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How to Prepare for and Defend Against Claims of Assault in the Long-Term Care Setting

I. Sexual Abuse in the Long-Term Care Setting

Despite the narrative being told by trial lawyers and media outlets, staff-on-resident sexual abuse is rare. However, an allegation of sexual abuse must be immediately addressed and treated with the utmost diligence. These claims are highly emotional because they involve the elderly and their family who have placed trust and confidence in a long-term care facility to care for their loved one. You cannot "unring the bell" after an allegation of sexual abuse. Any allegation of abuse, sexual or otherwise, must be taken seriously and immediately reported to the appropriate law enforcement and regulatory bodies. Common mistakes by long-term care providers range from failing to acknowledge the severity of an allegation of sexual assault, failing to timely report an allegation of sexual assault, failing to conduct a thorough staff-wide investigation, to an actual cover-up of a sexual assault.

The retirement of the Baby Boomer generation means more of our population will be entering long-term care facilities. Many long-term care residents suffer some form of metal illness, such as Alzheimer's and dementia. Because of this, the long-term care staff members often hear residents make allegations that the staff know are not true. Claims of sexual assault are different. There is no discretion when it comes to responding to and reporting allegations of sexual assault. You can NEVER discredit the resident because she is suffering from dementia. No matter how unlikely the allegation, if the resident alleges or makes a statement suggesting she has been sexually assaulted in any manner, the facility and its staff members must know the "where, when, and how" in terms of responding to such an event or allegation.

II. Responding to a Claim of Sexual Abuse

Generally, the following individuals and entities will be involved in a case of alleged sexual assault: the resident and resident's family; the facility's staff members; police; sexual assault nurse examiners (SANE); Department of Public Health; Department of Forensic Sciences; Department of Human Resources; other healthcare providers (hospital; the resident's primary care physician; the facility's medical director); and the suspect.

After becoming aware of an allegation of sexual assault, the facility should interview all staff members and the resident. The interviews should involve multiple staff members as witnesses and be well documented. The investigation may include interviews of other residents. The allegation, whether substantiated or not, should be reported to the police and the governing state agency. The facility must provide the police full access of the facility and do nothing to compromise the integrity of any evidence or the investigation. The facility's employees must understand (during their hiring process) that they should not do anything to the resident's room or to the resident until the police and a physician have had an opportunity to document the evidence and interview the resident. If a suspect is identified, the facility, in conjunction with the police, should take all appropriate steps to investigate the suspect's conduct and whether other residents could also have been subject to harm. The facility should promptly notify the resident's family. The facility should ask the resident (if she is capable of giving consent) or the resident's POA/family to consent to a sexual assault examination performed by a physician who is qualified to perform sexual assault examinations. This may require sending the resident to the hospital for a rape kit.

From a claims perspective, the first step is to identify which defendants are named (or likely to be named) in the lawsuit. Generally, if the nursing home is sued, coverage will be provided under a standard reservation of rights ("ROR"). If an employee is a named defendant, and he was acting within the line and scope of his employment, a defense will be provided under a standard ROR. If the employee was not acting within the line and scope of his employment, then coverage will likely be denied. Consideration should also be given to whether separate counsel is necessary to represent the nursing home and the employee. If the medical director is sued, the claims representative should determine whether she has separate coverage and, if so, the details of the policy and coverage limitations.

Claims representatives will also analyze which coverage applies to a claim of sexual assault. For instance, professional liability coverage may exist if the claim is filed under a theory of medical malpractice (as opposed to premises liability). Coverage may not exist if the injury is a result of a criminal act, which is generally the situation involving allegations of sexual assault. General liability coverage may be in play if there is an allegation the assault was committed outside the provision of medical care, such as by a maintenance personnel or third-party vendor. Other coverage considerations include sexual-acts-liability coverage and third-party coverage. Sexual-acts-liability coverage is generally afforded under an endorsement. Excess-coverage considerations are typically involved due to the nature of these claims. Excess insurance may exclude coverage for punitive damages, coverage for criminal acts, or both. Additionally, since many facilities undergo ownership and management changes, claims representatives must evaluate whether any such change may impact coverage.

III. Case Study

Case Study 1: Jane Smith v. Shady Oaks[1]

Ms. Smith was 90 years old when she was admitted to Shady Oaks independent-living unit in 2011. Over time her dementia progressed and Ms. Smith transitioned to Shady Oaks' memory-care / dementia unit. In June 2014, Ms. Smith alleged she was raped on two occasions. The

[1] The names of the resident and the facility have been changed for privacy reasons.

medical director examined Ms. Smith after the first rape allegation on June 17. The medical director did not perform a rape examination. The medical director determined Ms. Smith was not raped, but rather suffered from severe and progressing dementia with psychosis. The second rape allegation occurred on June 23. The medical director was again notified by Shady Oaks' staff. The medical director entered an order to send Ms. Smith to the hospital for a psychological evaluation. During the ambulance transport to the hospital, Ms. Smith told the paramedics she was raped. Ms. Smith was diverted to a different hospital to undergo a rape examination. The hospital notified local law enforcement about Ms. Smith's allegation. Shady Oaks notified the Department of Public Health about Ms. Smith's allegations on June 24. A litigation-hold letter was sent to Shady Oaks by Ms. Smith's attorney on June 26. There was one video camera in Shady Oaks' memory-care unit. The video showed the entrance to the memory-care unit, but did not show Ms. Smith's hallway or room. Shady Oaks inadvertently allowed the video surveillance to automatically record over the June 2014 footage. During the police investigation, pajama bottoms were found underneath Ms. Smith's mattress. The Department of Forensic Sciences concluded that semen and a single sperm were on Ms. Smith's sheets. The sexual assault nurse examiner opined that the rape kit was consistent with sexual assault. Ms. Smith's family sued Shady Oaks and Shady Oaks' administrator. The administrator was terminated from Shady Oaks shortly before the lawsuit was filed for reasons unrelated to Ms. Smith's situation. No suspect was ever identified.

IV. Procedural Considerations

In many cases, the resident or resident's family member sign an arbitration agreement upon her admission to the facility. Consideration should be given to: (1) who signed the arbitration agreement (the resident or someone else); (2) the resident's competency at the time the arbitration agreement was signed; (3) if someone signed on behalf of the resident, whether that person had the legal authority to sign documents on behalf of the resident; (4) whether the arbitration provision designates that the arbitration be conducted in a "forum"; and (5) the costs of defending a claim in arbitration versus court. The applicable case law, the judge, and the venue should be evaluated to determine whether the arbitration agreement is enforceable.

The nature of the claim is also relevant. If the claim sounds in medical negligence that may be subject to a state's medical liability act, the claim likely will fall outside the scope of a medical liability act because the assault did not involve the provision of medical care. This is significant because statutory medical liability acts often have more stringent discovery requirements and burdens of proof.

There may be a parallel criminal case to the civil case. Criminal cases can limit and delay discovery in the civil case, which includes delaying the suspect's deposition before the criminal case is resolved.

V. Evaluating and Valuating a Sexual Assault Claim

One of the first steps in evaluating liability is determining the "status" of the alleged assailant—that is, whether the individual was an employee, another resident, or an "outsider" (visitor or vendor).

If the suspect is an employee, many states preclude the employer from being held liable for a criminal act of an employee unless such conduct was foreseeable. Oftentimes, plaintiff lawyers argue the employer is vicariously liable for the employee's conduct because the facility owed a "heightened duty of care" to the resident suffering from a physical or mental deficit. Discovery in these instances will generally focus on the employee's background, which will include the employee's personnel file, the facility's pre-employment background check, and whether the employee's prior conduct should have placed the employer on notice of a potential assault. Discovery in the employee-resident context may also involve other similar incidents experienced at the facility and the facility's survey history.

In the resident-on-resident context, the liability analysis also focuses on whether the conduct was foreseeable. Discovery in this scenario will address the facility's "heightened duty" to monitor, supervise, and intervene when there is evidence that a suspect resident demonstrated questionable behavior in the past. This scenario may also involve questions about whether the facility should have discharged the suspect resident before the alleged assault, which may then invoke regulatory violations. The aggressor-resident's prior conduct, other similar incidents involving the aggressor, the facility's regulatory survey history, and the facility's policies and procedures to prevent resident-on-resident sexual assault will be scrutinized. Consensual activity is generally not a defense because one or both residents likely suffer from cognitive deficits.

If the assailant is a visitor or third-party vendor, many states preclude liability for an employer and premises owner for the criminal acts of third party. Rape is a criminal act. Discovery in this scenario will focus on whether the particular criminal activity (sexual assault) was foreseeable. Thus, questions about the facility's security measures and the knowledge about the suspect before the assault will be raised. Some states recognize liability may be imposed in this scenario because of the "special relationship" between the facility and a resident who is not able to care for herself.

The first 90 days of the lawsuit or pre-suit claim is critical. Outside counsel must do more than simply relay the facts of the investigation to the claims representative—outside counsel should provide an analysis of the issues, and ultimately how counsel views the facts playing out to an arbitrator or jury, and whether the claim has any merit and/or can be successfully defended. A litigation budget is not perfunctory. Rather, outside counsel should provide her best estimation of the cost of defense through trial/arbitration. This is important for setting reserves and evaluating potential settlement. After the first 90 days, it is crucial that outside counsel keep the claims representative and the insured apprised of ALL significant developments, good or bad.

A key component of most sexual-assault cases is experts. Most claims will involve a SANE, the Department of Forensic Sciences, police officers, medical directors, physicians, and hospital personnel. A geriatric psychiatrist can be helpful in explaining the resident's cognitive impairment mental and behavior. Because forensic evidence (DNA) is likely to be an issue, a forensics expert can help explain the evidence in simple terms. A forensic nurse examiner, a SANE, or both, should help analyze the nature of the resident's injuries and whether the injuries are consistent with a sexual assault.

Valuation of sexual-assault claims is difficult. While each case has its unique set of facts, generally these are not "split-the-baby" cases. In other words, a sexual assault either did or did not occur. In the instance of an undisputed sexual assault, with even questionable liability, the stakes are extremely high. As such, outside counsel, the claims representative, and the insured need to have candid discussions about the value and resolution of the case at an early stage. Alternatively, if the evidence proves an assault did not occur or there is a strong liability defense, outside counsel, the claims representative, and the insured should evaluate the pros/cons of defending the case through trial and the parties should attempt to resolve the case at an early stage for a reasonable figure.

VI. Discovery and Evidentiary Considerations

Like any medical-negligence case, the resident's medical chart must be reviewed in detail. Oftentimes what is not in the medical chart is just as important as what is in the medical chart. Plaintiff lawyers rely on the mantra "charting-by-omission"—that is, if information is not in the chart then it was not done. At the earliest opportunity outside counsel should meet with the key staff members and begin gather the resident's non-party medical records to help bridge any gaps in the medical chart. The staff interviews will also help assess which employees will be good witnesses for your case.

The facility's policies and procedures will be scrutinized. In many cases, a policy may have been partially followed or not followed at all. The internal policies should be compared with the applicable state and federal regulatory requirements. The facility's employees should assist with explaining why the staff took the action/inaction they did relative to the facility's own policies. A review of older versions of the facility's policies should be examined to determine if/when the policies were updated and why they were updated. In most cases, the facility will want the court/arbitrator to enter a protective order before producing its policies to plaintiff's counsel.

Dealing with former employees is not unique to sexual assault cases. More often than not, one or more employees will have been terminated by the time outside counsel begins to investigate the claim. The former employee may be hostile towards the facility. Thus, outside counsel should investigate the circumstances of the termination by speaking with the administrator, the current employees, and reviewing the former employee's personnel file. Outside counsel should perform its own independent background check on the former employee to see if there is any information inconsistent with what is represented in the employee's personnel file. If the former employee is willing to meet with outside counsel, and there is no criminal proceeding against the former employee, it is best to meet with the former employee as soon as possible to discuss his recollection of the resident. Consideration should be given to obtaining a mitigating statement from the former employee. In some instances the former employee will agree to

establish an attorney-client relationship with outside counsel, which will allow outside counsel to represent the former employee at his deposition.

At the outset of the investigation, the facility's administrator and front-office employees should be asked whether a preservation or litigation-hold letter was sent by plaintiff counsel. The failure to preserve evidence may be regarded by the court as an inference of the facility's guilt or negligence. Destruction of evidence may also establish a foundation for an independent tort of spoliation. Even if a preservation letter is not sent to the facility, the facility must have a system in place such that all employees understand how to preserve evidence and appropriately respond to a preservation request. An example of this is video surveillance. If video surveillance exists, it must be preserved. This is true even if the video does not capture the area of the alleged assault.

Non-party medical records and healthcare providers can critical to evaluating liability and causation issues. It is important to follow up with the resident's providers as the case progresses because there may be new information relevant to the underlying assault allegation. If your jurisdiction permits, after the HIPAA order is entered, it is prudent to meet with the medical director and the resident's other healthcare providers, e.g., the SANE who performed the rape kit.

VII. Mediation and Settlement

The claims representative, outside counsel, and the insured should discuss whether an early resolution of the claim is feasible and in the best interest of the insured. Naturally, the likelihood of successful early resolution depends in part on the reasonableness of plaintiff's counsel and plaintiff's opening demand. The claims representative and outside counsel will have established a litigation budget and set reserves. This will facilitate placing a fair value on the claim. Outside counsel and claims should "stick to the number" during settlement negotiations. But be prepared to adjust the value of the case (upward or downward) if the facts, evidence, or testimony change during discovery.

Oftentimes defendants are reluctant to share key portions of their investigation at mediation so as to preserve such evidence for trial. The vast majority of cases settle before trial. Thus, it may be wise to share the incriminating or impeachment information with the mediator and opposing counsel. Otherwise the evidence may never be revealed and an opportunity to materially impact the value of the case (in your favor) is lost.

VIII. Mitigating the Risk of Claims of Sexual Assault

Outside counsel, claims representatives, and long-term care providers can work together to mitigate against the risk of sexual assault on residents. Think "proactive" and "communication." First, there must be a "zero-tolerance" policy for inappropriate behavior towards residents. This includes zero tolerance for staff using social media and cameras while caring for residents. Second, the facility's employees must be trained on how to recognize and report claims of sexual assault. This includes an understanding of the many variations of sexual assault, both physical and verbal. The facility should understand that a "claim" or "allegation" of sexual assault may be expressed in different ways, particularly by those suffering from a mental illness. In our experience, utilizing "real-life" scenarios is a valuable education tool. Third, the facility

needs to have clear policies pertaining to recognizing, investigating, and reporting allegations of sexual assault. The policies should be easily accessible to the facility's employees and be reviewed and updated annually, at a minimum. Fourth, employee and resident background checks are important measures to help ensure individuals with questionable behavior are kept out of the facility. Fifth, the facility's safety interventions, e.g., "Lock-Down" units, to prevent abuse should be reviewed and updated annually, at a minimum.

In many sexual assault cases the story will be covered by local and national media outlets. Engaging a professional public-relations firm often helps navigate what the facility should and should communicate to the media. In most cases, the media will already have its narrative and simply ask the facility if it cares to comment. The facility's response may not influence the reporter or the content of the story—however, in our experience, it is best to respond in some fashion, particularly if the allegation is not supported by the facts.