

# ELDER LAW & LONG TERM CARE

Wroten & Associates, Inc.  
Attorneys at Law



## Managing Emotions When Mediating Elder Abuse Cases

By Regina Casey



Mediation of claims of elder abuse involve more emotion than other types of litigation.

When adult children entrust the care of a parent

to a facility and there is an unexpected injury or death, there is often a mixture of strong emotions, including denial, guilt and anger that can make resolution of the matter more challenging. Emotional tension must be managed effectively by the mediator and defense counsel in order to obtain the best possible result at mediation.

mine what caused the unexpected event or death. A lawsuit may often be prevented if the family's questions are fully answered at the time of death and family members are made to understand that the outcome is a result of the natural progression of their loved one's disease process rather than neglect or abuse.

### Overcoming Guilt

Guilt is another emotion that must be recognized and addressed when mediating a matter. The family often feels guilty because they were no longer able or willing to care for their parent at home and it was their choice to place him or her in the facility. The grieving daughter may think "If only I had not put Mom in that place,

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*Plaintiff Attorneys Get Their Way*

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Most Plaintiffs are still in the grieving process when a lawsuit is threatened or filed. After the loss of a parent or spouse, the grieving process may last over a year before there is acceptance by some individuals. The stages of grief include denial, anger, bargaining, depression and acceptance. Determining the emotional state of the parties and noting what stage of the grieving process the Plaintiffs are currently in is essential to a successful mediation.

### Dealing with Denial

It is common for grieving family members to be in denial. They cannot accept that their parent was at the end of life and that his or her overall health was deteriorating. Many adult children have had little communication with their parent's physicians and are not aware of the extent of their parent's disease or disability which made the injury or death inevitable.

Many people use litigation as a way to deter-

“Emotional tension must be managed effectively by the mediator and defense counsel in order to obtain the best possible result at mediation.”

she would not have died such a horrible death”. She seeks redemption by shifting the blame for the manner of her mother's death from herself to the facility staff. By addressing the daughter's emotion and providing alternative ways to absolve her feelings of guilt, such as a reasonable explanation as to why no one is to blame because the death was inevitable due to forces outside anyone's control, the matter can more likely be resolved to everyone's satisfaction.

### Diffusing Anger

Anger is a natural part of the grieving process. Unfortunately, the litigation process often intensifies this emotion rather than provide a remedy. Plaintiff's counsel intentionally includes inflam-

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## “Managing Mediation Emotions”

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matory language in the complaint and pleads malice, oppression or fraud in an attempt to obtain enhanced remedies such as attorneys fees and punitive damages under the elder abuse statute. The result is that Plaintiffs believe their anger is justified and Defendants must be punished. Plaintiff’s anger is also fueled in part by poor public perception of the nursing home industry. Many have heard and have adopted Plaintiffs’ attorneys’ mantra “Profit over people”. Deficiencies issued by the California Department of Public Health are referred to by Plaintiff’s attorneys to establish that the facility’s failure to comply with regulations is evidence of a pattern of substandard care, further enforcing Plaintiff’s anger towards the skilled nursing facility.

### Managing Emotions Effectively

Once you have identified the predominant emotions that are effecting Plaintiffs, you can devise strategies to help plaintiff’s overcome these emotions so a reasonable compromise can be reached. If denial or guilt is the prevailing emotion, educating the parties of the realities of the situation is the first step towards resolution. If anger is clouding the Plaintiff’s reasoning, then compassionate listening and patience may be the most effective tools to help Plaintiffs work through their emotion. Apology is a powerful and constructive form of conflict resolution when faced with anger. Webster’s Dictionary defines apology as an admission of error or discourtesy accompanied by an expression of regret. Defendants, of course, should never admit fault when there was no mistake or error causing the injury or death giving rise to the litigation. There are, however, different categories of apologies. One does not have to admit wrongdoing to express sympathy or remorse. A sincere expression of sorrow for the Plaintiff’s loss or regret for the family’s dissatisfaction with the care

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## Building Morale in the Workplace

By Marilyn Alleman, L.C.S.W



Everyone knows that morale impacts how we function in all aspects of our lives. When it’s up we are efficient, enthused, focused and positive about where we are and what we are doing. When it’s down we aren’t efficient, focused or enthusiastic about much of anything.

Management sets the emotional “tone” of the workplace environment. As a manager increasing your awareness of how you impact your staff’s morale will improve your effectiveness dramatically and decrease the causes of low morale. Low morale in the workplace can lead to poor attendance, lack of motivation, employee attrition, poor productivity, overall dissatisfaction among staff, and a disconnection between employees and management. In the current stressful times employees may also be concerned about job security and their financial welfare.

The key to improving employee morale in the workplace starts with enhancing **communication** between management and staff members. This may involve not only informing them of what the **expectations** are regarding job performance, accountability and communication, but also providing a consistent mechanism for **feedback**. Employees need to know that they can go to management and that someone will listen. Once a person voices their thoughts and contributes to the solution they will feel involved and valued by management. Remember communication is an exchange of thoughts, ideas,

and perceptions and always includes active listening!

Let’s look at other important ways to improve employee morale. **Fairness** is something that is important to all of us. In settling a dispute, always evaluate **all** sides, set the criteria and then, you must make a decision/judgment. If you remain undecided it will be seen as a lack of management’s decisiveness and the absence of clear goals and expectations, which will not be readily received by the parties involved. **Trust** is another important element in improving morale. Don’t micromanage, it implies distrust! When you give employees the power to do their jobs you are showing you trust them. Provide employees with **constructive**

“If your actions inspire others to dream more, learn more, do more, and become more, you are a leader.”

John Quincy Adams

**feedback** and **support**, but let them do their job. Be **candid** about how things are

going. If things aren’t going well, address the problems early on and nip any gossip in the bud. Gossip is the enemy of a happy work place and candor is the best way to fight it. **Acknowledge** even the smallest successes. Any kind of success will improve morale. Recognize individuals, as well as the whole department or office. This will give all involved a boost and will begin a positive movement towards improving morale. Provide positive **feedback**, both publicly and individually. Express your **appreciation** in both verbal and written communication. **Rewarding performance** is another way to acknowledge successes. Rewards can span the range of monetary and non-monetary recognition.

Fun and inexpensive ways to improve employee morale might include, gift

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## Wage and Hour Litigation: PAGA Claims

By Laura Sitar



**L**ook up the California Labor Code Private Attorney General Act of 2004 on the internet and you may see it referred to as the “bounty hunter’s

law” by defense attorneys. Undoubtedly, you would find different descriptors used by plaintiff attorneys. Both sides agree, however, that the Private Attorney General Act of 2004 is a powerful enforcement tool with grave financial consequences to employers found in violation of California labor laws and regulations.

### What is the California Labor Code Private Attorney General Act of 2004?

The California Labor Code provides for civil and statutory penalties for labor code violations. Prior to 2004, civil penalties could only be assessed and collected by the Labor Workforce and Development Agency (“LWDA”). The Private Attorney General Act of 2004 or “PAGA” provided a private right of action for employees to recover civil penalties for violations of the Labor Code on behalf of the State’s labor law enforcement agencies, such as the LWDA. The Act’s declared purpose is to supplement enforcement actions by public agencies which lack adequate resources to bring all such actions themselves. PAGA makes nearly all violations of the Labor Code subject to a private right of enforcement on behalf of the state.<sup>1</sup> Employees may now seek civil penalties for such diverse violations as an employer’s failure to pay appropriate overtime or failure to provide suitable seats when the nature of the work permits their use. An employee may assert a claim on behalf of him or herself and other current or former employees

and need not meet the standards for class actions when proceeding in a representative fashion.

Before pursuing a claim under PAGA, an employee must exhaust his or her administrative remedies by providing written notice in the form of a certified letter to the LWDA and the employer detailing the alleged violations, including facts and theories supporting the claim. If the LWDA decides not to investigate or pursue the claim, the employee may file suit. For less serious violations, the employer may cure the violation to avoid civil penalties. If the employer fails to cure, the employee may file suit.

For those violations of the labor code which carry no specified penalty, PAGA authorizes an aggrieved employee to recover \$100 for the first pay period in which a violation has occurred and \$200 per pay period for each subsequent violation. In a representative action, penalties are assessed for each aggrieved employee per pay period. A court has discretion to award a lesser amount than the maximum civil penalty based on the facts and circumstances of the particular case and if the maximum penalty would be unjust, arbitrary and oppressive, or confiscatory. Seventy-five percent of any penalty obtained is awarded to the LWDA and twenty-five percent to the employee bringing the action. Finally, a plaintiff who prevails is entitled to attorneys fees.

### What Does this Mean in Practical Terms?

While PAGA claims may be plead as individual actions, they often accompany class action wage and hour claims. Consider an employee who brings a claim for statutory penalties of one hour for each missed meal

and break period on behalf of himself and all similarly situated current and former employees. The complaint will generally also include a PAGA claim for civil penalties. If liability is found, the employees would collect premium pay for each meal and break period missed and \$100 civil penalties for the first pay period a break or meal period was missed and \$200 for each subsequent pay period for each employee with seventy-five percent of the civil penalty paid to the State. When you add attorneys’ fees, the potential financial liability can be staggering.

### Recommendations to Avoid Liability Under PAGA:

1. Regularly review all wage and hour related policies and procedures, including break and meal periods, exempt versus non-exempt status, overtime, termination, and reporting time pay.
2. Spell out your policies in detail in your employee handbook, including disciplinary action which will be taken for policy violations.
3. Regularly audit timecards. Look for missed meal periods as well as meal periods of less than 30 minutes.
4. Evaluate your pay periods. Companies that pay on a weekly rather than bi-weekly basis face twice the penalties for the same violations.
5. Respond quickly to any notification of a violation which appears to fit the requirements of PAGA even if the statute is not clearly spelled out. ■

<sup>1</sup> Long term care providers may see a similarity to Health and Safety Code § 1430(b) which allows current and former resident to pursue civil claims for violation of the Patient’s Bill of Rights and other related statutes and regulations.

OPINION

## Plaintiff Attorneys Ask the State... Change the Law to Make it Easier to Sue (and so far, the State is agreeing)

By Kippy Wroten



On Tuesday April 26 I made my first foray into the legislative process as I traveled to our state capitol in Sacramento to testify in opposition to Senate Bill 558.

SB 558 (Simitian), sponsored by plaintiff attorneys, proposes to lower the burden of proof required to establish civil claims of neglect and abuse from the present standard of “clear and convincing” evidence to the lower standard of mere “preponderance”. Very simply, claims of neglect and abuse are subject to more severe penalties than claims of mere negligence therefore the law requires a more rigorous standard of review. In law we call this due process. It’s a constitutional thing.

I am in no way an insider to the legislative process and as a result of my singular experience testifying before the Senate Judiciary Committee I’ve been unable to decide whether our legislative system is a blur of efficiency or the height of mediocrity. I can say that by my observation, the open committee meeting is designed for show rather than substance given that no issue was given more than the most superficial of attention, leaving substance and intellectual honesty behind in favor of media friendly sound bites and emotional hyperbole. In fact, efforts to bring substance to the table were soundly rebuffed as too time consuming.

The Senate Judiciary Committee meeting started with a matter of absolute priority to which the Judiciary Committee Chair Noreen Evans extended the utmost of the committee’s time and her personal courtesy, a bill to stop Sacramento’s professional basketball team from moving their

operations to Orange County. Earth shattering business identified in the agenda as “urgent” thereby giving it priority as it was shuffled to the front of the line. A rich 7 ½ uninterrupted minutes was provided to Senator Steinberg to state his case in support of his bill. Two hours and umpteen bills later, Senate Bill 558, a bill designed by plaintiff attorneys to reduce the due process rights of all long term healthcare professionals was finally called. The plaintiff attorneys of course appeared in force and presented more of their well known rhetoric, devoid of intellectual honesty but playing well to a crowd.

Finally, it was time for testimony in op-

“I’ve been unable to decide whether our legislative system is a blur of efficiency or the height of mediocrity.”

position. CAHF was there to take the lead. God bless them as they are a gallant lot who routinely face legislative bias yet return each day to levy the fight again. The CAHF lobbyist, a well skilled expert accustomed to talking at break neck speed, made a first pass in an effort to at least touch on a myriad of concerns. Now, it’s my turn. As I look around me it appears there will be little support to follow my comments leaving me feeling some amount of comfort that I’ll be given at least the same consideration to speak in opposition as Senator Steinberg received to discuss basketball. Such however, was not to be the case. In fact, after about half the time given to Senator Steinberg, and as I approached two key sentences in our California jury instructions that I wanted the Committee to consider, Committee Chair Evans was done listening. Appar-

ently, as Senator Evans declared for the record, she is an attorney and she knows how to read.

Given that most Californians may not make it part of their day to know the nuances of law required to support plaintiff attorneys’ claims of neglect and abuse I want to take this opportunity to provide folks with the two sentences given to California juries that supposedly evidence the substantial distinction between mere negligence and the more egregious conduct that brands our healthcare providers with neglect and paves the way for amongst other heightened remedies, paying the exorbitant attorney fees routinely racked up

by plaintiff lawyers. In case you cannot tell, the first sentence defines negligence and the second purports to define neglect.

**Plaintiff has established that it is more likely true than not true that the defendant failed to use reasonable care to prevent harm to oneself or others.**

**Plaintiff has established that it is more likely true that the defendant failed to use the degree of care that a reasonable person in the same situation would have used in providing medical care for physical and mental health needs.**

Now to be fair to Committee Chair Evans, she did ask for an amendment to the proposed bill in an effort to protect our long term healthcare professionals from having punitive damages awarded using the lower burden of proof. I suppose I should applaud her efforts but I just can’t

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## “Opinion: State Judicial Committee (Continued from page 4)

get there given the resulting jury instruction which this will create is in my mind meaningless.

SB 558 jury instruction before Evans amendment:

Plaintiffs must establish that it is more likely true than not true that defendant acted with malice, oppression, or fraud.

SB 558 jury instruction after Evans amendment:

Plaintiffs must establish that it is more likely true that defendant acted with malice, oppression, or fraud.

Somehow I just don't see a lay jury making much hay about this distinction.

So, there ends my story recounting my personal effort to bring an intellectual approach to the fore of legislative consideration as Evans led the party line vote in favor of moving this devastating new legislation forward. Hopefully, the voice of the long term healthcare professional will find an ear in the next round before this bill makes its way into law. ■

## WANT TO HEAR MORE?

Kippy Wroten will be speaking at the following event:

September 15, 2011 / Boston, MA

DRI: The Voice of the Defense Bar conference, “Nursing Home/ALF Litigation”.

Her session is titled “Class Actions I: The Skilled Health Care Case and Verdict”

### CONTACT US

If you have questions or comments, we want to hear from you. Please email us at: [nchancellor@wrotenlaw.com](mailto:nchancellor@wrotenlaw.com)

## The Patient Protection & Affordable Care Act of 2010

By Carmen Martin



Section 6102 of the Health Care Reform Bill requires skilled nursing facilities and other nursing facilities to establish compliance and

ethics programs to be followed by its employees, which may be tailored to the size of the organization, and which must be “reasonably designed, implemented, and enforced so that it will be generally effective in preventing and detecting criminal, civil and administrative violations under this Act and in promoting quality of care.” This section lists eight mandatory components of the compliance and ethics program and requires that the programs be in place by March 2013.

The eight mandatory components include:

- The Provider must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal, civil, and administrative violations.
- Specific high-level employees must be assigned overall responsibility to oversee compliance with such standards and procedures and have sufficient resources and authority to assure such compliance.
- The Provider must use due care not to delegate substantial discretionary authority to individuals whom the Provider knew, or should have known through the exercise

of due diligence, had a propensity to engage in criminal, civil, and administrative violations.

- The Provider must take steps to effectively communicate its standards and procedures to all employees and other agents, such as by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
- The Provider must take reasonable steps to achieve compliance with its standards, such as by utilizing monitoring and auditing systems reasonably designed to detect criminal, civil, and administrative violations by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents can report violations by others within the organization without fear of retribution.
- The standards must be consistently enforced through appropriate disciplinary mechanisms, including discipline of individuals responsible for the failure to detect an offense.
- After an offense has been detected, the Provider must take all reasonable steps to respond appropriately to the offense and to prevent further similar offenses, including any necessary modification to its program to prevent and detect criminal, civil, and administrative violations.
- The Provider must periodically undertake reassessment of its compliance and ethics program to identify changes necessary to reflect changes within the organization and its facilities. ■

## “Managing Mediation Emotions”

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provided by facility staff may be all that is required to dissipate Plaintiffs’ anger.

### Conclusion

Defense counsel must develop strategies to recognize, confront and deal with Plaintiffs’ emotions that are an impediment to a successful resolution of the matter. Emotions must be contained, but not ignored. Healthcare providers may be able to avoid litigation when an adverse event occurs by applying these same principles that are used in mediation by their attorneys. Sensitivity to what is motivating the family to threaten litigation, compassionate listening and appropriate expressions of concern may be all that is required to prevent a lawsuit. ■

## “Building Morale”

(Continued from page 2)

cards, gift baskets, acknowledgement in your company newsletter, or posting on a bulletin board, recognition at company meetings, team building activities, Friday breakfasts, or lunch, and outside company activities which may include family members such as, bowling, beach party, miniature golf, something that will be interactive and fun.

As you implement these suggestions, not only will you be a better manager, you will also begin to notice improved attendance, increased motivation, a decrease in attrition, productivity will improve, and finally, overall satisfaction among staff and management. ■

Additional information can be found on Marilynn Allemann’s website, [www.MastersExecutiveCoaching.com](http://www.MastersExecutiveCoaching.com). Please contact Marilynn Allemann directly at [mwallemann@sbcglobal.net](mailto:mwallemann@sbcglobal.net) with any questions.



## One More Reason to Consider Arbitration of Employment Disputes

By Laura Sitar



The Supreme Court has just upheld the enforceability of class action waiver provisions in arbitration agreements. Under such provisions, parties agree to arbitrate their disputes and waive the right to participate in class action lawsuits. The phone service agreement under review by the Court in AT&T Mobility LLC v. Conception, No. 09-893 (April 27, 2011) provided a dispute resolution process that included a clause requiring the submission of any disputes between the company and the customer to arbitration. It further prohibited customers from bringing any claims in a class action or other representative proceed-

ing. The Court reasoned that state law is preempted by the Federal Arbitration Act. It found the denial of such waivers is “an obstacle to the accomplishment and execution of the full purposes and objectives” of the FAA which reflects the strong federal policy favoring arbitration and the enforcement of arbitration agreements according to their terms.

The Supreme Court’s decision has significance to all employers. While AT&T Mobility involved an arbitration clause in a consumer agreement, the rationale of the case appears to apply to similar clauses in employment agreements. Up to this point, California courts have denied enforcement to class action waivers contained in employment arbitration agreements. Following the Supreme

Court’s ruling it appears they are valid and enforceable.

Employers who currently use employment arbitration agreements should strongly consider the inclusion of class action waivers. Employers who currently do not use such agreements now have a very strong incentive to consider their use.

We are available at Wroten and Associates to provide assistance in incorporating class action waiver language into existing arbitration agreements as well as to assist you in evaluating the benefits of implementing a comprehensive arbitration program. For more information, please visit our website at [wrotenlaw.com](http://wrotenlaw.com). ■



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**crisis**

through the eyes of the experts

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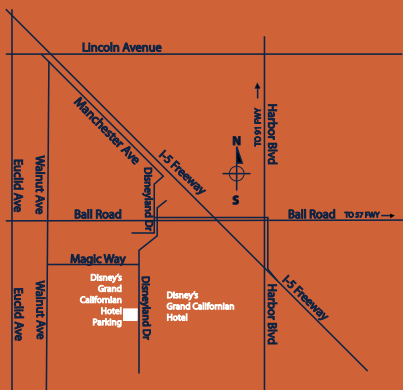
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