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THE ADELMAN ADVANTAGE

by Rebecca Adelman

Legal Trends in Pandemic Related Claims in Healthcare

Welcome and thanks to co-author Greg Cook, President of Future Care Risk Retention Group, which provides professional liability and general liability coverage to long-term care facilities throughout the United States. Greg offers a unique perspective as he also is the President of an insurance company that provides professional liability insurance to physicians. Spanning across various healthcare specialties with a focus on liability coverage, I invited Greg to share his insights.

"COVID-19 has left more in its wake than deserted office buildings and empty restaurants. Litigation claims touch on many aspects of daily living, including business interruption, workplace/ employee impact, treatments and cures, legal rights issues, and price gouging, just to name a few. Specifically, health care professionals are closely attuned to the potential legal liability of missed diagnoses, failed treatment plans, and workplace safety. Although the federal government is working to shield healthcare workers from COVID-related liabilities, many civil and class action lawsuits are already in motion.

One major factor that providers can control is their existing liability coverage. It is not uncommon for policies to exclude losses due to unusual circumstances. Couple those exclusions with the fact that much of policymaking is open to interpretation, and you have as many answers to questions as you have experts answering them. What is usually considered 'business interruption' when it comes to tangibles, such as a fire or a flood, is easier to define. A physical disaster like that may well level a building, and certainly close a business for months. The owner is now without supplies, equipment, and income. They then file a business interruption claim.

These situations are not as easily defined when it comes to a global pandemic. A healthcare practice is certainly considered essential during such emergencies, so how is loss determined when you are still open for business? One example might be the acute slowdown for non-emergent patient care. This immediately affected healthcare providers from many areas, including dentists, ophthalmologists, and even preventive care providers. Potential patients stayed home for months, avoiding all healthcare facilities, not daring to risk exposure to COVID-19. Does your policy cover this type of situation? It is best to confirm with your agent or carrier now, before you need to file a claim. Discuss your current coverage, along with options to shore up any potential gaps in coverage, so that you can continue operations with that necessary peace of mind."

Immunity for Liability

As Greg mentions, the state and federal governmental and legislative leaders have made significant progress with executive orders and legislation to protect healthcare providers from liability for COVID-related claims.

In the U.S. Senate, advocates are anxiously awaiting the release of the Senate Republican leadership's latest coronavirus response legislation. It is suggested by sources that the bill will create an exclusive federal cause of action for all COVID-19 related claims, and allow for claims filed in state court to be removed to the federal district court. Plaintiffs will be required to prove that the act or omission in question demonstrated gross negligence or willful misconduct and violated applicable health guidelines. In addition, damage caps would apply to any damage awards. Adelman Law Firm continues to gather more details about the proposal.

In the House of Representatives, there continues to be growing support for for the industry-supported Coronavirus Provider Protection Act. The environment has grown more challenging, however, as the American Association of Justice (the national association representing trial lawyers) sent a letter to their allies on Capitol Hill arguing the bill as being dangerous for patients and providers. States are also seeking to reduce immunities granted to healthcare providers.

For example, this past week, New York Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie announced the Legislature has advanced legislation to limit the immunity that was granted in the State Fiscal Year 2020-21 Budget. The new legislation will narrow that scope to certain health care professionals who treat patients during the COVID-19 state of emergency.

According to reports, the legislation is not meant to disregard the immense sacrifices made by the medical community during the height of the COVID-19 pandemic, but instead it seeks to prospectively balance the protections afforded to our heroic health care workers while recognizing the rights of their patients when provided care. Per the Senator, "*Now that the peak of the COVID-19 health crisis has passed here in New York and our hospitals are recovering, this legislation will serve to better strike that balance by narrowing some of the liability protections afforded by limiting their application to the actual care and treatment when related to the diagnosis or treatment of COVID-19".* We can expect to see more of this type of action from the states.

Plaintiff's Attorneys Are Mobilizing and Pandering to Community Fear

All one needs to do is Google "Lawsuit against nursing home COVID" to identity the many attorneys that are mobilizing

Continued on page 2

The Adelman Advantage continued from page 1

and have filed lawsuits against healthcare providers for numerous claims. The lawyers invite prospective Plaintiffs to share their experiences with COVID while providing them on-line information such as "What Responsibilities Do Nursing Homes Have During COVID-19?" Per the Plaintiff's attorneys, nursing homes have a responsibility to "Keep COVID-19 out"; "Prevent the spread of the virus", and "access and optimize PPE supply".

These advertisements and the Plaintiff's strategies pander to community fear and "Reptile Theory" themes that create a false light about the pandemic and the responsibilities of healthcare providers.

The media has only fueled the fire of mistrust in long-term care by reporting on nursing home deaths and linking them to poor performance and sanctionable conduct since the pandemic began.

Types of Claims

In reviewing the various complaints already filed and anticipated in healthcare, the following types of claims have emerged. We expect to see creative claims based on new theories of liability in the coming months.

Negligent treatment of COVID patients;

Failure to notify of COVID related issues/Communication Breakdown;

Lack of Preparation - Failure to prepare for and effectively manage infectious disease outbreak including staffing and/or equipment shortages, ineffective chain of command protocols and failure to lock down facility to outside visitors;

Failure to follow local/CDC guidance during the crisis;

Failure to prevent asymptomatic workers from spreading the virus unknowingly;

Loss of Sepulcher, privacy claims over communications;

Negligent treatment of non-COVID patients including delays in elective surgeries, inappropriate staffing due to deployment to COVID units, and communication issues with patients as to interim care plans.

Defense Strategies

On the legal front, the best defense is a good offense and preparing to and defending the COVID-19 lawsuit against a healthcare provider requires diligence and proactive risk mitigation by the provider along with experienced defense counsel.

As your defense counsel and claims managers, we are relying on many legal defenses such as the federal immunity legislation (PREP Act) and removing cases from state to federal courts to obtain the maximum extent of federal immunity offered. We are moving to compel arbitration in state courts in those cases where there is an arguably enforceable arbitration agreement (NOTE: consider an arbitration program in your organization). We are defending immunity orders and legislation in state courts that are being attacked on constitutional grounds by Plaintiff's attorneys.

And, we are formulating a compelling narrative for our providers to tell their story and build a bridge to the healthcare provider. We are personalizing the heroic stories of the healthcare providers and highlighting your organization's mission, vision and the sacrifices and patient care in a time of crisis. Themes are hope, restoration, and community prevailing over despair and fear.

To that end, defense counsel and the provider must collaborate and information must be tracked and maintained by the provider.

Record Keeping

What will defense counsel want and need from the provider or facility in preparing for the defense of a COVID-19 related lawsuit? Nearly everything. Sources of information will include emergency response leader, facility administrator, nursing director and other department leaders, human resources and compliance officers, Chief Information Security Officer or Chief Technology Officer, Quality Assurance Committee.

Establishing a local timeline that would include when residents/patients were first diagnosed and treated; who was notified and when; is there an Emergency Preparedness Plan (EPP); if there was an EPP, when and how was it implemented; efforts to obtain and provide Personal Protective Equipment (PPE) to staff; efforts to acquire and administer Covid-19 tests; receipt of guidance from governmental entities and efforts to comply; staff changes that occurred during the pandemic; infection control practices; and complaints from family/patients/residents.

Please contact me for a relevant documents checklist.

COVID-19 has divided us in many ways and our hope is that we continue to find ways to unite and grow together into the next version of our world. As we play our part in this evolutionary process, we'll be defending these lawsuits that our litigious society is now experiencing under extreme conditions. Identifying the proper venue, all available immunities, creating the alternative narratives and collaborating with the providers to retain and obtain the relevant evidence are the cornerstones to future success. Stay strong. Thank you for all you do for our communities and the sacrifices you make. Greg and I will continue to advocate for each of you.

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. Contact Rebecca at rebecca@adelmanfirm.com and visit www.adelmanfirm.com and www.rebeccaadelman.com.

Greg Cook, CPCU, AIC, MBA, CPA, ARM, is President of Future Care Risk Retention Group, Inc. which provides professional liability and general liability coverage to long-term care facilities throughout the United States. He is also President of CARE Risk Retention Group, Inc. which provides medical malpractice insurance to physicians, dentists, and ancillary healthcare providers.

Greg is also a partner of HPC Financial Services, LLC, a company providing underwriting, medical claims review, and captive and financial consulting services. Prior to leading CARE and Future Care, he was in the captive insurance management business for Aon (Bermuda), Ltd. and Risk Services, LLC. Greg has worked on a myriad of insurance captive programs in varying lines of business.

Getting on the Same Page by Paige Hector, LMSW

Going Beyond "Noticing" and Working Toward a Trauma-Informed Environment

The May article titled "I Began Noticing" described my recent experience in a medical office and framed those experiences from the perspective of trauma-informed care ("TIC") principles. This month, I'll continue that discussion and use those observations as a springboard to deepen our conversation of intentionally creating healthcare environments that are welcoming, safe, and staffed with people well-versed in TIC principles.

Let's start with a reminder of the definition of trauma-informed care according to Substance Abuse and Mental Health Services Administration (SAMHSA) which states that TIC is the "…adoption of principles and practices that promote a culture of safety, empowerment, and healing." Becoming a trauma-informed organization is a journey, an ongoing process, not a destination. It requires changes in how we see, hear, and experience the world around us. Much of TIC is awareness of the nuances of communication, attention to the words we say, to our non-verbal messages, and to the messages conveyed by the environment. The more we work with TIC principles, the more adept we will become at appreciating and implementing sustainable TIC changes.

In the current state of the pandemic, TIC is elevated to a whole new level of importance. While the examples in this month's article reflect the conditions discussed last month, I will also weave in concepts related to COVID-19 and trauma.

Focusing on the physical environment such as signage and common areas is a great place to start. In this medical office, there were several opportunities for discussion and possible improvement. Remember that incorporating trauma-informed principles is a process, one that requires participation of all staff. Before making any changes, talk with staff to learn about their experiences and their perceptions. Be curious and ask questions, but instead of "Why did you do that?" ask, "What is it about that solution that made you choose it?" If the signs are coming across as being confrontational, is there a story behind those choices? Have the staff tried to nicely ask people not to do certain things with disappointing results? Are staff experiencing difficult exchanges with patients who are already having an unpleasant day, are running late, frustrated with the parking situation, and taking their frustration out on staff?

While changing the signage might be an important step, it should not supersede understanding of the history of how those decisions and choices were made. There are many simple, 'surface' fixes like with the signs. But, if we do not discuss the underlying messages and the processes that resulted in those original choices, previous patterns and choices will resurface.

If a new or different behavior is desired, consider framing the 'ask' (in this case, the signage) in such a way that gives clear instruction for a pro-social behavior rather than a behavior to avoid. For example, rather than telling people where NOT to park, provide helpful information about where *to park*, like this, "Thank you for parking in clearly marked spaces reserved for our clinic! Our neighboring businesses also appreciate this. A towed car does not make for a great day!"

And, another example using the "NO TALKING ON YOUR PHONE!" sign. Being subjected to someone's phone conversation can certainly be irritating. However, is it realistic that we tell people to not talk on their phones? More than likely, that rule is not being followed, or enforced, anyhow. Instead, how about a pro-social behavioral reminder about phone etiquette such as, "If you choose to use your phone in the waiting room, please do so quietly and respect our desire to create a calm space for everyone." Along with that, staff must be trained to intervene in those instances when an individual is not being quiet or respectful.

Some of the fixes are inexpensive and can result in significant transformation of the space. For example, décor choices such as wall art, trash containers, reading material and a properly functioning water fountain can provide immediate changes that create a more welcoming and peaceful setting. There are many inexpensive options for calming and inviting artwork as well as music streaming options that provide ambient sound for people who may already be feeling stressed or anxious.

Some changes may require more planning and money. Take the unisex bathroom. If you're of the age when the show Ally McBeal was a hit (debuted in 1997), the unisex bathroom in their law office was home to some of the most hilarious scenes on the entire show. In today's world, signage for the restroom requires more consideration of other factors including respect for individuals who identify as non-binary and for individuals with an abuse history for whom sharing a bathroom with the opposite sex may result in distress or even panic.

The physical configuration of the environment may pose challenges that require more problem-solving to overcome. Upholding patient confidentiality is a fundamental healthcare tenet but when the physical environment acts as a barrier to confidential patient discussions (e.g. large open spaces, hard surfaces that amplify sound and staff voices that are much too loud), the solutions necessitate multi-faceted approaches. Most likely, if an employee is asked if patient confidentiality is important, the answer would be a resounding "yes". So, why is there a disconnect between that belief and what happens in reality?

As often happens, when we are accustomed to working in a particular setting, our objectivity may diminish, and we become focused on the task-at-hand without considering how it might be affecting people around us. A contributing factor could also be staff discomfort. Perhaps they have recognized breaches of patient confidentiality but do not feel comfortable or empowered to speak up. Creating a trauma-informed care environment strongly supports a non-threatening work environment that welcomes honest feedback, especially when staff notice areas of concern.

Consider the radical changes we've had to make to our nursing home environments in light of the pandemic: restricted

Continued on page 4

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Getting on The Same Page continued from page 3

movement, prohibited visitation, isolated dining, and use of extensive personal protective equipment that contributes to communication challenges. While each of these interventions are absolutely necessary, it must also be acknowledged that any one of these, or a combination thereof, can contribute to the experience of trauma. This is the tricky juxtaposition of medical trauma - that the very interventions that are intended to protect are also causing harm. The adaptations to the current environment are crucial to the safety of residents and staff, AND they also contribute to the development of other problems such as isolation, anxiety, helplessness, fear, confusion, and loss of functionality.

Every day there are news reports and research being published on the mental health implications of the pandemic on residents and staff. We are just beginning to see the consequences from prolonged isolation and rigorous protective measures that are taking their toll. As we continue finding our way through these challenges, I strongly encourage leadership to bring trauma-informed care principles into every staff meeting, into every resident care plan conference, and into every encounter. Incorporate trauma screenings upon move-in and regularly thereafter for every resident and patient (consider using the PC-PTSC-5 tool - https://www.ptsd.va.gov/professional/assessment/documents/pc-ptsd5-screen.pdf). If staff are not trained to address trauma following a positive screen, identity what resources are available such as mental health professionals, who can.

Communicate regularly with staff about their well-being, their experiences, and the support they need in order to continue providing excellent and compassionate care to the people they serve. People are wearing out and it is going to take a dedicated, concerted effort to maintain this level of performance and commitment in this new world.

Embracing TIC principles takes time, effort, and constant attention as we learn new ways of seeing and interacting in our environments. From the relatively simple 'fixes' to the more ingrained facets of healthcare, the most important culture change is how we think about and incorporate TIC practices into our daily work.

Contact Paige at 520-955-3387 or at paige@paigeahead.com
Discover more about her at www.paigeahead.com