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THE ADELMAN ADVANTAGE

by Rebecca Adelman

Who's To Blame for COVID-Deaths In Nursing Homes?

If you ask the White House appointed Select Subcommittee on the Coronavirus Crisis, for-profit nursing home companies are to blame. The Select Subcommittee, chaired by Rep. James E. Clyburn, is examining the devastating impact of the coronavirus pandemic on nursing home residents and workers, including the deaths of more than 40,000 Americans in nursing homes across the country. Modeling the committee after the Truman Committee (a Congressional investigative body, headed by Senator Harry S. Truman, formed in March 1941 to find and correct problems in war production with waste, inefficiency, and war profiteering), the investigation is focused on 1) CMS regulations and oversight; and 2) for-profit nursing homes and claims of profiteering. Where is the compelling alternative narrative for nursing homes? Read on.

The Probe

According to the June 16, 2020 letter sent from the Subcommittee to CMS requesting a list of records that reads like a Plaintiff's Request for Production in a nursing home lawsuit (which we can expect to see as the Plaintiff's attorneys mobilize around the media's narrative of the greedy nursing homes) *"Despite CMS's broad legal authority, the agency has largely deferred to states, local governments, and for-profit nursing homes to respond to the coronavirus crisis. "*

The letter to CMS cites, among other issues, "*…there has been little public reporting on which nursing home operators have received funds (Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Paycheck Protection Program and Health Care Enhancement Act, and Medicare's Accelerated Payment Program), the amount and type of relief provided, and how they have actually used the funds*."

The Committee probe also focuses on five major nursing home operators and seeks "*documents and information regarding the deaths of men and women in your company's nursing homes during the coronavirus outbreak, the conditions that may have contributed to these deaths, and any steps taken to protect residents and workers from further tragedy*," reads a June 16, 2020 letter from the Committee to each company's CEO.

The letter further indicts nursing homes' business practices and states, "*At the Subcommittee's briefing, participants also described how business practices at many long-term care facilities, including understaffing, low pay, and lack of paid leave for workers, contribute to this crisis. Briefers emphasized the need for accountability and transparency with respect to federal funding that many nursing home operators have received."*

The letter references a *"widespread and persistent"* pattern of deficiencies and generalized statements such as "*Over the past decade, many for-profit and chain-affiliated long-term care companies have taken steps to maximize profits for their corporate owners at the expense of protecting their residents and workers. Research regarding the impact of private equity buyouts on quality o fcare at nursing homes has found that buyouts lead to significantly lower quality of care, as measured by Five Star ratings generated by CMS" and by the rate of readmission to a hospital within 30 days of entering the nursing home. The measures typically taken by private equity firms and other private owners to increase profitability—including reducing staffing levels, increasing patient volume, and failing to pay living wages or benefits to staff—also appear to have had the effect of worsening coronavirus outbreaks in nursing homes."*

THE PROBE blames staffing shortages on private equity and *"The refusal of many long-term care facilities to provide medical insurance and paid sick leave to their staff has created additional risks during the coronavirus pandemic."*

I counted the word "many" at least a dozen times throughout the letter to the nursing homes. The Committee then asks for "many" documents spanning 10 categories of information that provides even more plays for the Plaintiff's attorneys to use in their lawsuit planning.

Of course, what THE PROBE fails to include in its letters and the media consistently fails to report is that nursing homes have been sounding the alarms and asking for help since the pandemic began.

Of course what THE PROBE fails to highlight is the extensive research and reports evidencing that the impact of COVID on nursing homes could have been avoided if the federal government would had begun this investment at the start of the pandemic instead of deprioritizing nursing homes and the elderly they serve and the staff that serve them.

The Crisis

The history of nursing home regulations, budget constraints and lack of prioritizing the quality of life and end-of-life care in this country is beyond the scope of this piece yet is a critical conversation to understanding the current conditions of the senior housing industry.

For purposes of THE PROBE and setting the record straighter, research by David C. Grabowski, PhD, a professor of health care policy in the Department of Health Care Policy at Harvard Medical School; Vincent Mor, PhD, professor of Health Services and Policy at Brown University; and R. Tamara Konetzka, PhD, professor of Health Services Research at the University of Chicago, found that the likelihood of outbreaks in nursing homes are most directly correlated with the size of the outbreak in the larger community where a facility is located, with little to no correlation to facility ownership structure, staffing or quality ratings.

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Senate testimony in May by R. Tamara Konetzka and Dr. David Grabowski's testimony before the Subcommittee on June 11, emphasize "**It didn't have to be this way**." Dr. Grabowski set the stage by stating, "*Much of the negative impact of COVID in nursing homes could have been avoided with increased federal leadership, resources, and attention. Rather than prioritizing the safety of the 1.3 million individuals that live in nursing homes and the staff that care for them, the federal government chose to push the logistics and cost off to the states and the nursing homes.*"

Efforts to stem the plague have taken a toll on staff who are asked to set aside their fears given the lack of COVID-19 testing and PPE. The data shows that over 600 staff nationally have died from COVID-19. You do not read that statistic in the Wall Street Journal.

Called "the Crisis on Top of the Crisis", testimony before the Committee noted that homes were not operating from a position of strength prior to COVID due to heavy regulation, nursing home reimbursement and high acuity levels.

Here are the factors driving the crisis despite reports to the contrary:

Payments are Low - Low or negative margins for a substantial portion of a nursing home's population strongly incentivizes facilities to prioritize the labor-saving care delivery approaches such as fewer staff, lower occupancy and other cost saving measures so they do not cease to operate and care for this vulnerable population. A New York Times article last year suggested 440 rural nursing homes have merged or closed over the past decade. Who will care for our elders?

Quality Regulations are Extensive but Inconsistent and Ineffective - While to date, the primary approach to addressing low quality has been regulation, the regulations are not clear, are changing and regulatory system often has a "check-box" feel in that the surveyor is simply going through a predetermined list which often feels disconnected from quality improvement initiatives to identify resident needs and facility action plans.

The Facts

Don't point the finger at the nursing homes. As presented in the Committee testimony, "*The primary goal of federal policy should be to prevent and mitigate COVID outbreaks at nursing homes to save the lives of residents and staff. As such, we need to target government resources to the source of the spread of COVID in nursing homes. If the underlying issue is poor infection control on the part of some "bad apples," one potential policy response might be increased regulation and oversight for these worst performing facilities. But, if the presence of COVID in nursing homes is due to the spread in the surrounding community, this calls for a system wide government response focused on identifying outbreaks and getting resources to facilities that urgently need them.*"

The publication Characteristics of U.S. Nursing Homes with COVID-19 Cases. *J Am Geriatr Soc*. 2020,Abrams HR, Loomer L, Gandhi A, Grabowski DC, found that traditional quality metrics such as star rating and having a prior infection control citation were unrelated to having a case. The finding that facilities with a high percentage of African American residents are more likely to have COVID cases echoes disparities in the pandemic at large and indicates a critical health disparity to be addressed in the response to COVID nursing home outbreaks.

Importantly, the result is supported by separate research projects being conducted at Brown University and the University of Chicago using different data and methods. Similarly, more recent work looking at the federal nursing home COVID data suggests that cases are relatively equally distributed across star ratings.

This firm and advocates around our industry have been stating since the pandemic began, the federal government has not been coordinated in its response to the COVID pandemic in terms of testing, PPE, family visits, support of the workforce, creation of specialized COVID nursing home settings, and data. By pushing the logistics and cost out to states and nursing homes, the federal government has failed this vulnerable population and the staff who care for them.

Despite recent suggestions that "testing should be slowed", the data supports that **testing is the key**. "*The secret weapon behind COVID is that it spreads in the absence of any symptoms, even among older nursing home residents*." Dr. Grabowski advocates that rather than pushing the "*logistics and costs*" on to states or the nursing homes, the federal government should own this issue. The federal government should set consistent policies across all nursing homes. The federal government should implement and cover universal testing of staff and residents in all US nursing homes. And this can't be a one-off. We need a surveillance program that regularly tests staff and residents in order to identify new cases as they emerge. "*And this can't be a one-off. We need a surveillance program that regularly tests staff and residents in order to identify new cases as they emerge.*"

Nursing home staff need **access to PPE**. The recent COVID relief bill passed by the Senate includes a $75 billion investment in PPE, although it is unclear what share will go to nursing homes. Rather than have nursing homes bid against hospitals and other providers to acquire PPE, "*the federal government should provide PPE directly to nursing homes. Similar to testing, we should not depend on states or nursing homes to acquire PPE.*"

Staff shortages are also a key problem and **workforce support** in the form of higher reimbursement for COVID cases to prevent layoffs and maintain staffing levels and matching and training workers to take the needed positions in SNFs along with childcare options (see my May article regarding staffing shortages and solutions).

The federal government also needs to support the establishment of **specialized nursing homes** to care for COVID patients who are discharged from the hospital and cannot receive care at existing facilities while still potentially contagious. This issue arises in my law firm with questions from providers about accepting COVID positive residents. As the research presented by Dr. Grabowski and his colleagues shows, some nursing homes are well-equipped to care safely for recovering COVID patients, but some markets will have a shortage of these facilities.

What we know for sure is that solutions to the crisis in the nursing home industry will take federal resources. Probing into nursing homes is not the solution to this crisis but creates more problems, more media stories, more politics and diverts the attention and resources of providers from caring for the elderly and themselves during these challenging times. Placing blame only results in lack of accountability for those with responsibilities to support us.

We are here to bring you peace of mind so let me hear from you and STAY SAFE.

Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, a Women's Business Enterprise National Council (WBENC) certified Women Business Enterprise (WBE) established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm's practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca's insurance defense practice includes representation of insurance companies and long-term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation.

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Getting on the Same Page by Paige Hector, LMSW
Social Work and Social Service Staff Input Into COVID-19

NOTE: *Part 2 of "I Began Noticing" that was published in May will continue in the July newsletter. The topic this month is more time-sensitive and the content immediately relevant to the operational processes in post-acute and long term care settings.*

Staff from every discipline and in every department are experiencing unprecedented levels of pressure in unbelievable - even frightening - circumstances. Everyone is being asked to perform tasks outside of their usual job descriptions and accommodate different processes for just about everything.

As part of an initiative to support nursing home social workers and social service staff, a group of social work researchers and advocates with The National Nursing Home Social Work Network started anonymous online support sessions to discuss the challenges and dilemmas of our current state, as well as ideas and solutions. The cathartic value of shared experiences, even when solutions are not yet visible, provides comfort and reassurance that people are not alone. The group meets every Monday at 4:00 PM EST.

The purpose of this month's article is to outline the topics from the first online support sessions. While session participants are social workers and social service staff, many of the issues cross disciplines, and are likely experienced by other nursing home staff. Living and working in a pandemic has launched all of us on steep learning curve, one that has not yet allowed time for contemplation or even to catch our breath. Naming the issues and challenges is an important step in making necessary course corrections, at the right time. Some of the problems may have relatively straightforward solutions while others are going to require systemic changes to everyday processes and facility culture for the near term, the near-long term, and the long term. It certainly is not too soon to begin identifying and prioritizing these issues.

Structural and facility level issues:

- Some social workers and social service staff do not have proper PPE and the associated training. They worry about their own safety, residents' safety, and their own family's safety.
- For facilities that only have one social worker or social service staff person, they cannot transition between the COVID units and non-COVID units, which means that psychosocial issues for one group may not get addressed as easily or addressed in a timely manner.
- Managing the logistics of tracking patients with COVID-19 (e.g. 14-day quarantine start and stop dates, testing and results) is time consuming and complex. This process should be shared between departments, a check-and-balance system to ensure that dates are accurate, and clinical data that drives decision-making is reported promptly.
- Every day, residents are subjected to room changes to achieve proper cohorting and maintain infection control measures. No matter the reason, room changes can be very distressing for residents and incredibly time consuming for staff. Residents may already be feeling vulnerable and stressed about the pandemic situation and when they are moved to different rooms, that distress is heightened. They likely worry about their belongings and wonder if they will be able to return to their previous living arrangement. In the meantime, they have to endure sometimes multiple different and possibly quite ill roommates which poses yet another source of stress on several levels.
- Participants expressed understanding that all staff need to be flexible and demonstrate willingness to assume roles and tasks not normally in their job description. When staff roles are blurred, it can cause tension and confusion; yet, setting boundaries can be difficult. Social workers and social service staff often assume additional tasks that other staff will sometimes not undertake. Historically, social work and social service staff are excellent advocates for residents and patients but find it especially challenging to advocate for themselves or their department. Some participants reported that it can be intimidating to approach leadership/administration to discuss these types of issues.

- When staff are expected to be a 'team player' and accept new responsibilities, yet their day is already overwhelmed with critical tasks, administrators, supervisors, and staff need to negotiate what tasks take priority. Some key questions to consider are "If I add this task to my day, what task should I remove?" Or, "How crucial is this task and what priority should it receive?" Negotiating what tasks *will not be completed* or assigning some tasks to a lower priority is imperative to reducing frustration and future misunderstandings.
- Transparency and clear communication by administration varies. When leaders welcome staff input and give it credence, and are transparent with decision-making, staff are more engaged and committed to helping the facility be successful. Clear communication and transparency not only make their job easier; it allows for better communication with residents, patients, and families. It earns trust.
- Keeping current on the rapidly changing situation and the volume of information and new recommendations and determining their likely reliability is consuming a great deal of administration's time and energy. If that information is not being shared with staff on a regular basis, staff may be unnecessarily fearful about making a mistake or not following proper protocol. Further, if staff perceive that administration is being less than transparent, it makes it difficult to trust in the decisions and directives being given to staff.
- When the Administrator and the Director of Nurses disagree, or worse, are at blatant odds with each other, tension and stress are exacerbated and may contribute to a toxic workplace.
- Some participants expressed concern about job stability and being designated as "non-essential" workers (such designation varies by state). It may be helpful to reiterate with all staff that non-essential does not equate to not important.

Social work and social service role with resident, patients, and families:

- Tele-biopsychosocial assessments may have replaced in-person interactions in some facilities. While it is hopeful that this is a temporary measure, the logistical challenges presented by this form of communication must be named and addressed. Relying on colleagues (usually nursing staff) to interact with residents and patients on behalf of the social worker or social service staff requires a high level of coordination which is often derailed (e.g. when both the staff members are available but the resident is sleeping or in the restroom). Or, the nurse might be available, but the social worker just got on a call with another family member. Understanding and making accommodations for these logistical challenges is greatly appreciated, especially in the event that other job duties fall behind.
- Residents, patients, and their families are expressing anger and distress at not being able to see their loved one and sometimes concerns about how the facility is handling various aspects of the pandemic. While social work and social service staff have a critical role with these interactions, when one department is expected to bear the brunt of ongoing anger and distress, those staff members will likely experience fatigue and possibly burnout.
- Limited onsite support from mental health providers is creating added burden on social work and social service staff, possibly resulting in some individuals practicing outside their scope of practice.
- All staff are witnessing the radical transformation of dying and death, including the inability or difficulty in honoring residents' and

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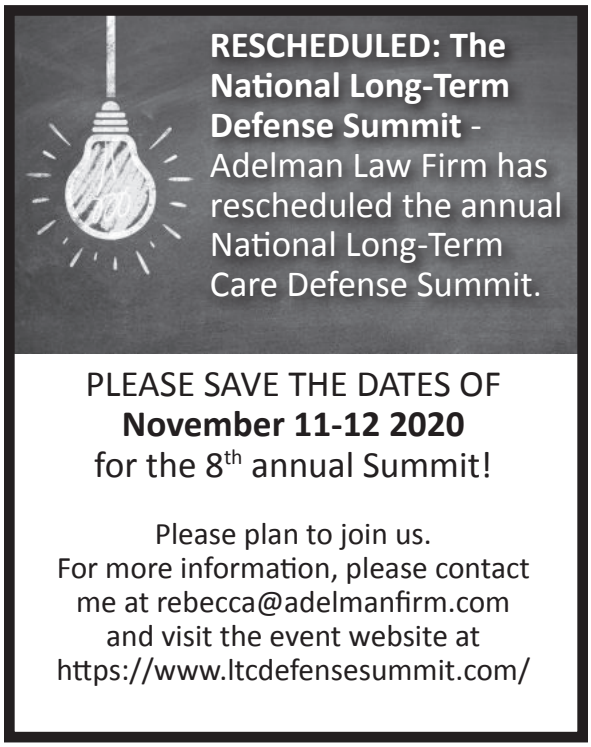

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family's cultural and spiritual traditions. This disconnect may result in moral distress.

- Residents' psychosocial well-being is at risk for depression, isolation, and trauma. Many residents miss their families, and some have voiced that they feel like families are staying away from them or being kept from them as "punishment". It is important that staff gently remind residents that no one is getting family visits due to the virus, that families are staying away out of love and concern, not punishment. Remember that some residents may not vocalize (or be able to share) their fears so staff have to be attuned to signs of distress and traumatization.

Social work and social service role with staff:

- Social work and social service staff are being asked to tend to staff concerns, distress, and burnout, which may result in practicing outside one's scope of practice or skill level.
- Experiences of transference of anger, grief, and frustration to the social worker from staff are common and add to feelings of being overwhelmed.
- In larger facilities with more than one social worker or social service staff, the supervisor may be struggling to maintain staffing levels and handle staff responses to working in the current situation.

Issues at the personal level:

- Usual, daily tasks may take much longer, lengthening the normal workday sometimes many more hours each week. Staff are missing important time with partners, spouses, and children as well as time to engage in rejuvenating self-care activities.
- When a person cannot perform their job as they feel it should be done, they are at risk of moral injury and/or moral dilemmas which can impact one's personal well-being and job satisfaction.
- Overall, staff are feeling reduced energy levels as stressors mount at home and at work.
- Staff are experiencing overwhelming grief and loss that also impacts their own families.
- Some are experiencing disillusionment with social work as a career/profession and, with healthcare in general.

Encouraging Reports

- Many residents, and staff, have endured terrific challenges in their lifetime and demonstrate remarkable resilience. Invite them to share their stories about how they coped with past crises. Create a collection and find ways to share the stories. Stories like these inspire others and give much needed glimpses of hope.
- Some residents who are typically quiet and communicate only with family members, are now talking to staff more.
- Some residents report they like eating their meals in their room because they can continue watching TV and they don't feel rushed to finish. They can take their time and enjoy the meal.
- Social service and activity staff are demonstrating creativity with new ways to connect residents with families, and with other residents. Keep in mind that older adults came of age at a time when sending and receiving paper cards was very important. Encourage families and friends to send cards!
- Affirm and validate the great work that staff (in all departments) are doing. Make it a daily practice to share notes of thanks, positive outcomes, and good news.

Please encourage the social worker and social service staff in your facility to join in these support sessions. Together we are all stronger! Here's a link with more information - https://clas.uiowa.edu/socialwork/nursing-home/national-nursing-home-social-work-network , just scroll down a bit and you'll see the support session information.

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