Elder Law & Long Term Care

Wroten & Associates, Inc.
Attorneys at Law

IN THIS ISSUE

Register Today

W&A Long Term Healthcare Conference

Crisis Management Through the Eyes of the Experts

June 2, 2011 at Disney's Grand California Anaheim

Register on-line at: www.wrotenlaw.com

deadline for registration: May 19th

E-Newsletter

W&A "Going Green" by Going Electronic

This *Spring* edition of the Elder Law & Long Term Care W&A newsletter will be the last paper edition.

The next edition will be available electronically by subscribing at www.wrotenlaw.com. Add your friends and colleages to receive a copy via email too. No cost.

Social Media and Employment

By Laura Sitar

You have six solid resumes for an open Executive Director position and would like to narrow the interview process to the top three candidates. Where to begin? How about a "google" search? Maybe a search of Facebook or LinkedIn? Before you type any applicant's name onto the search line and hit enter, there are a few important things to consider.

Social Media and the Hiring Process

Social media such as Facebook, LinkedIn and Twitter provide valuable sources of information regarding job applicants, but there are also serious pitfalls related with their review during the hiring process. Social media sites often contain far more information about a person than a standard application or resume, however, much of the information should never be considered when making a hiring decision.

A Neilson Report published in 2009 found that 35% of hiring managers "google" applicants. 23% check social networking sites. 33% of these searches resulted in the applicant being rejected. Those numbers continue to climb.

Consider that photos and other information posted on an applicant's Facebook page may disclose the applicant's age, race, national origin, marital status, sexual orientation, disability, religion or military status. Inappropriate use of any of this information when hiring can lead to claims of discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the American's with Disabilities Act and even GINA, the Genetic Information Nondiscrimination Act. When facing a claim of discrimination in hiring, it may be difficult to prove your decision to reject an applicant was not influenced by the blog you read discussing the applicant's recent triumph over cancer or large donation to a controversial political organization.

On the other hand, there is valid information that can and should be collected from social media sites. What about evidence of illegal drug or alcohol use, a poor work ethic, poor communication skills, negative attitudes about former employers, racist, discriminatory or harassing statements or general poor judgment? What type of decisions can you expect from an applicant who posts nearly naked pictures from a riotous party on his or her Facebook page? How much attention to detail can you expect from an applicant whose blog is riddled with spelling and grammatical errors? These questions can and should be considered during the hiring process.

The key to avoiding liability is to collect and use information gathered from social media sites wisely. Employers should conduct uniform screening of social media for information regarding all applicants being considered, rather than performing searches only on selected applicants. Screening should be done by a neutral party who only provides relevant, non-protected information to the person making the hiring decision. Subterfuge should never be used to get into an applicant's private social media sites. If the applicant's "friend" works for the company, resist the temptation to ask the friend to provide access to restricted areas. And always document the legitimate non-discriminatory basis for making any hiring decision

Social Media and Your Employees

Employers should also be conscious of the limitations they can and cannot legally place on their employees' use of social media. California law prohibits employers from taking any job-related action against an employee based on the employee's lawful conduct off the job. Further, under the National Labor Relations Act it is illegal for an employer to monitor an employee's union activities, including off-the-job meetings or gatherings. That prohibition also applies to any "concerted activity", which is simply

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"Social Media & Employment"

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activity undertaken by employees acting together, rather than individually, even if no union is involved, as long as the employees are discussing their work conditions or terms of employment. Social media sites and blogs often inadvertently become venues for employees' concerted activity. Employers must be careful in their attempts to monitor, restrict or discipline employees for what they post on social media sites. That said, there are some clear parameters which can and should be spelled out.

The premier social network, Facebook boasts 600 million active users. Business oriented LinkedIn claims 90 million users. Twitter generates 65 million "tweets" a day. YouTube brags that 2 billion videos are viewed per week. It's estimated there are 154 million blogs in cyber space. Studies suggest 25% of time spent on the internet involves use of some form of social media.

All employers should address the following topics in their Social Media Polices:

- Clearly articulate the parameters for use of social media sites during working hours.
- Communicate a means by which employees can bring forward work-related complaints before posting those complaints on social media sites.
- Reiterate that company computers and email systems are company property intended for company use and that they can and will be monitored.
- Prohibit the use of company logos and trademarks on social media sites without appropriate approval.
- Prohibit the disclosure of confidential or proprietary information, trade secrets or intellectual property of the employer.
- Prohibit posting information which would be a violation of the privacy rights of third parties, including information protected by HIPAA.
- Prohibit posting information which could be viewed by other employees as harassing, threatening or retaliatory.
- Prohibit posting false or misleading information regarding the company, its employees, and clients.
- Reiterate that conduct that would be grounds for discipline or dismissal if performed at work is also grounds for discipline or dismissal if performed on–line.
- Require social media users to report violations they discover.
- State that misuse of the company's Social Media Policy is grounds for discipline, including termination.
- Require employees to sign a written acknowledgement that they have read and will abide by the policy.

The best social media policies also identify a contact person who can answer questions and give direction regarding the company's policy and encourage users to seek an "official" answer prior to posting questionable material.

And when in doubt, seek legal advice when addressing thorny questions regarding your social media policy or disciplinary action resulting from its violation. ■

THE LAVENDER TRIAL:

Copycat Class Action Cases Continue

3rd & FINAL

By Kippy Wroten

Copycat class action cases continue to be filed throughout California as plaintiff attorneys attempt to capitalize on the Lavender verdict. At present there are at least 10 class actions that have been filed statewide alleging staffing ratio violations that utilize the Lavender case as a model. These suits demand "perfect" compliance despite the ever changing regulatory landscape under which there is the threat of a $500 per resident-per day penalty for any lapse. For a facility with a census of 100 this would equate to a $50,000 penalty per day despite the absence of any personal injury. It continues to be the opinion of this writer that such claims should not be sanctioned by our courts given their legal foundation is irreparably flawed. Following is our third and final article analyzing the Lavender case.

SIDESTEPPING THE UNIFORMITY REQUIREMENT FOR CLASS CERTIFICATION IS IMPROPER

Class action lawsuits provide a vehicle for courts to review claims made by large groups of people under the sole circumstance where each person within the class is asserting an identical claim. The first requirement to support any class action is therefore to establish that every member of the class has been harmed by an identical wrong. The uniformity between multiple individual claims allows the group to be bundled together for efficiency and cost effective management. It is this uniformity requirement that caused our courts to decide long ago that claims founded on patient care are not suitable for management through a group class action. The reason is simple. Human beings are unique and their need for individualized care and treatment defeats the uniformity requirement. No uniformity, no class action.

Plaintiff attorneys pursuing cases against

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Long Term Healthcare

Conference 2011

crisis MANAGEMENT

through the eyes of the experts

June 2, 2011
8am-5pm

Disney's Grand Californian Hotel
Anaheim, CA

- *1-Day Educational Conference for the Long Term Care Industry*
- *Continuing Education Units (CEU) Offered*
- *Clinical, Legal, Regulatory and Employment Topics Covered*
- *Register at www.wrotenlaw.com*

presented by wroten & associates, inc.

Who Should Attend?

This educational conference is offered exclusively for those who work in the long term care industry.

• Owners • Nurses • Administrators • Insurance Professionals
• Risk Managers • Operators • Staff • In-House Counsel

Panel of Experts

Experts in the field of long term care will be presenting crisis management solutions for the long term care industry.

Ric Henry / *President, Pendulum, LLC*

Mary Dietrich Tellis-Nayak / *V.P., MyInnerView*

Edward Schneider, M.D. / *Dean Emeritus, Andrus Gerontology Center, USC*

Kippy Wroten, Esq. / *Shareholder, Wroten & Associates*

Regina Casey, Esq., BSN, MSN / *Shareholder, Wroten & Associates*
Mediation Specialist

Laura Sitar, Esq. / *Shareholder, Wroten & Associates*
Employment Law Specialist

Darryl Ross, Esq. / *Shareholder, Wroten & Associates*

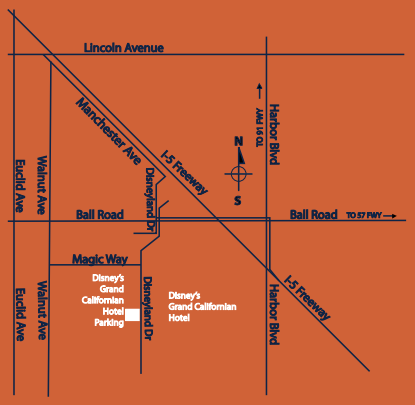
register on-line at www.wrotenlaw.com

Cost

Wroten & Associates, Inc. is providing this educational conference at no charge. Seating is limited - register early. Deadline for registration is May 19, 2011.

Parking

Valet parking is available for $21/day. Self-parking is $15/day, and the lot is located across Disneyland Drive. It's about a 5-minute walk to the hotel entrance.



Registration

Register on-line at: www.wrotenlaw.com
Email questions to: events@wrotenlaw.com

registration deadine: May 19, 2011

Communication & Conflict Resolution

Assumptions, Perceptions and Inquiry

By Marilynn Allemann, L.C.S.W., C.P.C.
Executive and Personal Coach

As we all know, conflicts are difficult and uncomfortable situations to deal with. A conflict is a dispute or disagreement between two or more people. Conflicts are produced when the needs and interests of two parties are perceived to be at odds over specific issues. Both parties feel threatened by the other. They occur in all aspects of our world, in the workplace among colleagues and co-workers, clients, and at home with family members, and friends. Every evening on the world news programs conflicts between political parties, governments and world religions are ever present and difficult to resolve.

Communication is the key to resolving conflict. Let's examine the elements of communication, its routine difficulties and how these difficulties contribute to conflicts that demand our intervention for resolution.

How many times have we made an assumption that has turned out to be totally wrong? An **assumption** is a statement or judgment that is presumed to be true without concrete evidence to support it. How often do we query a situation to gain additional information? An **inquiry** is any process that has the aim of augmenting knowledge, resolving doubt, or solving a problem. Resolving a conflict depends on the ability to come to a rational and well-informed understanding of the situation. This may come about by questioning our perceptions of the situation, our assumptions and through inquiry.

As has been previously discussed, **perception** is the process of attaining awareness or the understanding of sensory information. Our responses to difficult situations and people are the result of how we view the world, based on our perceptions, and our assumptions. This view may not necessarily be accurate but, nonetheless, it forms our **opinion**.

We utilize a number of different skills when we interpret situations and other people. Both verbal and non-verbal cues provide context in forming our perceptions and assumptions. Non-verbal cues include in part, written, visual, tone of voice, and body language. (NOTE: Email should NEVER be used as a tool for conflict resolution). We interpret each other's intentions and believe our opinion to be correct when it may be very far from the truth.

According to *Guy Harris, Certified Human Behavior Specialist*, conflict can create a perceived threat and as a result, we experience a rush of adrenaline that decreases our ability to communicate clearly. With that in mind here are some of his recommendations to improve your communication and assist you in resolving conflict:

1. **Focus on behaviors and not your interpretations.** As you communicate with other people, focus on and speak to their behaviors more than you speak to your assumptions about their behaviors. Ask yourself, what is their intent? How might they characterize their behavior?
2. **Stay curious, use inquiry.** Often time conflict occurs due to a misunderstanding or misinterpretation of information. Ask for clarification, research the issue, and repeat what you think was said. This active curiosity will allow you to clarify assumptions and uncover the problem instead of judging or attacking the person. Look for alternative explanations for the person's behavior for the situation.
3. **Use "I" Statements.** I statements are non-threatening statements indicating how a certain situation makes you feel. For example, if someone is speaking loudly an I statement would be "When you speak loudly, I feel like you are angry with me." Rather than, "Why are you so angry?" It takes some practice but it is very effective.
4. **Say what you want rather than what you don't want.** If you are interested in having someone change their behavior towards you tell them what you would like to see rather than want you don't want to see.
5. **Be aware of your non-verbal messages.** Remember that the other person will respond negatively to anything you do that they might perceive negatively (being dismissive, disrespectful, condescending, or threatening). Maintain steady eye-contact, relaxed posture, use a calm voice and your communication during conflict will improve.
6. **Give them a chance to speak.** Remember this, people don't need to get their way so much as they need to be heard and understood. If you slow down long enough to really listen, they will most likely calm down enough to listen to you. When people get a chance to say what is on their mind it helps to lower emotional energy and create a pathway for a more productive dialogue.
7. **Apologize for your contribution.** Conflicts rarely happen entirely due to one person's actions. You most likely did something to frustrate the other person prior to or just after the conflict began, if only unintentionally. Apologize. An apology will probably improve your status with the other person.

Conflict resolution can be effectively managed by each of us with the application of the above described elements to improve our daily communications with our loved ones, our families, our co-workers, colleagues and clients. Conflicts will occur when interactions involve misconceptions, poor assumptions, incomplete information or inaccurate perceptions. The accompanying loss of productive business energy and time and the costly lack of cooperative and collaborative effort in our professional and personal lives can be minimized with attention to these details.

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

"Lavender Trial"

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skilled nursing facilities have sidestepped the uniformity requirement by bootstrapping the 3.2 NHPPD (nursing hours per patient day) ratio to patient rights requirements as outlined in Title 22 §72527. The fallacy of this argument is apparent by a simple reading of §72527 which itself contains no reference to a specific nursing staff ratio. We can also look to the Department of Public Health's All Facilities Letter published on January 31, 2011 where the Department notes "[T]he minimum 3.2 NHPPD does not assure that any given patient receives 3.2 hours of nursing care…." The fact is, both federal and state legislators have recognized there is no empirical data establishing that care is improved at any artificially set staffing mark above 2.3 PPD.[i] California's 3.2 ratio was set with the "hope" that it would improve care but otherwise has no more of a relationship to the adequacy of any individual person's care than the number of lawyers it takes to screw in a light bulb. Unless each individual within the class is empowered to make a claim for 3.2 nursing hours for their personal care, there is no individual right. No individual right, no class action.

When evaluating uniformity it is also important to recognize that the fundamental design of the counting process has undergone numerous ideations in a host of All Facility Letters and DPH policies published over the years. While the recent DPH All Facilities Letter outlines with more specificity than ever before the manner in which the 3.2 ratio will be audited, this has been an evolving project. An example of the evolution is seen in the 3 versions of the newest staffing audit protocol DPH published in a short six week time span (December 10, 2010 through January 31, 2011). This changing regulatory landscape itself defies uniform evaluation over the protracted multi-year claims made in the current wave of class action complaints.

IMPACT OF THE NEW AUDIT PROCESS: IS THE NEW POLICY *LEGAL*?

In our Fall 2010 newsletter I discussed the enforceability of the 3.2 staffing statute in light of the absence of implementing regulations which the statute itself mandates the Department of Public Health adopt.[ii] There is a symbiotic relationship between statutes which broadly dictate conduct and implementing regulations that provide the details necessary for compliance. The adoption of any new law, whether a statute or regulation, requires lawmakers follow a plethora of other laws that dictate the rulemaking process. To put it simply, even DPH has to follow rules when they make rules.

Now remember back to October 2007 through January 2009 when there were a number of calls for public comment on several proposed regulations designed to implement shift ratios. The political wheels generated a call for mass participation by industry insiders as a number of new regulations passed through the formal adoption process. Title 22 §72038, which provided for the first time a definition for "Direct Caregiver", was part of this adoption process. To be sure, DPH doesn't engage the public process for adopting new regulations pursuant to its own good will. In fact the call to action that led to the adoption of the regulation defining "Direct Caregiver" came as a result of a lawsuit filed by a civil advocacy group that demanded DPH follow the rules and adopt these regulations.[iii] What is troubling however is that the implementation of the "Direct Caregiver" definition pursuant to Title 22 §72038 was delayed because the state couldn't pay for the additional care providers required to meet compliance. Fast forward to January 2011 and the newest All Facilities Letter which outlines the staffing audit process. Here you will find the same language used to support the adoption of §72038[iv] duplicated as a requirement in the new guideline. The budget appropriation on which §72038 hinges has never come to pass and the rulemaking process has now effectively been skipped.

Now I have no quibble with those of you who are simply trying to co-exist with the enforcement agency who has authority to make or break you in a very real sense every day. But in my world the law should be respected, particularly by the government and particularly when the entire staffing metric is being used by plaintiff attorneys in a way that has a potential to annihilate the entire industry. Let's remember that it took the Department of Public Health three attempts before they honed in the final, final, final version of the new audit guidelines. Guidelines that weren't available to the Lavender Court or during the bulk of the class periods associated with the 10 new class action cases. It's fine if compliance is somewhat of a moving target. Dealing with human beings should be flexible. But if the process creates a legal vacuum that fertilizes litigation and empowers plaintiff attorneys, it's time for someone to demand legal protection for our facilities. Until then, the low hanging fruit on which the plaintiff attorneys feast will continue to thrive. ■

[i] See "Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes, Report to Congress: Phase II Final" prepared by Abt Associates Inc. and Letter of Tommy Thompson to Congress.

[ii] Health & Safety Code §1276.5(a) states "The department shall adopt regulations setting forth the minimum number of equivalent nursing hours per patient required in skilled nursing and intermediate care facilities…. However … the minimum number of actual nursing hours per patient required in a skilled nursing facility shall be 3.2 hours…."

[iii] See Foundation Aiding the Elderly and Shelia Whittaker v Department of Health Services, Case No. CGC-06-456231.

[iv] January 31, 2011 All Facilities Letter 11-19, Part II Guidelines, § 1: Definitions subsection (e):
"Direct Caregiver means a registered nurse, as referred to in §2732 of the Business and Professions Code; a licensed vocational nurse, as referred to in §2864 of the Business and Professions Code; a psychiatric technician, as referred to in §4516 of the Business and Professions Code; and a certified nurse assistant, or a nursing assistant participating in an approved training program, as defined in HSC §1337, while performing nursing services as described in CCR Title 22 72309, §72311, and §72315…."

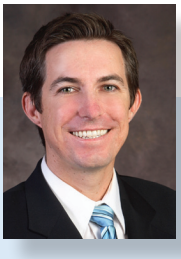
Compare to Title 22 §72038:
"Direct Caregiver means a registered nurse, as referred to in §2732 of the Business and Professions Code; a licensed vocational nurse, as referred to in §2864 of the Business and Professions Code; a psychiatric technician, as referred to in §4516 of the Business and Professions Code; and a certified nurse assistant, or a nursing assistant participating in an approved training program, as defined in HSC §1337, while performing nursing services as described in CCR Title 22 72309, §72311, and §72315….Initial implementation of this section shall be contingent on an appropriation in the annual Budget Act or another statute, in accordance with Health and Safety Code §1276.65(i)."

WANT TO HEAR MORE?

Kippy Wroten will be speaking at the following event:

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."



Legal Update

By Justin Buhr

Staffing Audit Guidelines Announced

The California Department of Public Health (CDPH) issued an All Facilities Letter ("AFL") on January 31, 2011 which provides guidelines to California Skilled Nursing Facilities for state 3.2 audit compliance. Unannounced audits were scheduled to begin as early as February 13, 2011.

Significantly, the AFL provides guidelines that clearly state that the 3.2 NHPPD does not assure that any given patient receives 3.2 hours of nursing care. The 3.2 NHPPD is simply the average number of direct nursing care hours present in the facility over a 24 hour period. No resident has an individual "right" to 3.2 hours of direct care per day.

The AFL touches on several other areas including: 1) an outline of the audit process; 2) how census is to be calculated; 3) who counts as a direct caregiver; 4) what qualifies as nursing services; 5) required documentation to demonstrate compliance; and 5) tracking forms for census, staffing assignments and NHPPD.

A subsequent ALF issued February 2, 2011 provides guidelines for facility requirements for appeals of penalties assessed for non-compliance

Informed Consent

AFL guidance was also recently issued clarifying required documentation under California Code of Regulations, Title 22 Section 72528(c). Each facility must document informed consent for all residents including those admitted with preexisting orders. This provides clarity in situations where the drug, restraint or device had been initiated prior to admission to the skilled nursing facility and was recorded in the patient's prior medical record.

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