



Fighting Elder Abuse Claims by Kippy Wrote

A Litigation Guide For the Long Term Care Provider



Over the next few months our newsletter will highlight practices which have left the long term care industry vulnerable to claims

of elder abuse. We know that with knowledge comes empowerment. Our goal therefore is to educate the long term care provider in litigation strategies as a first step toward controlling their litigation exposure. In the first of this series we start by identifying the problem. In our follow-up articles we will review plaintiff litigation strategies and describe proactive defense strategies designed to protect against unfounded claims of elder abuse.

Step 1: Defining "Elder Abuse"

In 1992 California passed the Elder Abuse and Dependant Adult Civil Protection Act which defines "elder abuse" and prescribes recoverable damages. The three claims favored by plaintiffs are the "failure to assist in personal hygiene," the "failure to provide medical care for physical and mental health needs," and the "failure to prevent malnutrition and dehydration." The favored strategy to support these claims is to use DHS records which evidence "violations" of federal and state regulations which plaintiffs claim also establish violations of standards of care. In addition to damages the statute provides for recovery of plaintiff attorney fees and the costs of litigation if the defendant is also found "guilty of recklessness, oppression, fraud, or malice." The stated purpose of the statute is "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."

Clearly the legislature intended to gain the interest of plaintiff attorneys by enacting the elder abuse statute. Historically, we know that negligence claims brought against healthcare providers have not proven lucrative for plaintiff attorneys due to limitations enacted by the 1975 Medical Injury Compensation Reform Act (MICRA). Although some of the MICRA limitations apply to the elder abuse statute there are two notable exceptions. First, upon a finding of "abuse" plaintiff will generally be entitled to recover their litigation costs which include attorney fees. Unfortunately this encourages plaintiff attorneys to over-litigate their cases as a strategy to force settlements as defendants struggle to meet rising litigation expenses. A striking example of this strategy is demonstrated by a recent plaintiff demand for over \$900,000 in fees and costs on a claim which was ultimately limited to \$250,000. In addition to attorney fees, the elder abuse statute can support a claim for punitive damages. Whereas MICRA effectively limits punitive damage claims, the elder abuse statute is seen as an invitation to claim punitive damages. The mere presence of a punitive damage claim creates an additional risk of a potentially devastating verdict which again drives settlements of otherwise defensible cases.

For most healthcare providers it is inconceivable that a claim of abuse could be successfully waged against them. The line drawn by plaintiffs to establish liability for elder abuse however is surprisingly simple and easy to present to a panel of lay jurors already jaded by skewed media reports and personal fear.

Following is an outline of plaintiff's template to establish "abuse" against the long term care provider.

- (1) To receive a license requires a written agreement to "ensure" compliance with all state and federal regulations.
- (2) Families rely on the licensee's promise to the state ensuring their full regulatory compliance which plaintiffs argue is akin to a contract for perfection.
- (3) Standard of care is determined by compliance with regulations.
- (4) Healthcare providers know the elderly are frail and that a failure to comply with regulations will result in injury. Failure to comply with regulations is therefore "reckless."
- (5) Healthcare providers know the law "mandates" full compliance with all regulations yet they allow violations to occur.
- (6) Department of Health Services surveys clearly establish that the facility violated multiple regulations over many years. The facility therefore had "notice" of their wrongdoing yet continued to operate.
- (7) Facility failure to contest any/every DHS violation is their admission of wrongdoing. Plaintiffs argue that legal protections precluding use of "plans of correction" do not preclude use of the facility's failure to challenge a DHS finding as evidence of their "culpable state of mind."

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- (8)** DHS surveys demonstrating deficiencies over many years document an ongoing business practice designed to elicit "profits over people." Such action is "malicious".
- (9)** A regulatory violation shifts the "burden of proof" from the plaintiff to the defendant. The plaintiff no longer must prove the provider acted wrongfully. Instead, it is the defendant provider who must affirmatively establish their lack of liability.

Although our government has the proven ability to reduce every nuance of life into neatly contrived law, life is more complex than can be evinced by strict interpretation

of boilerplate words. The legislative struggle to define words like "abuse" which elicit a moral measurement is not new to American jurisprudence. In 1964 Supreme Court Justice Potter Stewart grappled with defining obscenity and concluded with the simple words, "I know it when I see it." Although on its face identifying abuse appears simple because we all "know it when we see it", in reality the application of present law has been stretched past recognition by an unforgiving litigation system.

In our next article we will review regulatory compliance issues and offer insight to practices that protect the long term care provider.

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