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What is real

A LOOK AT THE ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT AND THE DIFFICULTIES FACED IN PROTECTING ELDERS

There was once a velveteen rabbit, and in the beginning, he was really splendid. He was fat and bunchy, as a rabbit should be. The velveteen rabbit's friend was the Skin Horse. The Skin Horse had lived longer than any of the other toys. He was so old that his brown coat was bald in patches and showed the seams underneath, and most of the hairs in his tail had been pulled out to string bead necklaces. He was wise as he had seen many things in his long life.

"What is REAL?" asked the Rabbit one day. "Real isn't how you are made," said the Skin Horse. "It's a thing that happens to you. When a child loves you for a long, long time, not just to play with, but REALLY loves you, then you become Real."

"Does it hurt?" asked the Rabbit.

"Sometimes," said the Skin Horse, for he was always truthful. "When you are Real you don't mind being hurt."

"Does it happen all at once, like being wound up," he asked, "or bit by bit?"

"It doesn't happen all at once," said the Skin Horse. "You become. It takes a long time. That's why it doesn't happen often to people who break easily, or have sharp edges, or who have to be carefully kept. Generally, by the time you are Real, most of your hair has been loved off, and your eyes drop out and you get loose in the joints and very shabby. But these things don't matter at all, because once you are Real you can't be ugly, except to people who don't understand."

Litigators of Elder/Dependent Adult Abuse/Neglect cases represent the Real. Our clients are Real. To understand Real, you have to be real. You do not have to be old, but you must be real in multiple ways. You must be real as in authentic. You must be willing to open your heart and your mind, and most importantly, you must be willing to be vulnerable. You must also be willing to hurt. You must be willing to give of yourself in a way that requires you to carry a burden that so often feels like a weight too heavy to carry. So, you cannot break easy.

It is true advocating for the vulnerable has the potential to be one of the most fulfilling professions around. It is one of the few specialties where we openly support our fellow plaintiff lawyer competitors. Most of us would rather help a competitor so a victim has a good and righteous outcome, rather than be motivated by our own financial gain. We believe that we are our brother's keeper. Because when we chose this specialty, we were idealistic in our beliefs that if we poured our hearts and souls into this, our cases just might have, and definitely should have the ability to chip away at a broken system and eventually change it.

When we chose law in general, we did not expect litigating would be easy. But when we chose elder abuse/neglect litigation, what we did not expect was to feel like we were/are carrying the weight of all our futures on our shoulders. Yet here we are. Elder abuse/neglect is a concept we should *all* care very much about. Most of us will someday, some sooner than others, reach an age when we all have the potential to fall victim.

Abuse-and-neglect cases are not for the faint at heart. We accuse corporations and individuals of committing awful acts. We allege that money is more important to these defendants than people. We question their humanity at every turn. Even in, and generally more so in our most righteous cases, the response we receive is fire, fury, contention, indignation, many untruths, lots of deception and, sadly, more unethical conduct than we ever thought we would see in what is supposed to be an honorable profession.

One could argue that litigation by its very nature is meant to create many of these concepts. But this is different. This practice has changed over the past two decades. Abuse/neglect cases allow for the pleading of punitive damages without leave of court. As such, the stakes are obviously high on both sides. Yet historically, abuse/neglect cases did not require a scorched earth approach. Today, there seems to be no other way.

When your client is alive

In a live victim case, plaintiff's counsel's duty is to their live client, not to the eventual heirs. As such, the internal battle wages from the moment the case is signed up. Plaintiff's counsel is always trying to push the case toward a quick end to net the plaintiff money during their lifetime to enhance the quality of their remaining life. Trial preference generally must be sought with elder victims, all the while knowing 120 days is not enough time to prove the corporate ratification and alter ego/joint enterprise status of the defendant entities where all the money lies. Nursing homes inevitably run financially in the red, or close to it. The money is funneled typically to other related corporate entities with the same owners/operators. But proving control and the necessary connection requires countless depositions and documents (like loan documents, tax filing status, overlap of officers and directors, written business contracts, budgets, emails, financial incentives, etc.).

It should be understood the Elder Abuse and Dependent Adult Civil Protection Act has no cap on damages for the pain and suffering of a live victim. Conversely, if the elder victim passes away prior to the conclusion of their litigation, their pain and suffering under certain circumstances can survive their death but is capped at $250,000. Thus, enter the world of delay, obstruct, and delay some more.

It starts from the inaugural request for medical records from a potential defendant facility. Despite regulations which require the production of those records in only a few days, often the request is ignored. An Evidence Code section 1158 action is often required, just to get one's medical records. This process alone takes weeks to months.

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Once records are received, a complaint is filed with often 40-50 pages of specific facts. Many times, in live-victim cases, one must forfeit suing the corporate controlling entities with the financial resources to pay a punitive verdict, because if those entities are sued, a removal to federal court for lack of personal jurisdiction motion will follow. Should the complaint remain in state court, or be remanded back to state court, an attempt is then made by defense to compel arbitration. This occurs even if the signor of the arbitration agreement has zero authority to contract for the elder. Plaintiffs' counsel presumes the motion to compel arbitration will be denied, but knows the denial will be appealed, even if completely meritless. This process triggers the automatic need to file a Motion for Preference, or the case proceeds in the Court of Appeals for likely two years. If the Motion for Preference is granted when appealed, the Court of Appeals is required to place that appeal before the other cases on its docket.

Once past this touch-and-go stage, regardless how detailed the complaint, a demurrer/motion to strike will be filed. With luck and good pleading, it will require only one opposition. But by now, plaintiffs are often months past the original filing date, and plaintiff's counsel's stomach lining is already starting to erode at the fear of not moving the case quickly enough.

In the meantime, 20 days after serving the complaint, plaintiffs promptly serve written discovery and deposition notices on the defendants. This is virtually always met with blanket objections, typically even to 1.1 of form interrogatories. Depositions almost never commence as noticed, often requiring seven or eight notices and ultimately motions to compel. Defense denies representation of witnesses such that subpoenas are required, until the day before the noticed deposition, when representation has miraculously occurred and now the subpoenaed deposition date is not workable. Even the most basic of discovery requests for policies and procedures, job descriptions, and witness's identification require massive meeting and conferring and eventual inevitable more motions to compel. The evening before the hearing on such motions, amended responses are received, often with policies that post-date the incident period, but just enough to tell the court that responses were sent, and the motions are now moot.

Another round of meeting and conferring ensues. More promises for subsequent responses are promised after requests for 30-, 60-, 90-day grace periods are requested, under the guise of difficulty in tracking down the requested documents. Eventually, when the process has resulted in the loss of one's hair from pulling it out, another motion is filed requesting sanctions. Meanwhile, plaintiff's counsel's stomach lining has become thinner and thinner as the stress of trying to balance the elder plaintiff's right to evidence is weighed against the clock of an impending trial date with virtually no evidence.

Once one finally receives a court order for basic discovery, that order often results in a motion for reconsideration, citing zero new facts or new law. The motion is nothing more than a second bite at the apple to try to change the mind of the court. Or better yet, to stall, because it is now months later, and zero documents or witnesses have been produced. This motion is met with an opposition requesting sanctions, which are often granted. Yet no one cares, the goal is still being met. A few thousand dollars in sanctions certainly are better than a potential punitive damages verdict.

The court-ordered discovery is ignored as are the sanctions. Another motion to enforce the court order is filed. That results in typically a data dump the day before the hearing of that motion with reams of paper of often duplicate documents copied two and three times in the production so the representation can be made to the court of production of hundreds if not thousands of pages. Most often the policies or job descriptions that are pertinent or relevant to the case are glaringly missing. But that requires yet another meet and confer process . . . you get the point.

Representing an elder victim who does not require a Motion for Preference is unusual. But in those cases, the defense goal is the same. Delay, obstruct and delay some more. Motions for psych examinations are brought in a physical injury case when damages are not sought beyond that amount of typical pain, suffering or distress. Motions are brought to seek tax records of the plaintiff when no lost wages or lost income is being claimed. When these motions are inevitably lost, they too result in meritless appeals.

When the victim is deceased

This process is a bit different with a case where the victim is deceased. Not faced with the tightrope walk of a live victim, plaintiffs know to request a discovery referee right up front. Judges try hard, but in the face of tactics like these, judges' patience wears thin very quickly when seeing what appears to be two sides who bicker and just cannot get along. Attempts are made at IDC (Informal Discovery Conference) but those typically result in the loss of months and recommendations with orders that are never followed.

The discovery referee

Alternatively, a discovery referee is paid handsomely to pay attention to the details of each motion and sees the conduct of both sides. Discovery referees can cost-shift when it becomes necessary. And because they have more time to pay attention to the details, they understand why large sanction awards are warranted and eventual evidentiary sanctions are appropriate. It is not unusual to have to file 40 motions to compel in a large case. It is not unusual to receive sanction awards of $40,000-$50,000. Yet no one cares. Rarely are they ever even paid. After they pile up and just prior to when it seems evidentiary sanctions are to be awarded, the cases settle, wrapping the sanctions into the overall settlement.

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Over the past two decades, monetary sanction awards have become more prevalent and larger. But it remains difficult if not almost impossible to find a discovery referee who isn't gun shy about awarding evidentiary sanctions. Moreover, it is not unusual in deceased-victim cases to take two years and three and four rounds of motions, just to get basic initial discovery responses. Mind you, many of these insurance policies are depleting policies, which erode the policy limits by payments to cover litigation costs and payment to defense lawyers. The cost of paying a discovery referee to pay close enough attention to recognize the truth about the shenanigans being played? It's close to $1,000 an hour, which can quickly add up to tens of thousands of dollars in fees.

Reaching jurors

Dependent-adult cases are a whole different beast. Seemingly some of the most unimaginable happens to those who our society places on the bottom rung of the value ladder. Commonplace are assaults, rape, sodomy, and profound neglect of even basic human rights, needs and dignity. Yet the behavior continues to be defended in litigation much the same as outlined above, with a tone and tenor of "why should we care, we don't even know if they know what happened to them." The weight here is equally as heavy, but for different reasons. Advocates for dependent adults know that humans are selfish beings. Jurors tend to only care about what might affect them or those they love. As advocates, the hurt we feel, the weight we carry is the fear we cannot find some commonality to strike a chord in jurors to engender a deserved outrage.

Trial brings yet another element of unrest and disappointing heartbreak. Yes, elders are old and infirm. Dependent adults often have disabilities and behaviors that make their care needs specialized and challenging at times. But let's be clear. Every defendant owner and operator made a choice. They agreed to be paid, primarily from government funds, in exchange for promising to provide individualized care to every resident/patient twenty-four hours a day, seven days a week. They specifically chose the business of caring for the old, the infirm, the specialized and the challenging.

Yet, after delaying, obstructing, and often concealing evidence, the trial strategies are often to focus on the age, the infirmity, the disability, the behaviors, and the challenges. Defendants focus on the exact elements that caused the need for their financial windfall. Moreover, almost every case results in blaming the victim for their own neglect. But even worse, the defense unbelievably often focuses on blaming the victim's family. It is common to blame the family for utilizing the exact services the defendant marketed to provide. But the *most* egregious is the common defense of blaming the family for the elder's death when carrying out the DPOH/DNR (do not resuscitate) orders the elders put in place as their end-of-life wishes. After heinous acts have occurred, family members are frequently asked by subsequent healthcare professionals to make the gut-wrenching choice of carrying out these end-of-life requests their loved ones have put in place. This results in a causation dispute at trial, with the family being blamed as the cause.

Why? Why are these the litigation tactics? The answer seems easy. Money truly has manifested itself into the root of all evil. It seems in these cases, no one cares any more about what is right and what is wrong. We strive to be able to get our day in court in hopes a jury will care. But gone are the days of seeking the truth, distinguishing right from wrong, your word is your bond, a handshake can be trusted.

Summary

Why this article? Why complain (or whine as some may perceive it)? Let us recap. Aging is real. All of us who have the good fortune to wake up tomorrow are doing it. Some of us are blessed to do it longer than others. But statistically, more of us are doing it than ever before. There is a reason a defendant in cases like these would rather pay $200,000 to a discovery referee than give up discovery. There is a reason defendants would rather be sanctioned $40,000-$50,000 in just one round of discovery motions. It does not take a rocket scientist to figure out why that is. And so long as that practice works, we all continue to be hugely at risk when we inevitably need the services of those who have gotten away with their conduct, hiding behind these tactics.

In case we have forgotten, elders and dependent adults were never meant to be commodities. With any luck, we all live long enough for our hair to be loved off, our eyes to get a bit droopy and long enough for our joints to get a little loose or stiff, as the case may be. But likewise, hopefully we as a country stop taking advantage of the vulnerability of these human beings. Our elders are our foundation that our lives are built on. Dependent adults were never given a choice. As has been said by many others, we must grade ourselves as a nation, not on how we treat the rich and the privileged, but on how we treat those who are not. At present, we should be ashamed. Very ashamed. We can do better. We must do better. The answer is easy. #humanityfirst

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