

ELDER LAW & LONG TERM CARE

Wroten & Associates, Inc.
Attorneys at Law



Employee Turnover: Effects & Implications Beyond the Obvious



By Darryl A. Ross



For those who know me, when I finish my day as an attorney, I put on my family hat which includes my role as Regional Commissioner for my city's American Youth Soccer Organization (AYSO) region where I am privileged to oversee 2,000 children and 300 volunteers. Additionally, I am honored to serve on AYSO's national legal commission and operations commissions where I assist the organization managing risk, protecting children and volunteers, and providing support in connection with decisions that will affect over 500,000 players and 300,000 volunteers nationwide.

Through my service to AYSO, I have come to recognize similarities between what the long term care provider community is tasked with, and my experiences within AYSO. Of course I am not comparing the responsibility of providing medical care and treatment to rehab and convalescent patients to that of teaching kids to play soccer. Instead, I am speaking to the responsibility of carrying out regulations and managing operations in the name of delivering a service to our customers that enhances their quality of life, while at the same time, is carried out in an environment that is positive and promotes loyalty from the organization to the employee / volunteer and vice-versa.

By now, you may be wondering where this piece is going. Before I answer that, let me throw out a few "numbers." What if I told you that your high-school son's batting average is .430? Or that as a pitcher, he strikes out 42.19% of opposing batters? Or that your daughter earned a 92.20% in a ridiculously difficult AP European history class? You might start dreaming of college scholarships. But what if I changed the facts and told you that the 42.19% represents the aggregate percentage of "direct nursing" staff turnover in 2009 throughout California's 1,090 skilled nursing facilities? And the 92.20% represents turnover of nurse assistants at a single facility somewhere in California.

Turnover burdens other employees as they must pick up additional shifts; turnover is costly as you have to train new employees in your systems; and while you may be saying goodbye to someone you regard simply as an "employee," your residents are being forced to say goodbye to people who have become a part of their family. I presume you know all of the above and I am not presumptuous enough to tell you how to fix "morale" problems in your respective facilities (AYSO instruction model of PIE might be useful - Positive Instruction and Encouragement).

In thinking about how to introduce this series, I spent considerable time reflecting on the similarities between long term care providers and running a youth soccer program. I was able to identify quite a few. Consider the following:

- Both are entrusted to care for a vulnerable segment of society;
- Both face changing business models: LTC facilities must contend with higher acuity residents, fewer available reimbursement dollars, and more demanding families. AYSO was founded on a business model rooted in the spirit of volunteerism is being confronted by today's reality that people have less available time;

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“Employee Turnover”

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- Both face the task of motivating people, whether it's low paid employees engaged in a difficult job, or volunteers who are asked to give their time;
- Both face the task of making sure people are properly trained;
- Both deal with staffing ratios, whether it's direct care staff to patients, or coach to player; and
- Both are mandatory reporters.

What I and my colleagues hope to offer you over the next few newsletters is a new way to think about your employees, including the effect of turnover and the implications beyond the obvious. We will analyze important issues such as 1) what happens when an employee with significant knowledge about your operations, including growth strategies, leaves for your competitor; 2) what that employee is permitted to share with his/her new employer; 3) what information may be “extracted” from someone you just plucked away from your rival; 4) social media policies and their impact on employee satisfaction and turnover; 5) progressive discipline policies and whether there really is an opportunity for the voice of a lower level employee to be heard; 6) the financial impact including the cost of training new staff; and 7) how can low turnover rates be used to attract higher acuity residents who likely carry higher reimbursement rates.

For my part in this series, I will incorporate certain ideas and lessons learned from my time with AYSO. While the consumers are different, there are many lessons learned that have application to the long term community. So as I close this introductory piece, I want to share some of AYSO's 6 core philosophies^[1] with you, only they have been slightly modified to, perhaps, have application to your circumstances.

Positive Coaching: Encouragement of employee effort provides for greater enjoyment by the employee and ultimately leads to better-skilled and better-motivated employees...

Employee Development: All employees should be able to develop their work skills and knowledge to the best of their abilities, both individually and as members of your team, in order to maximize enjoyment of their job...

Balanced Teams: Work schedules are formed as evenly and balanced as possible—because it is fair and employees will feel better about where they work if they believe they have a chance to

succeed, and that staffing burdens are spread amongst all employees...

Good Sportsmanship: Strive to create a positive environment based on mutual respect....and the facility is designed to instill an open environment where everybody has an opportunity to participate and affect positive change..

The preceding ties to the core belief that treating people well and making them feel valued will not only engender feelings of good will, but will eventually generate a feeling of being part of something worthwhile and just. Our next article will explore some of these concepts further, including the do's and don'ts related to information a former employee may provide to an employer and/or information you may obtain from your new star employee. ■

[1] Open Registration, Everyone Plays, Balanced Teams, Positive Coaching, Good Sportsmanship and Player Development

42.19%

AGGREGATE PERCENTAGE OF “DIRECT NURSING”

STAFF TURNOVER IN 2009 THROUGHOUT

CALIFORNIA'S 1,909 SKILLED NURSING FACILITIES

92.20%

TURNOVER OF NURSE ASSISTANTS AT A SINGLE

FACILITY IN CALIFORNIA.



Musings of a Frustrated Warrior:

Championing The Rights of the Long Term Care Professional

By Kippy Wroten



It's old news to again pound the drum that litigation against the long term care provider is out of control. I don't need any study from the government, underwriters, or San Francisco University's Nursing School to tell me that a comparison of litigation costs over the last 15 years will show a shocking drain of money into the hands of plaintiff attorneys. I've heard enough from

the "consumer" side touting trumped up stories of poor care played out to a self serving media corps anxious to create the next shock of the day scandal. After all, good care isn't "news", it just happens. Every day. Nonetheless, the system is designed to support this plaintiff attorney cash cow, so how did we get here?

First, let's recognize that back in the 80's long term care had problems. There's been a wealth of work to correct the insufficiency of care documented from this long past era. So, why do our litigation woes continue with such a fervency? Here's my take. Before reading on, please recognize this is an exercise of my First Amendment right to free speech. My opinion. Don't read on if you offend easily.

With the advent of the mantra "profits over people", long term care providers have learned that going to trial in a civil courtroom does not necessarily mean having a fair day in court. After all, it is a known condition of being human that we each harbor a cachet of personal fears and biases resulting from our own life experiences. In the civil courtroom such fear translates into verdicts so it should not be surprising that plaintiff attorneys strive to tap into this negative emotion as they work to tip the scales of justice in their favor. We've seen that the war cry of the plaintiff attorney against the long term care provider successfully resonates inherent fear held by our juries. Fear of aging. Fear of losing our senses, of losing command of our bodies. Fear of being called on to care for aging loved ones, and guilt for failing to do so. Result: out of control verdicts founded on tenuous facts.

Let's face it. Filing "successful" claims against any long term care provider has become sport of sorts as plaintiff attorneys hold an entire industry hostage to their routine leeching of the proverbial pound of flesh. File a claim and "cha-ching", money is paid. At first blush this may seem to be a wise move given there is only one guaranteed way to avoid trial and that is to settle. The problem here is that when settlement moves from being an option to being a standard, the demand for money goes up. A lot. Like

metal to a magnet, plaintiff attorneys follow the flow of money to collect their bounty. Certainly, experience has demonstrated that when more money is put into the hands of these adversaries the result isn't that they turn and go away. To the contrary, more money in their hands means they have larger war chests to support their next assault. More money means giving our adversaries the financial resources needed to ratchet up discovery costs, noting that plaintiffs don't go after voluminous discovery to learn about the defendants. They do it to create more work for your attorneys which in turn raises the cost of mounting a defense. Raise the cost of defense and you raise the value of settlement. Extract more money with each swipe of the sword, then repeat.... It's a formula. You get it.

Now enter traditional wisdom as we try to gain control of "litigation" costs. We can't control plaintiff attorneys but we can control our defense. Idea, cut the costs of defense. After all, we're going to pay anyway so why not just pay up front before paying for a defense that won't mean anything? It does make business sense. Why worry about quality control in an environment where the end game is known? But, if our system of jurisprudence is designed to prevent juror prejudice from impaling a party without good cause, why are we so threatened by facing a jury? It is after all a courtroom of law and we have a system of jurisprudence that protects us from prejudice. Right? In America we have a right to expect justice will be meted out with an equal hand and that prejudice will be monitored to ensure that decisions will be made without bias, be it bias against corporations, long term care facilities, or heaven forbid, corporations who operate long term care facilities. When did this highly vaulted concept of fairness get so lost as it's applied to the rights of the long term care operator?

Separation of powers and due process are bedrocks of our Constitution yet in the long term care world of law, we assume these fundamental tenants do not exist. First, there is the regulatory environment which intentionally blends all those government powers our forefathers so carefully separated. The combination of investigatory, prosecutory, and adjudicatory functions are all held in the hands of one agency who rules the roost. Sometimes with thoughtfulness, sometimes with knowledge, and sometimes without either. Come on folks. It's the government. Have you been to the DMV lately? Now, I don't have any issue with the need to run these quasi executive "expert" agencies differently than we do our civil courts. There is good reason for the difference. Still, the separation of governmental duties "is not

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“Musings”

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merely a matter of convenience or of governmental mechanism.” (*O’Donoghue v U.S.*) It is the system by which we disperse power to protect our citizens against arbitrary and unfair control. This separation is purposefully absent in the daily activities of the administrative agency overseeing regulatory compliance.

Now we get to the problem, which isn’t the manner in which regulatory compliance is monitored but instead, that our civil courts give deference to the findings of these monolithic agencies and as a result, their work product is often allowed to be introduced in civil courtrooms as evidence of wrong doing. Why is this a problem? Because regulatory due process protections are not equal to civil due process protections. What this means is that even in the event an agency finding is challenged by the operator, under law, the Government Code does not require the administrative hearings where regulatory compliance is adjudicated to meet the more stringent and technical rules of evidence applied in a civil court. In fact, the Government Code specifically allows evidence to be used in administrative hearings even if the same evidence would be excluded under the rules of the civil court. In the regulatory world, cross examination to challenge the truthfulness of adverse information is not required. Hearsay is more fully allowed. Even the side bearing the burden of proof is reversed with factual presumptions automatically falling in favor of the prosecutor and against the operator. And of course, when dealt a deficiency or citation, there is one agency that singularly stands as the investigating police power, judge, and jury. Under these striking differences in civil protections the question is begged. How can any civil judge justify showing a jury the findings of an administrative agency as evidence in civil actions? This is the line where the long term care operator must make a stand and demand our courts apply the same standards of fairness to which

all defendants are entitled. An entitlement guaranteed by the Constitution as a cornerstone of due process.

And finally, as we all recognize I’m voicing my lone opinion, I’ll address the stake that hurts the most in the battle to gain sanity in litigation. Here I refer to the division amongst the rank and file long term care professionals themselves that prevents the type of brain storming and sharing of information so successfully employed by the plaintiff bar. While the plaintiffs’ bar enjoys one of the best information pipelines imaginable, the defense bar is relegated to operating in self serving silos. Why? Because we have to. There simply can be no sharing of information or coalition to foster needed strength so long as there are those amongst our own members who adhere to the maxim “keep your friends close but keep your enemies closer.” We cannot engage a coalition to advance new defenses when the fox has literally been welcomed in the henhouse. We cannot freely share innovative ideas when we know that whatever is said today in trust will be bantered about freely tomorrow by our adversaries. And we can’t be colleagues with those who so zealously oppose us every day in court. But, rather than being unfairly critical of business decisions born of justified frustration I will instead close with a responsive adage of my own. Have you heard the one about the frog and the scorpion?

Best of the new year to all.

As always, it is an *honor* to serve you. ■

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Developing Excellent Customer Service Skills in Long Term Care Facilities

By Marilyn Alleman, L.C.S.W



Healthcare quality improvement has usually been focused on the clinical aspects of care. It is often ignored that healthcare quality starts with people! Inspiring leaders who empower their employees are the key to improving the quality of services in long term healthcare. Customer service has become so important these days

because facilities have become almost identical in what they have to offer. So where do families identify significant differences? It is in the perception of friendly, caring and attentive service.

The importance of training caregivers in ways to provide friendly, caring and attentive service cannot be over emphasized. Facilities should have in place a formalized training program educating employees on how to meet the emotional needs of residents and families. This training program should provide skills enhancing employee attitudes, and knowledge in building effective relationships with residents and their families. Modeling of these attitudes and skills should continuously be done by all leaders, managers and supervisors in the organization.

Quality Care/Customer Service is the result of competent well-trained employees performing daily assignments consistently well, including demonstrating the ability to connect with families and residents. The quality of care provided must be universal across all departments as families have chosen the facility based on all of the services offered. Families will rarely remember how quickly a job was done, but they will always remember how well it was done, especially if they feel as if they are important and cared about. The better the quality of care, the better the image of the facility, which ultimately translates into the greater success of the facility.

The training programs to improve customer service should focus on the following points:

ACTIVE LISTENING - Employees should be active listeners. Listening leads to understanding and understanding leads to meeting the resident's needs. Listen effectively and without judging. Active listening helps the caregiver build a relationship of trust and caring with the resident and their family members. It helps both the resident and family members to feel cared about and understood. Take the time to listen to the person's tone of voice, notice their body

language and give them your undivided attention.

COMMUNICATION – Communicate clearly. Speak slowly. Repeat yourself until you are confident you are understood. Ask residents if they understand or have questions. This may take some additional time, but will alleviate potential problems.

ANTICIPATE AND IDENTIFY – Try to anticipate and identify the needs of the resident. Most needs of residents and their families will be emotional rather than logical. Make no judgments. Reassure and clarify what the need may be. The more you or your staff knows your residents, the better you will become at anticipating their needs.

ELICIT FEELINGS OF APPRECIATION AND IMPORTANCE – Make the resident feel important and appreciated. Treat them as individuals and not just another resident. Be patient and kind.

Communicate with them on a regular basis. Thank them for their cooperation or compliance.

“People don't want communication with an organization or computer. They want to talk to and interact with a real, live, responsive, responsible person who will listen and help them get satisfaction.”

- Theo Michelson

KNOWLEDGE – Knowledge is power. There is nothing worse than not knowing the objectives, roles and expectations in any given situation. Take the time to help the resident and family understand your expectations, policies, routines and systems so there are no surprises. This knowledge will greatly reduce and possibly alleviate the client's potential anxious, angry or confused feelings.

GIVE MORE THAN IS EXPECTED – Giving more than is expected will foster a greater connection and alliance with the residents and their families.

These methods can be applied to all relationships within a facility including every employee or member of the team. Treating your employees with consideration and respect creates a higher regard for the clients residents and families they serve. Organizational cultures that encourage people to connect can generate a passionate commitment to achieve greater employee and customer satisfaction. A win win for all! ■

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

Treating the Elderly with Dignity

By Regina Casey



In recent years there has been a dramatic increase in the number of claims filed for Violations of Patients Rights. Health & Safety Code § 1430(b) states “A current or former resident or patient of a skilled nursing facility...may bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights in Section

72527 of Title 22 of the California Code of Regulations, or any other right provided for by federal or state law or regulation...” One of the rights listed in the Patient’s Bill of Rights is the right to be treated with consideration, respect, and full recognition of dignity in care of personal needs.

In addition to state law, there are federal regulations establishing patients rights in a nursing home. Title 42 Code of Federal Regulations § 483.10 states “The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility.”

A frequent allegation in lawsuits is that a Defendant nursing home showed a lack of consideration and respect for a Plaintiff and insulted his or her dignity by leaving Plaintiff in urine and feces for long periods of time. Poor hygiene alone can be a basis for a lawsuit under the theory that the staff at the skilled nursing facility violated a patient’s right to dignity by failing to provide proper grooming. If a patient is totally dependent on staff for his or her activities of daily living, all that is required for plaintiff to establish a violation and recover costs of litigation and attorneys’ fees is testimony of a family member who convinces the jury that every time they visited the patient he or she was not bathed, appeared unkempt or was in soiled clothes.

Healthcare professionals are trained to treat their patients with dignity and respect and strive to do so. There are times, however, when a patient refuses care, so their hair was not combed or their teeth had not been brushed when the family comes to visit. To avoid being falsely accused of not meeting the patient’s personal needs and exposing the facility to a claim for violation of the patient’s right to dignity, remember to follow the steps outlined here:

1) DOCUMENT ALL PATIENT REFUSALS OF CARE

When the patient refuses care, it is not only important to document that the patient refused, but you should also document what you did to try to obtain compliance.

2) NOTIFY THE FAMILY AND PHYSICIAN OF REFUSALS OF CARE

Not only should patient refusals be documented, but the record should also note that the family and physician were notified of the refusal.

3) INVOLVE THE FAMILY IN THE PLAN TO OBTAIN COMPLIANCE

In addition to documenting the refusal and who was notified, a plan should be implemented outlining measures to take in an attempt to obtain the patient’s cooperation. Asking the family to assist in the process not only increases the chances that the patient will accept the offered care, but is also a good way to demonstrate to the family that efforts are being made to provide the care that was refused.

4) EDUCATE THE FAMILY ON DIGNITY

There are occasions when honoring a patient’s refusal is the only way to treat him or her with dignity. Many times family members are overly protective of their loved one and expect the nursing staff to provide care even if refused. In those situations the family may need to be educated that the patient’s wishes should be honored. To treat the elderly with dignity requires that you respect their right to autonomy and control whenever reasonable. ■





Wage & Hour Update

By Laura Sitar



California employers continue to await the California Supreme Court's decision in *Brinker Restaurant Corp. et al. v. Superior Court of San Diego*. This wage and hour class action is anticipated to resolve the critical questions of (1) whether employers must ensure that employees take meal periods or simply provide them, (2) whether

a second meal period must be provided within five hours of the first meal, rather than after ten hours of work per day, and (3) whether these types of wage and hour claims are amenable to class treatment. The Court's decision in *Brinker* will undoubtedly have a significant impact on the current wage and hour litigation frenzy in California either by adding fuel to the fire or by providing employers some much needed relief.

The California Supreme Court heard oral argument on November 8, 2011, and while predicting the outcome of the case from the tenor of the Justices' questions at oral argument is a treacherous business, observers anticipate a mixed result for employers. On the whole, most observers agree the Court was sympathetic to the argument that an employer's only obligation is to make a meal period available to employees, not to force employees to take a meal period against their will and on pain of disciplinary action. On the other hand, the Court appeared less sympathetic to the

argument that a second meal period need only be provided after ten hours per day rather than after each five hour work period. A decision in favor of plaintiffs would require employers to provide a second meal period on a "rolling five hour" basis.

The Court gave little indication of their thoughts on whether these cases are amenable to class action treatment. Presumably, a decision that employers must only provide meal breaks leaving employees the freedom to do as they choose would run counter to class certification.

“On the whole, most observers agree the Court was sympathetic to the argument that an employer’s only obligation is to make a meal period available to employees, not to force employees to take a meal period against their will and on pain of disciplinary action.”

While the Court's decision was initially anticipated by early February, the Court ordered additional briefing on the issue of whether any decision could only be applied prospectively. Their decision is now likely to be issued by mid-April. California employers are waiting anxiously. We look forward to addressing what

the Court's long awaited decision means to California employers at our 4th Annual Long Term Healthcare Conference on May 31, 2012. ■

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