

Date of Hearing: May 1, 2012

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE

Mariko Yamada, Chair

AB 2149 (Butler) – As Amended: April 26, 2012

SUBJECT: Elder and dependent adult abuse: settlement agreements: gag order.

SUMMARY: Prohibits settlement agreements in civil cases involving abuse of older and/or dependent adults from containing restrictions related to contacting investigatory agencies.

Specifically, this bill:

- 1) Prohibits settlement agreements related to neglect, or related to the physical or financial abuse of an elder or dependent adult from including a provision that anyone involved in the case be barred from contacting or cooperating with the county Adult Protective Services agency (APS), law enforcement, the long-term care ombudsman, the California Department of Aging (CDA), the California Department of Justice (DOJ), or the Licensing and Certification Division (L&C) of the California Department of Public Health (DPH).
- 2) Prohibits settlement agreements related to the abuse of an elder or dependent adult from including a provision that anyone involved in the case be barred from filing a complaint or reporting a violation of law to the county APS agency, law enforcement, the long-term care ombudsman, the CDA, the DOJ, or the DPH L&C.
- 3) Prohibits settlement agreements related to the abuse of an elder or dependent adult from including a provision that anyone involved in the case be required to withdraw a complaint or violation filed with the county APS agency, law enforcement, the long-term care ombudsman, the CDA, the DOJ, or the DPH L&C.

EXISTING LAW

- 1) Establishes the Elder and Dependent Adult Civil Protection Act (EADACPA) within the Welfare and Institutions Code which acknowledges that older and dependent adults may be particularly at-risk for abuse, neglect, or abandonment; that they require special attention to their needs and problems; that they are a disadvantaged class; that cases of abuse of older or dependent adults are seldom prosecuted as criminal matters due to problems of proof, court delays, and a lack of incentives to prosecute; and that it is the intent of the legislature to enable interested persons to engage attorneys to take up the cause of the abused elderly and dependent adults through civil actions.
- 2) Declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.
- 3) Provides for punishments in the form of prison sentences of up to eleven years, and fines of up to \$6,000 for willful acts against older and dependent adults that are likely to cause

unjustifiable physical pain or mental suffering, and in the case of caregivers, willfully allows or causes the person or the health of an older or dependent adult to be injured.

- 4) Defines physical abuse of an elder or dependent adult as assault, assault with a deadly weapon, sexual assault, battery, prolonged constraint or deprivation of food or water, or the use of physical restraints or psychotropic medications as punishment, or for a period beyond that which has been ordered by a physician, or for reasons not directed by a physician.
- 5) Declares confidential settlement agreements as "disfavored" and specifically carves out information that is evidence of abuse of an elder or dependent adult financial abuse, neglect, and physical abuse, or if there is a substantial probability that prejudice will result from the disclosure and that the party's interest in the information cannot be adequately protected through redaction.
- 6) Prohibits disclosure of information obtained in mediation from discovery as long as the information is non-criminal.

FISCAL EFFECT: No known costs to the state.

Author's Statement:

"Under California's current Elder Abuse and Dependent Adult Civil Protection Act, while in civil litigation, abusers can ask for their victims to sign settlement agreements that prohibit the victim or victim's family from contacting or cooperating with Adult Protective Services, local law enforcement or other government agencies. Because of this loop hole, many abusers never face further investigation or prosecution. AB 2149 would not allow victims of elder and dependent adult abuse to have their voices silenced when seeking recourse in civil court."

COMMENTS:

As noted in the author's statement, the author is concerned about situations in which the alleged abuser asks the plaintiff to sign a settlement agreement that requests a plaintiff to withdraw a complaint, or prohibits the victim from contacting or filing a report, with a county APS program, a local law enforcement agency, the long-term care ombudsman, the CDA, the DOJ, or the DPH L&C. Background provided by the author and supporters suggest that "gag clauses" often impair efforts to identify, investigate, and prosecute abusers. Therefore, AB 2149 has very little to do with the parties of a settlement agreement, and far more to do with the well-being of others who may be in jeopardy because of resulting, suppressed investigatory activities. Furthermore, mandated reporters who are comprised of caregivers, health care professionals, clergy, law enforcement and others, may find themselves placed in double-jeopardy if they adhere to illegal gag-clauses and place their professional licenses at risk, as well as risk facing a 6 month jail sentence for failure to report a known incident of elder or dependent adult abuse.

Existing law disfavors confidentiality agreements in EADACPA cases (Code of Civil Procedure 2017.310), and provides for noncriminal information to be not discoverable in settlement agreements (Evidence Code Section 1190). There is no explicit prohibition from using confidentiality agreements regarding investigatory entities, though they are likely to be unenforceable if challenged. The mere presence of such language in a settlement agreement may have a chilling effect upon a victim and family members from reporting known criminal acts not intended to be protected by confidentiality clauses in settlement agreements. AB 2149 would provide for both parties to begin settlement negotiations with clearly articulated boundaries that

assure that no party misunderstands this important fact, and provides for an environment where legal, enforceable settlement agreements can be developed quickly in order to save time and avoid further, costly litigation.

Cases of abuse and neglect are not necessarily isolated incidents--if one vulnerable person has been abused or neglected in an institutional setting, there is likelihood that others have been similarly abused or neglected. Outside institutions, predatory elder and dependent adult abusers often have multiple victims. Gag clauses in settlement agreements have the effect of preventing law enforcement and other agencies from combatting "systemic problems," due to implied prohibitions to share information on criminal or potentially criminal acts. It is not difficult to imagine how other vulnerable people remain at risk of systemic or predatory abusers when alleged victims who are subjects of settlement agreements are intimidated from sharing their knowledge of criminal acts. AB 2149 assures that parties of settlement agreements are not confronted with implied barriers to reporting criminal acts to the agencies described in the bill. Furthermore, AB 2149 assures that the agencies described in the bill are free to carry out their statutory responsibilities to protect the health and welfare of vulnerable, older or dependent adults. Settlement agreements that serve to prevent victims from contacting, providing information to, or otherwise cooperating with investigatory agencies impede the mandated functions of these agencies, functions already challenged by low reporting statistics.

Elder and dependent adult abuse is widely documented as under reported. Vulnerable people are reluctant to report such crimes because perpetrators are often family members, or people with care responsibilities over the victim. Retaliation is a real fear and concern amongst victims because reporting may elicit even greater hostilities. According to the National Center on Elder Abuse (NCEA) at the United States Administration on Aging (AoA), no one knows precisely how many older Americans are being abused, neglected, or exploited because there are no official national statistics. However, studies of prevalence and incidence conducted over the past several years by independent investigators show that:

- 1) Between 1 and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone upon whom they depended on for care or protection (Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America, 2003, Washington, DC: National Research Council Panel to Review Risk and Prevalence of Elder Abuse and Neglect);
- 2) The estimated frequency of elder abuse range from 2% to 10% (Lachs, Mark S., and Karl Pillemer, October 2004, "Elder Abuse," *The Lancet*, Vol. 364: 1192-1263,);
- 3) Only about 1 in 14 incidents of abuse, excluding incidents of self-neglect, are reported to authorities. (Pillemer, Karl, and David Finkelhorn, 1988, "The Prevalence of Elder Abuse: A Random Sample Survey," *The Gerontologist*, 28: 51-57);
- 4) Only 1 in 25 cases of financial exploitation is reported, (Wasik, John F. 2000. "The Fleecing of America's Elderly," *Consumers Digest*, March/April); and,
- 5) According to the NCEA's own study from 1998, for every case of elder abuse, neglect, exploitation, or self-neglect reported to authorities, about five more go unreported. (National Elder Abuse Incidence Study. 1998. Washington, DC).

Statewide data from the Long-Term Care Ombudsman's office show 5,996 complaints of abuse in long-term care facilities where about 250,000 vulnerable people reside, out of roughly 39,000 complaints received during FY 2010/11. The California Department of Social Services reports that roughly 255,000 complaints of abuse in the community at large (not including long-term care facilities) have been received during the past calendar year. According to the California Department of Finance's (DOF) Demographic Research Unit, California is home to the largest number of seniors in the nation and their numbers are expanding at an unprecedented pace. DOF estimates that California's 65+ population will have grown 43% between 2010 and 2020 (from 4.4 million to 6.35 million). By 2030 the 65+ population will reach nearly 9 million people. Along with the increase in the aged population will come a corresponding increase in disability, vulnerability and dependency. These figures do not reflect the number of non-elderly individuals who are dependent upon others due to impairments.

### Supporters Argue

The California Advocates for Nursing Home Reform (CANHR), sponsors of AB 2149, assert that many abusers never face further investigations or prosecution once the victim, or family of the victim, enter into settlement agreements. The California Senior Legislature (CSL), a co-sponsor of AB 2149, writes that including gag clauses, preventing an elderly victim of financial or physical abuse from contacting law enforcement or adult protective services agencies is inconsistent with their efforts to protect and enhance the quality of life for aging Californians. The California Commission on Aging, the principle advocate for older Californians, states that the incidence of abuse of dependent adults is increasing across the nation. A prohibition of the use of non-contact or non-cooperation provisions takes an important step toward stopping abuse in its tracks; perpetrators should not be protected from exposure, nor should they be shielded from on-going scrutiny. The California State Sheriff's Association writes, since aged and dependent victims of abuse usually have fewer support systems and reserves—physical, psychological and economic—the impact of abuse and neglect is magnified. A single incident of mistreatment is more likely to trigger a downward spiral leading to loss of independence, serious illness, even death. AB 2149 will help assure that the dependent adults in our state will live with dignity, integrity, independence, and without abuse, neglect or exploitation. Ombudsman & HICAP Services of Northern California, a project of Legal Services of Northern California states that abuse cases often result in litigation and are settled by initiation of family members. This leaves other residents in facilities at risk of systemic problems because advocacy services, such as the long-term care ombudsman, are side-stepped due to gag-clauses. The Los Angeles District Attorney's office states AB 2149 will assist in deterring civil settlements from interfering with a witness in a criminal investigation or prosecution.

### Opponents Argue

Aging Services of California (ASC), in an opposition letter to the Judiciary Committee, states that the association members see no basis for positing such sweeping change to the efficacy of voluntary settlement agreements intended to end costly litigation. ASC asserts that AB 2149 will increase the cost of caring for and providing services to frail and disabled persons in California. The elimination of voluntary confidential settlements will force more cases to trial, increasing litigation costs, and the cost of liability insurance, which will be reflected in increased Medi-Cal costs. ASC asserts that state law already provides protections from cloaking evidence of abuse as described in the EADACPA, and enforcement is determined by the court. The CalChamber asserts that AB 2149 discourages settlement agreements in elder and dependent adult abuse cases, and that the expansion of current law will ultimately "...harm elderly and dependent adult

plaintiffs who wish to negotiate quick settlements, and drive up the cost of care at elder-care facilities..." CalChamber also states that AB 2149 is duplicative of existing law.

### Related Legislation

AB 634 (Steinberg) Chapter 232, Statutes of 2003, established state policy disfavoring confidential settlement agreements in any civil action, the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), such as financial abuse, neglect, or physical abuse.

### DOUBLE REFERRAL

AB 2149 is the subject of a dual policy committee referral. AB 2149 was heard in the Assembly Committee on Judiciary on April 25th where it passed out on a 6-4 vote.

### RECOMMENDATIONS

In order to assure the entire spectrum of investigative entities are covered in the gag-clause prohibitions of AB 2149, the author may wish to consider adding the Community Care Licensing Division of the Department of Social Services which licenses and enforces laws and regulations in assisted living (non-medical) long-term care facilities, the Office of Protective Services within the Department of Developmental Services, as well as the Bureau of Medi-Cal Fraud and Elder Abuse within the Department of Justice.

### REGISTERED SUPPORT / OPPOSITION:

#### Support

California Advocates for Nursing Home Reform (CANHR) – Co-Sponsor  
California Commission on Aging (CCoA) – Co-Sponsor  
California Senior Legislature (CSL) – Co-Sponsor  
American Federation of State, County and Municipal Employees (AFSCME)  
California State Sheriff's Association (CSSA)  
Consumer Attorneys of California  
Ombudsman & HICAP Services of Northern California  
Los Angeles County District Attorney  
State Long-Term Care Ombudsman

#### Opposition

Aging Services of California  
California Chamber of Commerce

Analysis Prepared by: Robert MacLaughlin / AGING & L.T.C. / (916) 319-3990