ELDER LAW & LONG TERM CARE

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THE LAVENDER TRIAL:

UNDERSTANDING THE LOSS IN HUMBOLDT

PART ONE

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Before we sound the alarms and adopt the self serving hyperbole of plaintiff attorneys it is an important first step to understand *what happened in Humboldt*. As a member of an experienced and highly skilled defense team in this monumental class action[i], my assignment as lead trial attorney was both the greatest of honors and deepest of defeats. The defeat however was not at the hands of skilled opponents, bad facts, or even a prejudiced jury. To the contrary, this defeat was the result of a perfect storm of legal inequities left un-tempered by the protective arms of judicial review.

> "It put the fear of the Lord in every nursing home chain in the state."
> *Daily Journal quote of Glendale plaintiff attorney*

A REVIEW OF THE LAVENDER CLASS ACTION TRIAL

In April 2006 the Lavender Defendants received the first shot across the bow when the plaintiffs served their initial demand. A month later the class action complaint was filed alleging that 22 California skilled nursing facilities[ii], their parent corporation, and their affiliated administrative services company had willfully failed to comply with daily nurse staffing ratios required by Health & Safety Code §1276.5[iii]. Looking over the financial records for the 22 facility operators it quickly became clear that RN, LVN, and CNA staffing over the class period was in the aggregate well over state requirements. This fact combined with the failure of the Department of Public Health to adopt clarifying regulations *mandated by the same statute*[iv], the lawsuit appeared both factually and legally unjustified. Even in hindsight there is little other than the knowledge of the ultimate *runaway verdict* that would have justified conceding to the heavy handed demands levied by plaintiffs' counsel.

THE VALUE OF FORUM SHOPPING

Forum shopping is the long held practice where plaintiff lawyers seek to file their cases in a particular court where they believe they will receive the most favorable result. Liberal or conservative tendencies are considered; pro or anti corporate sentiment is evaluated; and "us" vs. "them" mentalities of local citizens are all factors considered by plaintiff attorneys as they strive to find the most receptive jurisdiction in which to sell their case. For a number of years long term care providers have watched a plethora of plaintiff attorneys pushing to find that ultimate "plaintiff friendly" court. Lawsuits must generally be filed within the jurisdiction where the alleged injury occurred[v]. The ability to choose a "plaintiff friendly" court however, is increased in class actions where class members live across a wide area. The broad geographical area of class member residence allows plaintiff attorneys the right to file their case in any courthouse within the community where a prospective class member lives. Over the better part of this decade multiple plaintiff attorneys have pressed their ability to pursue similar claims amongst a variety of courts with completely inconsistent results, ultimately leading to the selection of Humboldt County in which to file the Lavender claim.

LOS ANGELES AND THE 2ND APPELLATE COURT DISMISS SAME CLAIM

August 1, 2007
Alvarado vs. Selma

"We find that calculating on a class-wide basis whether skilled nursing …facilities are in compliance with section 1276.5 … **is a task better accomplished by an administrative agency than by trial courts."**

Only a year after Lavender was filed in Humboldt County, the Second Appellate District affirmed the dismissal of another lawsuit alleging understaffing against a different group of skilled nursing facility operators. In their ruling the Appellate Court upheld the decision of the Superior Court Judge assigned to oversee the case who had exercised his judicial discretion to abstain from hearing the claim. In *Alvarado*, the Court conceded that the complexities involved in determining staffing compliance would best be addressed in a regulatory forum. As a result the targeted operators and their parent companies were spared the cost of trial and the threat of disparate judicial interpretation and jury application of complex statutory and regulatory licensing rules.[vi]

Unfortunately, the ruling in the *Alvarado* case did not fully establish a skilled nursing facility operator is entitled to a dismissal of similar staffing claims. Instead, the *Alvarado* ruling merely honors the *judicial discretion* exercised by that Superior Court Judge who refused to hear the plaintiffs' staffing claims. In Humboldt however, the assigned Superior Court Judge rejected the wisdom of the Alvarado ruling and instead exercised his judicial discretion in favor of plaintiffs.[vii]

ORANGE COUNTY SUPERIOR COURT JUDGE (RET.) RULES: STAFFING RATIO IS *NOT* ENFORCEABLE

January 17, 2010
Luis Cardenas, Judge (Ret.)

"The arbitrator has no choice but to conclude that neither 1276.5 or 1599.1 provide a cause of action for [plaintiff]."

An experienced and respected judge assigned to hear a binding arbitration was required to rule on the precise staffing questions presented by the Lavender case. In his written ruling, served just as the Lavender trial was commencing, we find another dramatically different conclusion.[viii] In *Fashing vs. The Earlwood* Judge Cardenas held that H&S §1276.5 is merely "enabling legislation directing the Department…to create a licensing regulation requiring the 3.2 ratio." An enabling statute is the necessary first step where the Legislature confers authority to DPH to create *new rules* through the adoption of administrative regulations (found in Title 22 of the California Code of Regulations).

Despite this contrary ruling involving the same class period, the same parent company and one of the same operator defendants as named in the Lavender Complaint, the Humboldt County Judge found no pause in proceeding with the Lavender trial.

3 JUDGES, 3 DIFFERENT RESULTS - THE CATCH 22

December 22, 2009
W. Bruce Watson, Judge of the Humboldt County Superior Court

"A plain reading of §1276.5(a) does confirm a duty to provide at least 3.2 NHPPD."

It is troubling to see any citizen punished for conduct that is not adequately defined by laws, but this concern is compounded when three Superior Court Judges review the same laws and come to strikingly different conclusions about their application. Here the question begged is *how can the judicial system justify punishing any company when the law itself defies consistent interpretation amongst the Judges themselves?* Described another way, how does the law abiding citizen know how to behave if the conduct subject to a life threatening penalty is not adequately defined?

In our system of justice we anticipate such inequities will be addressed through the appeals process. Injustice however cannot be avoided where runaway verdicts themselves operate as a financial barrier that precludes the ability of the aggrieved defendant to file an appeal. You see, defendants do not have the *right* to immediate appellate review of lower court decisions. A party's automatic right to appellate review is not vested until there has been final resolution of those issues in the lower court. For most cases, including Lavender, this requires a verdict. Hence we arrive at the ultimate *Catch 22*. The Lavender Defendants weren't entitled to have rulings reviewed by the Appellate Court for error until the jury rendered a verdict. In rendering that verdict however, those same questionable rulings set the stage for a runaway verdict that in this case financially blocked the Defendants' ability to file an appeal.[ix] If that doesn't seem fair, it's because it isn't.

IS THE 3.2 NURSING RATIO ENFORCEABLE LAW?

October 11, 2007
Department of Public Health

"Historically, it has been difficult for interested parties to easily or independently determine whether there was adequate nurse staffing to provide the minimum 3.2 nursing hppd."

This is a question that our higher courts have yet to answer. We certainly know that the Department of Public Health believes the ratio can be enforced although the Department recognizes a problem in application does exist. The Department's October 11, 2007 publication titled "Initial Statement of Reasons" prepared in support of newly adopted regulations stated "[H]istorically, it has been difficult for interested parties to easily or independently determine whether there was adequate nurse staffing to provide the minimum 3.2 nursing hppd."[x] The question then is whether any law that the administrative agency charged with enforcement authority has identified as being "historically" difficult to apply should be allowed by a civil court to threaten the very life of any defendant company. Particularly so in the absence of a *meaningful right* to appellate review.

HEALTH & SAFETY CODE SECTION 1276.5 MANDATES THE ADOPTION OF REGULATIONS

H&S §1276.5

"The department shall adopt regulations…."

The answer to this question lies within the statute itself. As you can see, the first sentence in H&S §1276.5 mandates the Department of Public Health *shall adopt regulations*. Regulations are rules created through a formal administrative process that have

the force of law. Regulations are required to ensure the uniform application of law by both the governmental agency charged to carry out their intent and those individuals who are required to comply with the law. So let's take the next logical step. Given the legislative mandate to adopt regulations, just what do the regulations state?

January 22, 2009

"Each facility shall employ sufficient nursing staff to provide a minimum daily average of 3.0 nursing hours per patient day."

Experienced skilled nursing facility operators are now righteously scratching their collective heads in confusion because Title 22 of the California Code of Regulations ("CCR") §72329(f) clearly defines the regulatory requirement to provide 3.0 *nursing PPD*. As it happened, in the course of adopting new regulations the 3.2 PPD ratio was swept into CCR §72329.1 as a *contingent regulation* awaiting funding.[xi] Specific language designating the contingent nature of §72329.1 and the coordinated inoperative date of the 3.0 ratio pursuant to §72329 were adopted three times between 2007 and 2009 to "eliminate confusion". Rather than clarity however, the Department adopted a contingent group of inconsistent regulations that still to this day lay dormant in anticipation of funding. Funding that California has learned is not in the forecast.

In the absence of defining regulations the job of interpreting important licensing requirements has been undertaken in the ad hoc action and individual discretion of civil court judges.

DPH HAS ENFORCED 3.2 FOR A DECADE: IS THAT RIGHT?

The Office of Administrative Law (OAL) is charged with oversight of the formal adoption of regulations. We know that the duty to create and implement regulations required by H&S §1276.5 was tasked by legislative mandate to the Department of Public Health. The next step in our review therefore examines whether the enforcement of the 3.2 standard has been impacted by the failure of the Department to adopt required regulations. We start by reviewing the 3 types of statutes recognized by the OAL.[xiii]

April 25, 2006
Office of Administrative Law

"…it is useful to think about three types of statutory provisions: self-executing, wholly-enabling, and susceptible to interpretation…a statutory provision that is susceptible to interpretation, may be enforced without a regulation, but may need a regulation for its efficient enforcement…Conceptually, this statute could be enforced on a case-by-case basis, but such enforcement would probably present significant difficulties."

The first type of statute is the "self-executing statute". A self-executing statute contains all information needed to clearly and consistently enforce the law. In the Lavender trial the question wasn't whether the number "3.2" is itself clear. Instead the question was *what information should be included in the calculation matrix*? Here are a few questions H&S §1276.5 does not answer.

- When is the census counted?
- How is the staffing calculation matrix impacted by changes in the patient census that occur throughout the day?
- What records are required as evidence of care?
- H&S §1276.5 provides that "nursing assistants, aides, and orderlies" are counted in the ratio but it doesn't define who is included within those categories.
- H&S §1276.5 also provides for reimbursement under a code section that defines "routine nursing" to include activities and social services. If that's how the provider is paid, is that how the provider should count?
- Are physical therapy "aides" who are certified and providing patient care counted?
- Are certified nursing aides that are coded to other labor categories counted when they provide direct patient care?
- Title 22 §72038 mandates that nurse assistants must be certified. Why then is 72038 contingent on funding that hasn't come?[xiii]

Despite these pressing questions, the Lavender trial Judge determined H&S §1276.5 is completely self defining. The Court then left it to the Lavender jury to answer these and other legal questions based on the argument of attorneys. The jury then applied their layman findings regarding these complex legal questions in hindsight against the Defendants.

The second type of statute is one that cannot be enforced on its face. The OAL cites as an example "The department may set an annual licensing fee up to $500." In this example there is nothing to enforce until the department affirmatively takes action. The statute therefore requires regulatory action before it can be enforced. (The Judge in *Fashing v The Earlwood* determined that H&S §1276.5 fell within this category.)

The third type of statute falls somewhere in the middle. This type of statute is one that "conceptually" can be enforced but such enforcement presents difficulties as it requires individual judgment to determine compliance. This writer believes that as applied by the Department, this is where H&S 1276.5 has been enforced. According to the OAL however, while it is appropriate to administer a statute on a case-by-case basis, such application

can only occur "so long as no rule or standard of *general application* is used that *should have been adopted*…."[xiv] Here, the long term care operator has not been provided the required clarifying regulations that are needed to uniformly and consistently apply a staffing matrix in the manner as was done by the Lavender Court. While the *"contingent"* regulations are a step in that direction, they remain just that, "contingent". Absent the individual review and analysis provided through the Department survey process the Lavender Defendants were very simply denied their due process rights.

THE UNFAIRNESS OF IT ALL

Regardless of whether one agrees or disagrees with this writer or the judges cited, the point of this article remains the same. There has been no consistency in the interpretation of this statute and until the necessary law is in place, no company should face what the Lavender Defendants were subjected to in Humboldt. In standing in the regulators' shoes, the Humboldt Court not only failed to address the multiple nuances of administrative law that are contemplated within the licensing process but it failed to carry out its sacred obligation to protect the rights of all parties. By agreeing with Plaintiffs simple mantra that "this is not rocket science," the Court ignored every protection designed to prevent the outrageous result that occurred. This catastrophic verdict is more than a mere nuisance. It is a subornation of injustice with the important caveat that no action has been undertaken by our courts that will prevent this same scenario from happening over and over again. And so the plaintiff attorneys line up.

THE FIRST STEP

Unfortunately we are already seeing the impact of this lawsuit. Not just the verdict, but the court sanctioning litigation of this nature. The queue is already in place as other attorneys line up to take their shot at grabbing the brass ring. The first defense step to be taken in this standoff is for long term care operators to understand the issues. While the Humboldt verdict should be viewed as an anomaly, we cannot move forward in the assumption that the next judge will be wiser than the last.

In our next newsletter we will address how the Humboldt Court's "aggregate *right*" was used to compound a $6 million dollar penalty into a $600+ million dollar fight for life. ■

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REFERNCE NOTES

[i] I consider my clients' General Counsel to be amongst the most innovative and wise attorneys in the industry. As such, "I" was not ever alone in the courtroom. Our defense team included not only the watchful eyes of in-house counsel but the vast experience and expertise of two nationally renowned law firms. I offer the highest of accolades for their skilled counsel.

[ii] Each named defendant skilled nursing facility is a separate LLC and is independently licensed as a skilled nursing facility operator.

[iii] Health & Safety Code §1276.5(a) provides: The department shall adopt regulations setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities, subject to the specific requirements of Section 14110.7 of the Welfare and Institutions Code. However, notwithstanding Section 14110.7 or any other provision of law, commencing January 1, 2000, the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours, except as provided in Section 1276.9.

[iv] The first sentence of Health & Safety Code Section 1276.5 states "The Department shall adopt regulations …." The Administrative Procedure Act requires adoption of regulations to give effect to the interpretation of statutes that are not self defining before they can be applied as a standard of general application.

[v] Venue in common law refers to the neighborhood where an injury occurred.

[vi] Alvarado v. Selma Convalescent Hosp., 153 Cal. App.4th 1292.

[vii] This determination was contested in multiple appellate proceedings and was supported with amicus filings by healthcare groups who were not parties to the Lavender lawsuit. Unfortunately, and for reasons that will never be fully understood, the Appellate Court and California Supreme Court refused to examine these issues before a verdict was rendered.

[viii] Fashing vs. The Earlwood Final Award on Arbitration Proceedings. "A careful review of these authorities leads us to the following conclusions: (1) H&S §1276.5 is enabling legislation directing the Department of Health Services (Department of Public Health) to create a licensing regulation requiring the 3.2 ratio. (2) Amazingly, nothing was done…no implementation is possible until an appropriation is included in the Budget Act. (3) Since no 3.2 ratio existed…[plaintiff] cannot cite this section in presenting his case… (4) So, the only viable regulation (to this day) is Title 22, California Code of Regulations, section 72329 which has a 3.0 ratio, not 3.2. (5) H&S §1599.1(a) does require a facility to maintain an adequate number of qualified people to carry out the functions of the institution but does not require a 3.2 ratio. Interestingly enough, reasonable minds may interpret 1599.1(a) as requiring either less or more than a 3.2 ratio to meet the "sufficient care" standard."

[ix] California law requires a defendant to post a bond 1.5 times the verdict in order to proceed with an appeal. In this instance the required bond would have exceeded $1 billion dollars, an amount that far exceeds the financial resources of most LTC operators.

[x] Initial Statement of Reasons, DPH-03-010E. "HSC section 1276.5, determined that direct care giving to residents in SNFs should be no less than 3.2 nursing hppd. Historically, it has been difficult for interested parties (patient advocates, SNF residents and their families, SNF employees and state inspectors) to easily or independently determine whether there was adequate staffing to provide the minimum 3.2 nursing hppd."

[xi] CCR §72329 (f) states the 3.0 PPD ratio. §72329 (h) provides that this section will become inoperative upon the operative date of Section 72329.1. CCR §72329.1(f) states the 3.2 PPD ratio. §72329.1(l) states "Initial implementation of this section shall be contingent on an appropriation in the annual Budget Act or another statute, in accordance with Health and Safety Code Section 1276.65(i).

[xii] The OAL provides a booklet "How To Participate In The Rulemaking Process" which can be found at http://www.oal.ca.gov/res/docs/pdf/HowToParticipate.pdf

[xii] 22 CCR §72038 adopted in final form on January 22, 2009 states ""Direct caregiver" means a registered nurse…a licensed vocational nurse…and a certified nurse assistant, or a nursing assistant participating in an approved training program, as defined in Section 1337 of the Health and Safety Code, while performing nursing services…. Initial implementation of this section shall be contingent on an appropriation in the annual budget…."

[xiv] See "What Must Be Adopted Pursuant To The APA?" in "How to Participate in the Rulemaking Process" found at: www.oal.ca.gov/res/docs/pdf/HowToParticipate.pdf.