the mortgage servicer. Contact must be in person or by telephone and must include an assessment of the alternatives to foreclosure.[2] California Civil Code § 2923.7(a) added a single point of contact requirement: “upon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer **shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact.**”

The common borrowers’ nightmare - submitting documents over and over again and never speaking with the same representative - should go by the wayside.

Another bonus for the litigator is that the new laws include a provision for the award of the borrowers’ attorney’s fees: The “court may award a prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief **or** was awarded damages pursuant to this section.”[3] Borrowers are able to recover their attorney’s fees as a prevailing party if they simply succeed in obtaining injunctive relief prohibiting the mortgage servicer from foreclosing - *prior to* the actual resolution of the action. Bad news for the mortgage servicer, but a possible boon to the borrowers. All that is required to show for injunctive relief is a showing of “sufficient grounds.”[4] Borrowers are not required to show they will prevail at trial. If the court merely enjoins foreclosure to allow the borrower time to set forth all of the facts

establishing the case, then the injunction seems to meet the prevailing party standard. The elder law attorney now has two weapons and two ways of recouping the attorney's fees and costs of the action.

The questions remain: Will the provisions of The Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"[5]) apply if the "single point of contact" fails to provide information to an elder borrower concerning all of the remedies? What if the elder borrower lacks capacity? We will have to wait and see.

Additionally, there is a new danger that perhaps the legislature did not consider. When the borrower submits the completed application for modification, the mortgage servicer is then foreclosed (pun intended) from taking any action to foreclose until all the requirements set forth in the new statutes have or have not been done. This effectively means that there is now a shifting of the burden of proof on the mortgage servicer to establish through a preponderance of evidence that the actions as set forth in the statutes (as well as all the other previous requirements set out in the Civil Code) have occurred. Prior to this, the mortgage servicer only had to prove that a borrower had defaulted and nothing more. These new statutes shall force lenders into enacting complex procedures that will require the implementation of new policies within their companies and the hiring and training of personnel to affect those policies and procedures. As such, lenders may look anew at judicial foreclosure as a preferred method of foreclosing on properties, especially properties where the differential between the loan and the current value is significant, because in a judicial foreclosure the lender may be able to recover a deficiency judgment from the borrower in default. This revised threat of judicial foreclosure also gives the lender the big stick to make the borrower much more willing to relinquish the property without the necessity of court action.

The legislation is new. We do not yet know what the courts will do with all the new provisions and especially how those new provisions will impact the rights of elders when combined with EADACPA. But any attorney dealing with the loan modification morass has some way to fight back.

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[1] California Civil Code § 2920.5(a)

[2] California Civil Code § 2923.5

[3] California Civil Code §§ 2924.12(i) and 2924.19(h)

[4] California Code of Civil Procedure § 527

[5] California Welfare and Institutions Code § 15610 et seq.

# Collaboration is the Key to Protecting Seniors in Contra Costa County

Friday, February 01, 2013

As most of you know, Contra Costa County has scheduled Elder Court calendars nearly every Tuesday morning since 2008 to handle financial, physical, or emotional abuse cases affecting Contra Costa adults age 65 and older. This calendar handled more than 250 of these cases in 2012 alone – but this statistic represents only the tip of the iceberg when one considers how much of Contra Costa’s ‘village’ is committed to their support and care. Without the dedicated assistance of our various partners, Contra Costa’s Elder Court would not be nearly so successful! Our special partners in this effort include: the Contra Costa County Bar Association, The Law Center, Senior Legal Services, the DA Victim/Witness program, the Public Law Library’s monthly workshops and Peer Counseling program sponsored by the Contra Costa Health Services Department.

Seniors can be a particularly vulnerable population, especially when their financial resources or decision-making skills are compromised. In Contra Costa, however, elder adults do not have to face their challenges alone. Victims of elder financial abuse who cannot afford paying some or all of the costs associated with legal representation can request pro bono assistance through The Law Center, seek short-term legal assistance through the CCCBA Lawyer Referral Service, or lower their legal costs if they qualify for assistance from the CCCBA Moderate Means Panel. Contra Costa Senior Legal Services, with support from the Legal Services Trust Equal Access Fund, also offers a weekly clinic where seniors can drop in and get patient and compassionate help with finding and filling out court forms, applying for restraining orders, or sorting out the complications when those who are victimizing them are also close family members or friends.

Elder Court participants can also benefit from the unique support and empathy of their peers. Through this program, elders can take advantage of the support and wisdom of Peer Counselors who, trained by the Contra Costa Health Services Department, can shepherd them through the process, explaining who they will meet and what they can expect from filing to disposition of their cases and beyond.

The statewide court budget challenges are well-known, and the future of the Contra Costa County Elder Court has been uncertain as a result. However, the Superior Court is committed to continuing the Elder Court because of the vital role it plays in the lives of this county's seniors. In 2013, Elder Court is currently being held in Department 25 by Hon. John Laettner on Tuesdays at 9:00 a.m.

Mimi Lyster Zimmelman is the Director of Business Planning, Information and Programs

## A Brave New World

Friday, February 01, 2013



Year after year, the news out of Sacramento is depressingly the same: reduced funding for the courts. The exact figures are not before me, but literally millions of dollars have been cut from the budget of our county over the last several years. Clerks have been let go. Hours of service have been reduced. And most recently, the positions of five court commissioners have been left vacant, including those sitting in the discovery and family law departments. In addition, the number of civil fast track judges has been reduced from four to three.

The three that remain will now have to do more than they did before. Name changes. Discovery motions. Small claims court hearings. Unlawful detainers. These are just some of the tasks that will be added to their already full days.

What this means for all of the litigators in this county and their clients is obvious: slower and more expensive resolution of cases.

The court and a number of litigation attorneys met during the last quarter of 2012 to discuss what could be done to fill the void left by the decline in state funding for the courts.

Two main solutions have been proposed: an increase in and refocus on judges pro tem; and a new program to address discovery disputes, which has been named the Discovery Facilitator program. In essence, the court is asking all of us to help the courts continue to provide access to justice.

No one knows yet how, or even whether, all of this will work. But, clearly, the only chance for it to work is through volunteerism and cooperation on the part of the bar.

Here is a brief introduction to the new programs. We ask as many of you that can to volunteer to serve as judges pro tem or discovery facilitators. For those of you who cannot, we at least ask for your cooperation. Know that none of us—neither the bench nor the bar—want these changes or do them willingly. But they are the only way to try to ensure that the courts can continue to provide timely resolution of civil disputes for the foreseeable future.



## Judge Pro Tem Program

The courts will be utilizing Judges Pro Tem to conduct small claims court hearings, as well as to hear unlawful detainers and probate matters.

To be qualified to serve as a Judge Pro Tem, you must have been admitted to practice as a member of the State Bar of California for at least ten years (or at least five years with good cause).[1] The conditions for appointment are found in Rule 2.812(b) of the California Rules of Court, and the education and training requirements are found in Rule 2.812(c). In Contra Costa County Superior Court, individuals must also complete additional training that the Court provides. Training sessions in judicial demeanor have already been offered in December and January, and more may be offered later in the year, if needed.

The hope and expectation is for judges pro tem to volunteer half a day per month.

This is an especially good program for those of you nearing retirement, who want to continue to contribute to the law, and anyone else who, for whatever reason, has some extra time to volunteer to the courts and serve the public.

## Discovery Facilitator Program

All discovery disputes will be sent to this program before a party will be permitted to file a formal discovery motion.

We struggled for some time to come up with the best title for the volunteers for this program that accurately describes the function they will serve. "Discovery Facilitator" does not quite capture its essence, but in the end seemed better than all the alternatives. The Discovery Facilitator is not a mediator. Neither is he or she a judge pro tem. The role of the Discovery Facilitator is to serve like the moderator in an Early Neutral Evaluation. The discovery dispute will be submitted to the Facilitator in a fairly informal manner. The Facilitator will attempt to talk through the dispute with the parties in a conference and either reach a resolution by consensus, or write a tentative ruling as though sitting as a Judge. If either party does not accept that ruling, the party seeking relief will then file a formal motion with the court, attaching the Discovery Facilitator's ruling to a declaration. All procedures thereafter will occur in the normal fashion.

Following is a brief description of other aspects of the program. For precise details, consult the actual rules, which have been drafted, but, at the time of this writing, have not yet been circulated to the general bar.

The ADR office will maintain a list of Discovery Facilitators. Anyone who has been an attorney for 10 years may be accepted onto the list upon completion of an application.

The party seeking relief will start the process by filing a notice with the ADR Office. Discovery Facilitators will be assigned in order off the list. A single name will be circulated initially. Each side will have an opportunity to exercise one peremptory challenge. Second and third names will be offered if necessary because of the exercise of challenges. The final choice of Discovery Facilitator will be known within approximately 10 days' time.

The hearing or conference will occur within 30 days thereafter.

The process will be informal and set by the Discovery Facilitator. As an example, in cases

assigned to me, the process will be for the moving party to submit only a Separate Statement of items in dispute, organized in a logical fashion, grouping similar disputes together, listing only the request and the response. The reasons why a further response should be required may be argued orally or put in writing at the election of the moving party. Written opposition will be optional. The point is for the parties to get a quick read on the likely outcome of their dispute so that hopefully they and their clients can avoid the costs and delay of a formal motion, not to create more cost and delay by having the same motion be drafted and argued twice in two different settings: once before a Discovery Facilitator who has no power to make a ruling; and a second time before a judge who has little time to make one.

We need your cooperation both to serve as volunteers and to make the program meaningful. Please do not scoff at it, or in every case, demand a “real judge.” Be reasonable both in propounding and in responding to discovery. Know that discovery is supposed to be self-executing, and to be used as a tool to facilitate litigation, not a weapon to wage it.

We will be monitoring how the program works. Feel free to use me as a contact point to offer suggestions, complaints, or ideas--anonymously or otherwise. We want to make this program as good as it can be and, more importantly, ensure that it achieves its objectives: to provide timely and inexpensive resolution of most discovery disputes; and to avoid bogging down our civil judges in petty or needless disputes, when they are needed more to rule on law and motion matters and to conduct trials.

It is a brave new world. The future may be filled with challenges and the possibility of bleak outcomes, but we can overcome the one and avoid the other if each of us pitches in. With small individual sacrifices, we can make a large, collective difference.

In addition to serving as CCCBA’s President this year, Jay Chafetz has a solo practice in Walnut Creek and specializes in personal injury, medical malpractice, elder abuse, trust and estate litigation, and general civil litigation.

[1] Rule of Court 2.812(a)

## Elder Law Issue-Spotting 101

Friday, February 01, 2013



Planning an elder law issue for the general consumption of lawyers is a challenge. Elder law defies definition. It is contracts, taxes, benefits planning, probate, conservatorships and trusts. It is class actions. It is personal injury, family law and criminal law. It is real

estate. Not only is elder law as a practice area ridiculously broad, the elder law landscape is in constant motion. Last year, I tried to focus this issue on community resources. This year, the issue is loosely "elder law issue-spotting 101."

The task of any attorney is to connect the people you care about with the information they need. Nowhere is this more true than with elder law – and often what people need is not strictly legal services. But you don't know what they need until you sit down and talk with them. So, what questions do you need to ask? To whom do you ask them?

The questions are fundamental. How do I find safe and affordable long-term care? How do I spot the scams? What service-provider options are out there to keep me living independently? How can I tell if I have an elder abuse claim? What is Medi-Cal and how does qualification work? How do I access the Contra Costa Elder Court? *How do I stay in my home?* Easy questions, hard answers. These articles can't answer your specific questions, but they will hopefully find a place in your subconscious. When elder issues arise in your world – and they will – you may be more able to spot them early and direct people to the resources they need.

Among the articles on private fiduciaries, skilled nursing and financial elder abuse, Prescott Cole and Geoffrey Steele have written about some new developments in the law. A couple of other changes are worth mentioning:

- AB 2149: Creates a prohibition against gag orders in elder abuse settlement agreements
- SB 1047: Creates a "Silver Alert" – a public advisory regarding missing seniors that functions much like the Amber Alert
- SB 345: Strengthens the role and independence of the state ombudsman program

There are many more, but time and space does not allow me to elaborate here.

Finally, I have to include with this issue my constant, unabashed plea for help on behalf of the seniors in our community. Do you have a skill or particular area of expertise? I guarantee that I can connect you with an elder services project that will put your skills to great use. For example, the upstart Lamorinda Village (see Ruth McCahan's article) needs an attorney with a nonprofit background to help it establish its 501(c)(3) status. Do you know contracts? The Elder Law Center always has contracts cases that can be solved with a well-written letter. The beauty of elder law is that you don't have to be an elder law attorney (whatever that is) to help with managing the overwhelming elder law needs out there.

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## Skilled Nursing Facilities: A Personal Perspective

Friday, February 01, 2013

After my mother was hospitalized for a broken hip, I had 24 hours to place her in a skilled nursing facility. One would think that with a growing population of seniors, there would be a wealth of information, but I learned that some of the key information could only come from others with personal experience of looking at facilities, and from looking myself.

Since clients look to their attorneys as a resource, readers may find themselves in a similar position either helping a client, or possibly a family member or friend. Here's what I learned about searching for a skilled nursing facility in a short time.

- A personal visit to at least three to five facilities is a must. The hospital can provide a list of recommended facilities but do not simply choose the closest one. I visited five and the one that I had hoped to choose turned out not to be acceptable. There are places out there that are a nightmare. Take the time to make sure that the facility chosen is one that the patient can stay in for several weeks. If the initial visit is uncomfortable, imagine a stay of some duration.
- During the visit, keep in mind the purpose for the stay. If it is rehabilitation, such as with the case of a broken hip, then looking at the physical therapy room is important. Is the room spacious with sufficient equipment for the patients, or cramped with only minimal equipment? Are there enough trained therapists for all the patients? How often will the patient receive physical therapy? Is occupational therapy also provided? If so, how often?
- Another consideration is the quality of the food. The patient may be there for a few weeks. Pain and boredom are factors. So if the food is good, that improves the experience. Also, do they serve meals at bedside or in a dining room? How is it decided where the meals will be served to a given patient? Do the employees eat the food? Sometimes the facility will allow a visitor to sample the food.
- What is the patient room like? Here are some questions to consider: How often do they move the patients? Patients get moved more than one might expect. How many patients are in a room? How do they match patients? This is important as having a roommate fresh out of surgery groaning in pain may disturb a patient who is on pain management and wants to sleep.
- Other questions are: What is the staff to patient ratio? How long will the patient have to wait for help once they have rung for assistance? During the visit, pay attention to how long the bells at the nurses' station ring without response.
- Assuming the facility has sufficient staff, what if the patient is too active or disoriented? What is the policy if the patient requires more attention than the average patient? Does the facility require a private companion to sit with the patient? If a private companion is required, it may not be covered by insurance. Memory is an issue for some seniors. Stress has a significant impact on memory loss. So patients may seem disoriented, as they are in pain, and if independent and strong-willed (my mom), they may not want to stay in bed and wait for help. If so, how does the facility handle the situation and are there alternatives to private care available, such as bed alarms, or a move to a private room where there is a better ratio of staff to patients? The private rooms are also not covered, and the cost difference is staggering; \$39+ a night for a private room vs. \$15 per hour for private caregiving. I have found that my mom is now a tad dependent on having a private caregiver at her beck and call!
- Make sure that the patient or someone else fills out the inventory of personal possessions. Things get lost in the laundry. If there is a list and something is missing, the chances of finding it improve.
- Ask the hospital social worker for a list of questions to ask in addition to the list of recommended facilities.
- For detailed information on any senior facility see [www.canhr.org](http://www.canhr.org).

This is not an exhaustive list of points, but rather questions and considerations that I wish I had in mind during the one day I had for the search.

Martha Davis Alexander has an estate planning practice in Walnut Creek and has been practicing estate planning for the last several years. Prior to that, Martha practiced family law in Walnut Creek for approximately six years.

## Who Shops for the Shoes?

Friday, February 01, 2013

Who shops for the shoes? I never considered the question until becoming a professional fiduciary. Attorneys often recommend professional, neutral fiduciaries to help and protect elderly clients when family conflict threatens or there is no immediate family living in the area. To get a glimpse into a fiduciary's day, take a moment to put yourself into these "shoes."

Imagine you are elderly and cannot drive. You get a little disoriented. Your feet hurt but you do not want new shoes because you like your routine and wearing sandals in freezing winter is easier than going shopping for shoes. Online shopping doesn't work because you don't own a computer. Also, you don't know your current size or what will feel right. Who will do this for you when your judgment and memory begins to fail?

One of my clients is a perfect example of the problem. My client is a dream - she is wonderfully wise and witty - but she suffers from mild cognitive impairment. She also needs a walker to help her maneuver after a recent fall and broken bones. She wants very few personal trappings and demands nothing. To make sure she is getting the type of care she needs, I sometimes have to imagine what she needs and then try it out with her to see what she thinks.

My client's doctor wants her feet protected. Scanning the selection in the shoe store, I pick out a variety. Some are her size, but most are larger because her feet have swollen a bit since she last bought shoes. Seven pairs come back with me. I remove the size tags and we play a little game. I play the part of a Nordstrom shoe sales person, she the picky customer. That pair was not cute enough. Those were too small (her size). Ah, these were just right. Almost. She said they were "ugly as sin but comfortable." She accepts one pair, only because she knows her doctor wants her to have them.

## Good Judgment is Valuable

Even with "dream clients" it can take 10 to 15 hours a week or more at the start of a case to: travel to their location; chase down income checks lost in the mail after they move into an assisted living home; secure the home; provide the necessary paperwork to various agencies to do the work as a Power of Attorney; work out a monthly budget; pay bills timely; and secure and check the mail - sorting personal mail from junk and from necessary, all while getting to know each other.

Oh, and find her some new shoes.

What are those hours worth to the person who is being served? They can mean the difference between hearing and not hearing, or the difference of a less stressful life due to less worry about how to handle the overwhelming details. Or even more crucially, persistent follow-up and attention paid on behalf of an ill or elderly person ensures a better standard of care from everyone involved. Not everyone has family who can do this for them. It is comforting to know there are professionals who do this job with care and competence.

## Stepping Into Their Shoes

A professional fiduciary uses his or her best judgment to find the most cost-effective way to serve a client - like the CEO of a small company. Even routine tasks like bill paying need someone to make sure they are being done properly. Changes in the situation, conflict between adult children or a lack of communication from health care providers require the professional fiduciary to use good judgment and re-evaluate to find new solutions that will serve the client best.

Think about the shoes. Imagine having to go out in the blustery cold on a shuttle bus while using your walker. Your hearing aid was lost back at the skilled nursing facility. You already know you'll be tired before you even find the right store. By stepping into our client's life to help and protect them, a private fiduciary can be a powerful ally in keeping a senior walking on an independent path for as long as possible.

Loren R. Acuña is a member of PFAC, an affiliated member of the Contra Costa County Bar Association and the Founder of The ACE Fiduciary Group. You can learn more about professional fiduciaries at [www.pfac-pro.org](http://www.pfac-pro.org).

## A Village for Lamorinda?

Friday, February 01, 2013

How would you like to have the amenities of a residential retirement community while staying in your own home and aging in place safely, securely and with the confidence of having a high quality of life? The objective of a village is to help its members delay, or if desired, avoid relocation to a retirement community without compromising that quality of life.

## The Challenge

America is graying fast. Life expectancy continues to increase and the proportion of elders among us continues to rise. In addition, baby boomers are increasing the ranks of the over-65's at the rate of 10,000 per day. Families are stretched out over the globe. The geographic mobility of the educated workforce nationally and internationally is unprecedented in human history. Even strong families find ties have loosened, at least in terms of how available members can be for each other in the practical matters of day-to-day living.

The market has responded to the needs of middle and upper class elders with a boom in gated retirement communities. In the last 20 years, any number of commercial facilities of this sort have become available in Northern California. In these new managed



communities, independent living is facilitated and a certain quality of life is protected with a menu of services and activities. However, the initial and the maintenance costs can be high.

Many among us want to enjoy an active healthy life without moving away from our neighborhoods. We are older, but we are also healthier and poised to set new records for longevity. We cherish living near old friends and among younger families. We fully appreciate the pleasures of our neighborhoods, our downtowns, familiar streets, lovely parks, favorite merchants, libraries, and churches, as well as all the professional and community-based connections on which we have come to rely.

## Toward Meeting the Challenge

The village concept is a membership program based on the successful Beacon Hill Village in Boston. Today there are over 89 villages in operation across the United States and over 150 in various stages of development. Operating here in the Bay Area are Ashby Village in Berkeley, Avenidas Village in Palo Alto, San Francisco Village and North Oakland Village. Most villages are private nonprofit corporations founded and managed by minimal staff and volunteers to give residents both the practical means and the confidence to live their lives to the fullest in their own homes as they grow older.

Think of a village as a concierge service with one-stop shopping via a phone call. A village can offer its members potential solutions to many real and perceived needs. They may be categorized into six major categories:

- Daily living and home services including transportation, meal preparation, and handyman and professional repair services
- Health and wellness assistance services including home health care, medical equipment and physical therapy
- Organized physical activities with exercise classes and walking groups
- Organized social activities including discussion groups, parties and musical events
- Continuing education with classes on a variety of intellectual subjects and how-to-classes on computing, the internet or cooking
- Personal, legal and financial services

A village's offerings are determined by a community survey: what are the needs and desires of its members? Annual membership entitles individuals and households to a number of activities and services free of charge. Many of the services will be provided directly by program staff through arrangements with third parties under contract to provide services either at a discounted rate or on a priority basis, or both. All service providers will have been thoroughly evaluated and meet the program's high standards. Finally, member will be connected to each other, creating a community of support.

In their times of need, instead of calling a busy or uninformed son or daughter, or relying on a neighbor or spouse, members will have one place to call for assistance. Membership will provide comfort and convenience to members in their own home, while maintaining their sense of autonomy and independence. Membership will also give access to a community of like-minded people and opportunities to socialize and spend time with one another.

A group of local residents from Lafayette, Moraga and Orinda has formed a working group to develop this village concept within the Lamorinda community. It might surprise



you that within the three communities there are more than 10,000 residents over the age of 65. That's 18% of the total population - more than enough to support this type of membership program, which affords members benefits that include convenient access to high quality services from trustworthy providers, reduced prices for services and opportunities to participate in activities that enhance the quality of life and sense of community.

Ruth D. McCahan is the Chair of the Lamorinda Village Task Force

## The Ethics Corner

Friday, February 01, 2013



There are two recently decided cases that affect Contra Costa practitioners no matter what area of law they practice in. The first, *In re Pacific Pictures Corp.*, (2012) 679 F.3d 1121, affects any lawyer who may come in contact with the federal authorities. It addresses the question of whether a party waives the attorney–client privilege forever by voluntarily disclosing privileged documents to the federal government. The facts of the case are interesting. Marc Toberoff, a Hollywood producer and licensed attorney, approached the heirs of the Superman creators with an offer to create a joint venture between the heirs and a company that he owned through which he would manage pre-existing litigation over the rights to the royalties and arrange for a new Superman film to be produced. Toberoff served as both business advisor and attorney to the heirs and while the court noted that this raised many ethical and professional concerns, the court also noted explicitly that these issues were not under consideration as they were not before the court.

During this time, Toberoff also hired a lawyer named David Michaels to work at one of his companies. After working for Toberoff for three months, Michaels absconded with several copies of confidential documents and subsequently sent the documents to the executives at DC Comics. DC Comics did not take the documents for their own gain and, recognizing the ethical implications of keeping the documents (unlike the parties in our next case, *Clark v. Sup. Ct.*, (2011) 196 Cal. 4th 37), they entrusted the confidential documents to an outside attorney and attempted to obtain them through normal discovery procedures in two previously filed and ongoing lawsuits. Toberoff took the position that all

of his communications with the heirs were protected by the attorney client privilege and resisted all attempts to turn over any of the documents.

About a year after Michaels disclosed the documents to DC Comics, Toberoff reported the incident to the FBI and, about three years after that, he asked the U.S. Attorney to investigate Michaels for theft of the documents. His efforts essentially skewered him - he received a grand jury subpoena for the documents, complied with it and then got a request from DC Comics for the unredacted copies. The magistrate judge concluded that because Toberoff had delivered the documents to the government, he could not elect when to waive the attorney-client privilege. The Ninth Circuit affirmed and held that voluntarily disclosing privileged documents to third parties generally destroys the privilege. Thus, a party may not selectively waive attorney-client privilege.

Being that an attorney's behavior may waive the attorney-client privilege, even without explicit act by the client, this calls for extreme caution by attorneys to ensure the confidentiality of their clients' documents.

While the Ninth Circuit was affirming a waiver via voluntary disclosure of confidential documents to the federal government, the California Supreme Court was considering whether the actions of a law firm in extensively reviewing obviously confidential documents was sufficient to disqualify them from representation.

*Clark v. Superior Court* (2011) 196 Cal. 4th 37 was another case involving confidential documents. Higgs, Fletcher & Mach LLP represented Grant Clark in a suit against VeriSign for wrongful termination. Unlike DC Comics, above, which handed the confidential documents over to a third party and then sought disclosure of them via proper discovery requests, in *Clark*, the law firm was disqualified from representation when the trial court found that the firm had received and excessively reviewed privileged documents. The court reasoned that the acquired information and the law firm's conduct could affect the outcome of the pending litigation. In a balancing of Clark's right to representation by his counsel of choice versus the protection of the "public administration of justice and the integrity of the bar," the court concluded that the latter was of greater interest.

In *Rico v. Mitsubishi Motors* (2007) 42 Cal.4th 807, the California Appellate Court held that a law firm has the ethical duty to refrain from examining the documents that it believes to be confidential except to the extent to determine whether they are privileged or not. In *Clark*, the California Supreme Court upheld the principles of *Rico* and found substantial evidence that the firm, in reviewing the documents, extended beyond the permitted examination to determine whether the documents were privileged or not. In fact, the evidence showed that the firm continued to review the documents even after VeriSign informed them that the firm was in possession of privileged material. Despite the fact that the law firm's retention and use of the documents after being informed of their nature appears egregious, the case highlights how seriously the court takes the holding from *Rico* and emphasizes that attorneys must examine only enough to determine whether inadvertently produced documents are privileged. Read in conjunction with *Pacific Pictures*, it becomes clear that, whether you are in state or federal court, it is important to take issues of privilege during document review and document retention seriously.

Carol M. Langford is an attorney specializing in State Bar defense. She is also a lecturer in law at U.C. Berkeley School of Law.

## 2013 Annual Officer Installation Lunch [Video and Photos]

Friday, February 01, 2013

On January 25, the 2013 Board of Directors and Section Leaders of the Contra Costa County Bar Association were officially installed during a luncheon honoring Richard Frankel for nearly two decades of extraordinary volunteer service to the CCCBA. After the presentations, Board President Jay Chafetz sat down with the Honorable Goodwin Liu for a mesmerizing Q&A chat. Enjoy the video and photos below...

[gallery link="file" columns="4"]

To see more photos from the 2013 Installation Lunch, please visit our Facebook page at [Facebook.com/CCCBA](https://www.facebook.com/CCCBA)

Photos courtesy of Michael Moya, MOYA fotografx | ArType Studio:  
[www.moyafotografx.com](http://www.moyafotografx.com)

## Deadline Fast Approaching: Renew Your Membership Today

Friday, February 01, 2013

The Membership Renewal Drive is ending on March 1, 2013. Don't miss out on being included in the 2013-2014 membership directory.

Here's a few benefits of the directory:

- Membership-wide distribution increases visibility
- Utilized as a popular reference tool by attorneys and legal professionals
- Extra exposure in the Specialty Practice section

[Click here to renew your membership today.](#)

## Congratulations to the Winner of the CCCBA Online Renewal Drawing

Friday, February 01, 2013

Congratulations to **Steven L. Sumnick**, 2013 winner of the CCCBA Online Renewal Drawing. Mr. Sumnick has won a "day pass" **worth \$175.00** for the use of the CCCBA conference room with our *newconcierge service*.

Contra Costa County Bar Association Conference Room Rental in Concord

Contra Costa County Bar Association  
2300 Clayton Road, Suite 520  
Concord, CA 94520

For information and to check availability, please call:

Theresa Hurley  
Phone: (925) 370-2548

#### **Basic rate**

\$125 all day (over 5 hours) § \$70 half day (under 5 hours) § \$20 hourly

#### **Concierge rate**

\$175 all day § \$100 half day

#### **Conference Room Details**

- Conference table seats 10-12 comfortably
- Available for rent weekdays, 8am - 5pm

*Concierge amenities include:*

- Peet's Coffee, Soda, Water
- Ordering food
- Photocopying (up to 50 B&W copies)
- Unlimited high-speed Internet
- Computer use, including access to printer (up to 50 pages, B&W) and telephone use
- Use of conference room audio-visual equipment, including conference call equipment and projector

Link for amenities: <http://oneconcordcenter.com/Amenities.html>

#### **Parking**

- Entrance to the building underground parking garage is on Park St.
- Automated payment by credit card ONLY.
  - Accessible by Public Transit, only a few steps from the Concord BART Station
- Link for map: <http://goo.gl/maps/bCUj>
- Two Blocks from Todos Santos Plaza and free public parking

## **Coffee Talk: How have elder issues impacted your family or professi...**

**Friday, February 01, 2013**

As a full-time mediator, I have had the privilege of mediating several cases addressing elder issues. One involved a ninety year old widower who contested his daughter's belief that he could no longer effectively manage his considerable portfolio of properties and would deplete her anticipated inheritance. In another, a non-relative "caregiver" managed to get her charge who was dying of cancer to co-sign a commercial lease and make her a business "loan" without the family's knowledge. I have often found that early mediation in these high-emotion cases tends to reduce the risk of families continuing to lose hard-earned wealth to perpetrators and attorney fees."

**Malcolm Sher**, full-time mediator of real estate, inheritance and elder-abuse cases

My mother started showing signs of dementia at the age of 60. She was later diagnosed with Alzheimer's and died of it at the age of 72. Those last years were made even more difficult by other complications. I learned many things during that time...things I'd rather not have learned at all, but what I did learn proved to be valuable in my estate planning practice.

***Anonymous***

I have an 89 year old mother who moved to the Bay Area from Southern California just over 10 years ago. Though she has been residing in an assisted living facility, I find that I still spend a lot of time worrying about her. There have been times when it has been appropriate to hire a caregiver outside of where she lives, and I am grateful that she has been able to remain somewhat independent with this extra support. Quality of life is so important, and knowing what resources are available to you only adds to the comfort and caring of a loved one. Don't ever hesitate to ask for help – as the adult child of an aging parent, I have learned just how important this is.

***Paula Silver-Manno***, MPH, Sutter Care At Home



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### The Many Faces of Financial Elder Abuse

Many people think elder law is a stand-alone set of laws that pertain only to probate. Not true. Elder financial abuse cases often cross over into other areas of the law in interesting ways. Below are some examples of

#### Spotlight

##### Skilled Nursing Facilities: A Personal Perspective

After my mother was hospitalized for a broken hip, I had 24 hours to place her in a skilled nursing facility. One would think that with a growing population of seniors, there would be a wealth of information, but I learned that some of the key information could only come from others with personal experience.

##### Who Shops for the Shoes?

Who shops for the shoes? I never considered the question until becoming a professional fiduciary. Attorneys often recommend professional, neutral fiduciaries to help and protect elderly clients when family conflict threatens or there is no immediate family living in the area. To get a glimpse into a

#### News & Updates

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