Elder Law & Long Term Care

Wroten & Associates, Inc.
Attorneys at Law

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Save the Date

3rd Annual Wroten & Associates' Long Term Healthcare Conference

Thursday, June 2, 2011
at Disney's Grand California,
Anaheim, California.

Continuing Education Units (CEU) Offered to Administrators, Executive Directors, LVN's, RN's & CNA's.

THE LAVENDER TRIAL:

DID A MATHEMATIC FICTION RESULT IN $600+ MILLION ERROR?

PART TWO

By Kippy Wroten

When I was a small child, my grandmother earnestly told me I had 11 fingers. When challenged she proved it to me by counting my fingers: "10, 9, 8, 7, 6" she counted on one hand "plus 5" on the other is, of course, 11. "Numbers don't lie" she proudly proclaimed. With this simple calculation, my grandmother demonstrated what appeared to be a straightforward mathematical truth to support a completely ridiculous conclusion.

In today's article, I leave behind the grind of factual review and instead turn our focus singularly to examine the mathematical process used to reach the astronomical verdict. An examination of the methodology behind the numbers reveals the same nonsensical process by which a legal slight of hand was allowed to unfairly compound an otherwise modest penalty into Armageddon.

Doing The Math

In an effort to avoid any bias arising from the facts of our trial, I'm going to change the underlying scenario to a more neutral subject albeit one where reckless behavior creates a high potential of risk for devastating injury. My example uses the familiar but potentially dangerous activity of driving a car and the indefensible act of running a stop sign in a school zone. As a police officer sits at the corner watching out for the safety of the soon to arrive vulnerable children, enter reckless motorist who runs the stop sign. No children are present. No injury occurs. Still, the law has been violated. The driver is pulled over and receives a ticket. A fine will be paid.

For this example, let's assume the legal fine for running a stop sign is set at $500. The driver therefore is assessed $500 for violating the Vehicle Code. Note that "if" someone had been hurt as a result of the driver's reckless act of running the stop sign, additional legal claims designed to compensate the injured person would also be available to a plaintiff. The actual injury would be evaluated and additional financial damages associated with running the stop sign would be assessed against the driver. The fine for running the stop sign however is static. It does not change. Only the availability of additional "compensatory" damages is impacted by the actual occurrence of an injury.

Violating a facility staffing ratio is very much like running a stop sign. It doesn't matter whether anybody was injured or not. Violate the ratio, pay the fine. It seems simple, but as applied in Humboldt, it transitioned into the absurd. Here's how.

The Multiplier

As perceived by the Humboldt Court, it's not the act of running the stop sign the driver is being fined for. It's the potential injury that running the stop sign could

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"Lavender Trial"

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have caused that is being charged. As the theory goes, the stop sign was placed to protect everyone in the community. Residents pay their taxes in order to live in a safe community and every resident shares the same right to live in safety. That safety was threatened by the driver who ran the stop sign so even though nobody was actually hurt, the threat that they could have been hurt existed. Since every resident faced the potential threat of harm, then logically every resident is entitled to be compensated. Applying this logic means that even though the driver only ran the stop sign one time, the $500 fine is assessed per resident. In a community with 1,000 residents, the $500 fine is multiplied by 1,000. This equates to $500,000[i]. I live in a city with about 200,000 residents. Running a stop sign in my neighborhood will therefore cost a bundle. If this argument appears absurd, it's because it is.

The fundamental error in the Humboldt award was caused by the serial repetition of a fine that is based on a single, facility-wide calculation. No individual patient was entitled to receive any numeric staffing ratio of care, and no patient injury was claimed. Nonetheless, the Humboldt fine was repeatedly awarded to every patient in our facilities. The result was patently absurd and according to case law, the law is never supposed to be absurd.

Post Mortem

On December 16, 2010 the California Department of Public Health published an All Facilities Letter which now more specifically defines the manner in which 3.2 compliance will be audited. Hourly census averaging is one new feature I would have liked to have had available at our trial. Nonetheless I am alarmed at the requirement for perfect document management, the automatic nature of non-compliance findings, and the general set-up the long term care industry continues to be subjected to for an ongoing blood letting at the hands of plaintiff attorneys. To emphasize the point, I leave you with a word problem from 5th grade math class to mull over.

Presume a government deficiency is deemed conclusive evidence to establish a staffing violation has occurred. A facility with 100 census provides adequate nursing services to meet the 3.2 compliance but fails to document the hours in a format that meets the new documentation criteria on 4% of the 90 days audited. A single deficiency is assessed without any monetary penalty.

How much will the plaintiff attorney get?[ii] ■

[i] Our plaintiffs relied on a plaintiff class that was presumed despite the known fact that when appropriate notice to potential class members is actually given, less than 2% of the prospective members will request to be included. (Wang v. Chinese Daily News, Inc. (C.D. Cal. 2006) 236 R.R.D. 485, 488) as cited by Plaintiffs in "Plaintiffs' Motion Regarding Class Notice and Statement In Support Thereof."

[ii] This facility is understaffed 4 days (3.6 rounded up per ALF letter). 4 days x 100 patient census = 400 patient days. 400 patient days x $500 each = $200,000. The plaintiff attorney will additionally seek a court award of attorneys fees equating to 40% of the verdict plus expenses. This will add $80,000 for the attorney and at least enough in expenses to bring the defendants' cost in excess of $300,000. Add defense costs. (Mind you, plaintiff attorneys have done nothing more than collect DPH records. Nice return on investment.)

WANT TO HEAR MORE?

Kippy Wroten will be speaking at the following events:

- February 22, 2011 / Sand Diego, California
  American Health Lawyers Association (AHLA) Conference "Long Term Care and The Law".

  Visit: http://www.healthlawyers.org/Events/Programs/2011/Pages/LTC11.aspx for more information.

- April 4-5, 2011 / Miami, Florida
  American Conference Institute's (ACI) conference, "Preventing and Defending Long Term Care Litigation". Her session is titled "Deconstructing the $677 Million Dollar Jury Award in Lavender v. Skilled Healthcare Group, Inc.: An Insiders View."

  Visit: www.americanconference.com/litigation/LTCLitigation.htm for more information.

THE BENEFITS OF 'INSIDE/OUTSIDE' COUNSEL

By: Darryl Ross

Your company is growing, but it is not large enough to support its own in-house team of attorneys. Or, your company is large and you use counsel throughout California and the United States, yet your company's growth makes it difficult to coordinate counsel wherever your interests lie. Or worse yet, you are subject to any of an increasingly large number of class action lawsuits being filed wherein a band of plaintiffs' attorneys seek to pull the lever on the company slot machine.

Do any of the above scenarios sound familiar? Employing outside counsel while regarding them as "inside counsel" is becoming increasingly popular as it promotes efficiencies on many levels including:

1) access to counsel fluent in company operations, objectives, policies and culture;

2) the development of proactive strategies designed to minimize your company's litigation risk, including auditing to improve QA processes and employee relations;

3) management of company litigation related messages to assure uniformity across civil, regulatory and criminal proceedings; and

4) reduced costs associated with having a centralized repository without having to carry employees on your payroll.

LITIGATION COUNSEL

Litigation counsel is customarily retained to represent a single facility through entity insurance policies on a case by case basis. Using "panel" counsel on an as-needed basis may effectively deal with an isolated case. But what happens when company objectives shift between cases? Does counsel handling a geographically specific case have access to a repository of testimony and discovery responses that assures consistent information is provided? Do they have access to a warehouse of documents and pleadings which when used, not only maximizes uniformity, but drives down legal fees and, potentially, insurance rates? In the world of class actions, which often start with plaintiffs' counsel 1) stitching together pieces from multiple cases located in different jurisdictions, 2) accessing any of a number of databases containing information from "consumer attorneys", or 3) reviewing on-line financial disclosures from public websites, company personnel must re-evaluate how they view company operations.

Long gone are the days of counsel finding an isolated deposition transcript here or there. Instead, plaintiffs' attorneys have access to vast repositories that track facility statistics on topics such as staffing, budgeting, hiring / firing, etc. The use of outside counsel that functions as inside counsel gives company executives the necessary tools to not only collate information and identify litigation trends, but at the same time, the opportunity to proactively intervene to avoid civil, regulatory and even criminal exposure.

EVALUATION

As you evaluate your company, and its legal needs, you should consider whether the following services are being provided, and if so, are they being carried out with the protection afforded by the attorney-client privilege.

Risk Management

- Do you receive privileged reports concerning sentinel event investigations?
- Do you have access to 24/7 crisis management including responding to media inquiries?
- Do you receive privileged analysis regarding adherence to company policies, procedures and practices inclusive of recommendations to remediate deficiencies?
- Are privileged audits of QA processes conducted by JD /RN /Certified Risk Managers to maximize the confidentiality of your investigations?
- Have you developed, or do you have access to privileged litigation policy manuals to assure uniformity and consistency in all phases of civil and/or regulatory proceedings?
- Does your legal team have the ability to work side by side with your team, including on-site reviews to 1) identify weaknesses, and 2) provide in-service training to remediate identified problems?

Continuity of Representation

The continuity of inside/outside counsel relationships with the company translates into a partnership wherein everything the firm does focuses on helping the client. The firm's culture is service-oriented. And the firm regards the company's business with a sense of importance and, when appropriate, with a sense of urgency. Most importantly, legal services do not stop at the conclusion of any single case. Inside/outside counsel continues

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"Benefits of 'Inside/Outside' Counsel"

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to serve and provide legal guidance on day-to-day business issues that impact company operations.

Additional benefits of inside/outside counsel include:

1) improved efficiencies and effectiveness of legal services based on the close relationship between company and counsel;

2) counsel providing real-time advice or information to facility staff before they have to make difficult judgment calls;

3) counsel's willingness to consider the company's ability to be competitive in the marketplace, including making alternative billing arrangements when necessary, and

4) a willingness by inside/outside counsel to understand how and when to work collaboratively with other law firms, and how to manage them including deferring to those firm's strengths.

E-Discovery

Have you heard of that term? If not, you will soon. Aggressive plaintiffs' attorneys have quickly learned that a simple request for electronically stored information can bring a company to its knees. Documents sought typically include emails from company servers, including archived emails. The most recent trend is to seek information from Blackberry and other PDA devices. As these requests become more common, it is essential that the company have a protocol in place to 1) periodically audit company email traffic to identify problem areas, and 2) respond to eDiscovery requests including procedures to (a) efficiently harvest data, and (b) review sample data as a means to combat opposing counsel's overly broad requests.

As you evaluate your eDiscovery exposure, you should consider whether company personnel have:

1) the expertise with data extraction / harvesting of sensitive information;

2) the ability to host sensitive data for review; and

3) the capability to assemble production and privilege logs.

'Inside/Outside' Counsel is a Win/Win

Effective inside/outside counsel ultimately serves as a tremendous benefit to general and/or Compliance counsel, as well as key company executives. Inside/outside counsel serves as an extra layer of "privilege" in a legal world where privileges are increasingly being eroded. This includes the ability of inside/outside counsel to conduct discrete investigations with the flexibility to go where needed, when needed. Your inside/outside counsel must be mobile and utilize all modes of technology to maximize efficiencies and ultimately, to save your company money.

Wroten and Associates is fortunate to enjoy strategic relationships with clients that transcend the case by case assignment. By continuously working with our clients as their "inside/outside" counsel before, during and after regulatory and litigation matters, we are able help identify trends and provide guidance. We are able to provide recommendations with respect to necessary preventative or corrective measure. And we pride ourselves in our ability to assist our clients in the development of a consistent message that will withstand scrutiny regardless of the forum. As we start the new year, Wroten & Associates highly encourages you to critically analyze your company and evaluate whether you have the necessary systems, and strategic relationships in place to reduce your litigation risk. ■

Firm Announcements

Darryl Ross Appointed to AYSO National Legal Commission

On November 16, 2010, American Youth Soccer Organization ("AYSO") National President, Michael Wade, appointed Darryl Ross to its Legal Commission. AYSO is a not-for-profit youth development organization with premier regional programs throughout the United States, AYSO has more than 50,000 teams and more than 600,000 players. It also employs 50 people at its National Support and Training Center in Hawthorne, CA. AYSO's legal affairs are conducted exclusively by the Legal Commission of the AYSO National Board of Directors with the support of outside legal counsel.

Darryl Ross Appointed to CAHF Legal Subcommittee

On December 14, 2010, Darryl Ross was appointed as an Advisory Member to the California Association of Healthcare Facilities' GR Legal Subcommittee.

E-DISCOVERY HOT TOPIC TIPS

By: Sarah Gates

Electronic Discovery is targeted to be an area of increased litigation spending in 2011.[1] As the aggressive use of eDiscovery in litigation continues to gain popularity, the importance of evaluating your eDiscovery exposure becomes even more critical.

HOT TOPIC TIPS

TIP #1

Did you know "eDiscovery" is not just about e-mail?

The term "Electronically Stored Information" is actually defined very broadly and includes: Word processing documents, Instant messages, Electronic voice mail, Data on cell phones, Databases, GPS data, Video, Websites and Social media such as Twitter and Facebook.

TIP #2

Did you know eDiscovery must be discussed by Counsel *prior* to the very first Case Management Conference?

There's no hiding from eDiscovery anymore. The California Rules of Court were recently amended and now require litigants to meet and confer and specifically discuss eDiscovery schedules, scope, the associated costs, and preservation of such evidence.

TIP #3

Did you know there are multiple types of "meta data"?

Although it may sound like science-fiction, meta data is real, and if you haven't been asked to hand it over yet, you soon will.

System meta data: System meta data is the information which is automatically generated by a computer system, such as the time an email or document was created, date of creation or date it was modified.

Substantive meta data: Substantive meta data reflects substantive changes made by the author. This includes revisions made by a party reviewing the document.

Embedded meta data: Embedded meta data is information such as the text, numbers and content which is inputted by the user but not typically viewable on the screen or on a print out, such as excel formulas or sound files in power point.

Meta data is typically demanded in discovery, so the receiving party has the same ability to access, search and display the information as the propounding party. However, production often occurs in static format (such as TIFF or .pdf) with a meta data extraction.

TIP #4

Did you know that an entity's duty to preserve evidence may be triggered *before* litigation commences?

The duty to preserve evidence is triggered whenever litigation is reasonably anticipated, threatened or pending. Once the duty to preserve is triggered, the entity must undertake reasonable and good faith efforts to preserve documents which are reasonably calculated to lead to the discovery of admissible evidence, including ***E-mail, and other electronically stored information***. The term "reasonable anticipation" of litigation essentially means when the entity is on notice of a credible probability that it will become involved in litigation.

So how do you know if there is a "credible probability" of litigation? This must be determined based on a good faith and reasonable evaluation of the relevant facts and circumstances known at the time.

The duty to preserve is generally **NOT** triggered by vague rumors, indefinite threats or threats of litigation not made in good faith.

TIP #5

Did you know that California eDiscovery law includes a "Safe Harbor" provision?

It pays to implement and follow a document retention policy for a variety of reasons. An added benefit of a document policy in litigation is the "Safe Harbor" provision found in California Code of Civil Procedure. While the safe harbor provision does not alter any obligation to preserve discoverable information, absent exceptional circumstances, the court shall not impose sanctions on a party

[1] Fulbright & Jaworski, 7th Annual Litigation Trends Survey Report, November 2010

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"E-Discovery Hot Topic Tips"

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or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system, such as a document retention policy.

TIP #6

Did you know that collection of electronically stored information in litigation is more complicated than it seems?

I'm willing to bet you could have guessed that much! Forensically speaking however, while it may be "adequate" to have in-house e-mail users or the IT department collect their own data, the preferred practice is to have an outside technician who doesn't have a substantive stake in the outcome of the case collect data based on specific production protocols. While some healthcare companies do have privacy and compliance issues which add special challenges, these issues generally may be overcome by having the vendor execute a HIPAA Business Associate Agreement. Generally, the more removed the party collecting the data is from the litigation itself, the better. Further, use of a third party to collect data provides a credible chain of custody, a witness to testify about the specifics of the process should it be questioned, and trained technicians will do the least amount of damage to the data during the collection process thereby preserving the integrity of your information.

Now You Know!

ARE YOUR POLICIES & PRACTICES UP TO DATE FOR THE NEW YEAR?

GINA: The Genetic Information Nondiscrimination Act

By Laura Sitar

Regularly auditing employment policies and practices to stay on top of changes in state and federal laws can be a daunting task. Take for example new regulations published by the U.S. Equal Employment Opportunity Commission which went into effect January 10, 2011 regarding GINA. Have you updated your policies and practices to include the new GINA requirements? Do you even have GINA on your radar screen?

The **Genetic Information Nondiscrimination Act** (**"GINA"**) was signed into law in 2008. Title II of the act prohibits an employer from discrimination in employment based on genetic information and restricts an employer from acquiring and disclosing such information.

Genetic information covered by the act includes:

- Information about an individual's genetic tests;
- Genetic tests of that individual's family members (out to fourth degree relatives);
- The manifestation of disease or disorder in family members of the individual (family medical histories);
- An individual or family member's request for or receipt of genetic services, including clinical research that includes genetic services; and
- Genetic information regarding a fetus of an individual or family member or genetic information of an embryo of an individual or family member using assisted reproductive technology.

Simply put, an employer **may not** obtain genetic information regarding applicants and employees or the family members of those individuals. The prohibition may seem straight forward and easy to follow, until an employer takes into consideration medical information needed to determine an appropriate accommodation pursuant to the Americans with Disabilities Act or to evaluate certification of a leave of absence under the Family Medical Leave Act. Then things get more complicated.

Fortunately, GINA's prohibition against acquiring genetic information does not apply to information that is **"inadvertently"** acquired by the employer, for example, in discussions with an employee regarding a reasonable accommodation or regarding a request for FMLA leave. However, in order for an employer to take advantage of the "inadvertence" provision, an

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"POLICIES & PRACTICES"

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employer requesting medical information from an employee or healthcare provider must affirmatively advise the employee or healthcare provider not to disclose genetic information. The regulations provide the following suggested disclosure language:

> "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information" as defined by GINA includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

"An employer *may not* obtain genetic information regarding applicants and employees or the family members of those individuals."

The regulations also provide guidance regarding acquiring genetic information through social media and casual conversation. Active listening to a third party conversation or active internet research would not be considered "inadvertent." On the other hand, voluntary disclosure by an employee would be considered "inadvertent." But following up with additional questions or seeking specifics may constitute a violation. For example, the inadvertent exception applies when a supervisor receives family medical history directly from an employee following a general health inquiry (e.g., "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer). Similarly, a casual question between colleagues, or between a supervisor and subordinate, concerning the general well-being of a parent or child would not violate GINA (e.g., "How's your son feeling today?", "Did they catch it early?" asked of an employee whose family member was just diagnosed with cancer, or "Will your daughter be OK?"). However, the exception does not apply where an employer follows up a question concerning a family member's general health with questions that are probing in nature, such as whether other family members have the condition, or whether the individual has been tested for the condition, because the supervisor should know that these questions are likely to result in the acquisition of genetic information.

Compensatory and punitive damages are available for a plaintiff who pleads and proves he or she suffered discrimination as a result of an employer's violation of GINA. Attorneys fees are also available.

It is important to audit your policies and practices to assure they are in compliance with GINA.

- Review post offer health questionnaires and remove questions regarding family medical history. Require health providers who perform medical examinations of your staff to do the same.
- Update FMLA medical certification forms to include the disclosure language above.
- Include disclosure language on all other requests for medical information, including those related to requests for accommodations and worker's compensation claims.
- Educate all managers and supervisors on appropriate inquiries regarding medical information which may result in the disclosure of genetic information.

All employers benefit from periodic review of their employment policies and practices to assure compliance with ever changing state and federal employment laws. New regulations related to the Genetic Information Nondisclosure Act are just one example of the many changes employers face on an ongoing basis and the frequent need to adjust numerous policies based on a single change. At Wroten & Associates, we are available to perform employment related risk management audits to help employers spot troublesome policies and practices and to recommend appropriate changes to reduce potential liability. ■

CONTACT US

If you have questions or comments, we want to hear from you.

Please email us at:
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Firm News

By Stephen R. Hunter

The first week of 2011 brought another victory at Wroten & Associates. In representing a long term healthcare provider, Wroten & Associates recently moved to enforce an arbitration agreement between the healthcare provider and a former patient and her heir in a case alleging Elder Abuse, Negligence, Wrongful Death and Violation of Patient's Bill of Rights (Health & Safety Code §1430(b)). This petition to compel arbitration highlighted the recently decided Ruiz v. Posolsky (2010) case where the court held that all wrongful death claimants are bound by arbitration agreements entered into pursuant to Code of Civil Procedure section 1295 when the language of the agreement manifests an intent to bind the claimants.

Defendant's petition to compel arbitration was vigorously opposed by plaintiffs' counsel, who attempted to distinguish the Ruiz case as a narrow exception applicable only to "professional negligence" cases and should not be applied to cases alleging "elder abuse". In addition to arguing the applicability of Ruiz to this case, Wroten & Associates also utilized the recently decided Laswell v. AG Seal Beach (2010) case which dealt with the court's discretion to deny a motion to compel arbitration under CCP section 1281.2 as well as the presence of nonarbitrabale claims (1430(b). Ultimately the Judge was persuaded to apply the ruling in Ruiz and Laswell and ordered the matter into arbitration, with the 1430(b) claim stayed until completion of arbitration.

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