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SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

THE ADELMAN ADVANTAGE by Rebecca Adelman

NEGLIGENCE AND WRONGFUL DEATH COVID-19 LAWSUITS AGAINST NURSING HOMES: IS THE TIDE TURNING?



The Public Health Emergency reached a one-year anniversary milestone on January 31, 2021. While we have seen only limited negligence and wrongful death COVID-19 related lawsuits against senior living communities this past year, the statutes of limitations for filing these types of lawsuits will begin

to expire. Most states' statute of limitations are one to three years. Based on the recent decisions in Federal Court that essentially deny to senior living communities immunities under the PREP Act and the lack of consistency and even the repeal of state immunities, we are preparing for the lawsuits that are expected against senior living providers. This includes proactive defense strategies and grassroots advocacy.

Plaintiffs' Themes and Allegations in COVID-19 Lawsuits

The main themes of the lawsuits that have been filed against more than 60 providers across the country are failing to:

- follow proper infection control protocols;
- ensure workers were not working with COVID-19 symptoms;
- provide personal protective equipment ("PPE") to staff;

- separate those with symptoms from those without;
- adhere to social-distancing guidelines;
- respond to the presence of COVID-19 in the facility;
- timely request additional staff and assistance from public health entities;
- supervise, monitor, assess, and document the resident's condition;
- implement a care plan to address the resident's risk of contracting COVID-19;
- protect the resident from physical harm or injury;
- properly supervise and train staff;
- provide adequate staffing and nursing;
- follow standing orders, instructions, guidelines, and protocol regarding COVID-19; and
- provide adequate interventions; and
- disclose timely, truthful information about COVID-19 cases in the facility, infection control procedures and the health status and care of relatives before they died;

Two cases assert criminal neglect, which can result in potential incarceration in addition to fines, if convicted.

A Patchwork of State and Federal Immunities Providing Immunities to Nursing Homes

Efforts to provide immunity to nursing homes from COVID-19 negligence and wrongful death lawsuits

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have, to date, been unsuccessful. As noted in the next section, nursing homes have seen some success in Federal Court arguing that the PREP Act provide immunity from COVID-19 related claims. The PREP Act authorizes the Secretary of HHS to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines. Immunities, though, are largely dictated by the states through Executive Orders and Legislation, however, legislation can be repealed (as we see in New York) and immunities eroded for nursing homes. Lawyers defending COVID-19 lawsuits continue to argue the PREP Act immunities supported by Declarations and Amendments by the HHS under former Secretary Alex Azar. Following are updates on recent activity in the Federal Courts that may suggest a turning of the tides on the PREP Act protections which in turn increases the reliance on strong state immunities for senior living communities. Over 390 states have some legal immunity shielding senior living providers from COVID-19 lawsuits yet legislators are rethinking these immunities may follow suit with New York and repeal them.

Recent PREP Act Decisions Suggest an Unfavorable Direction for Senior Living Communities

Efforts to obtain federal immunity for COVID-related claims have been unsuccessful and the legal defense strategy is to remove a lawsuit field in the state court for COVID-19 related negligence and wrongful death to Federal Court and then seek a dismissal pursuant to the immunities provided under the PREP Act.

Recall I have been reporting on a COVID-19 lawsuit in Tennessee and others around the country against senior living facilities and the recent *Garcia Ruling* out of the District Court for the Central District of California that we hoped was a trend in Federal Court treatment of the COVID-19 lawsuit. The *Garcia* Court held that the PREP Act provides senior living facilities with an exemption from civil liability for actions taken by such facilities to protect facility residents from COVID-19. The

Garcia Ruling resulted in a dismissal of the lawsuit. Prior to *Garcia*, other Courts had held that a nursing home is not protected from civil liability under the PREP Act's immunity provisions. The significance of rulings after *Garcia* (February 10, 2021) cannot be overstated as we know that states can easily repeal immunity statutes leaving senior living communities without protection (New York). There may be a change in the tide as suggested in the following recent PREP Act rulings:

In *Martin v. Serrano Post Acute, LLC (March 25, 2021)*, the United States District Court in the Central District of California, granted Plaintiffs *Second Motion for Remand* to the Superior Court of California, County of Los Angeles. The *Second Motion for Remand* was based on a change in circumstances since the issuance of the prior remand order is that the HHS issued a further Declaration on the application of the PREP Act and the HHS General Counsel issued an advisory opinion on January 8, 2021 regarding the scope of federal jurisdiction and application of the PREP Act. Unlike the *Garcia Ruling*, the *Martin Ruling* held that the HHS document does not confer subject matter jurisdiction. The Court held that "Neither the Fourth [HHS] Declaration nor the advisory opinion is binding on this Court because there is no indication that HHS has been delegated any authority to interpret the somewhat esoteric federal jurisdiction doctrines at issue." Further, the Court held that neither pronouncement was persuasive because they are completely conclusory; they simply set out the relevant legal standard and state that the PREP Act satisfies it.

That same day in *Ivey v. Serrano Post Acute*, the District Judge ordered the case remanded to the state court. This opinion tracks the *First Martin Remand Order*. The Court found 1) that there was no "Federal Officer" removal jurisdiction as the Defendants were not acting "pursuant to a federal officer's directions" as a private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under'

a federal 'official'; 2) that there was no complete preemption of state law by the PREP Act; and 3) that there was no federal question jurisdiction. Thus, Plaintiffs will rerun to state court in a state where there are no legal immunities for senior living providers.

In both Martin and Ivey, Plaintiffs are family members of residents who died of COVID-19 at the nursing home.

A day earlier, on March 24, 2020, twenty-three consolidated cases against Life Care Centers of America, Inc. were sent back to state court for further proceedings after the District of New Mexico ruled that the federal court lacked subject-matter jurisdiction over the dispute. The cases were filed last August after the residents died from COVID-19 due to the facility's allegedly lack of response to the pandemic.

The Court explained the Plaintiffs' argument that "despite notice of the spread of COVID-19, none of the Defendants did anything to institute an appropriate facility plan to prevent the spread, and Defendants instructed staff not to wear masks, ordered all testing swabs destroyed without being tested, failed to sterilize equipment, reused N95 masks and nursing gowns without sterilization, required staff with COVID-19 symptoms to continue to work, and later, used the same HVAC system for quarantined and non-quarantined residents."

In October 2020, Life Care Centers removed each Complaint on the basis of federal question jurisdiction, asserting that the PREP Act. New Mexico has no healthcare immunities.

A month earlier and shortly after the *Garcia Ruling* on February 26, 2021, the United States District Court of Kansas in Robertson v. Big Blue Healthcare, Inc., agreed with the Plaintiff that the PREP Act's provisions regarding the administration or use of covered countermeasures are not applicable to the allegations of negligence stemming from a failure to follow certain policies, procedures, and guidelines regarding COVID-19. Kansas legislation

granting nursing home immunity from COVID-19 related lawsuits is on the Governor's desk.

Other Courts have also refused to follow the *Garcia Ruling's* reasoning and remanded cases back to state court. (Dupervil v. All. Health Operations, LCC, the District Court for the Eastern District of New York "respectfully disagree[d]" with the *Garcia* opinion and concluded that the "Advisory Opinion is unpersuasive and not entitled to any deference."; McCalebb, et al. v. AG Lynwood, LLC, et al., the District Court for the Central District of California found "the PREP Act does not create original federal jurisdiction over a covered claim for negligence or recklessness."; Brown v. St. Jude Operating Co., the District Court for the District of Oregon held that "*Garcia* is not persuasive authority and is an outlier in light of the weight of authority holding that" the PREP Act is not a complete preemption statute.")

What does this tide change mean? It appears there are floodgates opening against senior living communities despite their entitlement to protections for actions they took in conjunction with the federal government's national response to the COVID-19 public health emergency.

We continue to advance the federal jurisdiction removal strategies and PREP Act immunities applicable to senior living communities and support state legislation to protect nursing homes.

What Can Senior Living Providers Do Right Now – Tracking and Maintaining Information

We have been working with our senior living clients on a daily basis since the public emergency was declared in managing the new challenges of the pandemic and proactively preparing for possible COVID-19 related lawsuits.

Prepared by or directed by counsel, your community should be tracking and maintain specific COVID-19 related information that will be relevant to defending a claim.

This information includes:

Key Personnel and a Local Timeline focused on:

- compliance with federal and state guidance;
- new policies and procedures adopted;
- instructions and guidance received from the federal and state government;
- communications regarding responses to the guidance;
- resident records and collection of information related to COVID-19 cases;
- staffing records;
- third-parties with known COVID cases;
- infection control practices;
- key staff and employee interviews;

Documents to include

- Policies and procedures;
- Contracts with suppliers, medical professionals, insurance companies, telemedicine providers, cleaning agencies and other health care providers.

Let me know if you would like a complimentary checklist and other COVID-19 Litigation Toolkit Resources.

What's Next?

What's next is a multiple strategy approach to the increase in lawsuits against senior living providers.

1. Prepare and gather the information needed to defend a claim while simultaneously engaging claims and counsel to investigating and identifying shared liability and other proactive defense strategies;

2. Defense counsel will continue to pursue PREP Act immunity and appeal cases as needed.

3. Industry members will be engaging in grassroots and other legislative efforts to advocate for national immunity for senior living providers and also for state immunities to protect providers in each state against COVID-19 related claims.

Further Information

Our firm can provide further information, resources, risk mitigation solutions and tailored strategies for your communities for COVID-19 related issues and beyond, so please reach out.



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Boundaries are Important, but I've No Idea How to Set Them



I recently had a conversation with an administrator, one that began as a general discussion about the impacts of the pandemic and her experiences in her facility. At one point, we were discussing exhaustion: she was exhausted, the staff were exhausted, and residents and families were exhausted. I

invited her to tell me more and she shared that even when she wasn't at work (at the facility), she was still working. After she left the facility and before she arrived the next day, she was already 'at work'. On her drive to the facility, she typically fielded multiple calls from staff with varying degrees of urgency. From the moment she walked in the facility, she was bombarded with information, requests, updates, and issues – before she even had a chance to put her purse away. She quietly shared that she felt irritable before her day 'even started'. Who wouldn't feel irritable? Impatient? Discouraged? Overwhelmed?

The more she spoke, the more I became curious about boundaries, hence the inspiration for this month's article.

Intuitively, most people would agree that we need boundaries, and that boundaries can be healthy. Then, it gets a little trickier. How many of us were taught how to set and uphold boundaries? If you hear yourself saying (externally or internally), "I do more than I should" or "I'm everything for everybody" or "I wish I could say NO", there's a good chance that a boundary is unclear or perhaps it was never established to begin with.

If you've not heard well-known researcher and

author, Brene Brown, talk about boundaries, I highly recommend any of her podcasts or interviews on this topic. Here's one that I like - <https://www.bing.com/videos/search?q=brene+brown+on+setting+boundaries&docid=608035291005520491&mid=C6041D153E9FA487A7FFC6041D153E9FA487A7FF&view=detail&FORM=VIRE>

Simply put, Brown says that a boundary describes what is okay and what is not okay. She clarifies that setting boundaries is essential to creating a safe workplace because if we are not 'boundaried', we become resentful when people do things that are not okay for us.

Why is setting boundaries so hard? Brown gives us three reasons: 1) We care more about what people will think, 2) We want people to like us, and 3) We don't want to disappoint anyone. But there's a fallacy in our thinking: the fallacy is thinking that setting



boundaries creates division or separation. This couldn't be farther from the truth! Setting boundaries demonstrates respect. Brown says, "Compassionate people ask for what they need. They say no when they need to, and when they say yes, they mean it. They're compassionate because their boundaries keep them out of resentment."

Let's face it, setting boundaries is uncomfortable. However, if change is going to occur, we will need to get more comfortable with being uncomfortable. Soon after the conversation with this administrator, I created a worksheet with a framework to begin this uncomfortable, and liberating, work of becoming a boundaried person.

Before I share the elements of the worksheet, I would like to offer a perspective, one that might

help encourage you to set boundaries. For those of you reading this article who are administrators, supervisors, or managers, one of the most important things you can do as a leader is to set (and uphold) boundaries. Role modeling this behavior contributes to a trauma-informed culture by honoring transparency and trustworthiness. Staff will know where they stand with you which supports a healthy workplace environment. Another benefit is that staff receive permission to explore their boundaries and what would make their workplace more balanced, productive, and fulfilling.

Returning to my conversation with the administrator, as we explored the notion of boundaries, she voiced frustration with the overall hecticness in her facility (no doubt in part attributable to the stress of COVID) and her perception that staff seem to be operating in problem mode, constantly. As evidenced by the frequent interruptions, at her door and with phone calls, she expressed that she would like to help staff appreciate that not everything is urgent. In short, she wanted to set boundaries.

In his book *Overcoming Secondary Stress in Medical and Nursing Practice*, Robert Wick writes, "One of the most costly time wasters is interruptions – seek to limit them with assertiveness and clear feedback to those around you." Pause for just a moment and check in with yourself. What is your reaction to that quotation about interruptions? Do you notice a feeling of discomfort? Does the quotation resonate with your experience and do you feel curious as to whether things could be different? Perhaps it's both. Whether you're in the zone of writing a report, administering medications, composing an entry in the medical record, or conducting a resident interview, interruptions can derail your workflow and creativity, and result in frustration, resentment and in some cases, resident harm.

So, let's ask: what is *one key area* where you would like to establish a boundary? A good place to start is a situation in which you find yourself feeling frustrated or overwhelmed. (It might be hard to pick just one, but we need to start somewhere!) As you read each question below, jot some notes for yourself. Then, step away for a while and give your mind time to percolate. Later in the day or even in the week, read what you wrote and see what else bubbles up. Modify as needed.

Key area to set a boundary

- What is okay behavior?
- What is not okay behavior? How will you communicate this boundary to others?
- What is a simple statement that you could use in the event someone crosses your boundary?
- Under what circumstances would it be appropriate, and expected, that the boundary be crossed (e.g., resident safety concern, allegation of abuse, dangerous situation that needs immediate attention, etc.)?
- What will be your process to reconnect with people who needed your attention or assistance once you have completed the task for which the boundary was set?
- What challenges might arise when you set this boundary?
- How will you handle them?
- How will setting and upholding this boundary impact your well-being?

Next month, I will continue the discussion about boundaries and explore some ideas of how the administrator might set a boundary with staff. We'll also delve into some of the challenges that might come up when we set a boundary.

To further ground this work in the context of trauma-informed care and overall culture change, I would like to end with a quotation by Sylvia Haskvitz, a Nonviolent Communication Trainer who says, "When your example is something others want to follow, change begins." Setting boundaries is an example that others might want to follow, for all the right reasons.

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