Elder Law & Long Term Care

Wroten & Associates, Inc.
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FEATURE SERIES

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THE LAVENDER TRIAL:

UNDERSTANDING THE LOSS IN HUMBOLDT

PART ONE

By Kippy Wroten

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

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.

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

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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?

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 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]

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.

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- 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 <u>all</u> 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. ■

i-xiv: All endnotes can be found on-line at www.wrotenlaw.com.

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RISK MANAGEMENT CORNER

Higher Acuity Means Higher Risk

By Cynthia Uptmore, RN, JD, CPHRM

Recent data strongly suggests the overall acuity level of residents and patients in long term care facilities is increasing significantly. Maintaining quality care and safety for those individuals with higher acuity is a major challenge facing the healthcare industry.

WHAT DOES HIGHER ACUITY MEAN TO YOUR FACILITY?

When a residential care facility for the elderly or a skilled nursing facility accepts residents or patients whose needs or acuity levels exceed the staff's skills or training, the facility opens itself up to greater risk of adverse outcomes and liability.

Numerous factors have supported this trend toward higher acuity levels in long term care facilities. These factors include:

- Market changes, such as changes in entitlement systems and managed care policies;
- A growing philosophy that since an assisted living facility is a home to its residents, those residents should be allowed to "age in place" as long as possible rather than being relocated to nursing homes ;
- An increase in moderate to severe cognitive impairment in the elderly population (dementia, Alzheimer's);
- A similar increase in serious/complex chronic conditions;
- Advances in disease control and healthcare technology;
- Advanced age;
- and, very simply, the continuing population growth of the elderly

WHAT STEPS CAN BE TAKEN TO DECREASE THE HIGHER RISK ASSOCIATED WITH ACCEPTING HIGHER ACUITY RESIDENTS AND PATIENTS:

1. Review current admission criteria and ensure the criteria used is in compliance with applicable state and federal regulations.
2. Create and faithfully utilize initial screening tools.
3. Only admit residents and patients who meet established admission criteria, even in light of economic pressures to fill rooms and beds.
4. Identify a thorough plan to care for each new resident or patient.
5. Identify potential high acuity residents and patients.
6. Regularly re-evaluate staffing to determine whether the staffing levels are appropriate based on the current acuity level in the facility.
7. Educate staff, the resident/patient, and family members and legal representatives about any changes in the high acuity resident or patient's condition (ie: physical, mental and social).
8. Notify physician, family and legal representative of any concerns regarding the resident or patient.
9. Reassess the resident or patient regularly.
10. Review and revise resident's and patient's plan of care routinely.
11. Document the who, what, when, why, where and how.
12. Evaluate whether interventions are appropriate and change as necessary..

With the trend towards accepting residents/patients with higher acuity and the growing elderly population, facilities must have safeguards in place to protect the residents and patients as well as the facility. ■

[1] Agency for Healthcare Research and Quality, http://www.ahrq.gov/research/ltcscan/ltc3.htm

Perceptions About Long-Term Care

Making a Positive Shift

By Marilynn Allemann, LCSW, CPC
Executive and Personal Coach

Perception: What is perceived is real? Or is it?

In philosophy, psychology, and cognitive science, perception is the process of attaining awareness or the understanding of sensory information.

The processes of perception routinely alter what humans see. When people view something with a preconceived concept about it, they tend to take those concepts and see them whether or not they are really there. This problem stems from the fact that humans are unable to understand new information, without the inherent bias of their previous knowledge. A person's knowledge creates his or her reality as much as the truth, because the human mind can only contemplate that to which it has been exposed. When objects or situations are viewed without understanding, the mind will try to reach for something that it already recognizes. That which most closely relates to the unfamiliar from our past experiences, makes up what we see when we look at things we don't or can't comprehend.

> **"The difference between a mountain and a molehill is your perspective."**
> *Al Neuharth*

It is perceptions that dictate how something one believes in, becomes his or her reality regardless of what the truth is.

HOW DO WE CHANGE MISTAKEN PERCEPTIONS?

With this knowledge of how perceptions can be altered we therefore can change individual and community perceptions of the services provided by elder care facilities and the facilities themselves. For example, there is a preconceived notion that long-term care equates to a poor quality of life, complete dependency and eventual and inevitable death. Perhaps it starts with a shift in our societies' view of getting older. We need a new "vocabulary" describing the maturing of our older population and the quality of the services that can be reasonably and cost effectively provided by long term care facilities, and long term care doesn't mean not being able to do anything for yourself, and doesn't necessarily equate to the end of some one's life.

Americans' perception of long term care may be changing, but more consumer education is needed to counter negative views and perceptions and demonstrate to consumers how the industry is evolving in providing a higher quality of care and thus meeting the needs of the increasing elderly population within the financial restraints of individual and third party payers.

The focus of our efforts to change people's perceptions about long-term care should be the access to top-quality services in the most appropriate setting for each individual.

OTHER APPROACHES TO IMPROVE PUBLIC PERCEPTIONS IN PART MAY INCLUDE:

- Community visibility through participation in community activities.
- Educating the public by writing articles of interest about what objective criteria one looks at to determine if high quality services are being provided, the challenges of working with the elderly and the real financial realities of this type of care.
- Network with supporters within the public and private sectors, families, vendors, and others with similar interest.
- Increase communication, i.e., email campaigns introducing new services or the appointment of key staff/management to prospective residents and their families.
- Listen to peers – become aware of what others in the industry are discussing.
- Connect with families of residents, their churches, and advocacy organizations.
- Stay current on issues, governmental, financial and political.

Unfortunately, perception is reality (but, not necessarily the truth), and so it is up to those of us who support the long term care marketplace, individually and collectively, to begin to challenge and change those negative perceptions.

Additional information can be found on Marilynn Allemann's website, www.MastersExecutiveCoaching.com. Please contact Marilynn Allemann directly at mwallemann@sbcglobal.net with any questions. ■

Class Actions: Alive & Well

By Laura Sitar

Speaking of class actions, earlier this year, the Ninth Circuit Court of Appeal upheld certification of what appears to be the largest employment class action in United States history, Dukes v. Wal-Mart Stores. The Dukes case, which was first brought by California employee, Betty Dukes, alleges female employees at Wal-Mart were routinely subjected to sex discrimination in pay, job assignments and promotions. The class may ultimately include all females employed in 3400 Wal-Mart stores since 1998. The potential numbers are staggering! Just as three residents in Lavender v. Skilled Healthcare Group, Inc. represented a class of greater than 32,000 residents, six females who worked for Wal-Mart could represent millions of current and former female employees in Dukes v. Wal-Mart.

Interestingly, evidence presented by both sides in various hearings held in the case to date has shown that hiring and promotion decisions at Wal-Mart are made at the individual store level. Pay decisions are made at the store and district levels as well. Wal-Mart argued that with such a large number of individual decision makers in 3400 stores across the country there was not enough "commonality" to justify class treatment. In other words, there was little or no evidence that a female employee's experience in one store relative to pay or promotion was the same or similar to that of female employees in any other stores. The Court of Appeal disagreed and ruled that evidence of Wal-Mart's excessively subjective decision making in a corporate culture of uniformity and gender stereotyping suggests there are common legal or factual questions regarding whether Wal-Mart's policies or practices are discriminatory. In late August, Wal-Mart filed a petition with the United States Supreme Court asking for review.

THIS IS A CASE WORTH WATCHING

Whether you are a Wal-Mart fan or a vocal detractor, this case is worth watching! The Supreme Court's decision whether or not to grant review will have major implications for all employers. Certification of discrimination cases as class actions has generally been disfavored absent evidence of clear discriminatory company policies and procedures. The individual nature of employment decisions surrounding hiring, firing and promotions makes every situation unique and not well suited to class treatment. Add hundreds or thousands of supervisors making those employment decisions and commonality is virtually gone. Unfortunately, at least for the time being, that lack of commonality does not appear to be a problem in class certification of employment discrimination cases.

If the Ninth Circuit's decision is allowed to stand, employers should anticipate a significant increase in the number of employment discrimination class actions filed. Claims will not be limited to sex discrimination, but are likely to include discrimination based on age, race, disability and a number of other protected categories. The stakes are high for employers.

Some employers may not see claims of sex discrimination as a significant concern in the long term environment based on the general make-up of the workforce, but what about age discrimination or race discrimination? Imagine a class action alleging discrimination in promotion brought on behalf of all aides or Certified Nursing Assistances in a number of states in a particular protected category. Class action treatment would potentially deny the employer the opportunity to examine and defend each promotional decision on an individual basis.

It's now a waiting game to see if the Supreme Court grants review. We'll keep you informed. ■

Legal Update

By Darryl A. Ross

Community Care Licensing posts "Prioritization of Workload" in response concerns about how CCL is operating with reduced funding. See: http://www.ccld.ca.gov/res/pdf/CCLpriorities.pdf

CA SB1329 – pending legislation requires licensees of RCFE's to notify Community Care Licensing on specified indicators of financial distress.

The California Supreme Court ruled that heirs of a decedent patient must arbitrate their claims against a physician despite the fact that the heirs did not sign the arbitration agreement. The Court ruled that where the agreement signed by the patient manifested an intent to bind such claimants, the heirs are bound. *Ruiz v. Podolsky, No. S175204 (Cal. Aug. 23, 2010).* This case applies to wrongful death / medical malpractice claims. It is unclear whether this ruling will extend to arbitration provisions commonly found in resident agreements.

According to an article published on CNNMoney.com, John Hancock, one of the nation's largest providers of long-term care insurance, intends to raise insurance premiums an average of 40% next year. (http://moremoney.blogs.money.cnn.com/2010/10/08/premium-hikes-loom-for-long-term-care-insurance/)

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