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Welfare and Institutions

Chapter 659: Overcoming Obstacles to Elder Abuse Prevention

Anthony Schiavo

Code Sections Affected

Welfare and Institutions Code § 15610.67 (new), §§ 15630, 15631 (amended).
AB 40 (Yamada); 2012 STAT. Ch. 659.

I. INTRODUCTION

In November 2004, the Ombudsman Services of Northern California, a group of advocates for California's elder community, received a report of physical elder abuse in a Sacramento nursing home and sent a representative to interview the alleged victim.¹ The seventy-five-year-old woman would not admit to being abused, nor did the ombudsman see anything suspicious.² That woman died a few months later with unsettling bruises on her face.³ The ombudsman did not provide police investigators with evidence that could have saved the woman's life or helped to explain her death.⁴

Each state receives federal funding for a Long-Term Care Ombudsman Program (LTC Ombudsmen),⁵ which is a watchdog organization that represents the interests of the elderly residents of long-term care facilities in the state.⁶ California law requires a mandated reporter, which is anyone responsible for the care or custody of a dependent adult, to report suspected abuse of long-term care patients to *either* local law enforcement or the LTC Ombudsmen.⁷ The LTC Ombudsmen maintain a relationship with long-term care facilities to represent the residents' interests in quality care and facilities, but they are not trained to preserve evidence in a crime scene.⁸ In addition, federal confidentiality

1. Nancy Weaver Teichert, *Care Home Deaths Raise Alarm: Growing Industry Needs More Scrutiny, Group Says*, SACRAMENTO BEE, Dec. 6, 2004, at B1.

2. *Id.*

3. *Id.*

4. *Id.*

5. 42 U.S.C. § 3027(C)(9) (2006).

6. Teri Sforza, *Flaws Found in System Protecting Elders*, ORANGE CNTY. REG., Nov. 9, 2009, available at 2009 WLNR 22440025 (on file with the *McGeorge Law Review*).

7. CAL. WELF. & INST. CODE § 15630 (West Supp. 2012).

8. See 42 U.S.C. § 3058(g) (detailing the responsibilities of LTC Ombudsman Program members); PAMILA LEW ET AL., *DISABILITY RIGHTS CALIFORNIA, VICTIMIZED TWICE: ABUSE OF NURSING HOME RESIDENTS, NO CRIMINAL ACCOUNTABILITY FOR PERPETRATORS* 8 (2010), available at <http://www>.

2013 / Welfare and Institutions

safeguards prohibit the ombudsmen from reporting abuse to enforcement agencies without the informed, written consent of the victim.⁹ Tragically, an estimated seventy-five percent of ombudsmen's clients are unwilling or unable to provide the requisite consent, even if an ombudsman's report uncovers instances of abuse.¹⁰ With their hands tied by federal regulation, LTC Ombudsmen are unable to enlist the help of the police to investigate and resolve the abuse they investigate.¹¹ In response, the California Legislature passed Chapter 659 to require mandated reporters to report suspected elder abuse to law enforcement agencies and the LTC Ombudsmen simultaneously, thereby allowing police to investigate and preserve evidence for a possible criminal abuse prosecution.¹²

II. LEGAL BACKGROUND

Modern elder abuse reporting is governed by state and federal agencies that evolved in response to a nationwide movement to protect the rights of elders, first codified by the Older Americans Act (OAA) of 1965.¹³

A. Evolution of the Older Americans Act

In the wake of the Civil Rights Movement, Congress passed the OAA of 1965 to support elders' rights and welfare through government-funded services.¹⁴ Congress intended to provide, *inter alia*, "protection against abuse, neglect, and exploitation" by offering funding for community-based programs developed by the states.¹⁵ The OAA and its funding grew steadily; it was amended in 1978 to provide for state-created LTC Ombudsman programs, which provided elderly residents of long-term care facilities a local representative who can voice the elderly person's concerns.¹⁶ In 1979, California developed its own LTC

disabilityrightsca.org/pubs/548801.pdf (on file with the *McGeorge Law Review*) (explaining the ombudsmen's investigation process and training).

9. 42 U.S.C. § 3058g(d) (detailing current confidentiality safeguards affecting LTC Ombudsmen); Sforza, *supra* note 6.

10. Sforza, *supra* note 6.

11. *Id.*

12. See SENATE HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 40, at 3 (Mar. 21, 2011) (noting prior to Chapter 659, that the LTC "Ombudsman program operates under two conflicting mandates").

13. See 42 U.S.C. § 3027(C)(9) (mandating that each state shall establish a Long Term Care Ombudsman Program); JOHN ADKISSON ET AL., CAL. SENATE OFFICE OF OVERSIGHT & OUTCOMES, CALIFORNIA'S ELDER ABUSE INVESTIGATORS: OMBUDSMEN SHACKLED BY CONFLICTING LAWS AND DUTIES 4-5 (2009), available at http://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/ombudsmanreport10_29.pdf (on file with the *McGeorge Law Review*) (describing the OAA as a foundation of modern elder justice programs).

14. See 42 U.S.C. § 3001 (explaining the purpose of the OAA, passed in 1965).

15. *Id.*

16. See generally Carol V. O'Shaughnessy, *The Aging Services Network: Broad Mandate and Increasing Responsibilities*, 18 PUB. POLICY & AGING REP. 1, 4 (2008) (highlighting the various duties of LTC Ombudsmen).

McGeorge Law Review / Vol. 44

Ombudsman program that conformed to the federal guidelines.¹⁷ However, the OAA imposes a confidentiality regulation that prevents the LTC Ombudsman from disclosing any of a client's personal information without that client's written consent.¹⁸

B. Mandated Reporters

Modernly, individuals who are responsible for an elder or dependent adult may be deemed "mandated reporters" per California's Elder and Dependent Adult Civil Protection Act (EDACP) of 1992.¹⁹ Licensed staff of a care facility, health practitioners, and clergy members are examples of mandated reporters, who are legally responsible for reporting cases that reasonably resemble elder abuse, including neglect, physical abuse and sexual assault, to either the LTC Ombudsmen or local law enforcement.²⁰ After receiving this report, either agency investigates the situation.²¹ The EDACP supports communication between local law enforcement and the LTC Ombudsmen,²² but the federal confidentiality clause of OAA may prevent the LTC Ombudsmen from alerting local law enforcement of any abuse that the investigation uncovers.²³

III. CHAPTER 659

Chapter 659 expands the duties of mandated reporters to circumvent a conflict between the state and federal laws that restricts a LTC Ombudsman's ability to relay the results of elder abuse investigations to law enforcement agencies.²⁴ Chapter 659 requires mandated reporters to inform both the LTC Ombudsmen and law enforcement of suspected or alleged physical abuse in a long-term care facility.²⁵ Chapter 659 also authorizes individuals who are not mandated reporters to utilize the LTC Ombudsmen and local law enforcement to investigate or prosecute any type of elder abuse.²⁶

17. See ADKISSON ET AL., *supra* note 13, at 5 (recounting California's development of elder care programs).

18. See 42 U.S.C. § 3058g(d) (detailing current confidentiality safeguards affecting LTC Ombudsmen).

19. CAL. WELF. & INST. CODE § 15630 (West Supp. 2012).

20. *Id.*

21. *Id.* § 15640.

22. *Id.*

23. See ADKISSON ET AL., *supra* note 13, at 5 (recounting California's development of elder care programs).

24. WELF. & INST. § 15630(b)(1) (amended by Chapter 659).

25. *Id.*

26. *Id.*

2013 / *Welfare and Institutions*

IV. ANALYSIS

Chapter 659 aims to sidestep federal consent restrictions that limit communication between investigators and police so that state institutions can intervene in instances of elder abuse.²⁷ The California Senate Office of Oversight and Outcomes reported that the LTC Ombudsman's elder abuse investigations were among the most time-consuming and significant of their duties.²⁸ However, federal law required consent for any of those investigative reports to be released to outside agencies, and only twenty-five percent of abuse victims gave consent.²⁹ More troubling, almost half of the ombudsmen did not comply with the procedure for obtaining consent.³⁰ California is one of only four states that charges the LTC Ombudsmen with the investigation of elder abuse claims, but its effort is wasted due to the conflicting duties that Chapter 659 seeks to resolve.³¹ The Developmental Disabilities Area Board 10 has argued that California could resolve the issue by following other states and utilizing a centralized adult protective service to operate outside of federal restrictions and exclusively handle elder abuse investigation.³² Chapter 659 seeks to achieve the same end without the expense of creating a new organization by involving the police, who are not bound by confidentiality requirements, in every case of suspected abuse.³³ Thus, the police are guaranteed to properly investigate and preserve evidence of all reported instances of elder abuse, but the ombudsmen's purpose is less clear.

Mandated reporters favor contacting ombudsmen over the police to report suspected abuse in long-term care facilities; ombudsmen point to their familiarity with the community and the mandated reporters' fear of liability resulting from police intervention to explain this preference.³⁴ Because Chapter 659 requires mandated reporters to promptly phone the police for all suspected physical abuse, the ombudsmen no longer function as a familiar, comfortable option for reporting suspected abuse.³⁵ It follows that mandated reporters might be less inclined to act on their suspicions in the absence of this "safe" alternative to contacting the

27. SENATE HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 40, at 3 (June 4, 2012).

28. See ADKISSON ET AL., *supra* note 13, at 5 (citing statistics regarding the effect of conflicting state and federal laws on elder abuse reporting).

29. *Id.*

30. *Id.*

31. *Id.*

32. Letter from Doug Flescher, Governmental Affairs Chair, Developmental Disabilities Area Bd. 10, to Assembly Member Mariko Yamada (Apr. 7, 2011) (on file with *McGeorge Law Review*).

33. See SENATE HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 40, at 3 (June 4, 2012) (noting that the state LTC Ombudsman Program operates largely by volunteers).

34. See LEW ET AL., *supra* note 8 (considering possible explanations of the mandated reporters' overwhelming preference for reporting to ombudsmen rather than local law enforcement).

35. See 42 U.S.C. § 1320b-25 (2006) (requiring reports of crimes involving "serious bodily injury"); see also LEW ET AL., *supra* note 8 (considering possible explanations of the mandated reporters' overwhelming preference for reporting to ombudsmen rather than local law enforcement).

McGeorge Law Review / Vol. 44

police.³⁶ On the other hand, local law enforcement may be encumbered by over-reporting of suspected elder abuse that is not serious enough to require immediate police action.³⁷

Chapter 659 does not emphasize the importance of interaction between the police and ombudsmen in cases of alleged elder abuse involving patients with dementia, who may require the specialized knowledge of the ombudsmen.³⁸ This scenario is analogous to instances of child abuse reports, which call for a coordinated response from county child welfare departments as well as law enforcement to promote efficient resolution.³⁹ Opponents suggested that Chapter 659 should compel the police and LTC Ombudsmen to form a plan to avoid overlapping their investigation efforts and wasting resources.⁴⁰ Ultimately, Chapter 659 was not amended to mandate efficiency and it does not require the police and LTC Ombudsmen to coordinate their efforts.⁴¹

V. CONCLUSION

Chapter 659 ensures thorough investigation of elder abuse reports by involving both the LTC Ombudsman Program and law enforcement agencies.⁴² However, the police involvement mandated by Chapter 659 may have lasting implications: mandated reporters may no longer turn to their familiar ombudsmen to investigate suspected elder abuse without launching a full-blown police investigation.⁴³ Chapter 659 facilitates criminal prosecution in every reported case of elder abuse, but the effect of the dual-reporting requirement on the mandated reporters' willingness to report remains to be seen.⁴⁴

36. LEW ET AL., *supra* note 8 (considering possible explanations of the mandated reporters' overwhelming preference for reporting to ombudsmen rather than local law enforcement).

37. *See* ADKISSON ET AL., *supra* note 13 (describing the office's interview with the California Association of Health Facilities in which over-reporting was a cause of concern).

38. *Public Policy, Legislation*, CAL. ASSISTED LIVING ASS'N, http://www.caassistedliving.org/web/public_policy/legislation.asp (last visited Sept. 29, 2012) (on file with the *McGeorge Law Review*) (noting that Chapter 659 was amended to address their concerns).

39. SENATE HUMAN SERVICES COMMITTEE, COMMITTEE ANALYSIS OF AB 40, at 7–8 (June 4, 2012).

40. *Id.*

41. *Id.*

42. *Id.* at 3–4.

43. LEW ET AL., *supra* note 8.

44. CAL. WELF. & INST. CODE § 15630 (amended by Chapter 659).