The New Paradigm: Defending Multiple Government Investigations and a Lawsuit Arising Out of the Same Incident: How To Avoid a Three Ring Circus

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Panel of Speakers

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Susan Benz is a partner and Co-Chair of our Health Care and Human Services Practice Area.

- Susan represents health care and human service providers with regulatory, reimbursement, compliance, enforcement and corporate matters.
- Her clients include skilled nursing, assisted living, and independent senior housing facilities, CCRCs, home care agencies, clinics, hospices, medical transportation providers, pharmacies, billing companies and health care professionals.
- She also represents not-for-profit organizations that provide services to individuals with intellectual/developmental disabilities, communication disorders, and behavioral health issues.
Eric Naegely focuses his practice in the defense of complex health care litigation, including medical malpractice, dental malpractice, negligence and Federal and State statutory violations involving various health care providers.

- He has successfully tried numerous cases to verdict and has been selected for the past consecutive three years through a Peer Review process for inclusion in the Super Lawyer Directory.
- He also represents health care professionals in investigation and disciplinary matters before the NYS Department of Health Office of Professional Medical Conduct and NYS Education Department Office of the Professions.
- He also assists health care facilities in developing and implementing their policies and procedures in accordance with the various State and Federal laws, rules and regulations, as well as provides counsel to health care practitioners on patient care issues.

Margaret Surowka Rossi concentrates her practice in the healthcare regulatory field and the defense of Federal and State statutory violations involving various health care providers.

- She represents health care and human service providers with regulatory, compliance, enforcement, litigation and corporate matters in the areas of skilled nursing, assisted living, home care agencies, clinics, hospices, medical transportation providers, hospitals, physician practice groups, pharmacies and other health care professionals and providers. She is former General Counsel to New York State Dental Association.
- She also represents health care professionals and providers in investigations and disciplinary matters before the NYS Department of Health, NYS Office of People with Developmental Disabilities, NYS Office of Mental Hygiene, NYS Medicaid Fraud Control Unit, NYS Office of Professional Medical Conduct, NYS Education Department Office of the Professions, and other various Federal and New York State government entities.

Overview

- The Paradigm Shift
- The Impact of Governmental Investigations on Civil Lawsuits
- Tips to Manage the Three Ring Circus
I. The Old Paradigm

- DOH surveys facility and cites for failure to discard expired medications.
- Facility files plan of correction; DOH accepts.
- Life is good.

OR

- Resident’s family files a civil lawsuit based resident’s fall out of bed and resulting fracture.
- Parties settle. Facility's insurance covers all legal bills and settlement. No media coverage.
- Life is OK (mostly).

The Old Paradigm

- HHS-Office of Civil Rights receives a complaint from a resident’s family that an aide took pictures of a resident unclothed and posted them on Snapchat sharing with friends. Facility terminates aide.
- OCR investigates; determines aide violated HIPAA. Requires facility to retrain employees on its Social Media Policy and pay small fine. No Wall of Shame. No media.
- Life is bearable (mostly).
The Old Paradigm

- Medicaid Fraud Control Unit (MFCU) receives a referral from DOH regarding a reported incident.
- MFCU determines nurse diverted 200 narcotic pills from residents for personal use and falsified the medication records.
- Facility terminates nurse; MFCU charges nurse but not facility with multiple felonies and misdemeanors. MFCU issues press release naming nurse and facility.
- Life could be better.

The Old Paradigm

- Characteristics of the “old paradigm”
  - Single proceeding
    - One DOH survey
    - One civil lawsuit
    - One MFCU investigation
    - One HHS-OCR HIPAA complaint
  - One set of rules for handling the proceeding
  - One government agency or one lawyer (plaintiff’s counsel) for facility to deal with

II. The New Paradigm
The New Paradigm

- Multiple proceedings occurring simultaneously (think “three ring circus”)
- In different types of legal forums:
  - Administrative (provider exclusions; survey enforcement; withholding of M/M payments; suspension or revocation of facility operating certificates or professional licenses)
  - Criminal (misdemeanors, felonies)
  - Civil ($$$)

The New Paradigm

- Each proceeding has its own rules, sanctions or damages, and attorneys.
- Each proceeding has its own timetable.
- Strategic coordination of multiple timetables is difficult because facility is not in control.
- Findings in one proceeding have collateral consequences on other proceeding.

The New Paradigm

- Government agencies will share evidence with each other and even plaintiffs’ counsel if it’s in their best interests
- The facility may not know who is working with whom
- Government agencies will compete with each other to take control of case to obtain the biggest “reward” and the biggest news headline
### The New Paradigm

- Facility’s insurance will likely cover some of proceedings (civil lawsuit, professional licensure proceedings).
- But not all (DOH, MFCU, OMIG, HHS-OCR)
- Facility often has to fight for coverage of as many proceedings as possible.
- Facility may have to fight with insurance carrier to choose legal counsel experienced in handling multiple proceedings and collateral consequences.

### The New Paradigm

- Facility will have to decide if it is going to pay for the attorney’s fees for employees’ and former employees’ defense.
- Wait, What?
- Why? Outcomes of employees’ cases will drive facility’s legal and media exposure.
- If employee does not have legal counsel, they will likely:
  - Talk to government, write incriminating statements, hang themselves (and the facility).

### The New Paradigm

- Employees’ statements will be the basis for:
  - Criminal charges against the employees
  - Negative publicly against the facility (“perp walk”)
  - DOH deficiencies and enforcement action
  - Civil lawsuit by family
  - Higher dollar value of jury verdict or settlement; possible punitive damages.
III. The Mix of Agencies

Who's Who in NYS?

• NYS Medicaid Fraud Control Unit, Attorney General's Office (“MFCU”)
  – Civil and criminal enforcement authority over nursing home abuse and neglect and Medicaid fraud and abuse
  – Typically charge employees; have charged facility owners for falsifying business records, withholding information from investigators (see Medford NH case)

• NYS Office of Medicaid Inspector General (“OMIG”)
  – Administrative authority (auditing, handling self disclosures, excluding individuals from Medicaid)

Who's Who in NYS?

• NYS Department of Health (“DOH”)
  – Administrative authority (survey enforcement, licensure, fines)

• NYS Department of Education Office of Professional Discipline (“OPD”)
  – Administrative authority over nurses, NPs, therapists (licensure, discipline, suspension/revocation of licenses, fines)

• NYS DOH Office of Professional Medical Conduct (“OPMC”)
  – Administrative authority over physicians and PAs (licensure, discipline, suspension/revocation of license, fines)
Who’s Who in NYS?

- NYS Justice Center
  - Criminal and administrative authority to investigate “abuse, neglect and mistreatment” against individuals with developmental disabilities (administrative sanctions, criminal charges)
- NYS Bureau of Narcotic Enforcement (“BNE”)
- NYS Office of State Controller (“OSC”)
- Local County District Attorney Offices

Who’s Who in DC?

- U.S. Department of Justice (“DOJ”) and U.S. Attorneys Office
  - Civil and criminal authority (investigate and prosecute health care fraud and abuse)
- Dept of Health and Human Services Office of Inspector General (“OIG”)
  - Civil and administrative authority (exclude individual and entities from Medicaid/Medicare; impose civil monetary penalties; require Corporate Integrity Agreements)

Who’s Who in DC?

- Centers for Medicaid and Medicare (“CMS”)
  - Administrative authority (deny, suspend, revoke provider’s enrollment in M/M; suspend payment; recover overpayments)
- Dept. of Health and Human Services Office for Civil Rights (“HHS-OCR”)
  - Administrative authority (investigates HIPAA violations; imposes civil monetary penalties and corrective action plans); can refer to Department of Justice.
- Drug Enforcement Administration (“DEA”)
IV. Mandatory Self-Reporting

Mandatory Self-Reporting

• Facilities and licensed professionals have self-reporting obligations
• Department of Health (incident reporting)
• Office of Professional Discipline (professional misconduct and impairment for licensed professionals (nurses, therapists, etc.)
• Office of Professional Medical Conduct (professional misconduct and impairment of physicians and PAs)
• OMIG and Medicare (overpayments)
• NYS Justice Center (abuse, neglect, mistreatment)

Mandatory Self-Reporting

• Mandatory self-reporting creates government involvement
• While not discretionary in most cases, there may be flexibility in how incident is reported and investigated; consider using legal counsel for investigation; limit statements of employees or draft statements with attorney assistance
• However, that flexibility is decreasing
Civil Lawsuits
- An Overview
- What To Do In Today's Complex Legal Arena

The Civil Lawsuit

Alarming Facts
• In 1960: Only 1 of 7 medical providers were EVER sued.
• Today: 1 of 7 medical providers are sued every year.
• Long Term Care litigation has exploded.
• Reasons?

Predicting Lawsuits
• Studies have shown that better quality providers are sued just as often.
• Severity of the injury is the ONLY true predictor of whether a suit will be filed and whether the plaintiff will either:
  – Receive a settlement;
  – Win at trial.
Statute Of Limitations

- A Statute of limitations is a law that places a time limit on filing an action. These time limits are very strictly adhered to. There are some legal exceptions but they are rare (i.e. The Continuous Treatment Doctrine).

1. Medical Malpractice is 2.5 years
2. Nursing Home Negligence is 3.0 years
3. Intentional Torts (i.e. assault) is 1.0 year
4. General Negligence is 3.0 years
5. Contract Disputes is 6.0 years
6. Wrongful Death is 2.0 years (from the date of death)

Components of a Lawsuit

- Summons and Complaint
  - Methods of service (personal, etc.)
  - Does not tell you much about the case
- Answer to the Complaint
  - Must serve within 20 days of receipt of Complaint
- Discovery Process
  - Medical Records
  - Exchange of other documents (policies, etc.)
  - Depositions
- Motions
- Trial
Never Do The Following

• DO NOT ignore the Complaint.
• DO NOT contact the plaintiff or his/her attorney.
• DO NOT try to bargain away the lawsuit.
• DO NOT alter or destroy records.
• DO NOT discuss the case with random people.
• DO NOT panic.

Do The Following

• Contact your attorney.
• Contact your insurance company(s).
• Preserve evidence.
• Remember how common lawsuits are.
• Remember allegations are often without merit.
• Remember this is not personal.

Types of Damages

• Compensatory Damages:
  Economic Damages:
  o Wage loss
  o Out of pocket expenses such as hospital bills, prescription/medication bills, nursing care bills, therapy bills, medical device costs, etc.
  Non-Economic Damages:
  o Physical pain and suffering
  o Emotional pain and suffering
• Punitive Damages – Not typically allowed.
  * Public Health Law 2801-d cases are an exception.
How To Deal With This Awfulness

• Remember that lawsuits are part of today’s health care culture.
• Remember that most cases do not relate to quality of care but rather poor outcomes.
  - Poor outcomes are often out of your control, particularly in the long term care industry.
• Learn about the process and work closely with your attorney. Hopefully your attorney is not an emotional robot.
• Be strong for your residents and staff.

Common Lawsuits

• Falls
• Abuse
  - Physical
  - Sexual
• Elopement/Wandering
• Failure to Supervise
• Wrongful Death
• Failure to appreciate changes in condition
• Medication errors
• Wound issues
• Corporate negligence

Mistakes That Lead To Lawsuits

• Lack of communication during transfers between facilities
• Not documenting discussions with physicians and families
• Not properly documenting lab results and diagnostic tests
• Not ensuring orders are timely implemented and documented
• Not getting rid of poor employees or properly training them
• Treating the family disrespectfully
Plaintiff’s Litigation Tactics
• Divide and conquer the defendants
• Physicians vs. Staff
• Nurses vs. CNAs
• Disgruntled former employees
• Attack policies and procedures as insufficient and/or that the staff did not follow them
• Attack the corporate entity
  - A jury is more likely to rule against a corporation than an individual provider.

Risk Management
Providing Good Care Is Not Enough
• Hire and retain competent staff (easier said than done).
• Train and evaluate staff routinely.
• Know what mistakes lead to lawsuits.
• Assess and address changing staffing needs.
• Analyze marketing material. Does it promise too much?
• Preach good documentation.

Risk Management
Providing Good Care Is Not Enough
• Treat the family with respect.
• Treat the staff well.
• Review and revise policies and procedures as necessary.
• Keep informed of trends in litigation
• Recognize the potential for injury.
• Practice smart incident reporting.
  - Have two sets of incident reports.
  - Keep them simple.
  - Do not record resident’s version as if it is fact.
• Consider arbitration agreements.
The Impact of Government Investigations on Civil Lawsuits

- NYS Department of Health
  - Statement of Deficiencies and Plan of Corrections
    - "Road Map" for plaintiff's case
    - Discoverable – redacted version obtainable by FOIL request for any information/documents pertaining to plaintiff/resident
    - Admissible? Yes.
- Criminal Convictions
  - Federal, State, County and Local level
    - Admissible? Yes.
    - Relevant – pertains to plaintiff/resident
    - Standard: demonstrate an untruthful bent or willingness or disposition on part of provider to voluntarily place own self-interest and advancement ahead of the interests of society
    - Close in time

- NYS OPD AND OPMC licensure disciplinary actions and compliance agreements
  - Admissible? Yes.
    - Relevant – pertains to plaintiff/resident or repeated pattern of same conduct by provider

- Media Coverage and Public Exposure
  - May not provide accurate portrayal of situation
  - Negatively and irreparably taints jury pool
  - Possible to reveal name of disgruntled former employees to testify against facility or other employees

The Impact of Government Investigations on Civil Lawsuits

- Plaintiffs' attorneys will encourage plaintiff (resident and/or family members) to file complaints with various government agencies
- Plaintiffs' attorneys more likely to place a case in suit where there is already or likely to be a finding
- Increases potential verdict and settlement value
- Increases likelihood that case will not be decided on the merits
- May trigger additional reporting requirement of provider to National Practitioner Data Bank
Patient Rights Statute
Public Health Law Sec. 2801-d

- Purpose of Statute (1979)
- Potential Defendants under the Statute – expanded by “Burkhart” case
  - Skilled Nursing/Rehabilitation
  - Assisted Living
  - Independent Living
  - Adult Homes

Public Health Law Sec. 2801-d

- Statutory claim:
  - Cause of the recent proliferation of long term cases in New York State – recent decision expanded potential liability under statute to other facilities aside from skilled nursing/rehabilitation
  - Based on the same set of facts as the negligence or malpractice claim
  - Does not require plaintiff to prove a deviation from the accepted standard of medical care through an expert
  - Allows for class action lawsuits against long term care facilities
  - Dramatically increases potential damage awards
Public Health Law Sec. 2801-d

- Creates a Private Cause of Action for Residents and Families

“Any nursing home or residential health care facility that deprives any patient of said facility any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation…”

- Historically, plaintiffs’ firms only brought PHL Sec. 2801-d claims against nursing homes - not anymore

Public Health Law Sec. 2801-d

- Right or Benefit Defined:

“Any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation…”

- Injuries Defined:

“Injury shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient”
Public Health Law Sec. 2801-d

- Affirmative Defense: places a very high burden of proof on facilities/providers in defense of a claim – very difficult burden of proof to satisfy in any case

  “No person who pleads and proves that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section”

Public Health Law Sec. 2801-d

- New York Courts hold that this statutory cause of action is separate and distinct from a claim of either medical malpractice or negligence
- Damages: remedies provided are in addition to and cumulative with any other remedies available to a resident (can result in duplicative awards for the same injuries arising out of the same facts and circumstances)

Public Health Law Sec. 2801-d

- Compensatory Damages: expands the potential damages that a plaintiff may recover if able to prove his or her claim

  “In no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility . . . or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists”
Public Health Law Sec. 2801-d

- Expressly authorizes punitive damages an award of attorney’s fees
  
  “Where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed”

- New York Courts hold that public policy precludes insurance coverage for punitive damages reasoning that the deterrence and punishment purposes would be undermined by a contrary result – insurance companies may outright disclaim coverage or reserve their right to disclaim coverage upon a successful verdict

Typical PHL Sec. 2801-d Cases

- Falls and Drops
  - Failure to perform risk assessment for falls and to determine, implement and follow appropriate interventions in a care plan with regard to bed mobility, transfers and ambulation
  - Failure to maintain an environment in the facility free from accident hazards

- Decubitus Ulcers and Pressure Sores
  - Failure to ensure that a resident who entered the facility without ulcers/sores did not develop them unless clinically avoidable
  - Failure to provide the necessary treatment to promote healing and prevent infection to pre-existing ulcers/sores

- Physical Abuse and Neglect
  - Failure to develop and implement written policies prohibiting mistreatment, neglect and abuse of residents
  - Failure to investigate accidents or incidents of neglect/misreatment/abuse and to report to the facility administrator or state authorities

Now Nursing Homes are not the Only Targets...
Defending Against the Trilogy:
Contemporaneous Criminal, Civil, and Administrative Proceedings

• Facilities/providers are facing a trilogy of proceedings: criminal, civil and administrative
• What begins as a simple administrative proceeding, i.e., a bad survey, may migrate to civil or criminal proceedings
• Poses a multiplicity of issues and requires synchronized representation among all counsel
• Need to avoid potential adverse implications of a non-global settlement of all proceedings

Retain Legal Counsel

Involve legal counsel immediately to assist in internal and external investigation of subject-matter involved in a potential or current government investigation
Retain Legal Counsel

- Legal counsel can:
  - Identify conflicts of interest with multiple representations
  - Create a buffer, limit unnecessary contact and protect rights of facility/employees
  - Control the flow of information and documents – relevancy and confidentiality/privilege
  - Prepare a defense strategy based on the laws/regulations
  - Operate under a joint defense agreement with all defense counsel involved in proceedings
  - Negotiate a global resolution/settlement

Identify Conflicts of Interest

- The facility is vicariously liable for the acts and omissions of its current and former employees
- Conflicts of interest between facility and employees arise and will require the involvement of more than one law firm
- By providing paid legal representation to the employee, the facility is defending and protecting itself
- If employee’s acts too heinous, the facility will want to distance itself from employee (more for perception than for legal position)
- Effective use of joint defense agreements
Determine Applicable Insurance Coverage

- Potential Insurance Coverage for Civil Litigation and NYS OPD AND OPMC licensure disciplinary actions
  - Generally, yes up to the policy limits and within coverage scope but not for payment of punitive damages or attorney’s fees to opposing party awarded pursuant to PHL 2801-d
- Criminal proceedings (generally not)
- NYS Department of Health surveys and enforcement actions (generally not)
- OMIG/OIG investigations (generally not)

Remain Silent
Remain Silent

• Statements of facility management (owner, administrator, medical director, director of nursing, etc.), current employees and former employees are admissible in civil, criminal or administrative proceedings

• Do not speak with investigators from government agencies without legal counsel present – defense attorneys can control time, nature and scope of interviews and hearings

Limit Document Disclosure

• In general, the government agency has broad legal authority to obtain documents from facility and health care providers

• However, the government is not entitled to everything it asks for and must have specific legal authority to obtain each document requested

• Control document disclosure process by determining authority, relevancy, confidentiality/privilege, and track documents provided

• Avoid plaintiffs’ counsel obtaining documents disclosed in response to government agency investigation
Thank you!