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WHITE PAPER ALERT

PRE-LITIGATION MANAGEMENT OF THE POTENTIAL ELDER ABUSE CLAIM

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AN OVERVIEW

Litigation concerning the negligent custodial or medical care rendered to our elderly has changed dramatically. The conditional view of a complaint charging the negligent care and treatment of an elder in a nursing home setting as a medical malpractice claim is no longer viable.

In today's world, long-term care is one of the most heavily regulated industries in America. Federal regulations under the Omnibus Budget Reform Act (OBRA) provide an extensive recitation of standards that Medi-Care/Medi-Caid funded institutions must met in order to maintain their funding eligibility.¹ In addition, the individual states, led by Florida, Texas and California, provide explicit standards of their own for facilities to comply with licensing and certification requirements. The sheer volume of regulations virtually guarantees that even a fully funded, fully staffed and well intentioned facility may well fall short of compliance in certain areas on any given day.

Preparing for and defending against litigation in any industry as heavily regulated as the long-term care arena, is a daunting task. However, the enactment of laws such as California's Elder Abuse and Dependent Adult Civil Protection Act² have significantly changed the litigation climate in favor of the plaintiff's attorney.

In the current climate it is imperative long-term care providers act in a proactive fashion to prevent, limit and/or defend against an ever increasing wave of litigation.

¹42 CFR § 483.1 et seq.

²California Welfare & Institutions Code § 15600 et seq.

WHAT CAN WE DO?

1. Provide Quality Care.

Despite the news stories sensationalizing allegations against long-term care facilities and the unjustified lawsuits we have all seen, the reality is the legislation which placed us into our current litigation predicament came about as a result of poor care by a minority of those in the industry. Until the long-term industry is able to resurrect its image as a quality caring provider for the elderly, job one is quality care.

In order to assure quality care, facilities must have one individual who is responsible for the quality of the care rendered in a particular long-term care facility. That individual's job description should mirror the vague standard to which California facilities are held "to assure all residents reach or maintain their highest practicable level of mental and physical function". Staffing levels must be evaluated with both census and acuity in mind. Staffing continues to be an area which despite the quality of the care in a facility, is open to attack on many fronts.³ Evaluating acuity and census does not necessarily require additional staff members. Facilities should give consideration to assignments of their highest quality staff members, at every level, to their highest acuity patients. Facilities must remember the quality care includes "the basics" or custodial care as plaintiffs will consistently refer to it as. Bathing, toothbrushing, toileting, grooming and nutrition are outward signs to a family and hallmarks to a jury of the quality of care that is perceived from a particular facility.

2. Staffing Issues.

The key component in staffing issues is not the number of staff in a particular facility. The key component in staffing is the satisfaction of the staff with their position and their willingness to actively participate as a part of the care giving team. Studies consistently show that what workers want from their jobs is not better benefits or more money. Rather, it is the small things that make them feel commitment to an organization or part of a team that they are searching for. Baxter Labs recently did a global study in which they asked their employees worldwide what they could do to make things better for them. The resounding answer was that what employees wanted was to be "respected as whole human beings with a life outside of work".

What does this mean in the day-to-day operation of your facilities. Remember that a simple "Thank You" goes a long way in motivating your employees. Last year in California, the average long-term facility experienced over an 80% of turnover in their CNA employee population. CNA's are often the employees in a long-term care facility with the most patient contact, the most family contact and the least respect. Know your entire team from top to bottom. Frequent contact with them on a personal level will help both of you feel as if you are on the same "team". This concept works equally well for indoctrinating your personnel to providing the best possible care for your residents. Encourage your employees to learn as much about the

³Most recently, the GAO completed a study of 3 states, Mississippi, Washington and Ohio and found, once again, that the homes providing more nursing hours for patients were less likely to have quality of care problems. *Nursing homes: Quality of care more related to staffing than spending* (GAO-02-431R) (June 13, 2002).

residents on a personal level as possible. Encourage your employees to learn about Mrs. Rayburn not bed 222A.

Emphasize care at every opportunity. Emphasize relationships at every opportunity. Long-term care is a business which must be run effectively in order to succeed. However, our business is unique in the eyes of the public. We are asked to take care of our most fragile and important resource, the elderly. Create an environment that feels like family, not a job, your staff will respond, and so will your perceived quality of care.

3. Be Proactive During Surveys.

In the current political media and regulatory climate, surveyors are often seen as the enemy. Just as your employee should be treated as part of the family, consider treating your DHS surveyor as an uncle who has come to visit. Make the DHS surveyor a part of your team; make them feel as if they are welcomed and a useful resource, rather than an enemy from whom you are hiding.

The surveyor's job is to come in and look for something that is wrong. Remember that. They have no perception or understanding of any individual resident's history or daily life outside of what they see during a brief visit. Proactively work with the surveyors when they are in your buildings. Encourage them to ask you questions and try to resolve them on the spot with positive information. If a potential problem is found while the surveyor is in the building, work to address it while they are there. Let them see you are working with them. Encourage and remind the surveyor that they are part of your quality assurance process and you welcome them in your building.

4. Communicate With Your Families

It is often said that the best managers know when to shut up. Listen more than you talk. Encourage your families, like your employees, to come to you and others in the facility to discuss anything and everything concerning their family member. Provide a regular newsletter that encompasses information from the family and resident counsels. These are your clients, these are also your potential plaintiffs.

5. Some Final Words.

All too often, first contact with defense counsel occurs after a lawsuit is served. In the reality of potential litigation involving long-term care today, the facility must identify potential plaintiffs as early as possible. The clearest indication of potential litigation is when a family member or any other entity requests a copy of a resident's record at your facility. Far too often facilities do not evaluate the care that was rendered to a patient after another family member has requested a copy of the resident's record. Families are not asking for your resident record to review and highlight the quality care you provided to their loved one. If someone is asking for a copy of your resident record you can be sure they are doing it because they believe something was done wrong to their loved one. Be proactive immediately. From the facility's perspective a request for production of the resident record should be considered notice of a potential lawsuit and treat it accordingly within the building and corporation.

Assess and remember who your clients are. Your clients are not only the resident and the family members of your residents. Your clients also include your employees, your surveyors, and the physicians and independent contractors who work in your building on a daily basis. All of these entities are your clients who you have to satisfy on a daily basis.

In the present litigation climate we must understand that being proactive is a requirement. Complaining and placing blame will not solve the problem. Act now, provide quality care, listen to your families, and treat your employees with respect.

If you have any questions or desire further information on this, or any other topic, please contact:

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