



# Investigating and pursuing RCFE elder abuse and neglect cases

*Reporting is the first step in successfully prosecuting*

BY GEORGE R. KINDLEY

As increasing numbers of Baby Boomers are aging and entering into care facilities, including Residential Care Facilities for the Elderly (RCFE), new homes are popping up all over the country. Unfortunately, caring for the most vulnerable members of our society often falls to understaffed and undertrained facilities. More unfortunate is that most of these facilities are capable to provide the necessary resources and training but choose not to do so simply to make even more money.

As a state, California attempted to protect our aging parents and grandparents by enacting 1991's California's Elder and Dependent Adult Civil Protection Act (EADACPA). Additionally, the recent 2014 Residential Reform Bills have provided some additional legal protections for elderly and dependent adults in Residential Care Facilities for the Elderly ("RCFEs").

The ten bills, signed into law by Governor Jerry Brown, were designed to address the ongoing issues we are experiencing in RCFEs in California. Unfortunately, despite these efforts, abuses continue to occur and investigating and pursuing neglect and abuse claims are extremely difficult. Research has shown that many elder abuse and neglect cases are the result of business decisions made by parent corporations that place profits ahead of the care of the elderly and infirm in their facilities. Often, the successful prosecution of these abuses comes down to deliberate, strategic choices on the part of the attorneys representing an elderly person and/or family. In order to successfully investigate and prosecute elder neglect and abuse

in RCFEs, attorneys should follow a series of best practices.

## What is an RCFE?

RCFEs are residential homes for seniors age 60 and over who require or prefer assistance with care and supervision. RCFEs may also be known as assisted living facilities, retirement homes, and board and care homes. RCFEs are non-medical facilities that provide room, meals, supervision, and assistance with activities of daily living ("ADLs"); although non-medical, RCFEs may distribute medications. According to the California Department of Social Services, Community Care Licensing ("CCL"), which regulates the state's RCFEs, there are currently about 7,500 RCFEs licensed in the state of California, with nearly 150,000 beds.

Roughly 80 percent of California's RCFEs have six or fewer beds. However, over 70 percent of RCFE residents reside in RCFEs with over 50 beds.

So what is required as far as staffing is concerned? The California Code of Regulations states that there shall be a "sufficient number" of trained staff to meet client or resident needs and for the overall operation of the facility. This is obviously a very slippery standard ripe for misinterpretation. CCL can require the licensee to provide additional staff when there is determination that the facility is unable to meet the needs of all clients/residents at their current staffing level. RCFEs charge a premium for what they promise to be robust services. The reality is that the RCFEs collect high payments but fail to spend those monies on appropriate staff or staff training.

## \$3,750 a month and public funding is minimal

RCFE residents pay an average of \$3,750 per month. As public funding (Medi-Cal, SSI) is minimal to nonexistent, nearly all of these residents pay privately (out of their retirement) for their care. RCFEs can – and do – accept residents with a wide and significant array of medical conditions (and associated needs), including dementia, incontinence, the inability to ambulate, inability to transfer from bed to wheelchair/walker, the inability to toilet without assistance, to dietary needs and restrictions and the aforementioned distribution of medications.

Caregivers in RCFEs are generally undertrained and overworked. It is not uncommon for an RCFE resident to depress a call button indicating the need for assistance – be it with toileting, transfer, or with some other such need – and then to wait 30, 40, or 50 minutes for a caregiver to arrive to assist if at all. Oftentimes that resident has soiled himself or herself, or attempted to transfer himself or herself in spite of the knowledge he/she is unsafe and unfit to do so. A myriad of health conditions, from UTIs to sepsis to bedsores to broken bones, can and often do arise from the RCFEs' inability to timely address their residents' needs. The individual caregivers generally mean well, but their multi-tasking skills are limited and they often find themselves in a can't-win situation as facilities reduce staff to increase profitability. These are our parents and grandparents – the residents in California's RCFEs – who pay privately for care they are entitled and deserve to receive, but who ultimately suffer the consequences of a broken and abused system.



## Report the abuse

Reporting suspected abuse and neglect is the first step in successfully prosecuting any elder abuse case. Timely reporting by family members to State Agencies ensures that, where possible, appropriate civil (and even criminal) penalties are pursued and evidence of the abuse and neglect is preserved, collected, and documented. This is especially important in situations involving physical neglect and abuse, because as time passes and as wounds heal, documenting the abuse with pictures and video becomes more difficult. This is also a means to prevent ongoing abuse of other residents and to shine light on the abuses that would otherwise be swept under the rug by the facility.

In addition to serving as a deterrent for further abuse, CCL can be an attorney's best friend in investigating abuses that occur inside an RCFE. CCL has immediate access to the facilities' records and personnel, before records can disappear or be altered, and CCL has immediate access to staff to interview and investigate abuse allegations. When a complaint is made, the law requires CCL to begin an investigation within 10 days.

CCL's procedures are not perfect or foolproof, however. CCL only provides complainants with written findings of its investigations if the complainant explicitly requests those findings. Complainants do not have any recourse to appeal CCL's findings. Conversely, RCFEs have a formalized appeal process, and complainants have no input into that process. In many ways, the complaint process is designed to protect the RCFEs, not the abused elders and their families.

CCL may issue violations to facilities and provide a timeframe within which the facility must correct the violations. Type A violations are the most serious type of deficiency for violations that "pose an immediate or substantial threat to health, safety, and/or rights of residents if not corrected." Even with Type A violations, CCL can only issue negligible fines that

amount to much less than a slap on the wrist. Unfortunately, CCL's toothless enforcement mechanisms do little to deter wayward RCFEs.

Therefore, while reporting abuse to CCL is a good first step, it is equally important to immediately report suspected abuse to an attorney who specializes in nursing home abuse cases. The sooner the abuse is reported, the more recourse you and your attorney have to pursue the facilities.

## Gathering evidence

Despite laws requiring accurate and ongoing record keeping, cases involving the alteration or destruction of records in elder abuse situations are widespread. Getting accurate records of what happened within the facility is extremely important and often, the sooner you act, the easier it is to get accurate, unaltered records.

Care Records - Whenever possible, encourage the client or their family members to get complete copies of records from the RCFE including the entire administrative file, all care records/service notes/medication administration records/ADL notes, incident reports, etc.

Names and contact information for care providers and other residents and their family members – Employee turnover can be extremely high in RCFEs and rapid turnover makes it difficult to contact the witnesses who provided care or witnessed the abuse and neglect of the elder or dependent adult. Getting names, addresses, phone numbers and email addresses for anyone who provided care or worked at the facility at the time of the elder's stay can make obtaining witness statements and conducting depositions much easier down the road.

## Timely file suit

With living clients, timeliness is extremely important due to the sensitive nature of the client's physical condition. Check the licensure of the facility, as this will dictate the statute of limitations. Again, filing as soon as possible is key.

With the ongoing delays in the civil court system as a result of recent budget cuts, clients often find waits of several years between the time of filing a lawsuit and the time the suit goes to trial. Filing the lawsuit as soon as possible and well before the statute will ensure that elderly clients are able to participate in their case to the fullest extent possible. Also, file a motion for a preferential trial whenever possible.

## Get experts on board early

Title 22, which governs RCFEs and California's Skilled Nursing Facilities ("SNFs"), is broad and wide-ranging. Hiring an expert in the field, usually a nurse or someone who has served as an administrator in RCFEs and/or SNFs, and having him or her review the facility's records and your client's records, will ensure that critical issues are not missed. This will also allow you to tailor your discovery to ensure that any missing information is quickly obtained.

You may want to ask your expert to evaluate whether a resident was appropriate for a particular facility, and to review records to ensure that all medications were appropriate (and accurate), that the staffing was sufficient, and for any of the other tell-tale signs that indicate a facility was putting profits first at the expense of residents' well-being.

## Conclusion

Assisting with investigations and pursuing civil claims against the individuals and organizations who fail in their duty to care for and protect the most vulnerable members of society is our duty as members of the bar. By approaching cases in a systematic manner, we can improve our representation and increase the likelihood of a successful result for our clients.

*George R. Kindley is the founding partner of The Kindley Firm, San Diego, which focuses on nursing home litigation throughout California.*



Kindley