



Elder Abuse: Million Dollar Litigation

How Plaintiffs Turn Survey Results Into Elder Abuse *by Kippy Wroten*



It is well understood by long term care professionals that the complex regulatory scheme under which facilities are licensed

does not anticipate perfect compliance. Although it may seem obvious that any demand for human "perfection" is patently unreasonable, such perfection is exactly what plaintiffs demand when arguing a claim for elder abuse. The ladder on which the plaintiff builds his case starts under a legal theory that provides plaintiff the easiest road to proving liability.

The legal term is "negligence per se." Negligence per se is the theory under which a jury is instructed to make a mandatory finding of negligence against any defendant who has violated the law. That the violation is limited in either scope or severity is not relevant. The mere fact that a violation occurred is sufficient to establish the first prong of a defendant's liability. As such, today's plaintiff attorney sees Title 22 as the lynch pin on which to build their case.

The advantage gained by plaintiff's ability to introduce evidence of regulatory violations is not limited to negligence claims. In orchestrating their case of "elder abuse" plaintiffs introduce multiple instances of non-compliance to support their argument that a facility was inadequately staffed. Minor violations which independently appear insignificant gain importance through the volume of violations claimed to have occurred.

The proverbial "mountain out of a mole hill" is built to support an argument that inadequate staffing (in numbers or training) caused a *pattern* of non-compliance which equated to "reckless" misconduct.

How Plaintiffs Use Regulations

- (1) Licenses require compliance with all state and federal regulations.
- (2) Standard of care is determined by compliance with regulations. The violation of a regulation is negligence.
- (3) Families rely on the licensee's promise of full regulatory compliance. The failure to comply is fraud.
- (4) Elderly are frail and it is known that non-compliance will result in injury. Non-compliance is therefore "reckless."
- (5) DHS/DSS surveys establish an ongoing pattern of non-compliance. The ongoing business practice places "profits over people" which establishes malice, oppression, and fraud to support abuse and punitive damages.

Additionally, plaintiffs argue that deficiencies noted in surveys, complaint investigations, unusual occurrence and incident reports establish knowledge of ongoing wrongdoing. Such "notice" creates the foundation for a finding of malice, oppression, or fraud which catapults a simple act of negligence into a multi-million dollar elder abuse verdict.

The long term care provider can assist in breaking the liability chain by following some very simple steps. First, take the time to create thoughtful plans of correction which specifically document corrective measures undertaken, even for minor deficiencies. Second, keep documentation of in-services that directly respond to findings of deficiencies in a manner that allows for easy retrieval in the event of litigation. Attendance at in-service programs directly related to deficiencies should be specifically documented. Documentation should include all related informal training such as caregiver shadowing or policy reviews presented at daily stand-up meetings. Finally, staff training records must be consistently maintained and must include evidence of training on mandatory abuse reporting requirements.

Unfortunately, the survey process requires the surveyor to subjectively interpret how regulations will be applied under specific circumstances. Such subjectivity oftentimes leads to inconsistent results between individual surveyors which in turn leaves the long term care provider in a compliance conundrum. It is therefore imperative that the long term care provider protect themselves by engaging independent measures to clearly document steps taken in response to deficient findings in order to break the potential liability platform on which an elder abuse claim can be launched.

Our next newsletter will highlight the Administrator's responsibility to report suspected elder abuse. Wroten & Associates welcomes attorney Kimberli M.P. Smart, RN, CPHRM. Ms. Smart specializes in long term care and risk management.

ELDER LAW & LONG TERM CARE



Wroten & Associates Inc.
Attorneys at Law

Promotion of Regina Casey to Partner

Wroten & Associates is proud to announce the promotion of Regina Casey to Partner. Ms. Casey has a long history serving as an aggressive advocate for healthcare providers in State and Federal Courts where she has served as lead attorney at trial, mediation, arbitration, and administrative hearings.



Ms. Casey brings a depth of knowledge and experience to Wroten & Associates where the focus of her legal practice is the representation of the Long Term Care industry during all stages of civil litigation, including government administrative and professional licensing hearings. Ms. Casey is also active as a medical/legal educator and has been instrumental in assisting clients both limit and avoid legal problems by addressing risk management issues and investigating sentinel events before family or government

officials raise concerns. Ms. Casey is respected for her ability to negotiate and resolve claims of "elder abuse" fairly and expeditiously thereby eliminating the need for trial, arbitration, or government action. As an experienced and aggressive negotiator, Ms. Casey provides the perfect balance to the successful trial practice of Wroten & Associates where Ms. Casey also serves as the Managing Attorney.

In addition to her legal experience Ms. Casey has worked as a practicing nurse and nurse educator. Ms. Casey graduated Magna Cum Laude from Duke University earning a Bachelor of Science in Nursing in 1975. In 1985 Ms. Casey was awarded her Masters of Science in Nursing at Catholic University America where her Master's thesis addressed the treatment of decubitus ulcers. Ms. Casey taught nursing at American University and

has lectured extensively on a variety of nursing topics including the training of Home Health Aides and life care planners.

Ms. Casey graduated with Honors from the University of Maryland Law School in 1986 and was a member of the Maryland State Bar and District of Columbia Bar until relocating to California in 2001.

Trial: The Defense Wins

Wroten & Associates is proud to announce the November 9 defense verdict obtained against Robert Chavez and Anthony Lanzone of Wilkes & McHugh. This marks the second long term care defense verdict for Wroten & Associates since our opening last March.

For further information regarding this article, please contact Ms. Wroten at 949.788.1790 or e-mail her at: kwroten@wrotenlaw.com

