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June 4, 2020

TO: ASM. JIM WOOD, CHAIR, ASSEMBLY HEALTH COMMITTEE
ASM. ADRIN NAZARIAN, CHAIR, ASSEMBLY AGING AND LONG-TERM CARE COMMITTEE

FR: CONSUMER ATTORNEYS OF CALIFORNIA
ADVOCATE CONTACTS: NANCY PEVERINI AND JACQUIE SERNA

RE: Asm. Health & Aging Committee Oversight Hearing--COVID-19 Outbreak in Skilled Nursing Facilities (SNFs) 6/9/20

Thank you for giving Consumer Attorneys of California the opportunity to comment on the important issue of ensuring that our seniors and those with disabilities are protected during this pandemic. Nursing homes account for nearly fifty percent of COVID-19 deaths in California and new studies show that people of color are particularly impacted. It is crucial that the Legislature determine why these deaths are occurring and what steps we can take to protect our most vulnerable members of society.

The COVID-19 pandemic has shed light on the staffing shortages, inadequate conditions and poor responses to emergencies that have plagued skilled nursing facilities for years. There is a pattern—facilities that were understaffed and had high levels of deficiencies and citations pre-pandemic, correlate with many of the worst COVID-19 infection and death rates during the pandemic. This is supported by a GAO study dated May 20, 2020, which describes the prevalence of infection prevention and control deficiencies in nursing homes prior to the COVID-19 pandemic and draws a correlation between facilities with deficiencies in 2018-2019 and current COVID-19 outbreaks. Infection Control Deficiencies Were Widespread and Persistent in Nursing Homes Prior to COVID-19 Pandemic, GAO-20-576R: Published: May 20, 2020 (accessible at https://www.gao.gov/assets/710/707069.pdf). In short, the current crisis of bad care in some facilities is an extension of past harmful practices.

For example:

- During the 2017 Santa Rosa fires, two long-term care facilities abandoned dozens of elderly residents during the fires, leaving panicked family members and emergency responders to evacuate the seniors. In Humboldt, it took legal action to force a major nursing home chain to provide adequate staffing for its residents.
- Certain counties like Yolo, Los Angeles, Orange, Santa Clara, Alameda, and Contra Costa have some of the highest nursing home COVID-19 fatality rates and must be accountable under the law if they abuse or neglect residents.
- In one Los Angeles Area nursing home (Hollywood Premier Healthcare Center), at least sixteen elderly residents are now dead, seventy- two residents have been infected, along with thirty-seven staff for a total of 109 infections. Family members allege that at one point only two nurses were caring for eighty-three residents.

We believe that COVID-19 outbreaks are tied to poor facility performance, poor management by nursing home owners, and poor enforcement and are not random. As a priority, the Legislature must

demand better transparency and obtain specific data to track the connection between facilities that have a pattern and practice of violating the law and the number of COVID-19 infections and deaths.

Problems CAOC members have identified in response to the pandemic include:

- Nursing staff is being allowed to work at multiple SNFs, thus heightening the risk of COVID spread;
- SNFs are not informing third party vendors of COVID outbreaks, thus leading to new infections;
    - For example, in one of the worst SNF COVID outbreaks in Los Angeles (the National Guard was called in), neither the funeral home that came to retrieve a COVID victim nor a mobile imaging company that came to conduct lung imaging was informed of the COVID outbreak;
    - In another example, a paramedic and Kaiser employee became COVID infected after treating an elder due to lack of protective gear.
- SNFs that had staffing problems pre-pandemic are still being allowed to care for COVID patients;
- The worst of the worst SNFs are being allowed to be turned into COVID-only facilities – this is a death sentence for residents. Hospitals are where COVID cases should be treated, not nursing homes with vulnerable senior populations;
- SNF residents who are COVID positive are being prevented from being transferred to hospitals for urgent care as their health needs increase;
- The state has suspended on-site inspections for violations and deficiencies at a time when they are needed most;
- There is an inadequate number of in person state monitors at facilities to determine what is happening inside SNFs. Before the pandemic, the majority of abuse and neglect was reported by family, but now since families cannot visit, there is no one watching what is happening behind closed doors;
- The facilities continue to be understaffed – higher staff levels are needed based on the increased acuity of the patients with COVID. Instead the opposite is happening. SNFs are getting waivers to have less staff;
- Staff is overworked. We are hearing reports that the small numbers of remaining staff are working two and three shifts at a time – this endangers staff health and resident health;
- The residents are isolated. It is understandable that outside visitors should be restricted at SNFs; however, this means that alternative ways of communication need to be put in place ASAP. We are using technology in the workplace and schools and we must similarly adapt in facilities. Elders in SNFs need access to tablets, phones and computers and need staff to facilitate their use so that they are not isolated and are not dying alone.
- There is inaccurate and false reporting of COVID rates: our members report that it is near impossible to get accurate information, much less an explanation of how the data is being collected and what the reported numbers mean;
- There are multiple residents in rooms- some facilities have up to five resident beds per room which does not work in a pandemic;
- Facilities are failing to report COVID-19 as a cause of death on death certificates;
- There is a lack of COVID tracing within nursing homes – plus there needs to be full transparency to residents and their families. If CNA #1 tests positive, everyone that CNA has had contact with needs to be told, etc.
- There is a lack of personal protection equipment.
- There is a current lack of communication accommodations.
- Government moneys are given to the SNFs but without any accountability.

CAOC recommends long term and short term proposals that we believe will help save lives. Foremost, the Legislature must immediately demand better transparency and obtain specific data to track the connection between facilities that have a pattern and practice of violating the law and the number of COVID infections and deaths.

A short term solution should also include ending the visitation ban in a sensible and safe way. The truth is that in many cases it is a family member who performs much of the care and need to be present not only to give that care but to monitor treatment. Social isolation is real and can kill people so we must balance these interests but CAOC believes it can be accomplished.

We must also have access to real time data on infections and who is being impacted. For example, how many of the deaths in SNFs are occurring among communities of color? How many deaths are among medi-cal patients? We need access to this data in order to address problems of inadequate care among these populations.

There are also long-term solutions that will improve care, including:

- Inspections must be more impactful, including higher fines, audited plans of correction, and a presumption of harm on certain deficiencies like infection control.
- The legislature must enact changes to the transparency structures of facilities, so it is clear who has ownership and who is ultimately responsible for resident care. Specifically, state and federal websites should include searchable information by chains. See #5 on the Master Plan recommendations: http://canhr.org/masterplan/CANHR_Master_Plan_Recommendations.pdf
- The burden of proof to prosecute Elder and Dependent Adult Civil Protection Act cases must be changed from clear and convincing evidence to a preponderance of the evidence, the current standard for every other civil case in California and for financial elder abuse.
- Mandatory staffing ratios must be improved and monitored to lead to quality care.

Further, the legislature must soundly reject the industry's outrageous request for legal immunity. While CAOC encourages reasonable mitigation strategies, this type of legal immunity is known as a "government standards defense" and has always been a concept pushed by Republicans and industry. This proposal on the federal level is currently being pushed by Republican leader Mitch O'Connell and opposed by all Democratic leaders.

Government standards are intended to be minimum standards of care and not indications of a legal duty of care. For example, California regulations state that a long-term nursing care resident must receive at least 3.5 hours of staffing per day-- or, with a waiver that is freely given by DPH, 3.2 hours. However, a 2001 CMS report on minimum staffing requirements concluded that staffing below 4.1 hours a day is likely to result in "substantially increased risk of quality problems." There are many situations, especially in the nursing home arena, where state standards are met but elder abuse or neglect still occurs. Staffing requirements may be met but due to neglect, serious bed sores, dehydration, and sepsis still occur. Industries should not be given a pass for meeting minimum regulations.

Existing law already makes it very difficult to prosecute elder abuse cases; the law should be improved for seniors and persons with disabilities during this time, not weakened. Elder and dependent adult abuse cases require a standard of proof that rises far above a preponderance of the evidence, the standard for every other civil case in California. The code requires that elder abuse cases prove: 1. by clear and convincing evidence, that a facility operator has physically abused, neglected, or abandoned

residents; and 2. that there was recklessness, oppression, fraud, or malice in the commission of the abuse; and 3. that the facility operator ratified an employee's wrongful conduct or was personally guilty of oppression, fraud, or malice themselves. (Welfare & Institutions Code section 15657 and Civil Code section 3294.) Further, the statutes purpose is to:

a. Require reports of known or suspected cases of abuse, and "to encourage community members in general to do so."

b. Gather data about numbers, circumstances and other information that is intended to guide the state in providing adequate services to victims, and,

c. Protect those who speak out against abuse.

None of these goals are accomplished by weakening legal liability.

Further, immunity for following a state regulation ignores the fact that professionals and facilities must adapt any guidance to the facts they see on the ground and implement best practices learned from other sources to prevent the spread of the infection. Companies need to continue to act reasonably in interpreting and implementing guidance as it develops. For example, the nursing home guidance from March 13, 2020, lists as a guideline testing all workers for signs of fever or respiratory issues and requiring those showing signs of potential COVID-19 to wear a facemask. This wasn't updated until April 2, 2020 to say that personnel should be wearing PPE, if available, when interacting with patients. While it may be debatable when, exactly, in that period a nursing home should have mandated PPE, it would be improper for a nursing home to wait for CMS (the federal agency) to update guidelines if they knew or should have known that there are steps they can take that will reduce the chance of spreading the disease amongst their residents. Changing facts demand changing responses. If following guidance alone grants an industry immunity, companies may not keep up with the latest information about how to protect customers and employees.

Thank you and CAOC looks forward to working with you on these important issues.