

RESOLUTION 02-03-06

DIGEST

Elder Abuse Reporting: Immunity for EADACPA Reporters

Amends Welfare & Institutions Code section 15634 to eliminate absolute immunity of some mandated EADACPA reporters and require reports made under penalty of perjury.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Welfare & Institutions Code section 15634 to eliminate absolute immunity of some mandated EADACPA reporters and require report made under penalty of perjury. This resolution should be disapproved because it is based on an unsupported assumption that there are significant numbers of false reports being filed by mandated reporters.

Because the objective of reporting under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) is to permit investigation of possible abuse of vulnerable people, the reporting frequently is of sensitive information about which the mandated reporter is not unqualifiedly certain. Therefore, the reporter may be uncomfortable giving reports under penalty of perjury. The resolution does not address the problem of false reporting by non-mandated reporters. In addition, the resolution would generate additional paperwork by the staff people who would have to review and approve or disapprove such reports. There is also an apparent conflict with the oral reporting requirements under Welfare & Institutions Code section 15630(d)(1) for certain financial and banking institutions that was added in 2005 by S.B. 1018.

SECTION/COMMITTEE REPORT

TRUSTS AND ESTATES SECTION

DISAPPROVE

The Trusts & Estates Section does not understand the rationale for this change. The section believes that requiring a declaration under penalty of perjury as a condition for absolute immunity would (1) deter many reporters (mandated or otherwise) from reporting cases of suspected elder abuse; (2) create unnecessary paperwork for Adult Protective Services and may cause a delay in investigating a reported cases of suspected elder abuse; and (3) may conflict with S.B. 1018 (now chaptered) which requires banks and financial institutions, beginning in 2007, to report immediately by telephone cases of suspected financial abuse of elders.

This position is only that of the TRUSTS AND ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of

California. Membership in the TRUSTS AND ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to Amend Welfare and Institutions Code § 15634 to read as follows:

1 §15634

2 (a) With the exception of criminal liability for perjury based upon the content of
3 the report attested to under penalty of perjury, no care custodian, clergy member, health
4 practitioner, or employee of an adult protective service agency or a local law enforcement
5 agency who reports a known or suspected instance of elder or dependent adult abuse shall be
6 civilly or criminally liable for any report required or authorized by this article, provided that
7 such report is attested to under penalty of perjury. Failure to attest to a report under penalty
8 of perjury shall result in the report being deemed null and void by adult protective services.
9 Any other person reporting a known or suspected instance of elder or dependent adult abuse
10 shall not incur civil or criminal liability as a result of any report authorized by this article,
11 unless it can be proven that a false report was made and the person knew that the report was
12 false. No person required to make a report pursuant to this article, or any person taking
13 photographs at his or her discretion, shall incur any civil or criminal liability for taking
14 photographs of a suspected victim of elder or dependent adult abuse or causing photographs
15 to be taken of such a suspected victim or for disseminating the photographs with the reports
16 required by this article. However, this section shall not be construed to grant immunity from
17 this liability with respect to any other use of the photographs.

18 (b) No care custodian, clergy member, health practitioner, or employee of an adult
19 protective services agency or a local law enforcement agency who, pursuant to a request
20 from an adult protective services agency or a local law enforcement agency investigating a
21 report of known or suspected elder or dependent adult abuse, provides the requesting agency
22 with access to the victim of a known or suspected instance of elder or dependent adult abuse,
23 shall incur civil or criminal liability as a result of providing that
24 access.

25 (c) The Legislature finds that, even though it has provided immunity from liability
26 to persons required to report elder or dependent adult abuse, immunity does not eliminate
27 the possibility that actions may be brought against those persons based upon required reports
28 of abuse. In order to further limit the financial hardship that those persons may incur as a
29 result of fulfilling their legal responsibilities, it is necessary that they not be unfairly
30 burdened by legal fees incurred in defending those actions. Therefore, a care custodian,
31 clergy member, health practitioner, or an employee of an adult protective services agency or
32 a local law enforcement agency may present to the State Board of Control a claim for
33 reasonable attorneys' fees incurred in any action against that person on the basis of making a
34 report required or authorized by this article if the court has dismissed the action upon a
35 demurrer or motion for summary judgment made by that person, or if he or she prevails in
36 the action. The State Board of Control shall allow that claim if the requirements of this
37 subdivision are met, and the claim shall be paid from an appropriation to be made for that

38 purpose. Attorneys' fees awarded pursuant to this section shall not exceed an hourly rate
39 greater than the rate charged by the Attorney General at the time the award is made and shall
40 not exceed an aggregate amount of fifty thousand dollars (\$50,000). This subdivision shall
41 not apply if a public entity has provided for the defense of the action pursuant to Section 995
42 of the Government Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Grants an absolute privilege to health care practitioners and other mandated reporters under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), who report suspected elder and dependent adult abuse.

This Resolution: Would explicitly remove the absolute immunity from civil and criminal liability for any report authorized or mandated under EADACPA, unless the report was attested to under penalty of perjury.

The Problem: Health practitioners have no duty to investigate known or suspected abuse. In addition, health practitioners who report known or suspected abuse are immune from civil and criminal liability for any report authorized or mandated under EADACPA. (Welf. & Inst. Code § 15634(a).) An absolute privilege exists in favor of those required to make reports. (*Easton v. Sutter Coast Hospital* (2000) 95 Cal.Rptr.2d 316, 320.) Because the privilege is absolute rather than qualified, the truth or falsity of the report is of no moment. (*Id.*) On the other hand, the failure to report known or suspected abuse or neglect, while not civilly actionable, is a misdemeanor punishable by imprisonment, a fine, or both.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: M. Kamionski, Esq., Law Office of M. Kamionski, 1334 Parkview Drive, Suite 100, Manhattan Beach, Ca. 90266 818-609-1795; Fax 818 609 0426, e-mail address: mkamionski@yahoo.com

RESPONSIBLE FLOOR DELEGATE: M. Kamionski

COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

Mandated reporting of suspected elder abuse by the front line individuals most likely to discover the problem is critical to the welfare of our vulnerable adult population. However, despite the

fact that such reporting is mandated for health care practitioners, clergy, care custodians, APS and law enforcement, and that fines and penalties for failure to report have been upheld by the courts, there is still great reluctance to do so. This resolution, with its requirement that such reports be under penalty of perjury, will only add to that reluctance and create a chilling effect on reporting. Further, many emergency reports that are necessarily made by phone will not be if there is a requirement that they be made under penalty of perjury. The absolute immunity that the author complains of reflects the overriding public policy interest in identifying and preventing elder and dependent adult abuse and should be preserved for the health and safety of this vulnerable population.

SAN DIEGO COUNTY BAR ASSOCIATION

The Resolution itself gives no clear reasons why it is necessary. One can surmise, however, that the drafters believe that because a failure to report by one who has such a duty (*e.g.*, health practitioners) is a chargeable offense, when a report is made, it should be of some “moment” such that attestation should be required. Hence, this argument is premised on the notion that because no attestation is necessary “the report is of no moment” (quoting from the Resolution itself).

Nothing could be further from the truth. The reports are full of “moments,” so to speak, whether attested to or not, in that an investigation is normally launched after a report is made, and the conclusions of the investigator, which are normally communicated to the court in related proceedings, may literally mean life or death for the vulnerable person who is the subject of the investigation. In addition, this Resolution is obviously very likely to discourage strongly the reporting of any abuse, as the reporting person may fear monetary liability, or worse, if the content of the report for whatever reason (which may include perjury by the abused party) is not confirmed.