MUSINGS OF A FRUSTRATED WARRIOR: CHAMPIONING THE RIGHTS OF THE LONG TERM CARE PROFESSIONAL (Ed)

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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 loosing 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 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?

About the Author:
Founder and Shareholder of Wroten & Associates, Kippy Wroten's experience covers a broad spectrum of complex litigation encompassing all areas of healthcare liability including high exposure and class action claims of elder abuse, fraud, and corporate unfair business practices. Ms. Wroten's experience includes the successful defense of individual healthcare providers, independent long term care facilities, ancillary service providers, as well as related corporate enterprises and their executives.

Ms. Wroten started her legal career as a Deputy District Attorney for Orange County where she prosecuted gang, child and spousal abuse cases. Thereafter, she spent 15 years as a litigator for a prestigious healthcare defense firm where she was a shareholder and lead her long term care practice area. Ms. Wroten founded Wroten & Associates in 2006 to better meet the growing challenges of the long term care industry. Wroten & Associates is designed to provide personal service at rational rates.

Ms. Wroten is a sought after speaker who is dedicated to the education of the healthcare industry and legal community. She has been an invited lecturer for the Defense Research Institute, Irvine Medical Center, Chapman University College of Law, and the Association of Southern California Defense Counsel.

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