

MUSINGS OF AN ELDER ABUSE ATTORNEY

Ordained

Within five minutes of my birth, my Grandma Gladys proclaimed, “There’s my lawyer!”; a hope she had harbored for my dad who, instead, went into my grandfather’s modest business selling trucks and, throughout a rewarding career, built it into an internationally successful company. Thus, to my parents schooled on the streets of Brooklyn, the pursuit of a law degree by their son who loved to read, had the gift of gab, and mixed well with people made perfect sense. They had always believed a Juris Doctorate to be an excellent entrée to the world of “wheeling and dealing.” Fifty-one years later, I remain surprised that the young man intent on traveling the world and importing exotic wares practices law, not making “deals,” but wrestling with life’s big issues of family, death, and America’s business and health care models.

A Fruitful Initiation

They come from all walks of life -- rich, poor, gay, straight, devoutly religious, atheist, sophisticated, uneducated – yet when it comes to the question of care for their elder spouse, sibling, or grandparent, they all arrive at my office having wanted the same thing: compassion, dignity, and competence in providing for their loved one’s basic physical and emotional needs as well as their more complicated medical scenarios. Now, they desperately want to right a wrong.

I was an attorney for five years before handling my first Elder Abuse case. Like all plaintiff attorneys, I was used to hearing stories of physical and emotional difficulties and loss. However, I had never even heard of the emerging area of Elder Abuse law. Thus, prior to our first meeting in 1993 when I read Kay Delaney’s two page narrative describing the

shameful level of care her mother, Rose Wallien, received at Meadowood, a nursing home in Lake County, CA, I was moved and horrified. Clearly, Kay was a precise historian and a devoted daughter advocating for her mother. Despite Kay visiting her mother more than once a day, attempting to forge relationships with front line staff, and complaining to the Director of Nurses about deficiencies related to Rose's care, Rose was still recklessly neglected by those entrusted to meet her needs. Rose entered Meadowood to receive rehabilitation for a broken ankle and was dead from reckless neglect within four months. Five years later, after many depositions, thousands of pages of discovery, interviews with ex-employees in Lake County cafes and bars, abusive defense council, a three week trial rotating between the Courthouse and County Supervisors' chambers, a First District Appeal victory involving a painstaking review of Elder Abuse law legislative history (Welfare and Institution Code Section 156000 et. seq.), and with the assistance of many individuals more talented than I who helped us win a unanimous California Supreme Court decision establishing the viability of Elder Abuse law (*Delaney v. Baker* (1999) 20 Cal. 4th 23), I had found a calling. ¹

Absorb the Story

I sit in my office waiting to meet with a potential new client. Typically, before this type of meeting I have reviewed medical records, defendant's ownership history, and the nursing home's Department of Public Health regulatory history. Further, my assistant and I have conducted numerous phone conferences with the client ascertaining key dates, family history, and a myriad of other issues. Trying to quiet my mind so I can be present with the predictably sad story I will hear, I endeavor to forget about the obstructive defense attorney discovery just reviewed, phone calls regarding my father's heartbreaking Alzheimer's, my

¹ The Elder Abuse and Dependent Adult Civil Protection Act- EADACPA-created remedies and encouraged attorneys to protect this vulnerable population. Although I have prosecuted cases on behalf of dependent adults, and against Residential Care Facilities for the Elderly, Hospitals, etc. For purposes of this article I am referring to Skilled Nursing Facilities.

own family obligations, replenishing the law office business account, and what a beautiful off-shore-wind beach day it could be for me if I weren't sitting behind a desk. I remind myself that, despite having heard countless variations of the inevitable story of betrayal of trust, neglect, sibling rivalry, and the many complex issues entwined with long term care litigation, this client's story is unique and needs to be heard as it was lived and as it continues to be played over and over in his/her head.

People sit across from me. I take out the tissues, and they tell me of horrors that could have been avoided but for inadequate training and staffing due to the greed of corporate facility owners. The vast majority of the stories I hear concerning Elder Abuse involve a loved one who has already died of neglect. Dehydration, malnutrition, pressure sores the size of your fist, overmedication, obvious signs of infections and suffering ignored, multiple falls and broken bones, indignities of loved ones lying in urine and feces, their pleas for help ignored, are the common threads woven through these testimonies of grief. My clients experience regret, guilt, anger, denial and confusion. They want and *need* recognition that their loved one – a spouse, grandparent, or even a disabled child – was grievously wronged, and that they themselves were violated and left with extremely scarring memories with which they will forever struggle to make their peace. Almost to a person, they passionately state their desire to help others avoid the same terrible experiences. To have a lawyer champion their cause, to possess the language and skills to create a public record of what happened to their loved one, and to give validity to their story is almost always more important than the money. Realistically, I know from experience that my clients will grow to care more and more about the money, but I always try to remind them, as well as myself, that ultimately their cases are about justice, public policy, and creating a community standard that places compassion and care of the vulnerable above greed and the almighty dollar. This reminder is very important when self-doubt, fatigue, burnout and ego creep into my thoughts. I think

about the families with which I am still in touch, the cards, letters, and simple homemade gifts received in appreciation, but most importantly, I summon my pride in being a plaintiff attorney and doing healing work. I picture my “from San Quentin to the penthouse” experiences of speaking with various and sundry family members in order to understand the full picture of events and relationships or to simply obtain a necessary signature to carry out the dry mechanics of the legal machine.

The Other Side

The story absorbed invariably comes back with a different slant. The complex interplay of numerous filters -- front line workers (nurses, certified nurses' aides, etc.), corporate owners and executives, and defense attorneys -- must be confronted as a formidable barrier to realizing the “truth.” Issues become even more convoluted when the machinations and lack of heart connection on the part of the insurance companies pulling the strings behind the scene are factored in. Sometimes, front line workers are honestly upset and feel blindsided by lawsuit allegations as they believe overall care was adequate or even good. Oftentimes, however, these individuals were not involved or were clueless as to when significant events occurred. It is important to absorb this part of the story and to remember there are people with legitimate feelings on the other side as most health care workers do not go into the field in order to hurt those in their charge. Fortunately, in most cases I am sufficiently appalled as to avoid conflicting emotions. Regarding defense attorneys, over the years I have come to understand that, in general, theirs' is oftentimes a “golden handcuffs” technical practice of law with inseparable ties to business interests. So it is a true pleasure when I have the opportunity to work with the rare attorney on the other side adept at balancing all of the aforementioned analyses and who does not obstruct when doing their utmost to persuade me that my valuation of the case is lacking. As to corporate owners and insurance companies on the other side, their behavior regarding Elder Abuse is no different

than in any other Plaintiff's practice area, and it could even be a bit worse as they do their best to cloak prevarications in MICRA (Medical Injury Compensation Reform Act) in order to loop back into the legal machine.

The Legal Machine

To hear, absorb, and compassionately acknowledge the client's story is imperative, but to overcome the formidable obstacles to achieving justice, one must navigate our complex and imperfect legal system. Furthermore, Elder Abuse cases require understanding the subtleties of mainstream America's mores and beliefs regarding the elderly who are, unfortunately, all too often left behind in today's fast-paced and highly mobile society. Even the cohesion of close families is often compromised by the pursuit of individual fulfillment and financial independence.

In this age of Tort Deform and the Corporatization of Society, people have been bombarded with messages of personal responsibility and the sanctity of big business driving the economic engine. This ethos often creeps into the judiciary and the very government agencies supposedly protecting consumers and the vulnerable population our hard won Elder Abuse laws were originally enacted to protect. Defense attorneys often successfully cloak their clients' reckless neglect in medical language and legal statutes readily grasped by Judges. Similarly, they invoke corporate doublespeak of "privacy, proprietary interests, etc." in order to distract from the more insidious neglect and systematic business strategies employed in facilities where profits are routinely placed before people and basic moral decency concerning the vulnerable residents entrusted to their care. As a result, absorbing the client's story is even more crucial in order to persuade the Court and the defense that these cases are not focused on garden variety negligence or medical malpractice, but rather a business culture that must be changed.

A Path to Justice

Over the years, I have seen millions and millions of dollars paid in settlements and trial verdicts, and although I do believe lawsuits have spurred some betterment of the long term care business model, I am also keenly aware of how obscene profits allow the numerous bad actors to resolve lawsuits and blithely continue down the same path of greed. For example, I will never forget a case I handled in which a large settlement was quickly paid immediately before trial so the corporation could have a “cleaner” bankruptcy. Eventually, this company emerged from Chapter Seven and was sold for a substantial profit.

Given the large increase in the need for Long Term Care, fundamental changes in civil and criminal legal enforcement of already existing law are needed. Layers of LLCs (Limited Liability Companies) are created to block transparency and to cover up the true extent of the self-dealing in which they routinely engage. For example, a nursing home will pay a management company - owned by the same people/“corporation” as the nursing home - huge sums for management services when the same services, yet better and more cost effective, could be procured on the open market. Proof of the incredible profits in the Long Term Care industry is the recent trend of sales to private equity funds. More vigorous criminal enforcement of Medicare fraud by the Federal Government and more aggressive prosecution of understaffing and false charting by the Attorney General’s Office are necessary for the creation of effective Injunctions to severely curb such despicable business practices. I believe these measures would go a long way towards sensitizing hospital physicians, coroners, paramedics, and other health care providers to the sad acts of Elder Abuse and Neglect they so often observe and/or treat as well as to as to their ethical duty to more actively report and track such incidents. Similarly, more active flexing of Government legal muscle coupled with the medical community focusing on this increasingly alarming

issue would hopefully force the notoriously inept Department of Public Health enforcement division to considerably step up their efforts.

Because the majority of the institutionalized vulnerable elderly no longer work or vote, they have few effective advocates other than big-hearted nonprofits, academics, plaintiff attorneys, and the occasional champion within the government bureaucracy. The efforts of these folks help to restrain the industry from unbridled greed and direct crucial media attention to the issues. As the media increasingly focuses its spotlight on these matters, hopefully, people will become rightfully outraged, support the underfunded nonprofits, and put pressure on their government officials. As we all know, the right message broadcasted via the media is quite powerful. In fact, when clients of mine have had the opportunity to tell their stories to Congress, CNN, and local news and print media, recognition of their loved one and their heartfelt connection to the big picture crystalizes. Additionally, media exposure frequently brings forth important witnesses by giving them the courage to speak out. Further, as Elder Abuse lawsuits are prosecuted and publicized, aggrieved parties who may have previously lacked the knowledge and/or courage to bring a lawsuit are emboldened to seek justice.

This justice manifests itself in various forms. Winning large sums of money in settlements and verdicts is important as a means of punishing wrongdoers and also as a deterrent to future indefensible conduct. I have been involved in multiple cases in which obtaining money afforded immediate benefit to a living abused elder (and peace of mind on the part of the family caring for them) by making possible the provision of essential custodial and medical care. Justice is also achieved when those who have battled the corporate medical machine on their own find support in attorneys able to passionately voice their concerns and effectively advocate on their behalf. Admittedly, the occasional client will disappoint and be overly focused on the money, but in my personal experience and in the cases I choose to

prosecute, people genuinely desire an opportunity not only to punish the offenders, but also to work their way to a place of emotional healing where they are able to feel that their loved one did not suffer in vain. Lastly, for me as the attorney, justice is also achieved when I receive adequate monetary compensation thus allowing me to not only make a living, but to also amass the resources to fight another day.

On the Bright Side

In spite of all the heart wrenching and unforgiveable lack of humanity I have battled all these years, I take solace and gather strength from watching as many fine attorneys take up the cause of the vulnerable elderly in new and creative ways which is exactly what the original backers of the EADACPA/Welfare and Institutions Code envisioned. Further, many attorneys, nurses, physicians, academics and nonprofits willingly and generously share work product. Often, people at social functions are ready to tell me how they don't like lawyers, but once I tell them what I do, their entire demeanor and attitude changes, and they frequently say "thank you". True, I am personally gratified when I receive these thanks, but of greater significance, such conversations indicate that the public is becoming increasingly aware of Elder Abuse issues. As I always tell my clients, similar to Women's Suffrage and Civil Rights, Elder Abuse requires public outrage to bear pressure upon the political, legal, corporate, and medical arenas. I am proud of being a part of this movement in my own small way, and I am gratified to have chosen a challenging avocation that allows me to significantly control my own schedule to make time for the travel and adventure I have always needed. While I've definitely fulfilled Grandma Gladys' wish to have a lawyer in the family, I know in my heart that the area of law I have chosen to champion is one which is essential to the well-being of many families, and for that, I believe she would be proud.