



Liability Insurance Special Report



Part 2 of 4

IMPROVING YOUR ODDS IN ELDER ABUSE REPORTING

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With dramatic insurance premium increases, rampant litigation and acute labor shortages plaguing the industry, you may not feel these days that you control your community's destiny. However, in one area, elder abuse reporting, your actions could help alter or reverse these trends.

There is a difficult Catch-22 inherent in every decision to report or not report elder abuse. If you fail to report, you face civil or criminal liability. If you report, however, you can trigger a terrible domino effect that begins with a State regulatory visit and citation and ends with a private lawsuit for elder abuse in which the plaintiff demands enhanced remedies including attorneys' fees, punitive damages in certain instances, and post-death pain and suffering damages. Furthermore, if your facility is cited by a regulatory agency and you fail to oppose or defeat the citation, the plaintiff in a private lawsuit may be able to shift the burden of proof to you through the "negligence per se" doctrine. Successful claims can, in turn, wreak havoc with your insurance premiums, limit your access to insurance, and exacerbate your staffing woes.

Is there a third, more appealing option? I believe there is. By reporting *properly*, I believe you can begin to control the outcome of abuse incidents. Consider the following steps:

Understand the Different Abuse Reporting Requirements

The Department of Justice ("DOJ") video you received last summer describes the State Elder Abuse and Dependent Adult Civil Protection Act

("EADACPA") but does not mention four or five other relevant reporting laws. For example, a CCRC that participates in Medicare must also contend with the unusual occurrence reporting requirements under the RCFE and SNF laws; the federal abuse prevention, investigation and reporting requirements (the "seven components"); and the State law requiring SNFs to report to the Department of Health Services ("DHS") all incidents of alleged or suspected abuse. The list is longer if you care for any residents with developmental disabilities.

Each of these laws contains its own definition of reportable incidents, its own timeline, its own reporting mechanism, and its own penalties. A one-size-fits-all approach to reporting under these laws is not in your best interest, as it will lead to over- or under-reporting. For example, psychological abuse must be reported under federal law but not under EADACPA. Similarly, a mere allegation or suspicion of abuse must be reported to DHS (even if unsubstantiated); however, it may be inappropriate to report an unsubstantiated allegation under the other laws.

Recognize What Is and Is Not Abuse

Abuse is not simple negligence, it is not a mere accident, and it is not any bad outcome. It is defined more narrowly and should not become a legal "conclusion" in reports that you file. Unfortunately, this message has not necessarily been heard by residents' families, who have come to equate any health decline with neglect, conveniently ignoring the natural progress of disease or aging. Staff can also misconstrue this term, either innocently or maliciously.

Sometimes accidents and negligent errors must be reported (e.g., as an unusual occurrence), but they need not and should not be described as abuse.

Do Not Speculate as to Causation

If you have not yet investigated a reportable injury, do not speculate in the report as to the probable cause of the injury. Report only verified facts.

Train Your Staff

Without training, your staff will report events as abuse based on their common-sense understanding of the term, not based on legal definitions. To avoid over-reporting, and to comply with the law, you must educate your staff regarding these laws. One session may not be enough, and sessions should be interactive. You may also prefer to tailor your materials to your audience (e.g., by providing more sophisticated materials to supervisors). Any good abuse in-service should include a module on detecting and preventing staff burnout.

Encourage Your Mandated Reporters To Involve You in Reporting

Any of you who have seen the DOJ video are painfully aware that reporting under EADACPA is an individual, not organizational duty. Under this law, you cannot compel an employee to report to you before reporting abuse to the ombudsman or police. (You can under many other laws.) Likewise, you cannot require an employee to share his or her EADACPA report with you. Nonetheless, you can and should encourage employees to consult with their supervisor in preparing the report, and you can require them to report the underlying facts of any incident to their supervisor.

Do Not Over-Document Abuse Investigations

A common – and unfortunate – error is to document an abuse investigation so extensively that you help establish the plaintiff’s case in a related civil claim. To protect the confidentiality of your investigation, it is essential that certain documents be prepared within the attorney-client privilege and that other documents not be prepared at all. Similarly, reports to government agencies must be drafted with a very different objective – and different contents – than materials you prepare for your insurer or legal counsel.

Decide Which Agency To Report to Under EADACPA

You may report abuse under EADACPA to either the ombudsman or the police. Often, the police will be the better choice because of their sophisticated knowledge of criminal law. Sometimes, however, particularly if you enjoy a good relationship with your ombudsman and the incident involves a “problem resident,” reporting to this agency may be preferable.

Know When To Contact Your Insurer

You know you need to notify your liability insurer of all legal claims brought against you. However, you may need to give notice even before a formal suit is filed. Many insurers now require insureds to advise them of all regulatory deficiencies and citations, and of any event likely to result in a claim. If you fail to report or needlessly delay reporting, you may jeopardize your coverage.

Know When To Contact Legal Counsel

Sometimes, it is appropriate to call counsel even before you contact your insurer. For example, it may be unclear whether an event constitutes abuse. Or you may want assistance in wording an abuse report. Likewise, you may need to decide what measures to take against an employee. Or you may seek advice about how to communicate with the family of the allegedly abused resident. Your handling of all of these matters can help determine whether an alleged incident of abuse ever escalates into a claim.

Communicate

Although it sometimes feels as though the system is stacked against you, you may be able to change your odds by fostering open relationships with local licensing offices, employees, residents and their families. This investment in clear and open communications can improve morale and reduce claims by promoting trust at all levels.

Members with questions are welcome to contact the Pam at 415-995-5043 or pkaufmann@hansonbridgett.com.

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