Solutions to Avoid Unnecessary and Expensive Litigation

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In today’s litigious environment, nursing and assisted living centers are targets for lawsuits. Disgruntled individuals have little to lose by taking legal action against care centers because (in most instances) they do not pay attorneys up front and they do not have to pay court costs if they lose. Aggressive attorneys fuel these lawsuits by publishing misleading advertisements about care centers in the media to solicit new clients that can lead to lucrative damage awards.

It is for this reason that AHCA/NCAL developed this Professional Liability Toolkit (Toolkit). It is a resource and learning tool for State Affiliate staff, members, and legal counsels. There is something for everyone.

The Toolkit offers strategies for evaluating, preparing, and responding to negative attorney advertising. The Toolkit also suggests ways the profession can push back, especially against the attorney practice of misusing survey language in advertising to manipulate the public’s opinion about quality in nursing and assisted living centers.

The reality is that providers must think ahead and strategize to avoid potential litigation. Ensuring that resident care is of the highest quality will
make the center less appealing to a trial attorney even if an individual or former employee is eager to sue.

Providers must commit to quality processes, documentation, communication, resident and staff satisfaction, positive outcomes, and being a visible partner within the overall community.

Five Star ratings should be high, with citations few and isolated. Advancing in AHCA/NCAL’s Quality Initiative and Quality Award programs provide credible evidence of the center’s drive to excel and continuously improve quality of care and quality of life.

Yet, even under the best of circumstances, providers are vulnerable to lawsuits. Specialized attorneys have built large practices by suing nursing and assisted living centers, especially targeting states with nonexistent or weak tort laws.

These attorneys are accustomed to the time commitment and complexity of nursing and assisted living cases. They understand that the damage awards in these cases can be substantial. They have marketing shrewdness too, relying on three overarching tactics:

1. Repeat the theme of “profits over people” in media messages
2. Promote damaging testimony from former employees and families
3. Flood the media with insinuations about abuse and neglect

These marketing campaigns capitalize on the public’s lack of understanding of care practices and survey, certification, and enforcement. Some lawyers also take advantage of a family’s vulnerabilities, such as guilt over placing a parent or loved one in a nursing or assisted living center, anger over payment issues, or family dynamics.

The current upsurge in lawsuits against care centers is occurring at a time when AHCA/NCAL has data indicating a significant rise in care quality profession-wide as shown in the AHCA Quality Report.

Unfortunately, these data make clear that even high quality nursing and assisted living centers may be sued. The key is in implementing the risk management, communication, litigation, legal, and legislative strategies described in this Toolkit to prepare for or avoid costly litigation.

AHCA/NCAL wishes to thank the following committees and organizations for help in compiling this Professional Liability Toolkit:

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LITIGATION RISK MANAGEMENT

Operating a nursing or assisted living center is like running a small town; it is challenging work. There are thousands of interactions daily and there will be unexpected adverse events—like a side rail issue, medication error, allegation of abuse, etc. There also may be serious family issues that need special attention.

Several common themes from this Toolkit recur here: “be objective,” “be factual,” and “communicate.” A disciplined risk management environment contributes in significant ways to protect the center in negative situations that may lead to litigation.

A provider should be prepared for any eventuality, including having a litigation risk management plan. Integrate the plan into a center’s daily operations and monitor it for adherence. The events described below should trigger a center’s risk management protocols and be a guide to staff in documenting the who, what, where, when and how of such events.

The four sensitive areas in facility operations that often need special care are: 1) Adverse Events 2) Media Communications 3) Family Interactions and 4) Managing Record Requests.

Adverse Events
Every shift needs an adverse event coordinator to manage situations and write up the events. Typical candidates for this position include a charge nurse, unit manager, or certified nursing assistant (CNA). Coordinators need training to be proficient in writing an adverse event report and dealing with complicated situations. Coordinators also need to practice preparing an adverse event report and learn to include only objective information.

Pre-planning and practice are necessary to manage an adverse event skillfully. All staff should understand:

1. Patient First
   a. Take care of the affected resident/patient first
   b. Arrange transportation to a hospital
   c. Initiate the transfer form to the Emergency Medical Services (EMS) personnel
   d. Notify the attending physician

2. Preparing the adverse event report
   a. Include the substance of the conversations with EMS personnel
   b. Include the condition of the resident at the time of writing the report
   c. Keep the report as short as possible
   d. Note the time and how the attending physician was notified
   e. Record the time the attending physician returned the call and the status of the resident at that time
   f. Include a copy of the transfer sheet

3. Family communication is key
   It is important to contact (phone, text, or email) the family or guardian promptly. Thus, the adverse event coordinator, or person assigned to contact the family, should be experienced and skilled in dealing with families and need not be a nurse. This staff person should be compassionate, trustworthy, calm, and disciplined. These are traits families appreciate.
The basic rules to follow in communicating with the family or guardians include:

a. Calmly relate only the facts known at the time (e.g. what happened; where patient was taken, etc.)
b. Never speculate as to causes or severity of injuries
c. Explain that the center will share information as it becomes available
d. Voice mail, email, and text messages should be short and factual
e. Document the date, time, and method of communication with all parties

4. Investigation process

A member of the Quality Assessment & Assurance (QAA) committee—not the original adverse event coordinator—should complete the investigation and follow-up with the family, physician, regulators, and police as necessary.

Activities and procedures of the QAA committee representative should follow these rules for investigating an adverse event:

a. Individually interview relevant staff members
b. Review records and video footage; and retain copies of these materials as required by the center’s protocol
c. Write a summary of the event; and have all relevant staff review, edit and sign the document
d. Directly report findings to the administrator, Director of Nursing (DON), care plan coordinator, social worker, etc. Decide who will follow up with the family, physician, regulators and/or police regarding the results of the QAA investigation
e. Determine which Interdisciplinary Team (IDT) member needs to be alerted as to the change in status (wound team, dietary, behavior, etc.)
f. Document any change made to resident care plan or other actions in the resident’s chart

NOTE: To learn more about protecting QAA documents, go here.

Media Communications

It’s important to think about media responses early. For details, refer to the Communications Strategies section of this Toolkit.

Family Interactions

Whether it is in the day-to-day care of a resident or for other reasons, nursing and assisted living providers will encounter upset families. The following is a list of “do’s” and “don'ts” on ways to conduct business in difficult situations:

1. Interacting with families

   a. If family members are unruly, ask them to wait in a private area. The key is to remove these individuals from patient/resident care
areas. Decide next steps
b. Respect what the family is saying yet be confident about the quality of care provided
c. Document family feedback in the resident’s chart; include names and dates

2. Involvement with management
a. People respond favorably to follow-up from those in leadership positions; include, for instance, the care plan coordinator, wound care nurse, and dietician if possible
b. Solicit feedback from staff directly involved with the actual care issue (i.e. dietitian, therapist, etc.)

3. Documentation
a. Keep records of invitations and attendance at care planning conferences
b. Note all the individuals who attend the care planning conference
c. Ask the individual with power of attorney (POA) to review and approve the resident’s chart in-person
d. Make sure the individual with POA has signed a consent form allowing the center to leave messages on voicemail etc.

4. Say “I’m Sorry” Cautiously
a. There can be negative consequences if a provider or staff person admits fault or error. However, some states allow health care workers to apologize without having it be admissible in a civil lawsuit, while some states do not. Refer to the Legal Strategies section of this Toolkit to learn more about “I’m Sorry” laws

Managing Record Requests
It is important to know how to handle record requests. Be familiar with state regulations (e.g., some states only allow certain individuals access to records). If a center has a relationship with a liability insurance company, that company may help in handling record requests.

1. Record requests
a. Treat all record requests as if they might end up in the hands of an attorney
b. Designate a staff person who is familiar with medical records to verify that the proper individual signs a record release authorization form
c. If approved, the medical record clerk should compile the records

2. Record release
a. Review the record, ensure completeness, identify areas of concern, and approve the release
b. Establish a protocol that the DON, Director of Nursing Services (DNS), or social worker contacts the family and offers to review the records in person and answer questions
c. If the resident is still at the center, offer to review the record with that individual or his/her POA regardless of who makes the record request
d. A center may want to release both electronic and paper records. In this instance, the medical records clerk should maintain a master list by department of what record system (paper or electronic) was used and for what period
e. A center with an Electronic Health Records (EHR) system should familiarize staff regarding printing a complete legal medical
Communication Strategies

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RESPONDING TO ATTORNEY ATTACK ADS

Seek First to Understand the Public Mind
To better understand the public reaction to attorney attack ads and provider responses, AHCA/NCAL conducted focus groups in Kentucky and Pennsylvania with the help of the Kentucky Association of Health Care Facilities (KAHCF) and the Pennsylvania Health Care Association (PHCA). For more information, review the Focus Group Report Executive Summary. In Pennsylvania, PHCA also conducted polling of nearly 800 individuals, which is reported in this section.

Providers will find invaluable intelligence in the focus group and polling results on the following pages, especially if a provider becomes the target of an attorney’s attack ad or a care center just wants to develop a positive PR campaign.

A provider who wants to counter the negativity of an attack ad needs to be cautious; care center messaging can easily be counterproductive and miss the mark if some of the tenets learned in the focus groups and polling are not considered. As you will read, the general public can reject a provider’s message for many reasons but especially if it has no supporting facts or data to back up its assertions.

Providers will learn that whenever entering the court of public opinion, they are not on a level playing field. Providers need to develop messages that are “factual,” avoid “name calling,” speak in terms of “community, communication, and trust.” A provider’s “tone” needs to be welcoming and professional. Pictures of doctors or nurses work best.

More broadly, lessons learned from the focus groups demonstrate that the average person places more trust in a care center that makes the effort to establish a relationship and regularly communicates with families about their loved ones.

To the public, good clinical practice, tasty meals, ambiance, etc. are not the only priorities. To earn trust, the focus groups tell us, takes a positive relationship, coupled with overall quality, to engender the trust that helps a care center avoid lawsuits. In a trusting environment, providers are freer to deal with a negative situation and offer remedies that are acceptable to the family.

As to culpability for bad outcomes, in almost every scenario, people in the focus groups said that a care center and its management are the responsible entities, not the Licensed Practical Nurse (LPN), CNA or other caregivers.

This is why management’s commitment to establishing a relationship is very important.

Lastly, the focus groups make a good case for using the well-established process of continuous quality improvement (CQI). People contemplating a lawsuit do so to bring relief or justice to a loved one allegedly injured at the care center. The person bringing the action may have the desire to protect all other residents in the center from having the same bad outcome. Lawsuits may not just be about what’s good for “Mom” or “Dad,” but the “greater good” as well.

CQI is just one example of how to use a process to show corrective action taken to maintain a safe and secure environment for all.

To be successful in any strategic messaging efforts, providers need to consider what the public, or their specific audience, thinks when faced with various scenarios.
The words and ideas on the following pages come directly from the public, the proverbial “man-on-the-street.” These are the same folks who may serve on a jury. Know that on the following pages may be the basis of a future verdict in a court of law, the final straw in the court of public opinion, or the missing link you’ve been looking for to develop successful strategies to communicate with your various audiences.

**Focus Group with Individuals “Likely to Sue”**

Individuals in this group expressed a propensity to sue and in fact they have sued other health-care providers in the past. They believe litigation is the way to obtain justice and send a clear message to the nursing and assisted living center to provide good services. Virtually no explanation or counter-ads would cause them to modify their beliefs, but specific actions may have an impact.

These individuals also hold nursing and assisted living center staff to the same standards that they would hold themselves to if they were caring for a loved one at home.

This group believes:

1. **Care centers communicate INADEQUATELY**
   - Are not likely to follow through on their concerns and complaints
   - Need to set a high priority for taking action on family concerns
   - Need to communicate with families and patients and have staff proactively build relationships with families

2. **Care centers are REACTIVE**
   - Must build credibility and trust, so that when a negative event occurs and staff tries to explain what happened and correct it, families don’t just see this as an effort to avoid legal action

3. **If TRUST exists, these actions may be credible**
   - Administrator promises intensive follow-up care with additional medical services offered at no cost to the family
   - Assurances that all patients will receive increased level of protection

4. **Attorneys are TRUTH-FINDERS**
   - They only get paid when there is a settlement or court decision
   - They bring lawsuits only if the facts justify an action.

**Focus Group with Individuals “Likely to Sue” and “Likely to be Potential Jurors”**

Individuals in this group represented a greater diversity of opinions about bringing lawsuits. Overall they were not as inclined to sue as the previous group. This group felt that nursing and assisted living center staff would be receptive to their concerns and take action to solve their problems. For them, communication is the key. However, a lack of follow-up action after an accident could lead to legal steps.
This group believes:

1. **LITIGATION is not the first alternative to a problem**
   - Care centers need to fix systemic problems
   - Care centers need to be accountable

2. **Care centers must know and COMMUNICATE with the family**
   - Families would NOT consider a lawsuit if the administrator contacted them to explain what happened, reassured them that medical personnel are properly caring for the patient, and expressed deep concern
   - The administrator is the responsible party when problems occur, not the caregivers

3. **Care centers must forge strong RELATIONSHIPS with families**
   - Schedule family meetings with the administrator
   - Provide a weekly progress report
   - Allow cameras in patient rooms
   - Assign a person as a point of contact for each patient

4. **Distrusts attorneys**
   - May be greedy
   - May not solve problems
   - Selectively take cases based on a chance of success
   - Unclear about how to compare effectiveness of attorneys
   - Trust local counsel more than out-of-state attorneys

**Groups Evaluate Response Ads**

As part of the Focus Group discussions, panelists viewed ads developed in response to negative attorney ads. The following are the major points from those discussions.

**#1 Response ad**
Features an elderly couple appearing concerned with the headline “Don’t be Fooled” with subhead “By Misleading Ads Attacking Nursing Homes.”

**#2 Response ad**
Features a middle-aged, serious-looking man in a suit with a headline “Out-of-Town Personal Injury Lawyers Are Threatening Our Nursing Homes.” The ad then stated:

> “… facilities like ours are often fighting frivolous, speculative lawsuits filed by predatory… every dollar we spend… is a dollar that we can’t invest in the care of your loved ones.”

Individual comments include:
- The headline “Don’t be Fooled” would be more effective if it said “Get the Facts”
- The statement about nursing centers “Taking Responsibility” is most important: “Choosing the right nursing home is an extremely personal and important decision. The best way to make these decisions is to do your research and visit different facilities to ensure they offer the right services for you or your loved ones.”

**#3 Response ad**
New images of a young male doctor and young female RN with the headline “An Open Letter to Our Neighbors about Out-of-Town Personal Injury Lawyers Seeking Jackpot Justice” is run with the same six-paragraph letter as in #2-response ad.

Individual comments include:
- This ad received strong negatives from all groups:
  - Words like “frivolous,” and “speculative” are insulting to victims
  - The advertisement is meant to dissuade lawsuits
  - It is not believable that nursing centers that pay for lawsuits have less funding to care for patients
  - The ad is “whiny”
  - There was no explicit denial of the negative claims in the care center’s response ad

**#1 Response ad**
Features an elderly couple appearing concerned with the headline “Don’t be Fooled” with subhead “By Misleading Ads Attacking Nursing Homes.”
• Out-of-town law firms should not come to new locations just to file a lawsuit against a local nursing or assisted living center

#4 Response ad
Panelists were asked to imagine that a care center wants to establish a positive reputation, not just respond to a negative attorney ad. Elements of the ad included a headline that read, “Meet the (name of care center) Family,” The ad then stated:

“Some skilled nursing homes have recently been the target of misleading advertising … We wanted to set the record straight about (name of care center). Here’s what you can expect as a resident of our home—Care, Communication, and Community.” Focus groups comments include:

• The section on “Community” was most favorable
• The favorite bullet point among the six read: “Many of our new residents are referred to us by families and friends of current or past residents…”
• The ad, in stating that the care center had been targeted, caused the opposite reaction as panelists assumed this meant the care center had problems since it had been the target of advertising
• Need to identify people giving testimonials in ads

#5 Response ad
Features a middle-aged female nurse and elderly man in a wheelchair with the headline, “(Name of Care Center), At the Forefront of Modern Skilled Nursing Innovation.” Panelists preferred this bullet point emphasizing individuality: “Our programs are individually tailored to suit each resident’s specific needs. From around-the-clock medical care to our wide range of therapy and recreational activities; our professional staff can help your loved ones design a plan to maximize their comfort and quality of life.”

POLLING BY THE PENNSYLVANIA HEALTH CARE ASSOCIATION (PHCA) SUPPORTS FOCUS GROUP STATEMENTS
Negative ads “work” and that’s why attorneys use advertisements to attack care centers nationwide. In fact, negative ads have an overwhelming impact on consumer opinions. Care centers sometimes produce positive response ads to counter negative ads, but this effort has minimal impact on the public at large.

In PHCA’s polling, nearly 250 individuals were asked to respond to both negative “attorney” ads and positive provider ads:

• Quality of care and attributes related to delivering high quality care were most important to the group; while size and location of the care center were least important
• When individuals saw a negative attorney ad first, their initial attitudes toward that nursing center was very negative
• Seeing a positive ad first only minimally softened their reaction to seeing a negative advertisement
• When individuals saw a positive advertisement, it had no effect on their overall attitude toward care centers. It didn’t matter if the respondent saw the ad before or after a negative advertisement

As a result of seeing a negative ad, individuals thought that the nursing care center:

• Is not meeting licensing standards (82%)
• Is not following the rules (50%)
• Has not fixed problems or issues (42%)
• Does not care for its patients (76%)
In response to negative advertisements, individuals overwhelmingly believed that the care center:

- Is a repeat offender (70%)
- Puts residents at risk (80%)
- Neglects to care for its residents (72%)
- Should be closed (65%)

Key findings from PHCA polling include:

- Least influential to consumers in choosing a care center are news coverage and care center advertising
- Care centers must build trust through a relationship first policy with patients’ families
- Negative ads are very effective at convincing the public that something is wrong at the care center
- Many in the public believe attorneys are not allowed to place an untruthful ad
- Upon viewing the unfavorable attorney advertisement, 87% of respondents believed the care center should be penalized and puts residents’ lives at risk
- The most common reason for suing a nursing center is to protect other patients from harm
- Positive advertisements are NOT very effective at countering negative ads

Conclusion

Nursing and assisted living centers can avoid lawsuits by focusing on continuous quality improvement with a culture of “communicating” with residents, patients and their families.
SMARTER COMMUNICATIONS TO COUNTER AN ATTORNEY MEDIA CAMPAIGN

Law firms nationwide are targeting nursing and assisted living centers with media campaigns as a way to acquire new business. Providers should prepare for legal situations just as they prepare and drill for natural disasters and fires. Think “legal emergency preparedness.”

Attorneys waging a campaign against a particular nursing or assisted living center initiate a series of advertisements that disparage a center’s care quality, often relying on exaggerated or dated claims of past performance. These advertisements appear on a mix of billboards, newspapers, television outlets, transit, and radio advertisements to spread their messages everywhere.

To inoculate a nursing or assisted living center operation from a general legal assault in the media takes more than good surveys, high Five-Star and customer satisfaction ratings, or a solid reputation in the community.

Plan Before Becoming a Target,
Outline of a Communications Plan
Operating a care center with an unambiguous quality record is the first step in fending off lawyer-sponsored media campaigns. In responding to negative ads, a nursing or assisted living provider can cite a care center’s value and trustworthiness to the community, in concert with other information, to offset a negative ad.

Every care center should map out a communications plan and use it consistently and proactively to push out news regarding its accomplishments. Refraining from sharing good news with the public is a missed opportunity to build the stronger community relationships that are so important to centers in defending themselves against litigation. A communications plan needs time to become operational and show results in building up goodwill, not only with the community but also with the center’s own staff.

A basic communications plan should:

1. List Objectives
   a. Be a respected and trusted member of the health care community
   b. Have a visible, positive presence in the community
   c. Respond to negative attacks with affirmative, data-based facts

2. Identify Goals
   a. Establish and maintain stakeholder awareness that the care center:
      • Communicates with residents and families regarding care planning status and employees
      • Has a deep commitment to care quality
      • Conducts and reports on customer and staff satisfaction surveys
   b. Demonstrate value, trust and institutional commitment to the community

3. Identify Stakeholders
   a. Residents, patients and families
   b. staff, consultants, vendors, and volunteers
   c. referral sources (managed care and health care partners)
   d. community, spiritual centers, social and professional clubs and organizations, senior centers
   e. community leaders, elected and appointed officials, all media

4. Prioritize
   a. establish relationships with the press and other media. Run print ads that emphasize care center successes, staff accomplishments, and resident human-interest stories.
   b. in smaller markets, visit publishers and editors as they may be readily accessible
   c. invite reporters to events and prepare materials for them
   d. put journalists on social media lists
e. Publish a monthly newsletter that includes operational reports
f. Use data and facts to make the case, e.g. Five-Star ratings, customer satisfaction surveys, state and national quality program data, recent CMS results, and staffing data. Avoid seeming to be self-serving by using emotional or defensive outbursts.
g. Consider enlarging testimonial ads into posters and displaying them in public areas like lobbies, meeting, and activity rooms.

5. Participate
a. Show participation in your state and national long term care associations
b. Sponsor community events, especially related to health, sport teams, etc.

With a communications plan in place, consistently and proactively documenting a center’s commitment to quality, a nursing or assisted living center is better able to respond to negative attacks immediately. This immediacy increases the chances of blunting the impact of an attorney’s negative campaign.

Who to call, what to do
The trigger point for implementing the legal emergency response component of the communications plan is the publication of an attack ad against a center. Because laws vary from state-to-state and because of potential differences in the content of advertisements, individual tailoring of a message is required. The following material can guide the provider in many situations.

Let us say a nursing or assisted living center has done everything possible to implement a successful communications plan, then one morning, the administrator scans the local newspaper and is confronted with this ad:

**IMPORTANT NOTICE**

If your loved one has been a resident at Happi Valley Health and Rehabilitation Center

This facility has been cited for multiple deficiencies including:

____________________________________________
____________________________________________
____________________________________________
____________________________________________

DETERIORATION, BED SORES AND EVEN DEATH.

POOR CARE AND UNDERSTAFFING CAN LEAD TO:
BEDSORES, CHOKING, FALLS, BROKEN BONES, DEHYDRATION, INFECTIONS/SEPSIS, MALNUTRITION, OR UNEXPLAINED DEATH

If someone you love has been a resident at Happi Valley Health & Rehab Center call our attorneys for a free consultation at

________________________ __________________________
________________________ __________________________
________________________ __________________________
A center that pre-plans for a legal emergency knows exactly what to do! Center leadership knows what to say and do because they’ve developed a strong communications environment and practiced responding to attorney attack scenarios.

Most attorney ads report only the F-tag headings (see sample lawyer ads), which seems to imply that the government is “currently” accusing the care center of providing inadequate care and “harming” patients. Center staff know that the regulatory language used in F-tags can be negative, but to the average consumer it sounds devastating.

The center’s leadership team should focus on the specific survey referenced in the advertisement and dive into its details. Facts gleaned from this research will be the core of a center’s response. That’s because the lawyer’s ad will attempt to manipulate the public into thinking the worst and believing that the findings are serious and current.

The center should respond immediately to counteract the accusations made in a particular ad. The message must be objective, supported by the facts, and should hold back from being an emotional counter attack lacking substance.

If a center’s audience is the general public, expressing resentment that the attorney or the judicial process is the problem is generally ineffective and often counterproductive. The public will see this type of response as self-serving and it could confer even greater legitimacy to the original attack ad.

There is only a narrow window of opportunity to counter accusations of inadequate care leveled at the center. Providers have one shot to go on record and make a positive rebuttal to the public. Their message, in whatever forum or venue delivered, must be factual and point out fallacies in the original attack ad. In other words, attack the message, not the messenger.

See page 21 for a sample response ad.

To develop a communications plan, refer to the Communications and Legal Strategies of this Toolkit. The following are a few highlights:

Consumers say:
✓ The only effective way to counter a negative advertisement is to be “factual,” and “speak in terms of community, communication, and trust”
✓ Avoid “name calling” or being judgmental and calling actions “frivolous”
✓ A soft image ad is not enough to counter negative information about past survey results
✓ Implement a formal quality system so as to document both quality and corrective actions taken to maintain a safe and secure environment for all residents/patients

Consumers emphasize:
✓ A center’s response to an ad should be factual, not judgmental in tone:
✓ Headlines should read, “GET THE FACTS,” rather than “Don’t be fooled”
✓ Use facts; do not attack a negative ad with words like “frivolous,” and “speculative”
✓ Don’t use the defense: “If nursing centers pay for lawsuits, there is less funding to care for patients”
✓ Playing the victim card may backfire and cause the opposite effect
✓ Claiming “The care center is the target of misleading advertising,” only plants the thought that the center had past problems and may still be in noncompliance
SAMPLE MEDIA TALKING POINTS

a. Survey results cited in the newspaper advertisement date back many years
b. All deficiencies were corrected at that time and no residents were at risk or inconvenienced
c. Besides presenting stale information, the ads are inaccurate by implying a higher level of seriousness than noted by the state health department
d. Residents are safe and secure and are the number one priority
e. The center is a vital part of the town’s spectrum of care, just like home care and hospitals
f. As a 5 (or 4)-Star rated nursing care center, we provide quality health care services to the community
g. We are committed to helping older adults and individuals with disabilities maintain or improve their health and quality of life
h. Discuss outstanding achievements:
   • CMS Five-Star ratings (5- or 4-Stars)
   • AHCA/NCAL Quality Award recipients (Bronze, Silver, Gold)
   • My InnerView “Excellence in Action” Award (based on customer satisfaction)
   • National quality initiatives (AHCA/NCAL Quality Initiative)
   • Reference examples of any recent initiatives implemented to continue to improve care quality and services
SAMPLE OPINION-EDITORIAL
FROM CENTER LEADERSHIP

Note: Modify this sample opinion-editorial (op-ed) to reflect the actual circumstances in the situation. Be factual. Use data and facts, available in Long Term Care Trend Tracker, to make your points in a positive tone. Avoid directly criticizing attorneys or their motives. Point out errors in the materials they publish. Be specific. An op-ed should be longer than a “letter to the editor”; but check with the publication for a preferred length prior to drafting your op-ed. An op-ed should come from the center’s leadership, such as Administrator, Executive Director, or Medical Director. This is a good time to contact your AHCA/NCAL State Affiliate for advice and help.

As the [licensed care center leader] at [name of center], I need to point out that recent ads published in the [name of newspaper] inaccurately question the quality of the care at the [name of center]. While I generally respect attorneys as knowledgeable and honest, in this instance an out-of-town law firm is running misleading ads that provide inaccurate information to your readers. The ads are deceptive and without merit as discussed below.

The ads cite an annual state survey that is years old and thus mischaracterizes the status of [name of center] today. Care centers statewide average [number of deficiencies] deficiencies per annual survey; in our latest survey, we only received [number of deficiencies]. Yet, the recent attorney advertisement implied a much worse situation.

We take every deficiency seriously, but according to the surveyors back in [year], none of their findings was considered harmful to residents or patients. All were deemed to be “isolated” (not a widespread problem). Everything cited by the surveyors at the time was corrected on the same day or by week’s end.

[Name of center] currently holds a Five (or Four) Star rating by the federal government and our last annual survey by the government was deficiency free.

Senior care today focuses on the needs of each person, called “person-centered care.” Our collective mission is to provide an individual with appropriate services and supports as well as a safe and comfortable environment.

[Name of State] residents need to be informed consumers. People who will need long term and post-acute care services should proactively seek their preferred care center by using the many tools available today. For example, the federal Five Star rating information, along with individual facility reports, is available on www.Medicare.gov.

Finally, be a frequent visitor and get to know the center’s staff during your visits, they are doing amazing things every day to help the residents, your loved ones.
SAMPLE OPINION-EDITORIAL FROM STATE AFFILIATE

*Note: Modify this sample opinion-editorial (op-ed) to reflect the actual circumstances in your state. Be factual. Use data and facts to make your points. Most of this information is available in Long Term Care Trend Tracker. Avoid directly criticizing attorneys or their motives. Point out their errors and correct the record with data and facts. An op-ed should come from the affiliate’s leadership, such as Executive Director or top elected member, such as the Chair. This may be a good time to contact AHCA/NCAL for advice and help.*

Recent advertisements in [name of newspaper] are an inaccurate depiction of the quality care provided in [name of state] nursing and assisted living centers. Funded by out-of-state attorneys, the media campaign targets care centers using very dated and misleading information.

Today’s nursing and assisted living centers strive to maintain the highest quality care possible. Our nursing and assisted living centers work with federal, state, and local officials to ensure that standards of care are met or exceeded. We are proud of our well-trained staff and take pride in the services they provide to patients and families at any time of day.

In fact, [name of state] has demonstrated this commitment and is ahead of the nation. [Name of the state] benefits from a low and continuously decreasing hospital readmission rate from care centers. [Name of the state] also reduced antipsychotic drug use for individuals with dementia and has a lower rate of individuals on these medications than the national average.

The federal government rates nursing care centers nationwide with a program called Five Star. [Name of the state] has [number] four and five-star facilities – the highest quality ratings these centers can achieve. The attorneys’ media campaign ignores these “truths,” opting to disseminate misinformation and innuendo with old information. Their crusade is very self-centered and superficial; not meant to improve lives of our older adults and individuals with disabilities.

These unfair ads also denigrate the thousands of career nurses and staff members who spend their days and nights caring for the more than [number] individuals currently within our care. Our dedicated professionals choose to work in long term and post-acute care settings because it is a calling – where residents are more than patients, they’re family. This out-of-state law firm tries to diminish the commitment these caregivers have made to advance its own agenda.

If you have any comments or questions please contact me at [email address].
SAMPLE LETTER TO THE EDITOR

Note: Use this sample as a guide for drafting the center’s letter. Be sure to edit the letter to reflect the individual situation. Do not use residents or family members as spokespersons. Suggest the Medical Director, Director of Nursing Services (DNS) or other licensed care center leader be the author.

Dear Editor:

As the [licensed care center leader] at [name of center], the recent ads being run by an out-of-town law firm are inaccurate, rely on out-of-date material and are deceptive. The ads refer to a survey done by the [State] Health Department in [year]. In that survey, [name of center] received deficiencies; none were deemed by the state to “cause harm” to residents or to be “widespread” within the center. By the end of that week in [year], all the deficiencies were corrected. Today, [name of center] holds a Five [or Four] Star rating of the federal government.

Our professional, caregiving, and support staff are proud of [name of center]’s standing in the community; we value our commitment to an open dialogue with any person in the community who may have questions about this or any other matter. Please contact me at [phone number] or via email at [email address].

SAMPLE LETTER FROM A FAMILY MEMBER

Dear Editor:

I visit [name of center] frequently and know most of the staff by name. I participate in activities with residents, attend offsite events, and visit other residents who have become good friends. Our family considers the staff that cares for our [family member] to be an extension of our family. We have the highest regard for the mission of the [name of center] and appreciate the respect afforded to every resident.

As a community, we need to recognize those who live and work in our hometown and care for our loved ones!
EFFECTIVE VS. INEFFECTIVE LETTERS

Sample: Effective Letter

The following is a sample letter or op-ed responding to negative attorney ads. The sample is fictional and follows the precepts advanced in the focus group section of Communications Strategies. Namely, if a care center’s purpose is to influence the public’s attitude, then the center should be civil and focus on factually showing how the offending advertisement is misleading. Avoid attacks directed solely at a law firm or lawyer. Speak in a professional tone; many in the public believe that lawyers are “truth seekers.” If a center questions the attorney’s motives too harshly, the public can conclude that the center has some guilt. Tailor the final, written information to your individual situation and remember to keep it “civil.”

AN OPEN LETTER TO OUR NEIGHBORS IN ANY TOWN, USA

On behalf of ABC Skilled Nursing Center, I want to address the negative advertisements now running in the Gazelle newspaper. The ads are clearly deceptive and intended as a marketing tool of the sponsoring law firm. As the Medical Director at ABC, and lifelong resident of Any Town, let me explain.

The ads cause concern about ABC and the quality of care we provide. Unfortunately, for the public, the ads don’t give you current facts to consider.

The ads exaggerate a 3-year old (2012) annual survey done by the State’s Health Department. Admittedly, there were deficiencies in 2012, however, none caused harm to residents or were deemed widespread within the care center, according to the State’s survey team. We corrected the root cause of all the problems before the week ended.

Most care centers in America receive so-called “deficiencies” during state inspections. However, not all deficiencies are equal. The vast majority reflect minor lapses in quality, dietary, record keeping, or maintenance. In a typical year, about 8 percent of care centers in the USA receive a “deficiency-free” stamp of approval from the state government.

Today, as always, ABC Skilled Nursing Center delivers quality services and satisfaction to our 175 residents, many of whom are short-stay rehabilitation patients who return to the community.

ABC has a Five Star Quality Rating from the Federal government, which requires excellent grades for Staffing, Quality and Survey results (see www.medicare.gov).

In customer satisfaction surveys, 98% of our residents or families would recommend ABC Skilled Nursing Center (See our website, www.ABC.com).

I personally have no problem with lawyers seeking out clients; but being deceptive and tricky with words in order to get more business is not acceptable or professional.

Our doctors, nurses, and caregivers are proud of our positive reputation in the community and we work hard to earn this trust.

If you have questions about this situation, please give me a call, email, or stop by and we can discuss it.

Kindest regards,
Dr. Joe Doe, M.D.
Medical Director
On behalf of ABC Skilled Nursing Center, I want to address the negative advertisements now running in the Gazelle newspaper. The ads are clearly deceptive and intended as a marketing tool of the sponsoring law firm. As the Medical Director at ABC, and lifelong resident of Any Town, let me explain.

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The ads exaggerate a 3-year old (2012) annual survey done by the State’s Health Department. Admittedly, there were deficiencies in 2012, however, none caused harm to residents or were deemed widespread within the care center, according to the State’s survey team. We corrected the root cause of all the problems before the week ended.

ABC Skilled Nursing Center has a Five Star Quality Rating from the Federal government, which requires excellent grades for Staffing, Quality, and Survey results (see www.medicare.gov).

In customer satisfaction surveys, 98% of our residents or families would recommend ABC. (See our website, www.ABC.com).

Our doctors, nurses, and caregivers are proud of ABC’s positive reputation in the community and we work hard to earn, and maintain, this trust.

If you have questions about ABC, please give me a call, email, or stop by and we can discuss it.

Kindest regards,

Dr. Joe Doe, M.D.
Medical Director
ABC Skilled Nursing Center
SAMPLE: INEFFECTIVE LETTER

The following sample letter or op-ed demonstrates the type of language NOT to use when responding to attorney ads. The tone is uncivil, accusatory and lacks any depth or facts. It is purely a stream of consciousness. The writer may feel good at lashing out at the sponsor of the ads but, if the purpose is to influence the public attitude, this letter will probably fail. In fact, it may be counterproductive, and actually cause the public to be suspicious about the care center in question. For more information, please refer to the previous effective sample.

(Highlighted text shows typical language to avoid in a response letter or op-ed.)

AN OPEN LETTER TO OUR NEIGHBORS IN ANY TOWN, USA

The ABC Skilled Nursing Center would like to set the record straight about some of the negative and misleading advertisements being run in our local newspaper.

The claims being made in these attack ads are an attempt by an out-of-town, personal injury law firm to smear our name in order to scare residents and their loved ones into filing speculative lawsuits.

This personal injury law firm, with no ties to our community, is trying to profit by spreading fear among our elderly population and twisting the truth for their personal financial gain. However, here’s what they won’t tell you: Filing as many lawsuits as possible is their business. It’s called “jackpot justice,” and it’s based entirely on their ability to prey on the emotions of unsuspecting families. These law firms aren’t looking out for your best interests; they are looking to boost their profits.

Unfortunately, in today’s world, facilities like ours are often fighting frivolous, speculative lawsuits filed by predatory personal injury attorneys that ultimately amount to nothing more than shake down efforts.

However, that’s not to say these speculative lawsuits don’t have an effect: The reality is that every dollar we spend defending ourselves against these suits is a dollar that we can’t invest in the care of your loved ones. It’s a dollar that can’t be used to hire more of our exemplary caregivers. And it’s a dollar that can’t be used to purchase the latest technologies and equipment that have helped us earn our reputation as one of the leading skilled nursing facilities in our community.

If you have any questions about these out-of-town attack ads, please give us a call or drop in and pay us a visit. We’re located right here in Any Town, and we’d be happy to talk to you about caring for your loved ones.

Kindest regards,

Jane Doe, LNHA
Administrator
Legal Strategies

Special Thanks to Content Contributors:

A Valued Tool – Voluntary Arbitration
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“I’m Sorry” Can Make A Difference
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Ed Dowdy, Underwood Law Firm, LLC

Providers Can Halt Negative Ads in Court
Jason Bring, Arnall Golden Gregory LLP
Ryan Hood, Arnall Golden Gregory LLP

The contents of this document may represent some preferred practices, but do not represent minimum standards, “standards of care,” or industry-wide norms for nursing centers, assisted living communities or other providers. As always, a provider or community is responsible for making clinical decisions and providing care and services that are best for each individual person. In addition, the contents of this document are for general informational purposes only and may not be substituted for legal advice.
A VALUED TOOL—VOLUNTARY ARBITRATION AGREEMENTS

The best method for avoiding unnecessary and expensive litigation is to use voluntary arbitration agreements (VAA) in admission agreements.

A key concept of a VAA—an agreement that does not require signing as a condition of admission—is that it may be more favorable to the resident and may help prevent future complaints of unfairness and thus allow the provider to focus more resources on resident care and services. Mandatory arbitration agreements—an agreement that offer the resident unequal rights or obligations—are more likely to be problematic and challenged in court.

AHCA/NCAL members are wise to first seek resolution of disputes outside of the courts. To accomplish this objective, an updated VAA template, which was first distributed in 2002, is on pages 27 and 28. This new version can guide facilities looking for a reasonable and fair arbitration agreement. This VAA template addresses recent judicial rulings and includes language to help guard against potential challenges, including a:
- prohibition against class arbitration
- severability clause that allows the arbitration agreement to be enforced even if certain other provisions in a contract are unenforceable; provision as signing the arbitrator the authority for determining the agreement’s enforceability
- provision dealing specifically with attorney’s fees
- provision assigning the facility the greater share of the arbitrator’s fees

Ultimately, a VAA is the best solution for avoiding unnecessary and expensive litigation, and for maintaining a facility’s reputation in the community.

How to Find an Arbitrator

In some instances, the arbitration agreement will specify the arbitrator. In other instances, the parties together will determine the arbitrator. Always consult with an attorney in making this decision. Good arbitrators should have experience in running an arbitration hearing, good reasoning and writing skills and an ability to quickly understand complex matters. Generally, anyone can be an arbitrator because there are no certifications or qualifications. In nursing and assisted living center disputes, arbitrators are commonly lawyers or retired judges who understand and are experts in the profession. American Health Lawyers Association, ADR Services, JAMS, and National Arbitration Forum offer both procedures and lists of arbitrators typically used in the long term and post-acute care settings.

Background – the Federal Arbitration Act (FAA)

The FAA created a strong national policy in favor of enforcing arbitration agreements. Further, the US Supreme Court has consistently found that both state and federal courts must protect these agreements under the law.

The FAA overrides state laws prohibiting arbitration agreements unless the law falls under the state’s general contract laws. Even with court challenges to the FAA, using the AHCA/NCAL voluntary arbitration agreement remains the best way for providers to use arbitration as a less costly and more efficient alternative to litigation.

A contentious court case can erode a community’s trust in a facility’s ownership, management, or quality standards.
It is understood and agreed by ___________ (the “Facility”) and ______________ (the “Resident,” or “Resident’s Authorized Representative,” hereinafter collectively the “Resident”) that any legal dispute, controversy, demand, or claim (hereinafter collectively referred to as “claim” or “claims”) that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration and not by a lawsuit or resort to judicial process except to the extent applicable law provides for judicial review of arbitration proceedings or judicial enforcement of arbitration awards. Such arbitration shall be conducted at a place agreed upon by the Resident and the Facility (hereinafter collectively referred to as the “Parties”), or in the absence of such agreement, at the Facility, in accordance with the rules of ____________, 1 which are hereby incorporated into this agreement.

Arbitration under this agreement shall be conducted by a single arbitrator agreed upon by the Parties. In the absence of such agreement, the arbitrator shall be an attorney selected pursuant to Section 5 of the Federal Arbitration Act, 9 U.S.C. § 5. The arbitration shall proceed under the rules of procedure and evidence for civil cases of the State in which the Facility is located, but such rules shall only apply to the extent deemed necessary by the arbitrator. The Parties shall bear their own attorney’s fees and costs except in cases where the arbitrator awards such fees and/or costs under an applicable provision of state or federal law that expressly authorizes such an award. The Facility shall pay ___ percent of the arbitrator’s fees. The Resident shall pay the remaining ___ percent.2

This agreement to arbitrate includes, but is not limited to: any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility; violations of any right granted to the Resident by statute, common law, or by the Resident Admission Agreement; breach of contract, fraud, deceptive trade practices, misrepresentation, negligence, gross negligence, malpractice, wrongful death, and any other claim, whether sounding in tort, contract, or otherwise. However, this agreement to arbitrate shall not limit the Resident’s right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The Parties agree that damages awarded, if any, in an arbitration conducted pursuant to this agreement shall be determined in accordance

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1 The company agreed upon to provide arbitration services (e.g., the National Arbitration Forum, JAMS, the American Health Lawyers Association, etc.). Care should be taken to include language providing for the use of alternative rules in case the selected organization later changes its rules to preclude the arbitration of disputes covered by this type of agreement.

2 The question of how to allocate arbitration fees is a difficult one for which there is no one best practice. Although it is not uncommon for arbitration agreements to divide arbitration fees equally between the parties, many agreements in this context provide that the facility will be responsible for all or substantially all arbitration fees, subject to certain limitations (e.g., through a set number of hearing days, after which the parties bear equal responsibility for all remaining fees). In deciding what allocation to use, consideration should be given to the allocation’s potential effect on the agreement’s enforceability. For example, while evenly dividing responsibility for arbitration fees may be reasonable in the abstract, some have argued that the expense imposed by such an allocation should serve as a basis for invalidating arbitration agreements when such an allocation makes it difficult for residents of modest means to obtain dispute resolution. In contrast, an agreement by which the facility accepts responsibility for all or a majority of arbitration fees helps negate an argument that the agreement imposes an unreasonable financial burden on the resident, and therefore may help avoid the burden and expense of litigation over the agreement’s enforceability.
with the provisions of the state or federal law applicable to a comparable civil action filed in the State in which the Facility is located, including any prerequisites to, credit against, or limitations on, such damages. The Parties also agree to arbitrate each claim on an individual basis, and will not seek representative, consolidated, or class treatment of any claim.

The Parties intend that this agreement shall inure to the benefit of and bind: the Parties; their successors and assigns; the owners, agents, employees, and independent contractors of the Facility and any affiliated entities; all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident; and any person whose claim is predicated on conduct involving the Resident or the aforementioned individuals.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the arbitration proceeding.

The arbitrator shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this agreement, including, but not limited to, any claim that all or any part of this agreement is void or voidable. If any provision of this agreement is determined to be invalid or unenforceable, in whole or in part, the remaining provisions remain in full force and effect.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE CLAIMS DECIDED IN A COURT OF LAW BEFORE A JUDGE AND JURY.

The Resident also understands that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this agreement may be rescinded by written notice to the Facility from the Resident within 30 days of the Resident’s signature below. If not rescinded within 30 days, this agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident’s discharge and readmission to the Facility.

This agreement shall be governed by and enforced under the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

Resident/Representative Signature Date

Facility’s Authorized Agent Date

Resident/Representative Printed Name

Facility’s Authorized Agent Printed Name
“I’M SORRY” CAN MAKE A DIFFERENCE

In long term and post-acute care settings, where healthcare professionals care for the oldest and most vulnerable individuals, and where accidents can and do occur it is important to say “I’m sorry.” Such an expression of humility and compassion is statutorily protected and not an admission of liability in many states, thanks to the so-called “I’m Sorry” laws.

During the 1990s, in response to trends in increased negligence and malpractice lawsuits and increased malpractice insurance premiums, states began enacting “I’m Sorry” laws, which exclude certain statements, expressions or other evidence from being admissible in a lawsuit. Most of these laws protect only certain expressions of sympathy; but in a few states these laws also protect admissions of fault.

While these laws may help some health care professionals feel more comfortable about expressing empathy, they aren’t necessary to avoid lawsuits. Instead, good patient-family-provider relationships, communication, and open disclosure is the key to credibly responding to an unfortunate event. Full disclosure in the event of a mishap should include:

• Immediately inform the patient and the family of the event
• Express concern and lay out next steps for correction
• Notify risk management staff, the insurance company and legal counsel
• Arrange to meet with the family to fully explain the event and propose a plan to fix this problem and any future problems

It is important to note that saying “I’m sorry,” and disclosing certain information, is not the same as admitting guilt. Today only Alabama, Alaska, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York and Rhode Island do not have “I’m Sorry” laws. Following is a list of all the states and the District of Columbia that do have “I’m Sorry” laws. Be sure to check with legal counsel about how to best comply with the law in your state before taking any action:

1. Arizona, Ariz Rev Stat §12-2605
2. California, Cal Evid Code §1160
4. Connecticut, Conn Stat Ann §52-184d
5. Delaware, Del Code Ann tit 10 §4318
6. District of Columbia, DC Code §16-2841
7. Florida, Fla Stat §90.4026
8. Georgia, Ga Code Ann §24-3-37.1
10. Idaho, Idaho code Ann §9-207
11. Indiana, Ind Code §34-43.5-1-4
12. Iowa, Iowa Code §622.31
15. Maryland, Md Code Ann, Cts & Jud Proc §10-920
17. Michigan, Mich Comp Laws §600.2155
18. Missouri, Mo Rev Stat §538.229
19. Montana, Mont Code Ann §26-1-814
20. Nebraska, Neb Rev Stat §27-1201
22. North Carolina, NC Gen Stat §8C-1, Rule 413
23. North Dakota, ND Cent Code §31-04-12
24. Ohio, Ohio Rev Code Ann §2317.43
25. Oklahoma, Okla Stat tit 63 §1-1708.1 H
26. Oregon, Or Rev Stat §677.082
27. Pennsylvania, Pa Act 79
28. South Carolina, SC Code Ann §19-1-90
29. South Dakota, SD Codified Laws §19-12-14
30. Tennessee, Tenn Code Ann §409.1
32. Utah, Utah Code Ann §78B-3-422 and Utah Rules of Evidence, Rule 409
33. Vermont, Vt Stat Ann tit 12 §1912
34. Virginia, Va Code Ann §8.01-52.1 and Va Code Ann §8.01-581.20:1
35. Washington, Wash Rev Code Ann §5.64.010 and Wash Rev Code Ann §5.66.010
36. West Virginia, W Va Code §55-7-11a
37. Wisconsin, 2013 Wis Act 242
38. Wyoming, Wyo Stat Ann 1-1-130

With an ever-increasing volume of negative advertisements against nursing and assisted living centers, providers are starting to fight back in court. Initiating litigation to stop attorneys from publishing negative advertisements can work; but nursing and assisted living centers should proceed with caution. Before going to court, providers need to carefully analyze the content of unfavorable advertisements and determine if there is a strong chance a judge would decide that the advertisement is misleading, inaccurate and must stop. Needless to say, a nursing center that has a good survey record is more likely to be successful in court than one with a troubled history.

For instance, in Georgia, a nursing center challenged a false and misleading advertisement in state court and won. The judge determined that the advertisement did not accurately reflect the center’s survey report and stopped the law firm from publishing any more unfavorable advertisements. Nursing centers in other states are now following similar legal strategies.

**Evaluate the Advertisement and Survey**

Providers need to dive into the details of the actual survey that is the basis for a negative advertisement. These advertisements often use a similar format, and generally rely on listings of past survey citations (F-tags). Using F-tags in this way is a key component of most negative advertising; yet it also is a great vulnerability in debunking the advertisement in court.

By using only the F-tag headings in advertisements, attorneys create a false impression that a care center provides poor care. The deception in the advertisement is that it does not mention the actual survey findings, which may have been benign, easily corrected and isolated.

The following three examples are from real situations where judges stopped advertisements.

**Example #1**

An advertisement claimed a nursing center “FAILED to make sure that the nursing home area is safe, functional, clean, and comfortable for residents, staff, and the public.” In fact, analysis showed that:

- The ad referred to “garbage storage area” that was actually a dumpster located in the back parking lot.
- The surveyor’s language at the time was clear: “The facility failed to maintain the garbage storage area in a safe and sanitary manner.”
- The court ruled that the ad gave a false impression and stopped the ads.
**Example #2**
An advertisement claimed a nursing center “FAILED to prepare food that is nutritional, appetizing, tasty, attractive, well-cooked, and at the right temperature.”

In fact, analysis showed that:
- The survey referred to only a few residents that ate slightly burned toast.
- The survey data was over 19 months old.
- The court ruled in stopping the ad that the burnt toast was very different from the ad’s claim that “THESE DEFICIENCIES ARE KNOWN TO CAUSE SEVERE INJURY, HEALTH DETERIORATION, BED SORES AND EVEN DEATH.”

**Example #3**
An advertisement headlined that a nursing center “FAILED to provide care for residents in a way that keeps or builds each resident’s dignity and respect of individuality.”

In fact, analysis showed that:
- The facility gave several residents plastic drinking cups at meals instead of the required glass cups.
- The surveyor made no assertions about a “failure” to provide care to residents.
- The survey data was almost four years old.
- The court ruled the advertisement to be misleading and stopped it.

Read additional examples on page 38.

Providers who feel attacked by an unfavorable advertisement should first identify F-tags in the ad that have little to do with resident care. Research whether or not the surveyors identified any actual harm resulting from a citation that appears in the ad. Finally, only challenge advertisements referring to citations in the A through F range because these denote the same severity – no actual harm resulting to any resident.

**Date of Deficiency**
When a nursing center identifies an unfavorable advertisement, the provider should determine how long ago the survey citations mentioned in the advertisement actually happened. The best examples to use in court are advertisements that rely on citations that are several years old. For example, if an advertisement cites deficiencies from 2011, and the nursing center returned to substantial compliance at that time, then any advertisement using present tense verbs (e.g., have, has, etc.) is inaccurate and misleading.

If a nursing center is considering litigation, the best chance for success is to focus on older citations in the advertisement, at a low severity level and that have nothing to do with resident care.
Summary Statements
Most negative attorney advertisements, after listing the F-tags, include a summary statement. This statement attempts to connect the deficiencies to hypothetical resident injuries. Two actual examples of how a summary statement can deceive consumers follow:

**THESE DEFICIENCIES ARE KNOWN TO CAUSE SEVERE INJURY, HEALTH DETERIORATION, BED SORES AND EVEN DEATH.**

This statement creates an impression that the F-tag cited in the advertisement has (or will) cause “SEVERE INJURY, HEALTH DETERIORATION, BED SORES, OR EVEN DEATH.”

The problem with this language is there is no connection between the actual deficiency and the stated harm. The F-tags in the advertisement had nothing to do with resident care (this was the heading in the dumpster case, see example #1). The surveyor concluded that there was no actual harm to any residents. In addition, omitting the “old” timeframe from the ad weakens the content of the ad even more.

**POOR CARE AND UNDERSTAFFING CAN LEAD TO: BED SORES, CHOKING, FALLS, BROKEN BONES, DEHYDRATION, INFECTIONS/SEPSIS, MALNUTRITION, OR UNEXPLAINED DEATH**

This statement alleges that “poor care and understaffing” lead to a list of bad outcomes. When a nursing center can show that, despite this dire list, the surveyor did not cite staffing-related deficiencies, the difference—or disconnect—between the advertisement and the actual deficiency becomes apparent.

Consider Rating History
Nursing centers are sometimes frustrated with CMS’ Five-Star program because of errors, survey inconsistencies, and outdated information. The “reset” of the Five-Star program by CMS, and the redistribution of ratings among the various star classifications, has also been problematic to some providers.

Nevertheless, the staffing component of the Five-Star program can be crucial in challenging an advertisement that includes an “understaffing” statement. A high Five-Star rating, at four or five stars, can help to challenge claims of understaffing in court and is likely to help convince a judge to order that the attorney stop publishing negative advertisements, at least temporarily. Even a three star rating shows that, on the whole, the nursing center is performing equal to its peers.

Electronic Advertisement – Perpetual Existence
A provider must show “continued injury” to be successful in stopping attorneys from continuing to publish a negative advertisement about the care center. In most cases, a nursing center can point to the idea of “perpetual existence” of an advertisement in electronic form. That is, the advertisement will exist forever either as a stand-alone electronic advertisement on a newspaper’s web site or in the newspaper’s electronic archival system. The nursing center, or its attorney, should take screenshots of the online advertisement showing the date and time notations to demonstrate the ongoing injury to the court.

Note: Online advertisements can be difficult to find on a newspaper’s web site. Often a subscription is required to access an online edition or archived newspaper; but subscriptions are typically low cost and easily cancellable.
SHAPING A COMPLAINT

Causes of Action
One of the most important considerations in determining whether or not to go to court to stop a negative advertisement is to carefully analyze the appropriate cause of action for the lawsuit, including:

- State deceptive trade practices act claims
- State trade name/service mark anti-dilution claims
- State common law claims
- Federal Lanham Act claims

Filing a complaint under a state’s deceptive trade practices act or trade name/service mark anti-dilution statute is usually the most successful route. Generally, these statutes provide a precise remedy and a more efficient framework for a favorable outcome, including the recovery of costs and fees.

✓ State Deceptive Trade Practices Act Claims
Under the deceptive trade practice laws in Georgia and Ohio, for example, granting injunctive relief (a court order to stop the attorney from publishing negative advertisement) is possible without any evidence of monetary damages. See a complaint filed under Georgia’s Deceptive Trade Practices Act. Unfortunately, some states’ deceptive trade practices acts are limited. For example, in New Jersey and Pennsylvania there is no mechanism for providers to bring a complaint under those laws.

✓ State Anti-dilution Statutes
Anti-dilution statutes can also be effective in the fight against negative advertising. For example, in Georgia the anti-dilution law only requires evidence of a “likelihood” of injury to a business’s reputation or a “likelihood” of a weakened trademark or trade name by another’s wrongful use. The Georgia law does not require proof of confusion or competition, and also allows flexibility about who can bring the actual complaint. The flexibility about who can bring the suit, along with the limited evidence to show an injury, reduces the burden on the nursing center to show an injury from an unfavorable advertisement. It is important to work with local counsel to determine the appropriateness of using a state’s anti-dilution statute.

✓ State Common Law
Other traditional state common laws that a provider could use to bring a complaint asserting state common law claims against an attorney publishing negative advertisements include, but are not limited to:

- Defamation
- Invasion of privacy
- Tortious interference with contractual relations

A state specific legal analysis of any of these laws and potential causes of action is necessary to determine a nursing center’s probability of success.

✓ Federal Lanham Act
The federal Lanham Act may also be used as a vehicle for a complaint. Typically, a cause of action under the Lanham Act relates to trade infringement cases; but it also provides broad remedies ranging from injunctive relief to monetary damages. A Lanham Act complaint also brings the force and reach of the federal court to stop the unfair practice of targeting nursing centers with negative advertisements.

To win a Lanham Act complaint, a nursing center must show that:

- The attorney has made false or misleading statements about the nursing center’s services
• There is actual deception or at least a tendency to deceive a substantial portion of the relevant public
• The deception is likely to influence the consumer’s purchasing decisions
• The advertisement and/or services are within the United States
• There is a likelihood of injury in terms of declining sales, loss of “good will,” etc.

Providers should work closely with an attorney to select the proper cause(s) of action to fight back against negative and misleading advertising. In order to make strategic decisions promptly, it is imperative to engage counsel as soon as possible after the advertisement first appears. Just as important is deciding where to file the lawsuit.

Choosing a Venue
Along with strategically identifying the appropriate complaint, providers and their attorneys have to decide whether to file a cause of action in state or federal court.

State Court
Generally, state courts are the best location for these actions, particularly in smaller or rural jurisdictions where the nursing center may be one of the largest employers. In making the decision to file in state court rather than federal court, providers should take precaution to ensure that it stays there. “Diversity jurisdiction” is the legal term that allows an out-of-state attorney to move the litigation from state to federal court if the amount in controversy exceeds $75,000, and the attorney is a citizen of the same state as the targeted nursing center. Since many attorneys publish advertisements in states outside the state where their law firm is located, nursing centers should make every effort to seek only injunctive relief to keep the litigation in state court. In a state deceptive Trade Practice Act case, the nursing center can seek costs and fees; but should be careful that those costs and fees do not contribute to the amount in controversy, which would then allow the case to be moved to federal court.

Federal Court
A provider can file a complaint under the federal Lanham Act in either state or federal court. The offending attorney, however, can easily move the lawsuit to a federal court, and most probably will. Nonetheless, that fact should not deter the nursing center from initially filing a complaint in state court if that is the best location for obtaining a temporary injunction.

A provider should only file an action in federal court if the state laws are unfavorable to the nursing center. For example, if the state law does not allow a private cause of action under its deceptive trade practices act or consumer fraud statute, or if the trial location is not favorable, then the targeted nursing center may have to file a complaint in federal court. Even in federal court, the nursing center can use state common law complaints.
Remedies

Injunctive Relief
In most cases, the nursing center should ask for an injunction to require the attorney to stop publishing the offending advertisement now and in the future. This would include a request to remove any electronic versions of the advertisement. It is important to note, that while providers can request a formal retraction, this may have the unintended consequence of bringing the advertisement back into public focus and generate unwanted publicity.

Monetary Damages
In rare cases, a nursing center may want to ask for monetary damages. The nursing center should only consider this option when the damages are clearly quantifiable and it is not critical to the center’s success to keep the case in state court. Alleging damages can open the door to an out-of-state attorney asking to remove the case to federal court, which could trigger unwanted discovery into the center’s finances. If the nursing center decides it wants to request monetary damages, it should consider naming the local newspaper in the action to guard against removal to federal court (even though potential jurors may feel sympathy towards the newspaper).

Limiting the request to a temporary, preliminary, or permanent injunction is usually the best way to success for the nursing center.

CODE OF PROFESSIONAL CONDUCT COMPLAINTS
Although the State Bar or the state’s highest court usually enforces violations of attorney rules of professional conduct, making such allegations in a complaint – without seeking any relief in connection with those violations – can serve as further evidence of deception and wrongdoing in court.

Most states have rules of professional conduct covering attorney advertisements, and those rules generally prohibit false and misleading advertising. Generally, the advertisements targeting nursing centers fail to comply with the technical requirements for attorney ads. For example: attorney rules of professional conduct often require that advertisements contain, among other things, the name of at least one lawyer responsible for the advertisement; or a disclaimer somewhere on the advertisement that it is, in fact, an advertisement.

Many unfavorable advertisements also fail to live up to both the spirit and letter of these rules, and a provider that points out these violations in conjunction with other evidence showing the false and misleading nature of the advertisement, helps set the overall tone of the court proceedings.

NON-JUDICIAL EFFORTS

Bar Grievances
While court actions are the primary weapon in the fight against negative advertisements, nursing centers also can file stand-alone, or parallel, complaints with the state’s professional licensing body for attorneys (typically the State Bar), which has the authority to penalize attorneys who violate the state’s professional rules of conduct. These penalties can include anything from a simple reprimand to cancelling an attorney’s license for repeated violations.

If a court determines the advertisement is false and misleading, then the State Bar should make the same decision. Likewise, if the court fails to find an advertisement is deceptive, it is unlikely the State Bar will make a contrary finding.

Consumer Protection Agency Complaints
In addition to filing a state bar grievance, some states have created a separate agency to protect consumers and businesses from unlawful, deceptive and unfair practices in the marketplace. These agencies will pursue actions on behalf of
the consumer or business and enforce applicable laws whenever a substantial public interest is at stake. When violations occur, the agency typically has the power to require the offending party to change its business practices and/or pay restitution, civil penalties, and applicable administrative fees. Much like the bar grievance, state agencies will follow the court’s lead with respect to a determination that the advertisement is false and misleading.

A nursing center should bring a bar grievance or state consumer protection agency complaint, even if the outcome might not be successful. This is just another opportunity to go on the offensive against the attorney publishing unfavorable advertising against the nursing care center.

Regulatory Efforts
Some headway has been made in convincing state regulatory agencies to work together with providers to stop attorneys from improperly using survey information as the basis for false and misleading advertising targeting nursing care centers.

In 2014, for example, the Pennsylvania Department of Health (DOH) agreed to post the following statements on its website: “The Statement of Deficiencies is not intended to be evidence of compliance with any legal standard of care in third party litigation. The Department also does not intend for its inspection reports to be used in advertisements for legal services or as a basis for solicitations of any type.” This announcement provided both clarity and a welcome relief for care centers that fight an uphill battle against an increasing number of malpractice claims.

Unfortunately, the Pennsylvania DOH has more recently moderated its posting on the use of surveys in advertising. The DOH now maintains, “The Statement of Deficiencies is not intended to be evidence of compliance with any legal standard of care in third party litigation. Health care facilities are required to submit a Plan of Correction in response to the Statement of Deficiencies. The Plan of Correction is mandatory, regardless whether the facility agrees with Department findings or not, and is the means by which the Department monitors and ensures correction of deficiencies.” Importantly, the department notes that a care center’s plan of correction is not an admission of wrongdoing.

Despite the nuanced rollback of the Pennsylvania DOH’s position on using survey deficiencies as the basis of negative advertisements, nursing care centers should consider a similar regulatory approach or continued effort towards obtaining similar language in their individual states.

Legislative Efforts
As evidenced by recently passed legislation, state legislatures are finally joining the fight against false and misleading advertising against nursing and assisted living centers. In some instances, state trial lawyers associations have been surprisingly receptive and have encouraged, or at least refrained from opposing, efforts to curtail negative advertisements, at least by out-of-state law firms. Wherever possible, engaging trial attorneys in a particular state may lead to quicker passage of legislation addressing false and misleading advertisements.

For more information, please see the Legislative Strategies section.

Working with the Media
Since the goal of the nursing center should always be to stop the publication of negative advertising, the importance of reaching out to the local media, particularly in smaller jurisdictions, cannot be overstated. This work should be ongoing and not just done when a crisis hits.

Local newspapers consider both themselves and the nursing center as part of the community. If positive relationships are created and ongoing, newspaper staff may not only notify the nursing center when an attorney attempts to place the
advertisement; but also refuse to run the negative advertisement. Some local newspapers have proactively refused to publish advertisements in the following cases:

• A local newspaper—named in the initial lawsuit—entered into a consent order not to publish any advertisement from the attorney in the future.

• After receiving a request to run a full-page color advertisement on behalf of a nationally known law firm, a newspaper notified the care center and then (instead of publishing the advertisement) decided to issue the following editorial criticizing the law firm’s advertising tactics:

“A full-page color advertisement in this week’s edition of The News-Reporter would have implied that a [local] business might have been responsible for abuse and neglect resulting in injury and even death. The advertisement came from a law firm seeking “victims” of the suggested abuse and neglect.

“The advertisement will not run in this newspaper. We have returned the check.

“Without disclosing the target of the advertisement, it may be difficult to convey the seriousness of the advertisement’s accusations. The local business in question, as far as this newspaper can determine after a preliminary search, is upstanding and among the best of its kind in the state… We will not be part of such an effort...”

We can learn additional information from nursing centers that have reached out to local newspaper editors fearing that another round of targeted attack advertisements may be on the way:

• One newspaper publisher did not print a negative advertisement after an attorney refused his request to modify the language in the advertisement.

• Another publisher told nursing center representatives “FYI - we ain’t running this [attack advertisement]. I’d heard this type advertisement was coming... ambulance-chasing lawyers targeting specific nursing homes.”

In another instance, a publisher apologized for printing a false and misleading advertisement and offered to:

• Run a half-page advertisement challenging the allegations in the previous advertisement free of charge
• Run a half-page advertisement in a sister publication supporting the nursing center free of charge
• Refrain from running any future advertisements submitted by the attorney

These cases illustrate that engaging with the local media in advance to prevent unfavorable advertising in the future is critical. This proactive approach is a more efficient method for stopping advertising than going to court.

Of course, there is no guarantee that the above outcomes will occur. Newspapers need advertising revenue to keep the presses running and may run an advertisement attacking a facility. It is rare that small newspaper publisher receive a request to run a full-page, color advertisement, and the revenue generated by that kind of buy might be significant to their business.

Finally, be aware that attorney law firms who are in the business of suing nursing and assisted living centers fund some nonprofit citizen advocacy groups. These types of nonprofits can and
should be exposed in the media. Go to GuideStar and set up a free account to find important nonprofit information (including IRS 990 forms) to ascertain whether or not attorneys are in fact supporting a nonprofit. For example, Families for Better Care, operating in Florida, received $114,700 in 2013 from Wilkes & McHugh as indicated on the nonprofit’s 2013 IRS 990 form. Many law firms do not bother to fund nonprofit advocacy organizations but instead set up their own web pages to resemble a consumer site. For example, the Nursing Home Complaint Center appears to be run by a law firm that routinely sues nursing and assisted living centers. These types of organizations also should be exposed in the media.

For more information, please visit the Communication Strategies section.

HALT NEGATIVE ADVERTISEMENTS
(CONTINUED FROM PAGE 31)
Following are additional examples of real situations where judges halted advertisements.

● An advertisement stated that a facility was cited for “FAILURE to assist those residents who need total help with eating/drinking, grooming and personal and oral hygiene,” along with a date reference to a survey. However, the actual citation alleged that a single resident’s nails were too long and had some dirt under them. There was no allegations of any “failure” to assist residents with eating or drinking. Moreover, the actual alleged citation occurred almost four years earlier.

● A law firm’s advertisement claimed that a facility was cited for “FAILURE to provide care for residents in a way that keeps or builds each resident’s dignity and respect of individuality,” along with a date reference to a survey. The citation merely alleged that a nursing assistant discussed a resident’s bowel movement too loudly in a hallway. The government made no allegations of any “failure” to provide care to residents.

● A law firm’s advertisement stated that a facility was cited for “FAILURE to dispose of garbage and refuse properly,” along with a micro-font date reference to a survey. The citation had nothing to do with resident care, health, or safety, but instead alleged that raccoons were getting into the outside trash dumpsters and scattering trash on the ground. The events had occurred more than three years previously.

As can be seen from these examples, a detailed analysis, and comparison of the facility’s actual survey reports against the advertisement’s language, is critical.
Legislative Strategies

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The contents of this document may represent some preferred practices, but do not represent minimum standards, “standards of care,” or industry-wide norms for nursing centers, assisted living communities or other providers. As always, a provider or community is responsible for making clinical decisions and providing care and services that are best for each individual person. In addition, the contents of this document are for general informational purposes only and may not be substituted for legal advice.
The reality of caring for the elderly and individuals with disabilities in today’s litigation climate is that nursing and assisted living centers are likely to face potential lawsuits in the regular course of doing business. The frequency and severity of those lawsuits will probably depend on the state and city where the facility is located.

According to a 2014 study by Aon, liability costs for nursing and assisted living centers are expected to increase by 5 percent with an estimated national loss rate of $2,030 per occupied bed in 2015. The annual study, Long Term Care General Liability and Professional Liability Actuarial Analysis, provides estimates of loss rates, which are the annual amount per occupied bed required to defend, settle, or litigate claims in a given year (see page 49).

The Aon study also shows that states that have enacted substantive tort reform laws experience significantly lower loss rates compared to those states with weak or relatively no tort reform laws.

For example, limits on damage awards are constitutionally prohibited in Kentucky, which has the highest projected loss rate of $9,220 per bed in 2015. Texas, on the other hand, which enacted substantive tort reform laws in 2003, has a projected loss rate of $320 per bed in 2015. For a nursing or assisted living center with 100 occupied beds, this means an annual cost to defend, settle, or litigate claims of $922,000 in Kentucky versus $32,000 in Texas.

The diversion of monies for litigation costs away from a nursing or assisted living center’s ability to improve patient care is concerning. State tort reform efforts can be an effective method for decreasing lawsuits that harm not only providers, but residents and taxpayers.

AHCA/NCAL encourages state affiliates to push for effective tort reform. Because of the various political make-up and influences, the type of tort reform that is realistically attainable varies. AHCA/NCAL hopes this Toolkit provides options for state affiliates and members to explore.

**Necessity of Tort Reform**

Before state affiliates and members begin to undertake tort reform efforts, they should consider whether such efforts would benefit providers. Some states do not need tort reform, as they already have adequate protections. If a state can answer “yes” to most of the questions below, it likely has adequate tort laws:

1. Are there legal limitations on non-economic damages in lawsuits against centers?
2. Are there legal limitations on economic damages (e.g., medical expenses, lost wages or rehabilitation costs) in lawsuits against centers?
3. Are there limitations on punitive damages in lawsuits against centers?
4. Are there other legal protections needed to safeguard centers in civil litigation (e.g., non-criminal)? Examples of other legal provisions to protect centers in civil litigation include:
   - mandatory mediation or other alternative dispute resolution procedures
   - discovery provisions unique to centers
   - protections against false and misleading advertising practices from trial attorneys

Of course, state affiliates and members also should consider the political climate and the liability costs to the states. The decision to initiate actions to obtain tort reform often depends on a particular political make-up and the level of opposition that will be faced.

**Tort Liability**

Before delving into the specifics of what actions might be necessary to obtain state tort reform, it is important to understand the basics.
Define
A tort is a civil (i.e., non-criminal) wrong-doing that is caused by one person on another, either intentionally or negligently, and allows the injured person to sue for damages in court. **Negligence** is defined as conduct “which falls below the standard established by law for the protection of others against unreasonable risk of harm.”

Damages
A tort lawsuit includes complaints of **medical malpractice, personal injury, bad faith** or **product liability**. If an injured party can prove negligence or wrongful conduct in court, then they may be entitled to economic or non-economic damages (e.g., **compensatory damages**). Economic damages are measurable monetary losses from an injury (e.g., medical expenses, lost wages or rehabilitation costs). **Non-economic damages** are monetary relief for more subjective aspects of loss and harm, such as “pain and suffering.” These two ideas are hard to quantify and open to broad interpretation and are often expensive.

**Punitive damages** (e.g., **exemplary damages**) are another type of damage award. Punitive damages do not compensate the injured person for losses; but instead are meant to punish and deter particularly egregious conduct. States that impose monetary **caps** on punitive damages usually treat them separately from compensatory non-economic damages.

Reform
State tort reform is proposed changes to the current state tort systems (e.g., the legal systems created to provide civil justice to the injured party). The most common tort reform is a limit or “cap” on non-economic and punitive damages; but this is not the only type of tort reform.

**Texas—The Gold Standard of Tort Reform**
Texas is considered to have the “gold standard” in health care tort reform. For a long time, Texas was known as a lawsuit magnet for tort litigation; but Texas was finally successful in passing substantive tort reform (**H.B. 4**) in 2003. In 2002, Texas had a loss rate of $6,080 per bed (the year before tort reform). In 2004, Texas’ loss rate dropped 80 percent to $1,260 per bed (the year after tort reform). The Texas legislature’s sweeping changes to the state’s tort system in 2003 includes complaints against physicians, “health care institutions” and “health care providers.” Important tort reform provisions in H.B. 4 include:

- **Caps on Non-Economic Damages:**
  Non-economic damages are capped at $250,000 for physicians and $250,000 for health care institutions. **TEX. CIV. PRAC. & REM. CODE § 74.301(a) - (b).**

- **Statute of Limitations:**
  A health care complaint must be filed within two years from the time of the injury or from the date the health care treatment is completed. Sometimes the actual date of the injury is impossible to ascertain. In those instances, the statute of limitations begins on the last date of treatment. There is no “discovery rule” applicable. **TEX. CIV. PRAC. & REM. CODE § 74.251(a).**

- **Expert Reports:**
  An injured party must file an expert report...
(e.g., a written report by an expert regarding his/her opinion about the harm suffered from failing to meet the standard of care).

**TEX. CIV. PRAC. & REM. CODE § 74.351**

- **Survey Documents:**
  Survey documents are not admissible in any nursing or assisted living center litigation, unless the survey documents relate directly to the particular incident and the particular individual who brought the complaint. **TEX. HUM. RES. CODE ANN. § 32.062**

- **Wrongful Death and Survival Claims:**
  For wrongful death and survival complaints, all damages (excluding economic damages for past and future medical expenses) are capped at $500,000. The $500,000 cap is subject to changes based on the consumer price index published in the Bureau of Labor Statistics of the United States Department of Labor. **TEX. CIV. PRAC. & REM. CODE § 74.303**

- **Limits on Medical Expenses:**
  Although H.B. 4 excludes medical and health care expenses from the statutory caps, § 41.0150 of the Texas Civil Practice and Remedies Code limits the recovery of medical expenses to costs "actually paid or incurred by or on behalf of the claimant." **TEX. CIV. PRAC. & REM. CODE § 41.0150**. As a result, an injured party’s recovery of medical and health care expenses under his/her health care policy may be admissible in court and used to reduce the nursing or assisted living center liability.

As a result of these reforms, the Texas lawsuit environment has improved considerably, and had far-reaching effects for both health care providers, as well as decreasing insurance claims for medical malpractice. As already mentioned, not every state can reach this level of tort reform; but these provisions can serve as a model for tort reform in individual states.

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**Advocating for Tort Reform**

Aggressive attorneys, specializing in litigation against nursing and assisted living centers, often look for cases in states with weak tort laws, and where they believe they can easily win large damage awards. In a state where nursing and assisted living center litigation is exploding, advocating for tort reform laws is critical. Advocates are typically most successful when the state legislature is conservative and litigation is particularly adverse and when the following strategies are implemented:

- Recognition that any successful effort will require significant time and funding
- The entire health care community (e.g., nursing and assisted living centers, hospitals, home health providers, physicians, etc.) must be consistently communicating and working together (usually working as a coalition)
- The coalition must develop and advocate its message in a unified and simple format (e.g., if consumers want access to care, then tort reform legislation is the solution, etc.)
- The coalition’s strategy must include a public component (e.g., education, grass roots, etc.). Here is one example from West Virginia.
- There must be public support for the coalition’s effort – specifically, the public must believe the coalition is advocating for a solution to existing problems
- The coalition must draft tort reform legislation that provides a solution
- There must be continued effort after tort reform is passed so that what has been accomplished is not lost in the future (e.g., California advocates led a successful effort in 2014 to ensure that the state’s cap on medical malpractice awards was not raised above the $250,000 cap)

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**State Specific Tort Reform**

Texas is not the only state to have enacted substantive tort reform that specifically limits non-
economic damages in medical negligence actions against nursing and assisted living centers. Other states that have enacted specific tort reform laws include:

- **Missouri**: The Missouri Governor signed into law Senate Bill 239 on May 8, 2015. This bill amends R.S.Mo. § 538.210 to create new limitations on the recovery of non-economic damages in medical negligence actions filed against health care providers to include nursing centers. Under the new law, injured parties cannot recover more than $400,000 for non-economic damages in medical malpractice actions. If the case involves claims of catastrophic personal injury or death, the cap is increased to $700,000.
- **California**: The California legislature resolved its health care crisis in 1975 with passage of the Medical Injury Compensation Reform Act (“MICRA”). MICRA has worked successfully to hold down health care costs and has achieved stability in California’s medical liability system. One of MICRA’s key components is a $250,000 limit on non-economic damages in personal injury actions against health care providers based upon professional negligence. See Cal. Civ. Code § 3333.1(a), 3333.2(b) (2). Nursing centers are considered a health care provider under MICRA. However, assisted living and residential care centers are not considered health care providers. Assisted living facilities, referred to in California regulations as “Residential Care Facilities for the Elderly” are state-licensed facilities that provide care to elders and certain other disabled individuals who are not sick enough to need full-time care offered by a nursing center.
- **North Carolina**: The North Carolina legislature enacted comprehensive medical malpractice tort reform in 2011 which expanded the definition of “health care provider” in N.C. Gen. Stat. § 90-21.11 to make it clear that the medical malpractice reforms apply to nursing and assisted living centers, as well as physicians, hospitals and other health care providers. Under the 2011 law, plaintiffs can not recover more than $500,000 for non-economic damages in medical malpractice actions. N.C. Gen. Stat. § 90-21.19.
- **West Virginia**: On March 18, 2015, the West Virginia governor signed into law Senate Bill 6, a significant tort reform measure to protect assisted living and nursing centers in the state. Senate Bill 6 broadens the definition of “health care facility” under W.Va. Code 55-7B-2(f) to include nursing and assisted living centers. Under the new law, an injured party cannot recover more than $250,000 for non-economic damages. If the case involves complaints of wrongful death or permanent and substantial physical deformity the cap is increased to $500,000. W.Va. Code 55-7B-8.

**Traditional Tort Reform Provisions**

“Traditional” tort reform commonly refers to laws or proposals that limit some type of damages award that an injured party can receive after a
successful lawsuit. Traditional tort reform legislation generally includes:

- limits on punitive damages
- limits on non-economic damages
- limits on contingency fees
- limits on attorney fees

The following states have enacted traditional tort reform laws that may be helpful to advocates when planning or drafting state tort reform legislation:

- **Alaska**: AS § 09.17.010 (non-economic damages cap) and AS § 09.17.020 (punitive damages cap)
- **Colorado**: C.R.S.A. § 13-64-302 (non-economic damages cap)
- **Georgia**: O.C.G.A. § 51-13-1 (non-economic damages cap)
- **Hawaii**: Haw. Rev. Stat. § 663-8.7 (non-economic damages cap)
- **Idaho**: Idaho Code Ann. § 6-1603 (non-economic damages cap) and Idaho Code Ann. § 6-1604 (punitive damages cap)
- **Indiana**: Ind. Code Ann § 34-18-14-3 (economic and non-economic damages cap) and Ind. Code Ann § 34-51-3-4 (punitive damages cap)
- **Louisiana**: La Rev. Stat. § 40:1299.42 (limits all economic and non-economic damages except future medical expenses)
- **Maryland**: Md. Code Ann., Cts. & Jud. Proc. § 3-2A-09 (non-economic damages cap)
- **Massachusetts**: Mass. Gen. Laws Ch. 231, § 60H (non-economic damages cap)
- **Michigan**: Mich. Com. Laws § 600.1483 (non-economic damages cap)
- **Mississippi**: Miss. Code Ann § 11-1-60 (non-economic damages cap) and Miss. Code Ann. § 11-1-65 (punitive damages cap)
- **Montana**: Mont. Code Ann. § 25-9-411 (noneconomic damages cap) and Mont. Code Ann. § 27-1-220 (punitive damages cap)
- **Nevada**: Nev. Rev. Stat Ann. § 41A.035 (non-economic damages cap)
- **New Mexico**: N.M. Stat. § 41-5-6 (non-economic damages cap)
- **North Dakota**: N.D. Cent. Code § 32-42-02 (non-economic damages cap) and N.D. Cent. Code § 32-03.2-11 (4) (punitive damages cap)
- **Ohio**: Ohio. Rev. Code Ann. § 2323.43 (non-economic damages cap) and Ohio. Rev. Code Ann. § 2315.21 (punitive damages cap)
- **South Dakota**: S.D. Codified Laws § 21-3-11 (non-economic damages cap)
- **Utah**: Utah Code Ann. § 78B-3-410 (non-economic damages cap)
- **Wisconsin**: Wis. Stat. Ann § 893.55 (non-economic damages cap)

Non Traditional Tort Reform Provisions

Limitations on non-economic and punitive damages, although effective, may not be politically feasible. Many state legislatures have and will
continue to push back on traditional tort reform measures, which limit some type of damages award. However, there are other creative legislative concepts that will positively impact the litigation climate of nursing and assisted living centers despite not limiting damage awards. Examples of some of these “non-traditional” tort reform provisions are listed below:

1. Protections from Misleading Advertising and Negligence Per Se Claims:
The Georgia Governor signed into law House Bill 342 on May 12, 2015. This new law protects nursing and assisted living centers from misleading advertising, as well as federal and state regulatory deficiency reports, commonly called survey documents, from being used as the basis for a claim of negligence per se. Under the new law, findings from a survey document may not be used in an advertisement unless the advertisement includes:

- the date the survey was conducted
- a statement that nursing homes are surveyed at least once every 15 months
- a disclosure of whether the deficiency has been corrected
- the number of findings in the survey and the severity level for each finding
- the average number of findings for other facilities in the state
- a disclosure of whether the deficiency allegedly caused harm to any residents
- a statement that the advertisement is neither authorized nor endorsed by any government agency

Anyone violating the advertising provisions under House Bill 342 is liable for attorney fees and expenses of litigation incurred in any litigation to stop the unlawful ads.

House Bill 342 also provides that federal and state survey deficiencies shall not constitute negligence per se. These restrictions are important because negligence per se has a much lower burden of proof and has therefore been exploited in litigation against nursing and assisted living centers. Negligence per se is a legal doctrine which concludes that a defendant is “negligent” if the defendant acts inconsistently with a statute or regulation.

This legal doctrine is a strict liability doctrine because it allows the plaintiff alleging negligence per se to not have to prove that a healthcare provider breached a professional standard of care.

The following other states also restrict the use of survey documents in civil actions and/or advertisements against nursing and assisted living centers: West Virginia (W.Va. Code 55-7B-7a); Texas (Tex. Hum. Res. Code Ann. § 32.062); Ohio (Ohio. Rev. Code Ann. 5165.67); Kansas (Kan. Stat. Ann. 39-935); and Tennessee (H.B. 714 (signed into law on May 18, 2015). Ohio Rev. Code Ann. 5165.67, which limits the use of survey documents in both civil actions and advertisements, provides in part:

- The results of a survey of a nursing facility … including any statement of deficiencies and all findings and deficiencies cited in the statement on the basis of the survey, shall be used solely to determine the nursing facility’s compliance with certification requirements or with this chapter or another chapter of the Revised Code. Those results of a survey, that statement of deficiencies, and the findings and deficiencies cited in that statement shall not be used in either of the following:
  (A) Any court or in any action or proceeding that is pending in any court and are not admissible in evidence in any action or proceeding unless that action or proceeding is an appeal of an administrative action by the department of Medicaid or contracting agency under this chapter or is an action by any department or agency of the state to enforce this chapter or an other chapter of the Revised Code;
  (B) An advertisement, unless the advertise-
ment includes all of the following:
(1) The date the survey was conducted
(2) A statement that the department of health conducts a survey of all nursing facilities at least once every fifteen months
(3) If a finding or deficiency cited in the statement of deficiencies has been substantially corrected, a statement that the finding or deficiency has been substantially corrected and the date that the finding or deficiency was substantially corrected
(4) The number of findings and deficiencies cited in the statement of deficiencies on the basis of the survey
(5) The average number of findings and deficiencies cited in a statement of deficiencies on the basis of a survey … during the same calendar year as the survey used in the advertisement
(6) A statement that the advertisement is neither authorized nor endorsed by the department or any other government agency

2. Ex Parte Communications with Complaining Party’s Health Care Providers:
Various states, including Tennessee, have enacted statutes that provide for a Health Care Portability and Accountability Act (HIPAA) compliant procedure where the care center or its counsel may petition the court for permission to interview the complaining party’s treating health care providers outside the presence of the complaining party and/or the complaining party’s counsel. Tenn. Code Ann. § 29-26-121(f) provides in part:
(1) Upon the filing of any “health care liability action,” … the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant’s counsel, with the relevant patient’s treating “health care providers,” as defined by SC 29-26-101. Such petition shall be granted under the following conditions:
(A) The petition must identify the treating health care provider or providers for whom the defendant or defendants seek a qualified protective order to conduct an interview;
(B) The claimant may file an objection seeking to limit or prohibit the defendant or defendants or the defendant’s or defendants’ counsel from conducting the interviews, which may be granted only upon good cause shown that a treating health care provider does not possess relevant information as defined by the Tennessee Rules of Civil Procedure; and
(C) (i) The qualified protective order shall expressly limit the dissemination of any protected health information to the litigation pending before the court and require the defendant or defendants who conducted the interview to return to the health care provider or destroy any protected health information obtained in the course of any such interview, including all copies, at the end of the litigation;
(ii) The qualified protective order shall expressly provide that participation in any such interview by a treating health care provider is voluntary.

(2) Notwithstanding any other provision of statutory or common law to the contrary, any healthcare provider’s disclosure of protected health or other relevant information, including, but not limited to, opinions as to the standard of care of any defendant, compliance with or breach of the standard, causation of the alleged injury, or any other information relevant to the early analysis and evaluation of the plaintiff’s claim, shall
be deemed a permissible disclosure under Tennessee law.

(3) Nothing in this part shall be construed as restricting in any way the right of a defendant or defendant’s counsel from conducting interviews outside the presence of claimant or claimant’s counsel with the defendant’s own present or former employees, partners, or owners concerning a health care liability action.

3. Expert Reports:
Approximately twenty-four states, including Michigan and Texas, require an injured party to file an expert report (e.g., a written report by an expert regarding his/her opinion about the harm suffered from a particular defendant’s failure to meet the standard of care). Because expert testimony is crucial in a nursing or assisted living center malpractice case, knowing what specific conduct the complaining party’s experts have called into question is critical to both the defendant’s ability to prepare for trial and the trial court’s ability to evaluate the viability of the plaintiff’s claims. This makes eliciting an expert’s opinions early in the litigation an obvious place to start in attempting to reduce lawsuits. Mich. Com. Laws § 600.2912d reads in part:

… the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff’s attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff’s attorney reasonably believes meets the requirements for an expert witness … The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff’s attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care
(b) The health professional’s opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice
(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care
(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff’s attorney an additional 28 days in which to file the affidavit required under subsection (1)

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint

4. Liability Protection for Passive Investors of Nursing and Assisted Living Centers:
In several recent lawsuits filed in Florida prior to 2014, an owner of a nursing center who was not involved in its management was found liable for substantial damages when the nursing center was successfully sued.

Therefore, the Florida Legislature in 2014 passed S.B. 670 to shield a passive investor in a nursing center from liability. S.B. 670 amends Fla. Stat. Ann § 400.023 to limit the parties which can be sued in an initial pleading against a nursing center to the center licensee and its management or consulting company, managing employees, and direct caregivers. The new law specifically states that passive investors are shielded from liability, a step aimed at ensuring that capital continues to flow to the state’s facilities.
5. **Liability Protection for Officers, Directors, and Owners of Nursing and Assisted Living Centers:**

*H.B. 661*, which was introduced in the Florida legislature in 2011 but unfortunately not signed into law, sets forth several creative legislative concepts that can positively impact the litigation climate of nursing and assisted living centers. For example, *H.B. 661* would require a court to hold an evidentiary hearing to determine if there is a reasonable basis to find that an officer, director or owner of a nursing center acted outside the scope of his or her duties in order for a lawsuit to proceed against that officer, director, or owner. *H.B. 661* provides in part:

(2) A cause of action may not be asserted individually against an officer, director, owner, including any designated as having a “controlling interest” on the application for nursing home licensure, or agent of a licensee or management company under this part unless, following an evidentiary hearing, the court determines there is sufficient evidence in the record or proffered by the claimant that establishes a reasonable basis for a finding that:

- The officer, director, owner, or agent breached, failed to perform, or acted outside the scope of duties as an officer, director, owner, or agent; and
- The breach, failure to perform, or conduct outside the scope of duties is a legal cause of actual loss, injury, death, or damage to the resident.

(3) If an action is brought by or on behalf of a resident under this part, a cause of action under...may not be asserted against an employee, officer, director, owner, or agent of a licensee or management company.

6. **Punitive Damages Safeguard:**

*H.B. 661* would also require a court to hold an evidentiary hearing before allowing a claim for punitive damages to proceed. *H.B. 661* provides in part:

(1) … A claim for punitive damages may not be brought unless there is a showing of admissible evidence that has been proffered by the parties … The trial judge shall conduct an evidentiary hearing and weigh the admissible evidence proffered by all parties to ensure that there is a reasonable basis to believe that the claimant, at trial, will be able to demonstrate by clear and convincing evidence that the recovery of such damages is warranted. A discovery of financial worth may not proceed until the pleading on punitive damages is approved.

7. **“I'm Sorry” Laws:**

Several states have enacted “I’m Sorry” laws that exclude certain statements and expressions of humility and compassion made by healthcare professionals from being admissible in a civil suit. For more information on the “I’m Sorry” laws, refer to the [Legal Strategies](#) in this Toolkit.

**Conclusion**

AHCA encourages state affiliates and its members to push for effective state tort reform when it is in the best interest of the profession. Tort reform efforts are a “heavy lift” legislatively. These strategies should provide concepts that will make the “lift” a lighter load. AHCA welcomes the opportunity to collaborate with state affiliates to enact effective tort reform.
AON STUDY SUPPORTS TORT REFORM

Aon Study
Almost every year since 2002, at the request of the American Health Care Association (AHCA), Aon Risk Consultants (Aon) has conducted the Aon study, an actuarial analysis of the cost of general liability and professional liability (GL/PL) claims to the long term care profession operating in the USA. The specific objectives of the Aon studies were to:

- Identify the overall trends in the cost of GL/PL claims for long term care by monitoring the change in the number of claims (frequency), the size of claims (severity), and the liability costs relative to occupied long term care beds (loss rates)
- Identify state specific trends in the cost of GL/PL claims for long term care
- Identify trends in frequency and severity over all and on a state-by-state basis
- Present closed claim statistics related to report lag, closing lag and expense versus indemnity (e.g., protection from loss and damages filed by another person)

Importance of the Aon Study
The Aon study is important to AHCA affiliates and members who are working to achieve substantive state tort reform. The study confirms that states that have enacted substantive tort reform laws experience significantly lower frequency, severity, and loss rates compared to those states with weak or relatively no tort reform laws (see tables). The diversion of monies for litigation costs away from a nursing or assisted living center’s ability to provide or improve patient care is concerning.

AHCA member participation in the Aon study, by submitting company data, is essential to ensure that the annual study continues to be a great resource for state affiliates and members.

History of Aon Studies
To see all the Aon Studies go to:

- Aon Study 2015
- Aon Study 2014
- Aon Study 2013
- Aon Study 2012
- Aon Study 2011
- Aon Study 2010
- Aon Study 2009
- Aon Study 2008
- Aon Study 2007
- Aon Study 2005
- Aon Study 2004
- Aon Study 2003
- Aon Study 2002
The following tables show the growth rates of frequency, severity and loss rate in a particular state.

Each state is color-coded according to when substantive tort reform was enacted – yellow states enacted tort reform before or after a comparison year, and blue states did not enact tort reform.

Overall, the tables show the yellow states were more likely to have negative growth rates compared to the blue states. The yellow states also had slower growth rates. This pattern was also true for severity and loss rates.
2005-2014

Percent change in indemnity claims per 100 occupied beds from 2005 to 2014
Negative values indicate decrease in indemnity claims per 100 occupied beds
Yellow states implemented tort reform in the years prior to 2014

Percent change in severity of claim from 2005 to 2014
Negative values indicate decrease in severity
Yellow states implemented tort reform in the years prior to 2014

Percent change in loss rate per 100 beds from 2005 to 2014
Negative values indicate decrease in loss rate
Yellow states implemented tort reform in the years prior to 2014

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The American Health Care Association and National Center for Assisted Living (AHCA/NCAL) represents more than 12,000 non-profit and proprietary skilled nursing care and rehabilitation centers, assisted living communities, and homes for individuals with intellectual and developmental disabilities. By delivering solutions for quality care, AHCA/NCAL aims to improve the lives of the millions of frail, older adults and persons with disabilities who receive long term or post-acute care in our member facilities each day. For more information, please visit www.ahca.org or www.ncal.org.

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The contents of this document may represent some preferred practices, but do not represent minimum standards, “standards of care,” or industry-wide norms for nursing centers, assisted living communities or other providers. As always, a provider or community is responsible for making clinical decisions and providing care and services that are best for each individual person. In addition, the contents of this document are for general informational purposes only and may not be substituted for legal advice.