

# Why Many Meritorious Elder Abuse Cases in California Are Not Litigated

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## Introduction

**E**LDER ABUSE HAS BECOME A NATIONAL EPIDEMIC that is a particularly acute problem in California. The California Attorney General has estimated that 200,000 elderly Californians are abused each year.<sup>1</sup> Fueled by the aging baby boomer generation, explosive growth in California's elderly population is anticipated this decade.<sup>2</sup> Attempting to respond, the California Legislature enacted legislation protecting California's elderly and targeting their abusers, most notably the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA").<sup>3</sup> EADACPA provides enhanced remedies to elderly victims of physical abuse in addition to other available legal remedies.<sup>4</sup> The Legislature also passed a law authorizing the imposition of treble damages for unfair or deceptive business practices perpetrated against senior citizens.<sup>5</sup>

Unfortunately, the remedies provided by the California Legislature have proven to be a mirage. If elder abuse claims go unreported

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1. Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 434 (2008).

2. *Id.* at 433-34. The number of Californians aged sixty-five years of age or older is expected to rise from 4.9 million in 2003 to 9 million by 2020. *Id.* at 434.

3. CAL. WELF. & INST. CODE §§ 15600-57 (West 2011 & Supp. 2012).

4. *Id.* § 15657.

5. CAL. CIV. CODE § 3345 (West 2008).

or are inadequately investigated, legal remedies can offer no protection at all. Even if elder abuse claims are properly investigated and reported, the legal remedies offer only illusory protection because they fail to provide sufficient incentives for legal practitioners to take on many meritorious elder abuse claims. As a result, many meritorious elder abuse claims are never litigated. Compounding the inadequacies in reporting, investigation, and the law itself are the practical difficulties often faced by an elder law attorney when the elderly victim is both the client and the primary witness. The elderly client may be of questionable mental capacity,<sup>6</sup> challenging the legal practitioner to determine whether he or she truly has authority from the client to take on the representation. The client's family members, and in particular the client's adult children, may become intimately involved in the representation, which can confuse the direction of the representation for the legal practitioner and raise concerns that undue influence is being exerted on the client. As witnesses, elderly victims may have physical, mental, or psychological deficiencies that affect their ability to provide proper testimony and leave them vulnerable to vigorous cross-examination. If jurors believe generally that elderly witnesses have less reliable perceptions and memories, they may give less credence to their testimony.

This Comment addresses the practical, financial, and legal obstacles facing a California victim of elder abuse. Part I of this Comment addresses the practical hurdle of obtaining legal redress for many elder abuse victims when the incidents of abuse are not reported or are reported but inadequately investigated. Part II of this Comment discusses the lack of sufficient incentive under California law for attorneys to take on many elder abuse cases. Part III of this Comment proposes changes that, if implemented, will create a means of providing justice to elder abuse victims on claims that would not otherwise be litigated.

## I. Getting the Cases Reported and Thoroughly Investigated

Elder abuse claims will never be pursued if they are not reported. For every reported incident of elder abuse, at least five others will go unreported.<sup>7</sup> The elderly fail to report instances of abuse for many reasons. They may fear retaliation from their assailant.<sup>8</sup> They may be

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6. See *infra* Part II.F.

7. Linda K. Chen, *Eradicating Elder Abuse in California Nursing Homes*, 52 SANTA CLARA L. REV. 213, 215–16 (2012).

8. See Meirson, *supra* note 1, at 434.

too proud to admit that they were vulnerable enough to become a victim of abuse.<sup>9</sup> Particularly when sexual abuse is involved, they may be too ashamed to report the incident.<sup>10</sup> Mistrust of law enforcement or the fear that law enforcement may not consider the abuse to be a criminal matter also contributes to the underreporting of incidents of elder abuse.<sup>11</sup>

A victim of elder abuse may decide not to report the incident simply to avoid getting caught in the maze that is our legal system. Litigation is extremely stressful and time-consuming.<sup>12</sup> The elderly victim may have health, cognitive, or emotional issues to deal with that might be exacerbated by impending litigation. Knowing that lawsuits can take years to litigate,<sup>13</sup> elder abuse victims may be reluctant to spend the remaining years of their life litigating a claim they may not live to see adjudicated.<sup>14</sup>

#### A. Reporting Family Members, Caregivers, and Doctors

By far, the most significant roadblock to getting cases of elder abuse reported can be explained by one simple fact: most elder abuse is perpetrated by the victim's own family,<sup>15</sup> and often by the victim's adult offspring.<sup>16</sup> Elderly victims will often refrain from seeking civil or possibly criminal sanctions against their own children no matter how egregious the abuse.<sup>17</sup> If he or she believes the child's upbringing

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9. See *id.* at 444–45 (describing a case in which the elder abuse victim, struck in the head by a motorcycle helmet, refused to admit in her trial testimony that she was hurt by the assault even though her injuries required substantial hospitalization).

10. See Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 166–69 (2006).

11. *Id.* at 168; see also Meirson, *supra* note 1, at 445–46.

12. Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, 12 PROB. & PROP. 52, 56 (1998) (“Because of the slow pace of litigation, many of the frail elderly do not survive long enough for a lawsuit to come to judgment.”).

13. Ryan McCarthy, *Aegrescit Medendo: Addressing Barriers to Medical Malpractice Litigation Faced by the Elderly*, 18 ELDER L.J. 391, 406 (2011).

14. *Id.* (discussing the time a typical medical malpractice case takes to come to fruition). As will be discussed in section II A-B, most elder abuse cases are pursued as actions for medical malpractice.).

15. Mary Twomey, Mary Joy Quinn & Emily Dakin, *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CTR. FAMILIES CHILDREN & COURTS 73, 75 (2005). Ninety percent of all elder abuse is perpetrated by the victim's family. *Id.*

16. *Id.*

17. EDWIN KASSOFF, *ELDER LAW AND GUARDIANSHIP IN NEW YORK* § 2:73 (1997) (“Elders who are abused at the hands of their adult children are generally loath to involve the criminal justice system in their predicament.”).

may have been a contributing factor, the elderly parent may even feel partially responsible for the abuse.<sup>18</sup>

The abuser may also be the victim's caregiver, whom the victim trusts and relies on, making the victim reluctant to report the incident of abuse for fear that the abuser will stop providing care.<sup>19</sup> Furthermore, abusers frequently isolate the elderly victim from the outside world.<sup>20</sup> The abuser may convince the victim that others cannot be trusted, making it extremely difficult for the victim to seek help.<sup>21</sup>

Special reporting problems may arise when the abuser is a physician. Because of the difficulties in meeting EADACPA's burden of proof, many cases of elder abuse against a physician are ultimately pursued as medical malpractice actions.<sup>22</sup> Moreover, the elderly victim may be more hesitant to file a lawsuit against a personal physician with whom they have an established relationship.<sup>23</sup> One study found that the elderly accounted for one-third of hospital admissions but were only responsible for ten percent of medical malpractice claims.<sup>24</sup> Since the elderly have a higher risk of medical injury, they may also be less demanding of their physicians and may have lower treatment expectations.<sup>25</sup>

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18. Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 *LOV. L.A. L. REV.* 589, 608 ("Parents often fail to report maltreatment because of the 'shame and stigma of having to admit they raised such a child.'").

19. Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser's Right to Inherit*, 23 *QUINNIPAC PROB. L.J.* 214, 218 (2010).

20. See Betsy Abramson, Bonnie Brandl, Tess Meuer & Jane Raymond, *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*, 3 *NAELA J.* 47, 48 (2007) ("Abusers use their power and control to isolate victims and, by so doing, make it easier to engage in physical, emotional and sexual abuse and financial exploitation. Abusers isolate their victims for essentially two reasons. First, they want the victim to be focused entirely on the abuser's needs. Other social contacts allow victims less time for their abusers, which is a right of victims that abusers do not accept. Second, abusers do not want their victims to develop sources of strength that could contribute to their independence or make them desirable to others. Most abusers are aware that a victim's social contacts can bring her strength and support that could ultimately enable her to escape the abuser's control. Consequently, abusers commonly attempt to keep their victims completely dependent on them to increase their power.").

21. Cheryl C. Mitchell & Ferd H. Mitchell, *Elder Abuse Through Undue Influence*, 26 *WASH. PRAC. ELDER L. AND PRAC.* § 5.16 (2011).

22. See *infra* Part II.A–B (discussing the difficulties in meeting the burden of proof under EADACPA, which can make an action for medical malpractice a more viable legal option).

23. McCarthy, *supra* note 13, at 405–06.

24. *Id.* at 395.

25. *Id.* at 406.

Reporting delays hinder criminal investigations, and therefore frustrate thorough investigation of elder abuse claims.<sup>26</sup> Ultimately, physical evidence of the abuse may simply fade away.<sup>27</sup> The victims may recover without record of their injuries, and witnesses to the incident may die or be convinced to remain silent.<sup>28</sup> Elderly victims may not recall the incident accurately. California law requires most health care workers, including those working in nursing homes, to provide written reports of physical elder abuse.<sup>29</sup> However, workers may not report the abuse because they fear adverse employment repercussions, or they may not possess the requisite training to recognize the abuse.<sup>30</sup> Additionally, when the appropriate state agency is eventually notified, the consistency in agency response is often suspect.<sup>31</sup>

The story of an elderly victim, Luis Aguilar, who was struck in the mouth by a staff member, illustrates such inconsistency. The facility waited two days before reporting the incident to an ombudsman, and four days before reporting the incident to the Department of Public Health (“DPH”).<sup>32</sup> DPH documents reflect that it notified the Bureau of Medi-Cal Fraud and Elder Abuse (“BMFEA”) two days after it had been notified, however BMFEA documents reflect that it was not notified until nearly three weeks after the incident.<sup>33</sup> BMFEA sent an investigator over a month and a half after the incident occurred.<sup>34</sup> By the time Luis’ injuries were investigated, the evidence of abuse was unavailable.<sup>35</sup> At long-term care facilities, California ombudsmen<sup>36</sup>

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26. Chen, *supra* note 7, at 241–42.

27. *Id.*

28. *Id.* at 242.

29. CAL. WELF. & INST. CODE § 15630, *et seq.* (West 2011 & Supp. 2012); *see also* CAL. ATT’Y GEN. CRIME OFFICE, YOUR LEGAL DUTY . . . REPORTING ELDER AND DEPENDENT ADULT ABUSE (2012), *available at* [http://www.ag.ca.gov/bmfea/pdfs/yld\\_text.pdf](http://www.ag.ca.gov/bmfea/pdfs/yld_text.pdf).

30. Videos, websites and training programs are available specifically to train certified nurse assistants, those typically employed in the nursing home setting, in the recognition and prevention of elder abuse. *See, e.g., CAN Training Solution Video: Elder Abuse*, HCPRO HEALTHCARE MARKETPLACE, <http://www.hcmarketplace.com/prod-3423-EXCROSS/CNA-Training-Solution-Video-Elder-Abuse.html> (last visited Feb. 13, 2013); *Neglect and Abuse*, CAN TRAINING HELP, <http://cnatraininghelp.com/cna-study-guide/neglect-and-abuse/> (last visited Feb. 13, 2013); *Domestic Violence and Elder Abuse for CAN’s & HHA’s*, CNAZONE.COM, <http://cnazone.com/Tests/Materials/C003Materials.pdf> (last visited Feb. 13, 2013).

31. *See, e.g.,* Investigations Unit, *Victimized Twice: Abuse of Nursing Home Residents, No Criminal Accountability for Perpetrators*, DISABILITY RIGHTS CAL. 4, 17 (Apr. 2010), *available at* <http://www.disabilityrightsca.org/pubs/548801.pdf>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

are legally charged with advocating for the residents' dignity and quality of life.<sup>37</sup> Elder abuse that occurs at long-term care facilities must be reported to either the ombudsmen or to local law enforcement.<sup>38</sup> If ombudsmen are made aware of elder abuse, federal law requires the abused resident to provide written consent before the report of abuse can be disclosed to an outside agency.<sup>39</sup> However, only twenty-five percent of nursing home residents provide such consent, essentially undermining the reporting and investigation of instances of elder abuse at long-term care facilities.<sup>40</sup>

### B. Deficient Investigation of Elder Abuse Crimes

Deficient investigations are one of the major challenges facing civil litigators who pursue elder abuse claims. Since elder abuse is frequently reported after the physical evidence of the abuse has disappeared, law enforcement cannot effectively investigate many cases.<sup>41</sup> Victim testimony, without substantiating physical evidence, may lead a civil litigator to believe that the evidence is insufficient, and therefore not worth the time and effort to take on the case. In nursing homes, where elder abuse is frequently perpetrated, cause of death is routinely not investigated unless a formal request for an investigation is made.<sup>42</sup> Additionally, nursing home employees, who may be responsible for the abuse, may also have direct control over patient medical records, making it easy to hide evidence of the abuse.<sup>43</sup>

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36. *Long-Term Care Ombudsman Program*, CAL. DEP'T OF AGING (Apr. 12, 2012), <https://www.aging.ca.gov/ProgramsProviders/LTCOP/> ("The California State Long-Term Care Ombudsman Program is authorized by the federal Older Americans Act and its State companion, the Older Californians Act. The primary responsibility of the program is to investigate and endeavor to resolve complaints made by, or on behalf of, individual residents in long-term care facilities. These facilities include nursing homes, residential care facilities for the elderly, and assisted living facilities. The Long-Term Care Ombudsman Program investigates elder abuse complaints in long-term care facilities and in residential care facilities for the elderly.").

37. Chen, *supra* note 7, at 222–23.

38. CAL. WELF. & INST. CODE § 15630(b)(1)(A).

39. Chen, *supra* note 7, at 232.

40. *Id.* at 233.

41. *Id.* at 224.

42. Clarissa Bryan, *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*, 7 NAT'L ACAD. ELDER L. ATTY'S J. 199, 210 (2011).

43. See generally *Tracking Abuse in Nursing Homes*, CBS EVENING NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2000/02/25/eveningnews/main165186.shtml> (describing how a victim of elder abuse in a nursing home suffered a dislocated neck and broken wrist after being assaulted by a nursing home employee. The doctor's chart reflected that the patient suffered no injury, no loss of consciousness, and no fracture of her mandible,

The BMFEA is responsible for investigating elder abuse claims in California.<sup>44</sup> BMFEA also trains law enforcement to investigate elder abuse crimes.<sup>45</sup> However, because BMFEA's most recent training program was held in 2008,<sup>46</sup> many who are responsible for the investigation of these crimes today are left without adequate knowledge of how an elder abuse investigation should be conducted.<sup>47</sup> Furthermore, BMFEA only requires elder abuse reporting where the abuse amounts to criminal activity.<sup>48</sup> Since law enforcement is not currently being properly trained in the investigation of elder abuse crimes, it may be difficult for officers to recognize which cases amount to criminal elder abuse.<sup>49</sup> As a result, the civil litigator considering an elder abuse case may be required to undertake a substantial investigation and advance the required costs of that investigation, something they are unlikely to do.

## II. Finding Counsel to Take the Case

Even if elder abuse is reported and properly investigated, the victims then face the challenge of finding a civil litigation attorney who is willing to take the case. If the victim is looking for a contingency fee arrangement, the attorney must justify the risk of non-recovery by relying on the incentive of recoverable damages and/or an attorney's fees award. If the case will be expensive to litigate<sup>50</sup> and the victim is unable to finance the litigation expenses, the attorney may balk at risking a significant amount of money out-of-pocket, in addition to the time and effort associated with handling a case, for which he or she may never receive compensation.

### A. Burden of Proof Under EADACPA

Another factor that makes even meritorious cases unattractive to a prospective attorney are the many legal and evidentiary hurdles that make a physical elder abuse claim difficult to prove under California

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forearm, or wrist. The bruising apparent on the victim's body was purportedly a result of her "medical illnesses").

44. Chen, *supra* note 7, at 225.

45. *Id.*

46. *Id.* at 236.

47. *Id.*

48. *Id.* at 237.

49. *See id.* at 236.

50. For example, the private investigator fees to obtain the physical evidence needed to substantiate an abuse claim can greatly increase the cost of litigation. *See* 2 Tenn. Litig. Forms & Analysis § 17:1.

law. The enhanced remedies provided under EADACPA<sup>51</sup> can only be obtained in cases in which the conduct amounts to egregious physical abuse.<sup>52</sup> The burden of proof required under EADACPA leaves civil litigators with the seemingly impossible task of proving by clear and convincing evidence that the defendant is not only liable for the physical abuse, but that the defendant is also guilty of recklessness, oppression, fraud, or malice.<sup>53</sup> The clear and convincing evidence standard is particularly difficult to meet in cases with the types of evidentiary problems endemic in elder abuse cases.<sup>54</sup> Attorney's fees are recoverable under EADACPA, but only if the burden of proof is met.<sup>55</sup> Therefore, an attorney taking on a physical elder abuse case in California can only rely on the enhanced remedies of EADACPA in the most flagrant cases, where the evidence is not reasonably disputable:

In a case where the victim has died, the burden of proving by clear and convincing evidence that a defendant acted with malice, etc., in order to recover pre-death pain and suffering damages, is daunting to any litigator. In the great majority of cases, it is only because the showing of culpability under the Act equates with (or is very

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51. If a victim cannot prove abuse under EADACPA, often the only remedy is to seek compensation by bringing a common law claim (e.g. battery, medical negligence). *See, e.g.*, *Mack v. Stroung*, 95 Cal. Rptr. 2d 830 (Ct. App. 2000). The trial court granted a demurrer on the cause of action pursued under EADACPA where a physician left a resident in a bedpan for thirteen hours, resulting in an untreatable stage III bedsore. *Id.* at 831-32. The doctor then concealed the existence of the bedsore until a month later. *Id.* When the family was notified of the condition, the doctor refused to allow any inspection of the bedsore until an ombudsman intervened six days later. *Id.* A month after the inspection the doctor continued to refuse to consent to the resident's admission to the hospital. *Id.* The family of the resident decided to take the resident to the emergency room on their own. *Id.* The resident died two days later. *Id.* at 832. At trial, the decedent's heirs pled numerous causes of action under several legal theories, including under EADACPA for elder abuse and professional (medical) negligence. *Id.* at 833. The trial court judge sustained the demurrer on the cause of action for elder abuse, and only the cause of action for professional (medical) negligence survived. *Id.* Although the demurrer was reversed on appeal, it is hardly an isolated incident. *See Sababin v. Superior Court*, 50 Cal. Rptr. 3d 266 (Ct. App. 2006) (trial court granted summary judgment on the elder abuse cause of action under similarly egregious facts, but the case was reversed and remanded on appeal because the court found that there was a triable issue of fact as to whether the care facility was guilty of reckless, oppressive, or malicious neglect).

52. CAL. WELF. & INST. CODE § 15657 (West 2011 & Supp. 2012). As defined in EADACPA, physical abuse is limited to serious criminal misconduct such as assault, rape, battery, incest, and sodomy. *Id.* § 15610.63.

53. *Id.*

54. *See infra* Parts II.G–H.

55. *See* CAL. WELF. & INST. CODE §§ 15657, 15657.5 (the standard of proof for physical abuse is clear and convincing evidence, as opposed to the standard of proof for financial abuse cases, which is a preponderance of the evidence).

similar to) the showing required for punitive damages, that these cases merit the time and expense of proceeding.<sup>56</sup>

The California Advocates for Nursing Home Reform (“CANHR”) co-sponsored a bill in 2011 to lower the burden of proof under EADACPA to a preponderance of the evidence standard.<sup>57</sup> The legislation, which was battered by political opposition, never made it out of committee, effectively killing the bill.<sup>58</sup> Needless to say, lowering the burden of proof would make cases of physical elder abuse under EADACPA much more attractive to civil litigators. Unfortunately, there is substantial political opposition to lowering the burden of proof, based largely on the argument that the state of California, which is financially responsible for the Medi-Cal program, would increase Medi-Cal costs if litigation costs increased.<sup>59</sup> The argument against lowering the EADACPA burden of proof is also fueled by the concern that the anticipated flood of litigation resulting from a more generous EADACPA evidentiary standard would ultimately be passed on to consumers in the form of increased insurance premiums.<sup>60</sup>

The legislature provided the enhanced remedies of EADACPA in order to encourage attorneys to “take up the cause of abused elderly persons and dependent adults.”<sup>61</sup> This goal cannot be met if the clear and convincing standard continues to chill the pursuit of litigation under EADACPA. Even if the elderly victim has the financial resources to retain litigation counsel on an hourly basis, such a fee arrangement will often make little, if any, sense if the victim’s damages are largely non-economic.<sup>62</sup> Additionally, the victim will face extreme difficulty finding a litigator willing to take an elder abuse case under EADACPA on a contingency fee basis in the absence of potent evidence. If the abuser is a nursing home, health care facility, or physician, the victim’s attorney will likely be faced with experienced defense litigators who have marching orders to protect the defendant’s reputation at all

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56. RUSSELL BALISOK, RUTTER GROUP PRACTICE GUIDE: ELDER ABUSE LITIGATIONS § 9:9.

57. S.B. 558, 2011–2012 Reg. Sess. (Cal. 2011); *see also* ASSEMBLY COMM. ON APPROPRIATIONS, S.B. 558 BILL ANALYSIS, 2011-12 Reg. Sess. (Cal. July 13, 2013) [hereinafter S.B. 558 ANALYSIS], *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0551-0600/sb\\_558\\_cfa\\_20110712\\_141608\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0551-0600/sb_558_cfa_20110712_141608_asm_comm.html).

58. *See* S.B. 558 ANALYSIS, *supra* note 57. The bill was opposed by the California Association of Health Facilities and the California Hospital Association, among others, based on the argument that lowering the burden of proof would lead to increased litigation. *Id.*

59. *Id.*

60. *See also* Bryan Carney, *Crossing the Line: Litigation of Elder Abuse Claims Hinges on the Distinction Between Professional Negligence and Actual Abuse*, 30 L.A. LAW. 42, 44 (2007).

61. CAL. WELF. & INST. CODE § 15600(j) (West 2011).

62. *See infra* Part II.C.

costs.<sup>63</sup> Unless the EADACPA burden of proof can be met, the attorney may be restricted to pursuing a cause of action under California's Medical Injury Compensation Reform Act<sup>64</sup> ("MICRA") based on the negligence of the health care provider.

## B. Cases Under MICRA

In an action against a health care provider based on professional negligence, MICRA caps recovery for non-economic damages<sup>65</sup> at \$250,000.<sup>66</sup> This maximum recovery applies to nursing homes, physicians, hospitals, and other licensed health facilities.<sup>67</sup> If a jury returns a verdict for non-economic damages exceeding the MICRA cap, courts are bound to lower the damage award to \$250,000.<sup>68</sup> The MICRA damage cap was implemented in 1975, and has not been changed since.<sup>69</sup> The \$250,000 cap on MICRA non-economic damages, when adjusted for inflation, was roughly \$58,857 in 2008.<sup>70</sup> Thus, MICRA cases became unattractive to contingency fee practitioners, particularly in cases where the lion's share of recoverable damages are non-economic.<sup>71</sup>

Egregious cases of medical negligence that do not amount to physical abuse within the meaning of EADACPA may not provide suf-

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63. A telephone interview with James Bartimus, an experienced attorney whom had personally been involved in several nursing home abuse cases, discusses why nursing homes are quick to protect their reputation. "[Nursing homes] want to avoid unfavorable publicity . . . [c]ases involving negligence where the resident suffers or dies from malnutrition and/or dehydration allegedly as a result of the nursing home's failure to provide the appropriate care scandalize the industry and the parent corporation." Elliott B. Oppenheim, *Nursing Home Litigation: A Primer for Trial Lawyers*, 6 MICH. ST. U.J. MED. & L. 81, 87-88 (2002) (quoting telephone interview with Mr. James Bartimus; Bartimus, Frickleton, Robertson & Obetz, P.C., Jefferson City, MO (Sept. 17, 2001)).

64. See generally CAL. CIV. CODE § 3333.2 (West 1997 & Supp. 2013).

65. *Id.* "In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary damage." *Id.* § 3333.2(a).

66. *Id.*

67. Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 371 (2006).

68. See generally *id.* at 371-75.

69. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1282-83 (2004).

70. Alicia F. Wagnon, *Published Opinion Upholding the Constitutionality of MICRA Cap on Non-economic Damages*, SAN DIEGO COUNTY MED. SOC'Y (Sep. 13, 2011), <http://sdcms.org/published-opinion-upholding-constitutionality-micra-cap-non-economic-damages>.

71. See *infra* Part II.C.

ficient incentive to pursue litigation against a health care provider.<sup>72</sup> Unlike EADACPA, MICRA does not permit the victim to recover pain and suffering damages if the victim has died.<sup>73</sup> Thus, the health care provider defending a MICRA case has an incentive to litigate for as long as possible to wait out the death of the elderly victim, and thereby avoid paying a pain and suffering award.

In medical malpractice cases brought by the elderly, up to eighty percent of the recovered damages are non-economic.<sup>74</sup> Because non-economic damages are such an essential component of recovery for an elderly victim, the MICRA non-economic damages cap effectively chills litigation based on professional negligence.

Cases against physicians present their own difficulties. Juries generally view physicians as sympathetic witnesses and defendants.<sup>75</sup> In a study of approximately 11,000 medical malpractice trials conducted from 1985 to 1999 where the defendant was a physician, plaintiffs were successful only nineteen percent of the time.<sup>76</sup> Attorneys are unlikely to line up to take MICRA cases for elderly victims where the cases statistically fail eighty-one percent of the time, and where the non-economic damages will be capped at \$250,000. Courts are also required to honor a MICRA judgment debtor's request for a periodic payment plan, where the judgment's future damages exceed \$50,000.<sup>77</sup> Thus, the victim's attorney may not see a payday for a significant period of time. Finally, MICRA limits the percentage recoverable by an attorney under a contingency fee agreement.<sup>78</sup>

### C. Economic Damages Are Not a Significant Component of Many Elder Abuse Claims

Elderly victims are often unable to recover, either in part or in full, certain economic damages typically available to a tort victim, specifically: future medical expenses, out-of-pocket medical expenses and lost wages. To recover economic damages in the form of future medi-

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72. See Robert A. Mead, *Unpublished Opinions and Citation Prohibitions: Judicial Muddling of California's Developing Law of Elder and Dependent Adult Abuse Committed by Health Care Providers*, 37 WM. MITCHELL L. REV. 206, 208 (2010).

73. CAL. CIV. PROC. CODE § 377.34 (West 2009).

74. See McCarthy, *supra* note 13, at 399–400.

75. "Physicians make sympathetic defendants." Emmanuel O. Iheukwumere, *Tort Reform Voir Dire Questions in Medical Malpractice Cases Are Attitudes About Tort Reform Fair Game for Voir Dire? In A Growing Number of Jurisdictions, the Answer Is "Yes."* 18 No. 3 Prac. Litigator, 49 (2007).

76. McCarthy, *supra* note 13, at 401.

77. CAL. CIV. PROC. CODE § 667.7 (West 2009).

78. CAL. BUS. & PROF. CODE § 6146 (West 2003); see also *infra* Part II.D.

cal expenses, a plaintiff must prove that there is a reasonable certainty that such expenses will be incurred in the future and that they are proximately related to the misconduct of the defendant.<sup>79</sup> These requirements present significant evidentiary issues when the victim of the abuse is elderly. Future medical expenses are calculated based on a person's life expectancy. An elderly victim in the latter part of their life will, by definition, have relatively insignificant future medical expenses.<sup>80</sup> Furthermore, it may become extremely difficult to prove that the conduct of the defendant proximately caused the need for future medical expenses because other ailments suffered by the elderly victim may also have contributed to the need for future medical care.<sup>81</sup>

The elderly also have difficulty recovering out-of-pocket medical expenses. However, most elder abuse victims do not incur a substantial amount of out-of-pocket medical expenses.<sup>82</sup>

Finally, lost wages are often a substantial component of a tort victim's economic damages,<sup>83</sup> but the elderly are likely to be retired or nearing the age of retirement and therefore do not typically claim lost wages.<sup>84</sup>

#### D. The Risk of Contingency Fee Litigation

The lack of attorneys willing to take elder abuse cases makes it difficult for elderly victims of abuse to recover damages. Even if the elderly victim can find an attorney willing to take their case, many plaintiff attorneys are retained on a contingency fee basis.<sup>85</sup> An attorney taking a case on a contingency fee basis is essentially gambling. Under a contingency fee agreement, the attorney is paid a specified

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79. Laura Dietz, *Damages, Burden; Sufficiency of Proof*, 22 AM. JUR. 2d. Damages § 719 (2012).

80. McCarthy, *supra* note 13, at 399.

81. *Id.* at 406-07.

82. *Id.* at 399 (“[T]he elderly are unlikely to have significant out-of-pocket medical expenses. States who have paid for an injured elderly patient's health care expenses through their individual Medicaid programs could seek to recoup their losses through indemnification of any civil judgment won by the injured elder. The same is true of the federal government recouping Medicare expenditures.” (footnote omitted)).

83. “[E]conomic damages, for medical expenses and lost wages, are the largest part of the average medical malpractice award . . . .” Kevin McManus, Comment, *Finding a Cure for High Medical Malpractice Premiums: The Limits of Missouri's Damage Cap and the Need for Regulation*, 49 ST. LOUIS U. L.J. 895, 898 (2005) (emphasis omitted).

84. Troy J. Crotts & Daniel A. Martinez, *The Nursing Home Residents' Rights Act—A Good Idea Gone Bad!*, 26 STETSON L. REV. 599, 609–10 (1996).

85. See McCarthy, *supra* note 13, at 404.

percentage of the total award only if the plaintiff recovers.<sup>86</sup> If the plaintiff loses the case, the attorney generally absorbs the economic loss.<sup>87</sup> Thus, an attorney operating under a contingency fee arrangement must carefully evaluate whether the case truly has sufficient economic value to justify the risk of representing the client.<sup>88</sup>

The issues created by contingency fee arrangements are exacerbated by the costs of litigation. Elder abuse cases may require expert witnesses to interpret medical records or examine financial documents. In professional negligence cases, an expert will be required to testify as to the appropriate standard of care.<sup>89</sup> The contingency fee attorney will typically be advancing the expenses of litigation, including the fees of expert witnesses. Thus, the attorney must expect a significant payoff in order to justify advancing expenses.

The problem is most notable in cases pursued under MICRA. MICRA imposes a limit on the percentage an attorney may obtain under a contingency fee arrangement in connection with a case based on the professional negligence of a health care provider.<sup>90</sup> MICRA provides that an attorney may not charge in excess of: Forty percent of the first \$50,000; Thirty-three and one-third percent of the next \$50,000; Twenty-five percent of the next \$500,000; and Fifteen percent on any recovery which exceeds \$600,000.<sup>91</sup> The limitations apply regardless of whether the award was earned by settlement, arbitration, or judgment.<sup>92</sup> The contingency fee limitation may chill a litigator's desire to undertake a meritorious case of elder abuse pursued under MICRA because the costs of litigation could far exceed the amount available under MICRA.<sup>93</sup>

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86. "Contingent or contingency fee under which the attorney is paid a percentage of what the creditor recovers or the debtor saves." PAUL W. VAPNEK, MARK L. TAFT, ELLEN R. PECK AND HOWARD B. WEINER, CAL. PRAC. GUIDE: PROF. RESP. CH. 5-B (5:50).

87. See McCarthy, *supra* note 13, at 404.

88. Ann L. Strayer & Marsha L. Morrow, *Discharged and Successor Counsels' Right to Contingent Fees*, LEGAL MALPRACTICE REP., Mar. 1991, at 10 ("Attorneys who undertake matters on a contingency fee basis are only too aware of the risk that their client's ultimate recovery may be inadequate to cover costs and attorneys' fees. Consequently, before undertaking a contingency fee matter, most attorneys carefully weigh that risk against the upside potential of the case.").

89. Chen, *supra* note 7, at 251.

90. CAL. BUS. & PROF. CODE § 6146 (West 2003).

91. *Id.*

92. *Id.*

93. Note, however, that the California Rules of Professional Conduct do not prohibit lawyers from advancing litigation expenses, nor do they prohibit the use of contingency agreements for repayment of litigation expenses based on the outcome of the case. See CAL. RULES OF PROF'L CONDUCT R. 4-210(A) (West 2013).

### E. Conflicts With the Elderly Victim's Family

An elderly client's family can dissuade an attorney from undertaking representation because, in the practice of elder law, the issue of client identity arises repeatedly.<sup>94</sup> The attorney's initial contact may be with the elderly client's adult child, who may well be paying for the representation and want to be intimately involved. This may even occur at the request of the elderly victim.<sup>95</sup> There are several important considerations for the practitioner to consider before undertaking a representation with heavy child involvement. As a threshold question, an attorney must determine who the client is. Sometimes a client's child's self-interest may be at odds with the elderly client's goals. This conflict of interest may reach a point where it becomes effectively impossible to represent the elderly client.<sup>96</sup> For example, an elderly client might desire to settle a case to avoid the stress of litigation, but his or her children may wish to proceed to trial due to a desire to earn more inheritance money, based on a perceived higher potential reward. An attorney who concludes that the elderly client is being unduly influenced by their adult child may find it extremely difficult to persuade the client to sever the exploitive relationship.<sup>97</sup>

The presence of the elderly victim's family in the representation can discourage an attorney from taking the case. If the many "clients" are pulling in opposite directions, the attorney may decide that the prospective headache of acting as a family counselor is simply not worth the time and effort. Even where there are no familial conflicts, an attorney must still consider whether the presence of the adult child in the consultations undermines the confidentiality of discussions with the elderly client.<sup>98</sup> The California Evidence Code provides that confidentiality is only intact if those present "further the interest of the client or [are] those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."<sup>99</sup> As discussed earlier, it is

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94. Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 *LOY. U. CHI. L.J.* 403, 446 (2000).

95. *Id.* at 447.

96. *See generally id.* at 455.

97. *Id.* at 448-49.

98. *Id.*

99. *See CAL. EVID. CODE* § 952 (West 2009) ("[Privilege is intact if the client discloses] the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.").

debatable in many situations whether the child's presence will serve to further the interest of the client, as a child may be serving his or her own self-interest.

#### **F. Does the Elderly Client Have the Capacity to Reach an Agreement on the Engagement of Counsel?**

An attorney cannot represent an elderly victim who lacks legal capacity because a person who lacks capacity is unable to provide effective legal consent to the representation, which is required whenever a lawyer undertakes representation.<sup>100</sup> The ABA Model Rules of Professional Conduct enumerate five factors for a practitioner to consider in evaluating the capacity of a client: (1) The client's ability to articulate reasoning leading to a decision; (2) variability of state of mind; (3) the ability to appreciate consequences of a decision; (4) the substantive fairness of the decision; and (5) the consistency of a decision with the known long-term commitments and values of the client.<sup>101</sup>

If an attorney concludes that his or her prospective client has a diminished capacity, the attorney must then decide whether the client is capable of entering into a contractual relationship.<sup>102</sup> It is imperative that the client understands and appreciates the potential consequences of decisions being made in the representation. As a result of these requirements, practitioners must be wary of taking on cases where the capacity of the client is in doubt.

An elder law attorney must also be cognizant of the prospective client's cultural background or ethnicity before reaching any definitive conclusions regarding the client's legal capacity.<sup>103</sup> This is important because

[a] client of a certain culture may have previous experiences or mental associations with the legal system that would hinder complete and open communication . . . such communication inhibitors weaken the attorney's ability to make an accurate assessment of capacity. The attorney may mistake anger or stubbornness for indicators of mental illness.<sup>104</sup>

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100. CAL. CIV. CODE § 1550(1) (West 1997).

101. MODEL RULES OF PROF'L. CONDUCT R. 1.14 cmt. 6 (2012).

102. Helen Y. Kim, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 ELDER L.J. 265, 268 (2007).

103. *See generally id.* (outlining the cultural concerns involved with determining capacity of an elderly client).

104. *Id.* at 287.

In addition, the client's desire to involve a relative in the representation may be misconstrued by the attorney as a sign that the elderly client is unable to make decisions on his or her own behalf, when in fact the desire is culturally grounded.<sup>105</sup>

### G. The Elderly Client as a Witness

In most cases of elder abuse, the client will be the chief witness in support of the claim. Elderly victims often make poor witnesses.<sup>106</sup> The elderly are particularly susceptible to suggestion and can be taken advantage of on cross-examination.<sup>107</sup> A significant number of the elderly suffer from physical and verbal impairment.<sup>108</sup> Elderly witnesses can be impeached based on poor eyesight or faulty memory and juries may not consider them as credible as younger witnesses.<sup>109</sup>

Vision can be a significant physical impairment for many elderly witnesses.<sup>110</sup> The aging process affects peripheral vision, depth perception, focus, and the ability to distinguish colors.<sup>111</sup> The elderly witness' testimony may be called into question if the testimony depends on the witness' ability to perceive the incident and the witness' visual abilities have been called into question.<sup>112</sup>

Accurate recollection of pertinent events is essential to effective testimony.<sup>113</sup> Elderly witnesses may not be able to remember the details of what happened to them.<sup>114</sup> Many elderly persons suffer from mild cognitive impairment, a disorder characterized by short-term

105. *Id.* at 283.

106. *Fraud Target: Senior Citizens*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/majcases/fraud/seniorsfam.htm> (last visited March 21, 2012).

107. See Henry Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CT. L. REV. 1, 13–14 (2007).

108. Chen, *supra* note 7, at 216.

109. Michael L. Rustad, *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Noneconomic Damages*, 35 N.M. L. REV. 337, 348 (2005) ("Elderly witnesses also have less credibility than plaintiffs in other age categories."); Robert J. Bonsignore & Robin E. Brewer, *Special Types of Witnesses—Elderly Witness*, in ATLA'S LITIGATING TORT CASES § 39:143 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2012).

110. A. Kimberley Dayton et al., *Vision and Hearing Impairments*, in 1 ADVISING THE ELDERLY CLIENT § 2.4 (2011).

111. *Id.*

112. See 2 JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTR. § 5003(a) (2012) [hereinafter CACI INSTR.] ("How well did the witness see, hear, or otherwise sense what he or she described in the court?").

113. See *id.* § 5003(b) (asking jurors: "How well did the witness remember and describe what happened?").

114. Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population*, 2009 MICH. ST. L. REV. 387, 414 (2009).

memory loss.<sup>115</sup> If, as is often the case, the elderly victim's testimony is the key to success at trial, any factor that undermines the credibility of the witness can be particularly damaging and may often prove fatal, particularly in an EADACPA case where the clear and convincing evidence standard must be met.

#### H. Do You Take Your Own Elderly Client's Deposition?

California Code of Civil Procedure § 2035.010(a) provides that anyone

who expects to be a party . . . in any court of the State of California, whether as a plaintiff, or as a defendant, or any other capacity, may obtain discovery . . . for the purpose of perpetuating that person's own testimony . . . for use in the event an action is subsequently filed.<sup>116</sup> A deposition on oral examination is an authorized method of discovery to perpetuate testimony.<sup>117</sup>

The elder law practitioner must consider whether taking the elderly client's deposition is needed in order to guard against the possibility that the elderly victim might die or become disabled before trial and would therefore be unavailable to testify and provide critical evidence. California deposition procedure authorizes the taking of video depositions.<sup>118</sup> Playing the videotaped deposition of a recently deceased or disabled elderly victim to a jury can pack a powerful punch. Deposition testimony is admissible at trial in lieu of live testimony if the witness is "[d]ead or unable to attend or testify because of existing physical or mental illness or infirmity."<sup>119</sup>

Why wouldn't the elder law practitioner who is anticipating litigation take the client's deposition every time? Even if the elderly client is enjoying apparent good health for his or her age, the client is still old and the risk of unavailability at trial always looms heavily. When taking a deposition to perpetuate testimony, an attorney may be trying to create a record of every important fact and all of the significant evidence that can be most effectively presented through the victim's own testimony. If litigation is filed on the anticipated claim, the videotaped deposition of the elderly client would likely fall within the purview of a discovery request from competent opposing counsel.<sup>120</sup> Upon discov-

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115. Caroline K. Craig & Thomas R. Craig, *Key Concerns in Servicing Ultra-Aged, Mentally-Impaired Clients*, 76 PRAC. TAX STRATEGIES 284, 285 (2006).

116. CAL. CIV. PROC. CODE § 2035.010(a) (West 2007).

117. *Id.* § 2035.020(a).

118. *Id.* § 2025.220(a)(5).

119. *Id.* §§ 2025.620(c)(2)(C), 2035.060.

120. California Judicial Council Form Interrogatory 12.3 requires disclosure of any "written or recorded statement from any individual concerning the incident[.]" CAL. JUD.

ery, the videotaped deposition will often provide an evidentiary road map to opposing counsel<sup>121</sup> and could even suggest questions and arguments that might otherwise be overlooked. Thus, the elder law practitioner is often faced with a Hobson's Choice: lose tactical advantages by taking the client's deposition or risk proceeding to trial without the star witness.

### I. Ageism

Dr. Robert N. Butler, the first Director of the National Institute on Aging, is credited with defining the term "ageism":<sup>122</sup>

[A] systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills . . . . Ageism allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.<sup>123</sup>

The rise in ageism has been attributed to our culture's obsession with youth.<sup>124</sup> Some scholars have argued that the obsession with youth is based upon the belief that the young embody the qualities necessary to advance society in the new progressive era.<sup>125</sup> Advocates for the elderly and ageists alike have continued to stereotype the elderly, as poor, lonely, weak, and incompetent, only disagreeing on the amount and type of social welfare programs that should be available to the elderly.<sup>126</sup> People are generally less likely to support domestic social programs that benefit the elderly during times of economic downturn.<sup>127</sup> The lack of opportunities available to the younger work-

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COUNCIL FORM INTERROGATORIES (DISC-001), FORM INTERROGATORY No. 12.3. These interrogatories can be used in any case where the amount in controversy exceeds \$25,000, essentially any elder abuse case. *Id.*

121. An attorney seeking to perpetuate testimony expects their client to be unavailable for trial. Accordingly, it is in the best interest of the attorney to glean every piece of relevant information from their witness during that videotaped deposition. Thus, arguments that might have otherwise been overlooked by the opposing attorney are essentially laid out on a silver platter.

122. Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 456 (1997).

123. *Id.* (quoting Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, 503 ANNALS AM. ACAD. POL. & SOC. SCI., 138, 139 n.2 (1989) available at <http://ann.sagepub.com/content/503/1/138>).

124. See Whitton, *supra* note 122, at 463–69 (arguing that the youth-driven culture has been contributed to by advertising and the media's obsession with youth).

125. *Id.* at 463.

126. *Id.* at 468.

127. *Id.* at 470.

ing population may lead to resentment toward the elderly, because the elderly are often better off financially, yet simultaneously they are viewed by some youths as an unproductive drain on limited government resources.<sup>128</sup>

A standard California jury instruction provides: “You must not be biased in favor of or against any witness because of his or her . . . age[.]”<sup>129</sup> Although juries are instructed to decide cases on the merits without being influenced by their own biases or preconceived notions, it may nonetheless be difficult for jurors to set these biases aside.<sup>130</sup> “Often little or no social value is ascribed to older people, thus making jury verdicts problematic.”<sup>131</sup> “People assume that because old people typically don’t work, they aren’t ‘contributing to society,’ and their days of achievement are long over. Their lives are spent watching television, waiting for visitors, and perhaps slipping in and out of dementia, awaiting a fast-approaching death.”<sup>132</sup> An opposing attorney may attempt to minimize the elderly victim’s value, suggesting to the jury that the victim is sick, doesn’t work, and therefore doesn’t matter.<sup>133</sup>

Ageism can have a direct impact on any award given to an elderly plaintiff.<sup>134</sup> One study found that in actions for medical malpractice between 1988 and 2007, the average payout received by non-elderly claimants was \$333,000.<sup>135</sup> In stark contrast, elderly claimants during the same period were awarded an average of only \$190,000, little more than half of the non-elderly group’s average payout.<sup>136</sup> Further-

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128. *Id.* at 469–70. Dr. Butler discussed the growing anti-elderly sentiment in the 1980’s “generated in part by envy about rich elders and in part by resentment over the presumed burden on the non-elderly caused by an ‘aging population.’” *Id.* Optimism increases when the economy expands and resources increase to address societal problems, but when the economy is in a downturn,

the elderly are blamed for the inadequate situations in which they find themselves by those economic and political interests that have the most to gain from public policies that reduce domestic social spending and that seek to shift public responsibilities to the individual or to other levels of government than the federal level.

*Id.* at 470 (quoting Carroll L. Estes et al., *FISCAL AUSTERITY AND AGING: SHIFTING GOVERNMENT RESPONSIBILITY FOR THE ELDERLY* 18–19 (1983)).

129. See CACI INSTR., *supra* note 112, § 5003.

130. See McCarthy, *supra* note 13, at 402.

131. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect-The Legal Framework*, 31 CONN. L. REV. 77, 149 (1998).

132. McCarthy, *supra* note 13, at 401.

133. Elizabeth H. Faiella & Peter J. Gulden III, *Battling Ageism in Cancer Negligence Cases*, TRIAL, May 2007, at 20, 27.

134. McCarthy, *supra* note 13, at 402.

135. *Id.* at 402.

136. *Id.*

more, the study found that only two of the 200 largest verdicts were obtained by elderly claimants.<sup>137</sup>

### III. Problems Specific to Financial Elder Abuse Cases

Financial elder abuse has been estimated to cost seniors \$2.6 billion annually.<sup>138</sup> The elderly are frequent victims of financial abuse for several different reasons:

First, seniors control a large portion of funds deposited in financial institutions, which makes them especially tempting victims. Second, most senior adults are homeowners, which exposes them to various home improvement scams, home loan bailouts, and other types of homeowner scams. Third, seniors can be socially “isolated due to their lack of mobility,” which increases their risk of victimization.<sup>139</sup>

As prevalent as financial elder abuse may be, the practical and legal challenges faced by the practitioner often provide little incentive to pursue these cases.

#### A. Expert Expenses

Potentially recoverable economic damages may be insufficient in amount to support either the attorney’s decision to take the financial elder abuse case on a contingency fee basis, or the victim’s decision to pay hourly legal fees in order to pursue the claim. Even if the claim would otherwise justify a decision to pay hourly legal fees, the victim may often find himself or herself financially depleted as a consequence of the abuse. Assuming that the amount of recoverable damages proves enticing to a contingency fee attorney, the attorney must include in the contingency fee calculus the amount of expert witness expenses that are likely to be incurred during the trial preparation and the trial itself. Frequently, financial scams will be uncovered only with the assistance of forensic accountants, who must pore over detailed financial records at considerable expense.<sup>140</sup> The forensic ac-

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137. *Id.* at 403.

138. Ekaterina Deaver, *Chapter 64: Assisting Victims of Elder Financial Abuse in Recovering Their Judgment Awards*, 42 McGEORGE L. REV. 531, 533 (2011).

139. *Id.* (citations omitted).

140. See Conrad Wilkinson & Patricia Wilkinson, *Financial Abuse: A Case Study & Litigation Guide for the Elder Law Attorney*, 16 NAELA Q., no. 3, 2003, at 18; see also, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-414, SECURITIES INVESTOR PROTECTION CORPORATION: INTERIM REPORT ON THE MADOFF LIQUIDATION PROCEEDING (2012) (“[C]osts of the Madoff liquidation reached more than \$450 million, and the Trustee estimates the total costs will exceed \$1 billion by 2014. Legal costs, which include costs for the Trustee and the trustee’s counsel, are the largest category.”).

countant will also be required to trace financial assets by analyzing bank records<sup>141</sup>

Even in cases with substantial potential recoveries against solvent defendants,<sup>142</sup> the contingency fee lawyer will still have to consider whether it makes sense to advance several hundred dollars per hour out-of-pocket to an expert forensic accountant and risk losing these hard costs if the case ultimately proves unsuccessful. Even if the contingency fee agreement provides that the client is ultimately responsible for case expenses irrespective of case outcome, how often will the elderly victim on the losing end of a financial abuse case be in a position to make the reimbursement? How many elder law practitioners are even in the position to advance tens of thousands of dollars in expert expenses in order to prepare a case for trial?

## B. Financial Marriage Abuse

The California Probate Code prohibits several classes of individuals from receiving testamentary gifts in an effort to protect the elderly from individuals who can exercise undue influence in testamentary decision making by virtue of their relationship to the elder.<sup>143</sup> However, the Probate Code safeguards are inapplicable in cases of financial abuse committed by a person to whom the elderly person is married.<sup>144</sup> Cases of financial elder abuse committed by a spouse often require balancing the victim's right to personal autonomy, i.e. the right to marry the person the elder wishes, against the need to protect the victim from undue influence.

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141. See, e.g., Mary F. Gillick, *The Expert Witness*, SH002 A.L.I.—A.B.A. 229, 234–35 (2002), available in WESTLAW ALI-ABA Database. (“[F]orensic accountant could assist the attorney to focus discovery efforts so that the necessary documents are obtained to trace the assets while at the same time not spending money on needless discovery.”).

142. See *infra* Part III.C.

143. Section 21350(a) of the California Probate Code provides in pertinent part that:

[N]o provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

...

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(6) A care custodian of a dependent adult who is the transferor.

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

CAL. PROB. CODE § 21350(a) (West 2011).

144. Ashley E. Rathbun, *Marrying Into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 227, 253 (2010).

Confidential marriages, which are legal in the State of California,<sup>145</sup> can easily hide financial elder abuse. Confidential marriages do not require any witnesses,<sup>146</sup> and the records are generally not open to the public.<sup>147</sup> Spouses must live with one another before entering into a confidential marriage in California, but the applicable statute does not specify a minimum amount of time.<sup>148</sup> Because of the secrecy associated with these types of marriages, the victim's family may not even be aware of the marriage. Moreover, after the victim has died, California law does not allow the family to challenge the marriage based on the victim's lack of capacity.<sup>149</sup> An elderly victim with medical issues may even sign an affidavit for submission to the county clerk and enter into a confidential marriage without being physically present at the ceremony.<sup>150</sup> A financial abuser in a confidential marriage with an elderly spouse will often do anything in his or her power to prevent discovery of the marriage until after the victim has died.<sup>151</sup>

### C. Collecting Judgments

A judgment has no value if it is uncollectable. Thus, it is economically pointless to pursue litigation against a judgment-proof defendant. Needless to say, many financial scam artists who prey on the elderly are hardly ripe targets for collection because avoiding detection is an essential part of being a scam artist. The elderly victim may end up spending an inordinate amount of time and money trying to find the scam artist. In many cases, the scam artist will never turn up, or even if found, will have either spent or hidden the victim's money.

The California Code of Civil Procedure provides numerous remedies to judgment creditors in enforcement of their judgments.<sup>152</sup> However, an individual judgment debtor may assert any number of exemptions to protect certain classes of property from being levied

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145. CAL. FAM. CODE § 500 (West 2004).

146. Rathbun, *supra* note 144, at 239.

147. *Id.* at 239–40.

148. CAL. FAM. CODE § 500.

149. Rathbun, *supra* note 144, at 240 (“[a] third party cannot challenge the marriage based on an elder’s lack of capacity.”).

150. CAL. FAM. CODE. § 502 (West Supp. 2012).

151. *See, e.g.*, Rathbun, *supra* note 144, at 242 (discussing the case of wealthy eighty-six year old Thor Tollefson, and his mid-fifties estate-planning attorney Linda Lowney). Tollefson and Lowney entered a confidential marriage, and of course, “Lowney did not want anyone to know about the marriage.” *Id.* Fortunately for Mr. Tollefson’s estate, the confidential marriage was invalidated due to the lack of pre-marital co-habitation. *Id.*

152. *See, e.g.*, CAL. CIV. PROC. CODE §§ 680.010–.260 (West 2009).

upon and sold in enforcement of the victim's judgment.<sup>153</sup> Additionally, if the judgment debtor is employed, the enforcement of judgment laws limits the garnishment of wages to fifty percent of disposable earnings.<sup>154</sup>

In recognition of the problems facing the elderly in collecting elder abuse judgments, the California Legislature enacted legislation under which elder abuse judgments have priority against all competing judgments for the same wage garnishment excepting only judgments for child support and for taxes.<sup>155</sup> However, this modification only became effective on January 1, 2012,<sup>156</sup> so it remains to be seen if the change will make an impact.

#### IV. Proposed Legislative Changes

The perfect plaintiff's case will have few, if any, significant evidentiary problems and substantial award potential. Unfortunately, most elder abuse cases are far from perfect. Evidentiary problems endemic in elder abuse cases are often a function of the diminished capacities and deficiencies in perception that tend to undermine the credibility of the elderly victims as witnesses. Even if the elderly client is a superlative witness, attitudes of ageism may depress jury awards. These problems come with the territory and will always be a part of elder law practice. The following changes in California law would incentivize practitioners to take on tougher cases where evidence may be difficult to obtain and expensive to prepare.

##### A. Proposed Change to MICRA

Simply stated, cases brought under MICRA are usually not worth the time and expense required by a competent attorney. Proving a case of medical negligence requires carrying the burden of persuasion that the physician failed to meet the appropriate standard of care.<sup>157</sup> Any case where the standard of care is raised as an issue requires the hiring of expert witnesses to establish what the standard of care is. Defense counsel has an incentive to delay MICRA litigation for as long

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153. *See id.* §§ 703.010–.995.

154. *Id.* § 706.052.

155. *Id.* § 706.023(d).

156. Deaver, *supra* note 138, at 538.

157. “[S]ome provisions attempt to ensure doctors are held accountable for deviations from the appropriate standard of care.” Matthew D. Easton, *Disparate Outcomes Among Medical Malpractice Victims: A New Look at an Equal Protection Challenge to Micra*, 30 WHITTIER L. REV. 67, 71 (2008).

as possible, which will run up the expenses for plaintiff's counsel and can also eliminate the victim's pain and suffering award if the victim dies before the case is tried.<sup>158</sup>

The \$250,000 damage cap for non-economic damages under MICRA<sup>159</sup> should be raised to at least \$750,000 for claimants sixty-five years of age and older. Opponents assert that the limitation pertains only to non-economic damages and that the victim may still obtain unlimited economic damages.<sup>160</sup> However, this argument falls flat when directed at elderly claimants whose recovery of economic damages will often be insignificant.<sup>161</sup> Opponents of raising the MICRA damage cap also argue that an increase in the cap will result in increased healthcare costs in California.<sup>162</sup> The argument goes that an increased damage cap will lead to increased malpractice insurance for physicians, the costs of which will ultimately be passed on to the patient consumers.<sup>163</sup> Increased healthcare costs play into a widespread concern held by the public at large that such increased costs will lead to rising insurance premiums. Raising the damage cap only in cases where the victims are sixty-five years or older would increase the incentive to attorneys to take on MICRA cases on behalf of the elderly, while, at the same time, reducing the impact to healthcare costs and insurance premiums because the cap would not be raised across the board.

## B. Proposed Change to EADACPA

The evidentiary shortcomings typical of elder abuse cases often deter attorneys from pursuing meritorious cases, even in situations of egregious elder abuse. The sensible way to combat the problem is by simply lowering the burden of proof. "If elder abuse attorneys are going to continue to take up the charge of representing this class of

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158. *See supra* Part II.B.

159. *See id.*

160. *MICRA Primer: Award Cap Equals Access to Care*, COOPERATIVE OF AM. PHYSICIANS, <http://www.caphysicians.com/node/65> (last visited Mar. 21, 2012).

161. *See supra* Part II.B.

162. *See* WILLIAM G. HAMM, C. PAUL WAZZAN & H.E. FRECH III, *MICRA AND ACCESS TO HEALTHCARE* 5 (2005), available at [http://www.micra.org/patient-access/docs/micra\\_study\\_ca\\_micra\\_reforms.pdf](http://www.micra.org/patient-access/docs/micra_study_ca_micra_reforms.pdf) (reporting that raising the damage cap to \$500,000 will increase California's annual healthcare costs by 6.5 billion dollars).

163. *Id.* at 33.

individuals, they should be permitted to do so on the same playing field as other personal injury victims.”<sup>164</sup>

EADACPA applies only in cases of egregious misconduct, where malice, recklessness, oppression, or fraud can be proven.<sup>165</sup> Many EADACPA cases are pursued against nursing homes, which harbor significant abuse problems because of insufficient staffing and inadequate training.<sup>166</sup> Lowering the burden of proof to a preponderance of the evidence standard will deter nursing homes from understaffing and inadequately training, and will encourage them to provide the quality of care that their elderly residents deserve.

Unfortunately, strong opposition exists to such a change in EADACPA. The same arguments made in opposition to raising the MICRA non-economic damages cap have also been used to oppose lowering EADACPA’s burden of proof.<sup>167</sup> Opponents argue that litigation costs (or increases in insurance premiums driven by litigation costs) will drain resources away from patient care. However, the argument against lowering the EADACPA burden of proof ignores the fairly limited scope of the statute and the important social objective of deterring the particularly despicable conduct the statute was designed to address. Whereas MICRA applies to all cases of medical negligence, EADACPA applies only to cases of actual physical abuse.<sup>168</sup> Thus, lowering EADACPA’s burden of proof will affect only a relatively small number of claims.

### C. Public Policy Considerations Dictate the Proposed Changes in California Law

Lawyers are not the most venerated members of our society. Laws that put more dollars in the pockets of lawyers are generally unpopu-

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164. Jody Moore, *California Proposed Elder Abuse Legislation May Lower Burden of Proof*, CAL. ELDER ABUSE LAW. BLOG (May 12, 2011), <http://www.californiaelderabuselawyerblog.com/2011/05/california-proposed-elder-abus.html>.

165. CAL. WELF. & INST. CODE § 15657 (West 2011 & Supp. 2012).

166. “Understaffing (the ratio of staff to residents) of nursing homes is a recognized factor often leading to abuse and neglect of the resident.” Daniel J. Penofsky, *Litigating Nursing Home Negligence and Wrongful Death Cases*, 110 AM. JUR. TRIALS 1, § 12 (2008); see also BENJAMIN ROSE, TAILORED AND ONGOING TRAINING CAN IMPROVE JOB SATISFACTION (2006), available at <http://www.benrose.org/inc/Research/BetterJobsBetterCareSummary.pdf>. The study found that factors contributing to nursing homes’ high employee turnover rates include inadequate initial training, poor orientation to the job and lack of ongoing training. This, according to the study, causes employees to be dissatisfied with their jobs, feel incompetent and confused and provide poor quality of care to residents. *Id.*

167. See *supra* Part II.A.

168. *Id.*

lar. Some groups, particularly health care providers, have argued that the costs of increased litigation will be paid by the general public at large.<sup>169</sup>

Obscured in the debate is the indisputable fact that many in our society simply cannot afford legal representation and cannot effectively pursue valid claims without legal assistance. It is ideological overreach to suggest that the proposed change in a statute of limited application such as EADACPA will have any significant economic impact on the costs of health care or on the health insurance market. As a society, we must guarantee that our senior citizens will have an effective legal remedy for the kinds of despicable conduct within the purview of EADACPA. An effective legal remedy will also serve to deter wrongdoers because the threat of litigation will no longer be empty.

It is unconscionable that elderly victims of medical negligence may not be able to find lawyers to take their cases because they are unable to assert significant economic damages. The proposed change in MICRA pertains to only a small portion of total medical negligence claims. The increase in health care costs or insurance premiums is surely justified because the proposed change in law remedies an injustice to the elderly, who are often barred on a practical level from pursuing MICRA claims because no one will take their case.

## Conclusion

Cases of elder abuse in California are often not litigated because they are not worth the money for an attorney. As a threshold matter, there may be a meritorious case of elder abuse, but without a thorough investigation or report of these incidents ever occurring, no legal practitioner can take the case. The deficient investigation of an elder abuse claim often leads to deficient evidence. Making matters worse, elderly victims can make poor witnesses who are susceptible to impeachment. California elder abuse cases are often seen as high risk and low reward, and are therefore unattractive when taken on a contingency fee basis. Exacerbating the unattractiveness of these cases are MICRA's non-economic damages cap and EADACPA's clear and convincing burden of proof. Because many meritorious California elder abuse cases create insufficient incentive to support a contingency fee decision, cases are not pursued and instances of elder abuse continue

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169. See, e.g., *MICRA Primer: Award Cap Equals Access to Care*, COOPERATIVE OF AM. PHYSICIANS, <http://www.capphysicians.com/node/65> (last visited Feb. 12, 2013).

to escalate. Absent an effective litigation deterrent, abusers will continue to prey on California's elderly.

The changes in California law proposed in this Comment will only be enacted if our politicians can overcome the strong headwinds of resistance from health insurers and the health care industry beating the drum of increased litigation costs.<sup>170</sup> Public awareness of, or interest in, an issue can create the proper political climate for accelerating changes in the law. In recent memory, two high-profile elder abuse scandals involving celebrities captured the public's attention. In one case, 103-year-old Brooke Astor, a famous philanthropist who had given away millions of dollars during her lifetime, had a fortune worth at least forty-five million dollars. She was deprived of adequate care by her son, who was ultimately removed as her conservator.<sup>171</sup>

In March 2011, entertainment legend Mickey Rooney provided gripping testimony before the U.S. Senate about his experiences as a victim of elder abuse.<sup>172</sup> In his testimony, Rooney described how his stepson and stepdaughter had isolated him by taking control of his finances, blocking his access to the outside world, depriving him of basic necessities such as food and medicine, and even threatening him with violence.<sup>173</sup> "Over the course of time, my daily life became unbearable . . . I felt trapped, scared, used and frustrated. But above all, I felt helpless . . . [f]or years I suffered silently, unable to muster the courage to seek the help I knew I needed."<sup>174</sup>

Unfortunately, the public's memory is short, and the current hard economic times in California drive public support for conservative measures that favor the individual's pocketbook over important social objectives that might cost the public some money. Without changes to California law, many meritorious elder abuse cases will continue to be ignored.

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170. See, e.g., *id.*

171. Meryl Gordon, *The Family Astor*, N.Y. MAG. (Aug. 6, 2006), available at <http://nymag.com/news/features/18860/>.

172. Carole Fleck & Talia Schmidt, *Mickey Rooney Claims Elder Abuse*, AARP BULL. (Mar. 2, 2011), <http://www.aarp.org/relationships/caregiving/info-03-2011/mickey-rooney-claims-elder-abuse.html>.

173. Courtney Hutchison, *Actor Mickey Rooney Granted Court Protection from Stepkids*, ABC NEWS (Feb. 17, 2011), <http://abcnews.go.com/Health/Wellness/mickey-rooney-90-victim-alleged-elder-abuse/story?id=12934033#.T2eJWxEgenk>.

174. Fleck & Schmidt, *supra* note 172; see also CNN, *CNN: Rooney: I Suffered from Elder Abuse*, YOUTUBE (Mar. 2, 2011), <http://www.youtube.com/watch?v=DIKa2TDda0o> (video of Mickey Rooney's testimony to the Senate describing his feeling of powerlessness).

